



FEDERAL REGISTER

Vol. 89 Wednesday,
No. 90 May 8, 2024

Pages 38837–39530

OFFICE OF THE FEDERAL REGISTER



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

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Federal Register

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

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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 738

[Docket No. 240503–0126]

RIN 0694–AJ58

Export Control Revisions for Australia, United Kingdom, United States (AUKUS) Enhanced Trilateral Security Partnership; Correction

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

ACTION: Correcting amendment.

SUMMARY: On April 19, 2024, BIS published in the **Federal Register** an interim final rule (IFR), “Export Control Revisions for Australia, United Kingdom, United States (AUKUS) Enhanced Trilateral Security Partnership.” The April 19 IFR removed license requirements, expanded the availability of license exceptions, and reduced the scope of end-use and end-user-based license requirements for exports, reexports, and transfers (in-country) to or within Australia and the United Kingdom (UK) to enhance technological innovation among the three countries and support the goals of the AUKUS Trilateral Security Partnership. This correction revises a footnote included in the April 19 IFR to add greater specificity for the Export Control Classification Numbers (ECCN) referenced, so only portions of those 0x5zz ECCNs in the footnote that were previously controlled for national security column 1 (NS1) or regional stability column 1 (RS1) reasons for control for the destinations of Australia and the United Kingdom will continue to require a license to Australia and the United Kingdom based on the license requirements specified in this footnote.

DATES:

Effective date: This rule is effective May 6, 2024.

Comment due date: Comments for the correction in this rule must be received by BIS no later than June 3, 2024.

ADDRESSES: Comments on this rule may be submitted to the Federal rulemaking portal (www.regulations.gov). The *regulations.gov* ID for this rule is: BIS–2024–0019. Please refer to RIN 0694–AJ58 in all comments.

FOR FURTHER INFORMATION CONTACT: For questions on this rule, contact Philip Johnson at RPD2@bis.doc.gov or (202) 482–2440.

SUPPLEMENTARY INFORMATION:

Background

On April 19, 2024, BIS published in the **Federal Register** the interim final rule (IFR), “Export Control Revisions for Australia, United Kingdom, United States (AUKUS) Enhanced Trilateral Security Partnership” (89 FR 28594). This correction makes corrections to footnote 9 of the April IFR for the entries for Australia and the UK, for consistency with the description of the regulatory changes included in the April 19 IFR.

BIS noted in the April 19 IFR that one particular license requirement remained unchanged as a result of that rule. Under the EAR, firearms-related items and other CC controlled items in ECCNs 0A501 (except 0A501.y), 0A502, 0A503, 0A504, 0A505.a, .b, and .x, 0A981, 0A982, 0A983, 0D501, 0D505, 0E501, 0E502, 0E504, 0E505, and 0E982 continue to require a license when destined to and among the UK and Australia. That license requirement mirrors the license requirement for firearms-related items in ECCNs 0A501 (except 0A501.y), 0A502, 0A504 (except 0A504.f), and 0A505 (except 0A505.d) destined to Canada.

Prior to the April 19 IFR, license requirements for these items to the UK and Australia were implemented through NS1/RS1 reasons for control. Since these license requirements were removed for the UK and Australia in the April 19 IFR, that IFR also added a footnote 9 to the Commerce Country Chart for the UK and Australia, which indicated that a license is still required for these 0x5zz firearms-related items to those two countries. The April 19 IFR specified that the license requirement specified in footnote 9 did not change the scope of the license requirements for these items to the UK and Australia that

applied prior to the effective date of that IFR.

Corrections

This correction revises footnote 9 to the Commerce Country Chart in supplement no. 1 to part 738, which was added in the April 19 IFR, so that only those portions of 0x5zz ECCNs referenced in footnote 9 that were previously controlled for NS1 or RS1 reasons for control for the destinations of Australia and the UK will continue to require a license to Australia and the UK based on the license requirement specified in this revised footnote.

In the Commerce Country Chart, this correction revises six of the ECCNs (0A502, 0A504, 0A505, 0D501, 0D505, and 0E505) and removes one ECCN (0E502) referenced in footnote 9. This greater specificity for the portions of the ECCNs referenced in footnote 9 is needed to ensure that the license requirement specified in footnote 9 does not change the scope of the license requirements for these items to the UK and Australia that applied prior to the effective date of the April 19 IFR. This correction makes the following corrections to the ECCNs referenced in footnote 9:

ECCN 0A502. For the reference for 0A502, this correction specifies that the license requirement in footnote 9 is limited to 0A502 for shotguns with a barrel length less than 18 inches (45.72 cm).

ECCN 0A504. For the reference for 0A504, this correction specifies that the license requirement in footnote 9 is limited to 0A504.i commodities.

ECCN 0A505. For the reference for 0A505, this correction removes the reference to 0A505.b because the license requirement under footnote 9 only extends to 0A505.a and .x.

ECCN 0D501. For the reference for 0D501, this correction adds the parenthetical phrase “(except “software” for commodities in ECCN 0A501.y or “equipment” in ECCN 0B501 for commodities in ECCN 0A501.y)” to specify that this “software” or “equipment” does not require a license under footnote 9.

ECCN 0D505. For the reference for 0D505, this correction specifies that the license requirement in footnote 9 for 0D505 is limited to “software” for commodities in ECCN 0A505.a and .x and “equipment” in ECCN 0B505.a and .x.

ECCN 0E502. For the reference for 0E502, this correction removes this ECCN from footnote 9 because none of the technology under this ECCN formerly required a license to Australia or the United Kingdom for NS1 or RS1 reasons for control.

ECCN 0E505. For the reference for 0E505, this correction specifies that the license requirement in footnote 9 for 0E505 is limited to “technology” for “development,” “production,” operation, installation, maintenance, repair, overhaul, or refurbishing commodities in 0A505.a and .x; for “equipment” for those commodities in 0B505; and for “software” for that equipment and those commodities in 0D505.

Export Control Reform Act of 2018

On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which included the Export Control Reform Act of 2018 (ECRA), 50 U.S.C. 4801–4852. ECRA, as amended, provides the legal basis for BIS’s principal authorities and serves as the authority under which BIS issues this rule.

Rulemaking Requirements

1. This correction has not been designated a “significant regulatory action” under Executive Order 12866.

2. Notwithstanding any other provision of law, no person may be required to respond to, or be subject to a penalty for failure to comply with, a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves a collection currently approved by OMB under control number 0694–0088, Simplified Network Application Processing System.

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

4. Pursuant to Section 1762 of ECRA (50 U.S.C. 4821), this action is exempt from the Administrative Procedure Act (APA) (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation and delay in effective date. Additionally, this rule is exempt from the ordinary rulemaking requirements of the APA pursuant to 5 U.S.C. 553(a)(1) as a military or foreign affairs function of the United States Government.

5. Because neither the APA nor any other law requires that notice of

proposed rulemaking and an opportunity for public comment be given for this rule, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Accordingly, no Final Regulatory Flexibility Analysis is required and none has been prepared.

List of Subjects in 15 CFR Part 738

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

Accordingly, part 738 of the Export Administration Regulations (15 CFR parts 730 through 774) is amended as follows:

PART 738—COMMERCE CONTROL LIST OVERVIEW AND THE COUNTRY CHART

■ 1. The authority citation for 15 CFR part 738 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.*; 50 U.S.C. 1701 *et seq.*; 10 U.S.C. 8720; 10 U.S.C. 8730(e); 22 U.S.C. 287c; 22 U.S.C. 2151 note; 22 U.S.C. 3201 *et seq.*; 22 U.S.C. 6004; 42 U.S.C. 2139a; 15 U.S.C. 1824; 50 U.S.C. 4305; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

■ 2. In supplement no. 1 to part 738, revise footnote 9 to read as follows:

Supplement No. 1 to Part 738—Commerce Country Chart

* * * * *

⁹ A license is required to these destinations for items in the following ECCNs: 0A501 (except 0A501.y), 0A502 for shotguns with a barrel length less than 18 inches (45.72 cm), 0A503, 0A504.i, 0A505.a, and .x, 0D501 (except “software” for commodities in ECCN 0A501.y or “equipment” in ECCN 0B501 for commodities in ECCN 0A501.y), 0D505 for “software” for commodities in ECCN 0A505.a and .x and “equipment” in ECCN 0B505.a and .x, 0E501, 0E504, and 0E505 for “technology” for “development,” “production,” operation, installation, maintenance, repair, overhaul, or refurbishing commodities in 0A505.a and .x; for “equipment” for those commodities in 0B505; and for “software” for that “equipment” and those commodities in 0D505.

Thea D. Rozman Kendler,
Assistant Secretary for Export Administration.

[FR Doc. 2024–10079 Filed 5–6–24; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

[DOL Docket No. ETA–2021–0006]

Adverse Effect Wage Rate Methodology for the Temporary Employment of H–2A Nonimmigrants in Non-Range Occupations in the United States; Ratification of Department’s Actions

AGENCY: Employment and Training Administration, Department of Labor.

ACTION: Ratification.

SUMMARY: The Department of Labor is publishing notification of the Assistant Secretary for Employment and Training’s ratification of the rule published February 28, 2023, titled *Adverse Effect Wage Rate Methodology for the Temporary Employment of H–2A Nonimmigrants in the Non-Range Occupations in the United States*.

DATES: This ratification was signed on May 3, 2024.

FOR FURTHER INFORMATION CONTACT: Brian Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–5311, Washington, DC 20210, telephone: (202) 693–8200 (this is not a toll-free number). For persons with a hearing or speech disability who need assistance to use the telephone system, please dial 711 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION:

I. Background

On December 1, 2021, the Department of Labor (“DOL” or “Department”) issued a notice of proposed rulemaking (“NPRM”) in the **Federal Register** to amend the regulations governing the methodology to determine the Adverse Effect Wage Rate (“AEWR”) for H–2A occupations other than herding and production of livestock on the range (*i.e.*, non-range occupations). See *Adverse Effect Wage Rate Methodology for the Temporary Employment of H–2A Nonimmigrants in Non-Range Occupations in the United States*, 86 FR 68174 (Dec. 1, 2021) (“NPRM”). The NPRM was open for public comment for 60 days from December 1, 2021 until January 31, 2022. See *id.* at 68174, 68185.

On February 28, 2023, after having considered the public comments, DOL published a final rule in the **Federal**

Register that amended the methodology to establish the AEWR, largely adopting the proposals from the NPRM with some technical changes. *Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in the Non-Range Occupations in the United States*, 88 FR 12760 (Feb. 28, 2023) (“Final Rule”). The Final Rule went into effect on March 30, 2023.

The Final Rule has become the subject of litigation in which it has been asserted that the Final Rule was improperly issued. Specifically, a question has been raised in litigation concerning whether the Final Rule was approved by the Attorney General in consultation with the Secretary of Labor and the Secretary of Agriculture. 8 U.S.C. 1188, Statutory Note.¹ On April 29, 2024, the Secretary of Homeland Security, in consultation with the Secretary of Labor and Secretary of Agriculture, approved the Final Rule. Prior to its issuance in February 2023, the Final Rule was provided to the Departments of Homeland Security and Agriculture through the interagency review process prescribed by Executive Order 12866.

To resolve any possible uncertainty, the Department, through its Assistant Secretary for Employment and Training, is ratifying the Final Rule. Under established case law, an agency may, through ratification, “purge[] any residual taint or prejudice left over from” a potential defect in a prior governmental action.² The Department is issuing this ratification out of an abundance of caution, and this ratification is not a statement that the Final Rule is invalid absent this ratification.

II. Ratification

By virtue of the authority vested in Secretary of Labor by law, including by the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1101 *et seq.* (“INA”), and as delegated to the Assistant Secretary for Employment and Training, 75 FR 66268, I am affirming and ratifying a prior action by Brent Parton, Principal Deputy Assistant Secretary, who was then serving as Acting Assistant Secretary for Employment and Training before the current Assistant Secretary of Labor for Employment and Training assumed office. On February 28, 2023, the Employment and Training

Administration published in the FR the Final Rule codifying amendments to the regulations governing the methodology to determine the AEWR for non-range H-2A occupations (all H-2A occupations other than herding and production of livestock on the range). 88 FR 12760 (Feb. 28, 2023).

The Final Rule was signed by Acting Assistant Secretary Parton. I have full and complete knowledge of the Final Rule action taken by former Acting Assistant Secretary Parton. Subsequent to the Secretary of Homeland Security’s documented approval of the Final Rule dated April 29, 2024, and out of an abundance of caution and to avoid any doubt as to its validity, I have independently evaluated the Final Rule and the basis for adopting it. I have determined that the amendments to the AEWR methodology in the Final Rule are consistent with the Secretary of Labor’s statutory responsibility to certify that the employment of H-2A workers will not adversely affect the wages and working conditions of workers in the United States similarly employed, and that the changes adopted in the Final Rule best strike the balance between the statute’s competing goals of providing employers with an adequate supply of legal agricultural labor and protecting the wages of workers in the United States similarly employed. I also agree with the Department’s certification that the Final Rule does not have a significant economic impact on a substantial number of small entities. *See* 88 FR 12760, 12799, 12802.

Therefore, pursuant to my authority as the Assistant Secretary for Employment and Training and based on my independent review of the action and the reasons for taking it, I hereby affirm and ratify the Final Rule, as of May 3, 2024, including all regulatory analysis certifications contained therein. This action is taken without prejudice to any right to litigate the validity of the Final Rule as approved and published on February 28, 2023. Nothing in this action is intended to suggest any legal defect or infirmity in the approval or publication of the Final Rule.

José Javier Rodríguez,

Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2024–10013 Filed 5–3–24; 4:15 pm]

BILLING CODE 4510–FP–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2024–0194]

Safety Zone; Fireworks Display; Elizabeth River, Town Point Reach, Norfolk, VA

AGENCY: Coast Guard, DHS.

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce a safety zone regulation for Norfolk’s 42nd Annual Independence Day Fireworks on July 4th, 2024, to provide for the safety of life on navigable waterways of the Elizabeth River, at Town Point Reach during this event. Our regulation for marine events within the Fifth Coast Guard District identifies the regulated area for this event in Norfolk, VA. During the enforcement period, entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port Virginia.

DATES: The regulations in 33 CFR 165.506 will be enforced for the location identified as item 13 in table 3 to paragraph (h)(3) from 9 p.m. until 10 p.m. on July 4th, 2024.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notification of enforcement, call or email LCDR Ashley Holm, Chief, Waterways Management Division, Sector Virginia, U.S. Coast Guard; telephone 757–668–5580 email Ashley.E.Holm@uscg.mil.

SUPPLEMENTARY INFORMATION: As noted in paragraph (c) of § 165.506, the enforcement period(s) for each safety zone identified in paragraph (h) of this section is subject to change, and the enforcement period announced here differs from the enforcement period noted in item 13 of table 3 to paragraph (h). The Coast Guard will enforce the safety zone in 33 CFR 165.506 for Norfolk’s 42nd Annual Independence Day Fireworks regulated area from 9 p.m. to 10 p.m. on Thursday, July 4th, 2024, rather than on one of the days of the first or second weekend of July. This action is being taken to provide for the safety of life on navigable waterways during this event. Section 165.506, specifies the location of the regulated area, which encompasses portions of the Elizabeth River and Town Point Reach. During the enforcement period, the entry of vessels or persons into this zone is prohibited unless specifically

¹ Although this provision vests approval authority in the “Attorney General,” the Secretary of Homeland Security now may exercise this authority. *See* 6 U.S.C. 202(3)–(4), 251, 271(b), 291, 551(d)(2), 557; 8 U.S.C. 1103(c) (2000).

² *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 13 (D.C. Cir. 2019).

authorized by the Captain of the Port, Sector Virginia. In addition to this notification of enforcement in the Federal Register , the Coast Guard plans to provide	notification of this enforcement period via the Local Notice to Mariners and marine information broadcasts.	Dated: April 16, 2024. Jennifer A. Stockwell , <i>Captain, U.S. Coast Guard, Captain of the Port, Sector Virginia.</i> [FR Doc. 2024–10022 Filed 5–7–24; 8:45 am] BILLING CODE 9110–04–P

Proposed Rules

Federal Register

Vol. 89, No. 90

Wednesday, May 8, 2024

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-2024-0768; Project Identifier AD-2022-00504-R]

RIN 2120-AA64

Airworthiness Directives; Bell Textron Inc., Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Bell Textron Inc., Model 212, 412, 412CF, and 412EP helicopters. This proposed AD was prompted by reports of cracked tail boom attachment barrel nuts (barrel nuts). This proposed AD would require replacing all steel alloy barrel nuts with nickel alloy barrel nuts and, replacing or inspecting other tail boom attachment point hardware and depending on the results, replacing hardware, stabilizing torque, and applying torque stripes. This proposed AD would also require repetitively inspecting torque and, depending on the results, corrective action. This proposed AD would require repetitively replacing the upper left-hand (LH) tail boom attachment bolt (bolt) and repetitively inspecting the other tail boom attachment point bolts. Lastly, this proposed AD would prohibit installing steel alloy barrel nuts. 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 June 24, 2024.

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](https://www.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](https://www.regulations.gov) under Docket No. FAA-2024-0768; 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, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For service information identified in this NPRM, contact Bell Textron, Inc., P.O. Box 482, Fort Worth, TX 76101, United States; phone (450) 437-2862 or 1-800-363-8023; fax (450) 433-0272; email: productsupport@bellflight.com; website: bellflight.com/support/contact-support.

- You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Parkway, Room 6N-321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222-5110.

FOR FURTHER INFORMATION CONTACT:

Jacob Fitch, Aviation Safety Engineer, FAA, 1801 S Airport Road, Wichita, KS 67209; telephone (817) 222-4130; email jacob.fitch@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-2024-0768; Project Identifier AD-2022-00504-R" 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](https://www.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 Jacob Fitch, Aviation Safety Engineer, FAA, 1801 S Airport Road, Wichita, KS 67209; telephone (817) 222-4130; email jacob.fitch@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

The FAA received reports of cracked barrel nuts involving Model 412EP helicopters. According to Bell Textron Inc., the root cause for cracking can vary from corrosion damage, high time in service, or hydrogen embrittlement. Barrel nut cracking can also cause loss of torque on the associated bolt and subsequent bolt cracking. Due to design similarities, Model 212, 412, and 412CF helicopters are also affected by the same unsafe condition. This condition, if not addressed, could result in increased fatigue loading and subsequent failure of the bolts, which could lead to separation of the tail boom from the helicopter and subsequent loss of control of the helicopter.

FAA's Determination

The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or

develop on other products of these same type designs.

Related Service Information Under 1 CFR Part 51

The FAA reviewed the following Bell alert service bulletins (ASBs), each Revision A, and each dated February 23, 2022. This service information specifies procedures for replacing the steel alloy barrel nuts with nickel alloy barrel nuts, inspecting and replacing the tail boom attachment hardware, stabilizing the tail boom attachment hardware torque, applying torque seals, and inspecting the torque.

- ASB 212–21–166 for Model 212 helicopters,
- ASB 412–21–187 for Model 412/412EP helicopters, and
- ASB 412CF–21–72 for Model 412CF helicopters.

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

Proposed AD Requirements in This NPRM

This proposed AD would require, for certain serial-numbered Bell Textron Inc., Model 212, 412CF, 412, and 412EP helicopters, removing the upper LH steel alloy barrel nut and bolt from service and replacing them with a new nickel alloy barrel nut, retainer, and bolt. For certain other serial-numbered Bell Textron Inc., Model 412 and 412EP helicopters, this proposed AD would require removing the upper LH steel alloy barrel nut from service, visually inspecting the removed upper LH steel alloy barrel nut and replacing it with a nickel alloy barrel nut and retainer, and either visually inspecting or replacing the upper LH bolt. For those serial-numbered Bell Textron Inc., Model 212, 412, 412CF, and 412EP helicopters, this proposed AD would also require removing the upper right-hand (RH), lower LH, and lower RH steel alloy barrel nuts, visually inspecting those removed steel alloy barrel nuts, and replacing them with new nickel alloy barrel nuts and retainers, and either visually inspecting or replacing the upper RH, lower LH, and lower RH bolts. Thereafter for those helicopters, as well as for one additional serial-numbered Model 412/412EP helicopter, this proposed AD would require, inspecting the torque applied on each bolt to determine if the torque has stabilized and, depending on the results, replacing and inspecting certain tail boom attachment point hardware and repeating the torque inspections, or applying torque stripes.

For all applicable helicopters, this proposed AD would require repetitively inspecting the torque applied on each bolt within a longer-term compliance time interval and, depending on the results, replacing and inspecting certain tail boom attachment point hardware and repeating the torque inspections and stabilization, or applying torque stripes.

Additionally, for all applicable helicopters, this proposed AD would require repetitively replacing the upper LH bolt within a longer-term compliance time interval by requiring removal of it from service and replacing it with a new upper LH bolt. This proposed AD would also require, for all applicable helicopters, visually inspecting the other three bolts within a longer-term compliance time interval and, depending on the results, corrective action. Following accomplishment of those actions, this proposed AD would require inspecting the torque applied on each bolt to determine if the torque has stabilized and, depending on the results, replacing and inspecting certain tail boom attachment point hardware and repeating the torque inspections, or applying torque stripes.

Lastly, this proposed AD would prohibit installing steel alloy barrel nuts on any helicopter.

Differences Between This Proposed AD and the Service Information

The service information specifies checking torque, whereas this proposed AD would require inspecting torque because that action must be accomplished by persons authorized under 14 CFR 43.3.

When stabilizing the tail boom attachment hardware torque, the service information does not specify what to do if the torque on a bolt is below the minimum allowable torque limit, whereas this proposed AD would require replacing and inspecting certain tail boom attachment point hardware, stabilizing the torque of the replaced hardware set, and applying a torque stripe.

This proposed AD would require replacing each upper LH bolt with a new (zero total hours time-in-service (TIS)) bolt within a 5,000 hours TIS or 5 year threshold, whereas the service information does not specify that action. This proposed AD would also require visually inspecting the upper RH, lower LH, and lower RH bolts within a 5,000 hours TIS or 5 year threshold, whereas the service information does not specify those actions.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 105 helicopters of U.S. registry. Labor rates are estimated at \$85 per work-hour. Based on these numbers, the FAA estimates the following costs to comply with this proposed AD.

For the initial requirements for certain helicopters, replacing the four steel alloy barrel nuts with new nickel alloy barrel nuts, inspecting or replacing up to four bolts, inspecting and stabilizing the torque, and applying torque stripes would take up to approximately 8.5 work-hours for an estimated labor cost of up to \$723. The parts cost for the four new nickel alloy barrel nuts (including retainers) would be approximately \$680. The parts cost for an upper LH bolt would be approximately \$196 and the parts cost for the other bolts would be approximately \$89 per bolt. The parts cost to apply torque stripes would be a nominal amount. The estimated cost for these actions would be up to approximately \$1,866 per helicopter.

For all applicable helicopters, inspecting the torque applied on each bolt would take approximately 1 work-hour for an estimated cost of \$85 per helicopter and \$8,925 for the U.S. fleet, per inspection cycle.

For all applicable helicopters, replacing an upper LH bolt, stabilizing the torque, and applying a torque stripe would take up to approximately 5 work-hours. The parts cost for an upper LH bolt would be approximately \$196 and the parts cost to apply a torque stripe would be a nominal amount. The estimated cost for these actions would be up to approximately \$621 per helicopter and \$65,205 for the U.S. fleet, per replacement cycle. Inspecting one of the other bolts, stabilizing the torque, and applying a torque stripe would take up to approximately 3.5 work-hours for an estimated cost of \$298 per other bolt and \$31,290 for the U.S. fleet, per inspection cycle. If required, replacing a bolt following that inspection would take a minimal amount of additional time and the parts cost would be approximately \$89.

If required as a result of failing a torque inspection, visually inspecting a barrel nut, replacing a bolt, stabilizing the torque, and applying a torque stripe would take up to approximately 5.5 work-hours per failed hardware set. The parts cost for an upper LH bolt would be approximately \$196 and the parts cost for the other bolts would be approximately \$89 per bolt. The parts cost to apply a torque stripe would be a nominal amount. The estimated cost for these actions would be \$664 (upper

LH bolt) or \$557 (other bolts), per failed hardware set. If required, replacing a barrel nut following that inspection would take a minimal amount of additional time and the parts cost for a barrel nut (including retainer) would be approximately \$173.

If required as a result of failing a torque stabilization, replacing a barrel nut, visually inspecting a bolt, stabilizing the torque, and applying a torque stripe would take up to approximately 5.5 work-hours and the parts cost for a barrel nut (including retainer) would be approximately \$73. The estimated cost for these actions would be \$541. If required, replacing the bolt following that inspection would take a minimal amount of additional time and the parts cost for an upper LH bolt would be approximately \$196 and the parts cost for the other bolts would be approximately \$89 per bolt.

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:

Bell Textron Inc.: Docket No. FAA–2024–0768; Project Identifier AD–2022–00504–R.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by June 24, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the Bell Textron Inc., helicopters, certificated in any category, that are identified in paragraphs (c)(1) through (5) of this AD.

(1) Model 212 helicopters, serial numbers (S/N) 30501 through 30999 inclusive, 31101 through 31311 inclusive, 32101 through 32142 inclusive, and 35001 through 35103 inclusive;

(2) Model 412CF helicopters, S/N 46400 through 46499 inclusive;

(3) Model 412 and 412EP helicopters, S/N 33001 to 33213 inclusive, 34001 through 34036 inclusive, 36001 through 36687 inclusive, 36689 through 38999 inclusive, 37002 through 37018 inclusive, 37021 through 37051 inclusive, 38001, and 39101 through 39103 inclusive;

(4) Model 412 and 412EP helicopter, S/N 37052; and

(5) Model 412 and 412EP helicopters, S/N 36688, 37019, 37020, 37053 through 37999 inclusive, 38002 through 38999 inclusive, and 39104 through 39999 inclusive.

(d) Subject

Joint Aircraft System Component (JASC) Code: 5302, Rotorcraft Tail Boom.

(e) Unsafe Condition

This AD was prompted by reports of cracked tail boom attachment barrel nuts (barrel nuts). The FAA is issuing this AD to address fatigue cracking of barrel nuts, damage to the tail boom attachment bolts (bolts), and certain bolts remaining in service

beyond fatigue limits. The unsafe condition, if not addressed, could result in increased fatigue loading and subsequent failure of the bolts, which could lead to separation of the tail boom from the helicopter and subsequent loss of control of the helicopter.

(f) Compliance

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

(g) Required Actions

(1) Within 300 hours time-in-service (TIS) or 90 days after the effective date of this AD, whichever occurs first, accomplish the actions required by paragraphs (g)(1)(i) through (iv) of this AD, as applicable. For purposes of this AD, the word "new" is defined as having zero total hours TIS.

(i) For all helicopters identified in paragraphs (c)(1) and (2) of this AD; and for helicopters identified in paragraph (c)(3) of this AD that have accumulated 5,000 or more total hours TIS or 5 or more years since new, or if the total hours TIS or age of the helicopter is unknown, remove the upper left-hand (LH) steel alloy barrel nut part number (P/N) NAS577B9A and upper LH bolt from service and replace them with a new nickel alloy barrel nut P/N NAS577C9A, new retainer P/N NAS578C9A, and a new bolt in accordance with the Accomplishment Instructions, part I, paragraphs 4 through 7, of Bell Alert Service Bulletin 212–21–166, Revision A, dated February 23, 2022 (ASB 212–21–166 Rev A), Bell Alert Service Bulletin 412CF–21–72, Revision A, dated February 23, 2022 (ASB 412CF–21–72 Rev A), or Bell Alert Service Bulletin 412–21–187, Revision A, dated February 23, 2022 (ASB 412–21–187 Rev A), as applicable to your helicopter model, except you are not required to discard parts.

(ii) For helicopters identified in paragraph (c)(3) of this AD that have accumulated less than 5,000 total hours TIS and less than 5 years since new, remove the upper LH steel alloy barrel nut P/N NAS577B9A, the upper LH bolt, countersunk washer, and plain washers, and visually inspect the removed upper LH steel alloy barrel nut for cracking. If there is any cracking in the upper LH steel alloy barrel nut, before further flight, remove the upper LH bolt from service. If the upper LH bolt was not removed from service as a result of the upper LH steel alloy barrel nut inspection, visually inspect the upper LH bolt for any corrosion, damaged threads, wear, and fatigue cracking. If upper LH bolt has any corrosion, a damaged thread, wear, or fatigue cracking, before further flight, remove the upper LH bolt from service. Regardless of the result of the upper LH steel alloy barrel nut inspection, remove the upper LH steel alloy barrel nut from service and replace it with a new nickel alloy barrel nut P/N NAS577C9A and new retainer P/N NAS578C9A. Install a new upper LH bolt or reinstall the existing upper LH bolt, as applicable, by following the Accomplishment Instructions, part I, paragraphs 6 and 7, of ASB 412–21–187 Rev A.

(iii) For helicopters identified in paragraphs (c)(1) through (3) of this AD, remove the upper right-hand (RH) steel alloy

barrel nut P/N NAS577B8A, the upper RH bolt, countersunk washer, and plain washers, and visually inspect the removed upper RH steel alloy barrel nut for cracking. If there is any cracking in the upper RH steel alloy barrel nut, before further flight, remove the upper RH bolt from service. If the upper RH bolt was not removed from service as a result of the upper RH steel alloy barrel nut inspection, visually inspect the upper RH bolt for any corrosion, damaged threads, wear, and fatigue cracking. If the upper RH bolt has any corrosion, a damaged thread, wear, or fatigue cracking, before further flight, remove the upper RH bolt from service. Regardless of the result of the upper RH steel alloy barrel nut inspection, remove the upper RH steel alloy barrel nut from service and replace it with a new nickel alloy barrel nut P/N NAS577C8A and new retainer P/N NAS578C8A. Install a new upper RH bolt or reinstall the existing upper RH bolt, as applicable, by following the Accomplishment Instructions, part I, paragraphs 11 and 12, of ASB 212-21-166 Rev A, ASB 412-21-187 Rev A, or ASB 412CF-21-72 Rev A, as applicable to your helicopter model.

(iv) For helicopters identified in paragraphs (c)(1) through (3) of this AD, remove one of the lower steel alloy barrel nuts P/N NAS577B6A, its lower bolt, countersunk washer, and plain washers, and visually inspect the removed lower steel alloy barrel nut for cracking. If there is any cracking in the lower steel alloy barrel nut, before further flight, remove the lower bolt from service. If the lower bolt was not removed from service as a result of the lower steel alloy barrel nut inspection, visually inspect the lower bolt for any corrosion, damaged threads, wear, and fatigue cracking. If the lower bolt has any corrosion, a damaged thread, wear, or fatigue cracking, before further flight, remove the lower bolt from service. Regardless of the result of the lower steel alloy barrel nut inspection, remove the lower steel alloy barrel nut from service and replace it with a new nickel alloy barrel nut P/N NAS577C6A and new retainer P/N NAS578C6A. Install a new lower bolt or reinstall the existing lower bolt, as applicable, by following the Accomplishment Instructions, part I, paragraphs 16 and 17, of ASB 212-21-166 Rev A, ASB 412-21-187 Rev A, or ASB 412CF-21-72 Rev A, as applicable to your helicopter model. Repeat the actions required by this paragraph for the other lower tail boom attachment point.

(2) For helicopters identified in paragraphs (c)(1) through (3) of this AD, after accumulating 1 hour TIS, but not to exceed 5 hours TIS after accomplishing the actions required by paragraph (g)(1) of this AD, using the torque value information in the Accomplishment Instructions, part II, paragraph 1, of ASB 212-21-166 Rev A, ASB 412-21-187 Rev A, or ASB 412CF-21-72 Rev A, as applicable to your helicopter model, inspect the torque applied on each bolt. Thereafter, repeat the torque inspection of each bolt after accumulating 1 hour TIS, but not to exceed 5 hours TIS, to determine if the torque has stabilized. Do not exceed three torque inspections total for each bolt and accomplish the actions required by paragraphs (g)(2)(i) and (ii) of this AD.

Note 1 to the introductory text of paragraph (g)(2): This note applies to the introductory text of paragraph (g)(2), the introductory text of paragraph (g)(2)(i), paragraph (g)(2)(i)(B), and paragraph (g)(2)(ii) of this AD. The Accomplishment Instructions, part II, paragraph 1, of ASB 212-21-166 Rev A, ASB 412-21-187 Rev A, and ASB 412CF-21-72 Rev A each refer to part I for allowable torque limits; part I of ASB 212-21-166 Rev A, ASB 412-21-187 Rev A, and ASB 412CF-21-72 Rev A specify the different torque limits for the different bolts.

(i) If the torque on a bolt is below the minimum allowable torque limit as a result of any instance of the torque inspection or if after three torque inspection attempts, the torque on any bolt has not stabilized, before further flight, accomplish the actions required by paragraphs (g)(2)(i)(A) and (B) of this AD.

(A) Remove the hardware set of one failed tail boom attachment point (barrel nut, retainer, bolt, countersunk washer, and plain washers). Remove the barrel nut and retainer from service as applicable to the affected tail boom attachment point. Visually inspect the removed bolt for any corrosion, damaged threads, wear, and fatigue cracking. If the bolt has any corrosion, a damaged thread, wear, or fatigue cracking, before further flight, remove the bolt from service.

(B) Install a new bolt or reinstall the existing bolt, as applicable, and a new nickel alloy barrel nut P/N NAS577C9A, NAS577C8A, or NAS577C6A, and new retainer P/N NAS578C9A, NAS578C8A, or NAS578C6A, with the P/N of the new nickel alloy barrel nut and the P/N of the new retainer being as applicable to the affected tail boom attachment point by following the Accomplishment Instructions, part I, paragraphs 6 and 7, paragraphs 11 and 12, or paragraphs 16 and 17, of ASB 212-21-166 Rev A, ASB 412-21-187 Rev A, or ASB 412CF-21-72 Rev A, as applicable to your helicopter model and with the paragraphs as applicable to that bolt. Repeat the actions required by paragraphs (g)(2)(i)(A) and (B) of this AD for each failed tail boom attachment point, one hardware set at a time. Then repeat the actions required by paragraph (g)(2) of this AD just for each newly installed or reinstalled bolt until the torque for all four tail boom attachment points stabilizes.

(ii) If the torque for all four tail boom attachment points has stabilized, before further flight, apply a torque stripe to all four bolts.

(3) For the helicopter identified in paragraph (c)(4) of this AD, within 5 hours TIS after the effective date of this AD, inspect the torque applied on each bolt in accordance with the Accomplishment Instructions, part II, paragraphs 1 and 2, of ASB 412-21-187 Rev A. Thereafter, repeat the torque inspection of each bolt after accumulating 1 hour TIS, but not to exceed 5 hours TIS, to determine if the torque has stabilized. Do not exceed three torque inspections total for each bolt and accomplish the actions required by paragraphs (g)(2)(i) and (ii) of this AD.

Note 2 to paragraph (g)(3): The Accomplishment Instructions, part II, paragraph 1, of ASB 412-21-187 Rev A refers

to part I for allowable torque limits; part I of ASB 412-21-187 Rev A specifies the different torque limits for the different bolts.

(4) For helicopters identified in paragraphs (c)(1) through (4) of this AD, within 600 hours TIS or 12 months, whichever occurs first after applying torque stripes to all four bolts as required by paragraph (g)(2)(ii) of this AD, and thereafter within intervals not to exceed 600 hours TIS or 12 months, whichever occurs first; and for helicopters identified in paragraph (c)(5) of this AD, within 600 hours TIS or 12 months after the effective date of this AD, whichever occurs first, and thereafter within intervals not to exceed 600 hours TIS or 12 months, whichever occurs first, using the torque value information in the Accomplishment Instructions, part II, paragraph 1, of ASB 212-21-166 Rev A, ASB 412-21-187 Rev A, or ASB 412CF-21-72 Rev A, as applicable to your helicopter model, inspect the torque applied on each bolt. If the torque on any bolt is below the minimum allowable torque limit, accomplish the actions required by paragraphs (g)(4)(i) and (ii) of this AD.

(i) Before further flight, remove the hardware set of one failed tail boom attachment point (barrel nut, retainer, bolt, countersunk washer, and plain washers). Visually inspect the removed barrel nut for cracking, corrosion, and loss of tare torque. If the barrel nut has any cracking, corrosion, or has lost any tare torque, before further flight, remove the barrel nut and retainer from service and replace them with a new nickel alloy barrel nut P/N NAS577C9A, NAS577C8A, or NAS577C6A, and new retainer P/N NAS578C9A, NAS578C8A, or NAS578C6A, with the P/N of the new nickel alloy barrel nut and the P/N of the new retainer being as applicable to the affected tail boom attachment point. Regardless of the result of the barrel nut inspection, remove the bolt from service and replace it with a new bolt by following the Accomplishment Instructions, part I, paragraphs 6 and 7, paragraphs 11 and 12, or paragraphs 16 and 17, of ASB 212-21-166 Rev A, ASB 412-21-187 Rev A, or ASB 412CF-21-72 Rev A, as applicable to your helicopter model and with the paragraphs as applicable to that bolt. Repeat the actions required by this paragraph for each failed tail boom attachment point, one hardware set at a time.

(ii) After accumulating 1 hour TIS, but not to exceed 5 hours TIS after accomplishing the actions required by paragraph (g)(4)(i) of this AD, using the torque value information in the Accomplishment Instructions, part II, paragraph 1, of ASB 212-21-166 Rev A, ASB 412-21-187 Rev A, or ASB 412CF-21-72 Rev A, as applicable to your helicopter model, inspect the torque applied on each newly installed bolt. Thereafter, repeat the torque inspection of those bolts after accumulating 1 hour TIS, but not to exceed 5 hours TIS, to determine if the torque has stabilized. Do not exceed three torque inspections total for those bolts and accomplish the actions required by paragraphs (g)(2)(i) and (ii) of this AD.

Note 3 to paragraph (g)(4): The Accomplishment Instructions, part II, paragraph 1, of ASB 212-21-166 Rev A, ASB 412-21-187 Rev A, and ASB 412CF-21-72

Rev A, each refer to part I for allowable torque limits; part I of ASB 212–21–166 Rev A, ASB 412–21–187 Rev A, and ASB 412CF–21–72 Rev A, specify the different torque limits for the different bolts.

(5) Within the compliance times specified in Table 1 to the introductory text of paragraph (g)(5) of this AD, accomplish the actions required by paragraphs (g)(5)(i) through (iv) of this AD.

Table 1 to the Introductory Text of Paragraph (g)(5)

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Helicopter Groups	Compliance Times
For helicopters identified in paragraphs (c)(1) and (2) of this AD, and helicopters identified in paragraph (c)(3) of this AD that accomplished paragraph (g)(1)(i) of this AD.	Within 5,000 hours TIS or 5 years after accomplishing the actions required by paragraph (g)(1) of this AD, whichever occurs first, and thereafter, within intervals not to exceed 5,000 hours TIS or 5 years, whichever occurs first.
For helicopters identified in paragraph (c)(3) of this AD that accomplished paragraph (g)(1)(ii) of this AD.	Before the helicopter accumulates 5,000 total hours TIS or 5 years since new, whichever occurs first, and thereafter, within intervals not to exceed 5,000 hours TIS or 5 years, whichever occurs first.
For helicopters identified in paragraphs (c)(4) and (5) of this AD.	Before the helicopter accumulates 5,000 total hours TIS or 5 years since new, whichever occurs first, or if the total hours TIS or age of the helicopter is unknown, before further flight, and thereafter, within intervals not to exceed 5,000 hours TIS or 5 years, whichever occurs first.

BILLING CODE 4910–13–C

(i) Remove the upper LH bolt from service and replace it with a new upper LH bolt by following the Accomplishment Instructions, part I, paragraphs 6 and 7, of ASB 212–21–166 Rev A, ASB 412–21–187 Rev A, or ASB 412CF–21–72 Rev A, as applicable to your helicopter model. Then accomplish the actions required by paragraph (g)(5)(v) of this AD.

Note 4 to paragraph (g)(5)(i): This note applies to paragraphs (g)(5)(i) through (v) of this AD. The Accomplishment Instructions, part II, paragraph 1, of ASB 212–21–166 Rev A, ASB 412–21–187 Rev A, and ASB 412CF–21–72 Rev A, each refer to part I for allowable torque limits; part I of ASB 212–21–166 Rev A, ASB 412–21–187 Rev A, and ASB 412CF–21–72 Rev A, specify the different torque limits for the different bolts.

(ii) With the upper RH bolt removed, visually inspect the upper RH bolt for any corrosion, damaged threads, wear, and fatigue cracking. If the upper RH bolt has any corrosion, a damaged thread, wear, or fatigue cracking, before further flight, remove the upper RH bolt from service. Install a new upper RH bolt or reinstall the existing upper RH bolt, as applicable, by following the

Accomplishment Instructions, paragraphs 11 and 12 of ASB 212–21–166 Rev A, ASB 412–21–187 Rev A, or ASB 412CF–21–72 Rev A, as applicable to your helicopter model. Then accomplish the actions required by paragraph (g)(5)(v) of this AD.

(iii) With the lower LH bolt removed, visually inspect the lower LH bolt for any corrosion, damaged threads, wear, and fatigue cracking. If the lower LH bolt has any corrosion, a damaged thread, wear, or fatigue cracking, before further flight, remove the lower LH bolt from service. Install a new lower LH bolt or reinstall the existing lower LH bolt, as applicable, by following the Accomplishment Instructions, paragraphs 16 and 17 of ASB 212–21–166 Rev A, ASB 412–21–187 Rev A, or ASB 412CF–21–72 Rev A, as applicable to your helicopter model. Then accomplish the actions required by paragraph (g)(5)(v) of this AD.

(iv) With the lower RH bolt removed, visually inspect the lower RH bolt for any corrosion, damaged threads, wear, and fatigue cracking. If the lower RH bolt has any corrosion, a damaged thread, wear, or fatigue cracking, before further flight, remove the lower RH bolt from service. Install a new lower RH bolt or reinstall the existing lower

RH bolt, as applicable, by following the Accomplishment Instructions, paragraphs 16 and 17 of ASB 212–21–166 Rev A, ASB 412–21–187 Rev A, or ASB 412CF–21–72 Rev A, as applicable to your helicopter model. Then accomplish the actions required by paragraph (g)(5)(v) of this AD.

(v) After accumulating 1 hour TIS, but not to exceed 5 hours TIS after accomplishing the actions required by paragraph (g)(5)(i), (ii), (iii), or (iv) of this AD, using the torque value information in the Accomplishment Instructions, part II, paragraph 1, of ASB 212–21–166 Rev A, ASB 412–21–187 Rev A, or ASB 412CF–21–72 Rev A, as applicable to your helicopter model, inspect the torque applied on each bolt. Thereafter, repeat the torque inspection of those bolts after accumulating 1 hour TIS, but not to exceed 5 hours TIS, to determine if the torque has stabilized. Do not exceed three torque inspections total for those bolts and accomplish the actions required by paragraphs (g)(2)(i) and (ii) of this AD.

(6) For helicopters identified in paragraph (c) of this AD, as of the effective date of this AD, do not install a steel alloy barrel nut P/N NAS577B9A, P/N NAS577B8A, or P/N NAS577B6A on any helicopter.

(h) Special Flight Permit

A one-time special flight permit may be issued in accordance with 14 CFR 21.197 and 21.199 in order to fly to a maintenance area to perform the required actions in this AD.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Central Certification 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 local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (j) of this AD. Information may be emailed to fwaco@faa.gov.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(j) Related Information

For more information about this AD, contact Jacob Fitch, Aviation Safety Engineer, FAA, 1801 S Airport Road, Wichita, KS 67209; telephone (817) 222-4130; email jacob.fitch@faa.gov.

(k) Material Incorporated by Reference

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

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

(i) Bell Alert Service Bulletin 212-21-166, Revision A, dated February 23, 2022.

(ii) Bell Alert Service Bulletin 412-21-187, Revision A, dated February 23, 2022.

(iii) Bell Alert Service Bulletin 412CF-21-72, Revision A, dated February 23, 2022.

(3) For service information identified in this AD, contact Bell Textron, Inc., P.O. Box 482, Fort Worth, TX 76101, United States; phone (450) 437-2862 or 1-800-363-8023; fax (450) 433-0272; email: productsupport@bellflight.com; or website: bellflight.com/support/contact-support.

(4) You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Parkway, Room 6N-321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222-5110.

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

Issued on March 22, 2024.

Victor Wicklund,

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

[FR Doc. 2024-09573 Filed 5-1-24; 4:15 pm]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 39**

[Docket No. FAA-2022-0600; Project Identifier AD-2021-01160-R]

RIN 2120-AA64

Airworthiness Directives; Bell Textron Inc., Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking (SNPRM).

SUMMARY: The FAA is revising a notice of proposed rulemaking (NPRM) that would have applied to all Bell Textron Inc., Model 204B, 205A, 205A-1, 205B, and 210 helicopters. This AD was prompted by an accident and incidents involving failure of the tail boom attachment structure. This action revises the NPRM by changing the proposed required actions and adding a special flight permit limitation. The FAA is proposing this airworthiness directive (AD) to address the unsafe condition on these products. Since these actions would impose an additional burden over those in the NPRM, the agency is requesting comments on this SNPRM.

DATES: The FAA must receive comments on this SNPRM by June 24, 2024.

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 by searching for and locating Docket No. FAA-2022-0600; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, this SNPRM, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For Bell material, contact Bell Textron Inc., P.O. Box 482, Fort Worth, TX 76101; phone (450) 437-2862 or (800) 363-8023; fax (450) 433-0272;

email productsupport@bellflight.com; website: bellflight.com/support/contact-support.

- You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N-321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222-5110.

Other Related Service Information: For other service information identified in this SNPRM, contact Bell Textron Inc., P.O. Box 482, Fort Worth, TX 76101; phone (450) 437-2862 or (800) 363-8023; fax (450) 433-0272; email productsupport@bellflight.com; website: bellflight.com/support/contact-support.

FOR FURTHER INFORMATION CONTACT:

Michael Perrin, Aviation Safety Engineer, FAA, 1801 S Airport Road, Wichita, KS 67209; phone: (562) 627-5362; email: Michael.j.perrin@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 the **ADDRESSES** section. Include "Docket No. FAA-2022-0600; Project Identifier AD-2021-01160-R" 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 again revise 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 SNPRM.

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 SNPRM 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 SNPRM, 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 SNPRM. Submissions containing CBI should be sent to Michael Perrin, Aviation Safety Engineer, FAA, 1801 S Airport Road, Wichita, KS 67209; phone: (562) 627-5362; email: Michael.j.perrin@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

The FAA issued AD 2021-15-14, Amendment 39-21661 (86 FR 39942, July 26, 2021) (AD 2021-15-14) for various restricted category helicopters. AD 2021-15-14 was prompted by an accident involving a Model UH-1B helicopter and two forced landings involving Model UH-1H and UH-1F helicopters, due to tail boom attachment structure failures. Each of the three events involved a failure of the upper left-hand (LH) tail boom attachment fitting, which is the most heavily loaded at the four tail boom attach points. The FAA issued AD 2021-15-14 to address fatigue cracking of tail boom attachment fittings, cap angles, longerons, and bolts.

Due to their similarity to the Model UH-1B, UH-1H, and UH-1F helicopters, the FAA determined that Bell Textron Inc., Model 204B, 205A, 205A-1, 205B, and 210 helicopters are also affected by the same unsafe condition and issued an NPRM to propose the same actions as those required in AD 2021-15-14. The NPRM published in the **Federal Register** on June 7, 2022 (87 FR 34587) to amend 14 CFR part 39, and would have applied to Bell Textron Inc., Model 204B, 205A, 205A-1, 205B, and 210 helicopters. The NPRM proposed to require revising the helicopter's existing rotorcraft flight manual (RFM) to incorporate pre-flight checks; removing excess paint and sealant, and cleaning certain parts; and repetitive inspections of structural components that attach the tail boom to the fuselage. Depending on the inspection results, the NPRM proposed to require repairing or replacing components, or re-bonding the structure.

Actions Since the NPRM Was Issued

Since the FAA issued the NPRM, the FAA has determined changes to the proposed required actions are necessary, primarily based on comments received from several commenters and additional review. The FAA has also determined to

require a special flight permit limitation as proposed in this SNPRM.

Comments

The FAA received comments from four commenters. The following discussion presents the comments received on the NPRM and the FAA's response.

Requests To Withdraw the NPRM

Request: Delta Helicopters Ltd. (DHL) and Remote Helicopters Ltd. (RHL) stated that because Bell service information and established maintenance programs already provide the needed requirements to address the unsafe condition, the proposed AD is not necessary. Additionally, an individual commenter stated the proposed requirements will not prevent a sudden failure and stated that daily nut and bolt inspections, replacement of bolts and nuts at scheduled intervals, and maintaining proper torque would be just as effective as the requirements proposed in the NPRM.

DHL stated that although damage does occur, sudden failures will not occur unless the helicopter is being operated outside of its capabilities and not being inspected properly as already prescribed by Bell in related alert service bulletins (ASBs). RHL stated that the proposed requirements in the NPRM are not necessary because properly accomplishing the service information from Bell and operating the helicopter within the appropriate parameters are sufficient. The FAA infers that these commenters are requesting that the FAA withdraw the NPRM.

FAA Response: The FAA disagrees. While an operator may incorporate into its maintenance program the inspections in the manufacturer's service bulletins referenced by the commenters, not all operators are required to do so. In order for these inspections to become mandatory, and to correct the unsafe conditions identified in the NPRM, the FAA must issue an AD.

Request: DHL, RHL, and one individual commenter each stated that the restricted category helicopters and the Bell Textron Inc., Model 204 and 205 helicopters have significant dissimilarities. DHL stated that the comparison between restricted category and Bell Textron Inc., Model 204B and 205A-1 helicopters is not accurate, and the Model 205 structure has more in common with the structure of a Model 212 helicopter.

RHL stated that the tail boom inspection for the Model UH-1 helicopter is more difficult because of lack of access to the inspection areas. Accordingly, RHL stated that lack of

access to the inspection areas is not a problem for Bell Textron Inc., Model 205 helicopters, and because of this, the inspection areas for these helicopters are inspected on a regular basis.

Additionally, one individual commenter stated the structural design of the tail boom and the fuselage attachment structure is different when comparing Model UH helicopters to Bell Textron Inc., Model 205A, 205A-1, 205B, and 210 helicopters, and that these helicopters are more robust than the Model UH helicopter. The individual commenter also stated the failures mentioned in the NPRM occurred only on Model UH helicopters used during heli-logging, and heavy lift activities, but that commenter has never seen these failures during heavy lift activities in the Bell Textron Inc., Model 205A-1 helicopter. Finally, the individual commenter stated the proposed AD is unwarranted and without basis to include the Bell Textron Inc., Model 205A, 205A-1, 205B, and 210 helicopters in the applicability as they are closer in similarity to the Bell Textron Inc., Model 212 helicopter. The FAA infers that these commenters are requesting that the FAA withdraw the NPRM.

FAA Response: The FAA disagrees. An examination of the structures of both the Model UH-1 helicopters and the Bell Textron Inc., Model 204 and 205 helicopters indicated no significant differences between the commercial and military model helicopters. Furthermore, there have been reported tail boom attachment failures involving the Bell Textron Inc., Model 205 helicopter. Additionally, performing heavy lift operations such as logging could accelerate failures in the tail boom attachment region. The FAA expects that the number of tail boom attachment failures will increase over time and will also include those aircraft not involved in heavy lift operations.

Request for Changes to the Required Actions

Request: DHL commenter stated that stripping paint is not necessary to detect damage during routine maintenance.

FAA Response: The FAA agrees and has revised this SNPRM accordingly.

Request: One individual commenter stated inspection requirements are part of the Instructions for Continued Airworthiness and should not be included in a flight manual. The individual commenter stated a mandatory inspection is a stand-alone inspection and is not related to the operation of an aircraft, which is the main reason for a flight manual. Furthermore, the commenter stated

maintenance personnel would not review or reference a flight manual for inspection requirements.

FAA Response: The FAA agrees and has revised this proposed AD accordingly by removing the requirement of revising the rotorcraft flight manual from the required actions.

Comment Regarding an Alternative Method of Compliance (AMOC) Request

Request: One individual commenter requested the ability to submit a request for an AMOC for the tail boom sensor supplemental type certificate.

FAA Response: The FAA agrees that operators may request approval of an AMOC under the provisions of paragraph (j) of this SNPRM.

FAA's Determination

The FAA is proposing this AD after determining the unsafe condition described previously is likely to exist or develop in other products of the same type design. Certain changes described above expand the scope of the NPRM. As a result, it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this SNPRM.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Bell Alert Service Bulletin (ASB) 210–21–15, Revision A, dated February 23, 2022 (ASB 210–21–15, Rev A). This service information specifies procedures for replacing the steel alloy barrel nuts with nickel alloy barrel nuts, inspecting, and replacing the tail boom attachment hardware, stabilizing the tail boom attachment hardware torque, applying torque seals, and subsequently checking the torque.

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

Other Related Service Information

The FAA reviewed Bell ASB 205–21–118, Bell ASB 204B–21–75, and Bell ASB 205B–21–72, each Revision A and dated February 23, 2022. This service information specifies the same procedures as ASB 210–21–15, Rev A.

Proposed AD Requirements in This SNPRM

This proposed AD would require for Bell Textron Inc., Model 204B helicopters, with the tailboom assembly removed, removing the upper left-hand (LH) bolt from service and inspecting the bolt's associated attachment hardware, and depending on the inspection results, removing the

associated nut from service. This proposed AD would also require visually inspecting each bulkhead, bolt hole, attachment fitting, the three other nuts, the upper right-hand bolt, and two lower bolts, including the bolt shank and head radii. Depending on inspection results, this proposed AD would require repairing or replacing an affected bulkhead or affected fitting, removing certain part-numbered nuts, removing any affected nut and its associated bolt from service, and removing any affected bolt from service.

This proposed AD would require for Bell Textron Inc., Model 205A, 205A–1, and 205B helicopters, with the tail boom assembly removed, removing the upper LH bolt from service, and inspecting its associated barrel nut and retainer, and depending on the inspection results, removing barrel nut and retainer from service. This proposed AD would also require visually inspecting each bulkhead, bolt hole, attachment fitting, the three other barrel nuts, associated retainers, the upper right-hand bolt, and two lower bolts, including the bolt shank and head radii. Depending on inspection results, this proposed AD would require repairing or replacing an affected bulkhead or affected fitting, removing certain part-numbered barrel nuts and retainers, removing any affected barrel nuts and its associated bolt from service, and removing any affected bolt from service.

This proposed AD would require for Bell Textron Inc., Model 210 helicopters, with the tail boom supported, removing the upper LH steel alloy barrel nut, retainer, and bolt from service. This proposed AD would also require removing the countersunk washer and plain washers, and replacing them with a new certain part-numbered nickel alloy barrel nut, new retainer, new bolt, an airworthy countersunk washer, and airworthy plain washers. This proposed AD would also require visually inspecting the upper RH bolt and its associated hardware, and depending on the inspection results, removing the upper RH bolt and barrel nut from service. Additionally, this proposed AD would require visually inspecting the two lower bolts and the associated barrel nuts, and depending on the inspection results, removing any affected barrel nut and its associated bolt from service, and removing any affected bolt from service.

Additionally, this proposed AD would require for all applicable helicopters, after the initial inspections have been completed, applying a coating of grease to each bolt shank only, installing the applicable hardware, and torquing each bolt by using the

torque value information identified in this proposed AD or identified in ASB 210–21–15, Rev A as applicable.

Thereafter, for all applicable helicopters, this proposed AD would require inspecting the torque applied on each bolt to determine if the torque has stabilized and, depending on the results, replacing and inspecting certain tail boom attachment point hardware and repeating the torque inspections, or applying torque stripes.

Lastly, this proposed AD would prohibit installing certain part-numbered steel alloy nuts on any Model 204B helicopters; and would prohibit installing certain part-numbered steel alloy barrel nuts on any Model 205A, 205A–1, 205B, and 210 helicopters.

Differences Between This SNPRM and the Service Information

The service information specifies checking torque, whereas this proposed AD would require inspecting torque because that action must be accomplished by persons authorized under 14 CFR 43.3.

When stabilizing the tail boom attachment hardware torque, the service information does not specify what to do if the torque on a tail boom attachment bolt is below the minimum allowable torque limit, whereas this proposed AD would require replacing and inspecting certain tail boom attachment point hardware, stabilizing the torque of the replaced hardware set, and applying torque stripes.

Costs of Compliance

The FAA estimates that this proposed AD would affect 62 (five Model 204B helicopters, fifty-three Model 205A, 205A–1, and 205B helicopters, and four Model 210 helicopters) of U.S. registry. Labor costs are estimated at \$85 per work-hour. Based on these numbers, the FAA estimates the following costs to comply with this proposed AD.

For the initial requirements for Model 204B helicopters, inspecting or replacing up to four bolts (which includes applying a coating of grease), inspecting each bulkhead, inspecting each fitting and bolt hole, inspecting and stabilizing the torque, and applying torque stripes would take up to approximately 8.5 work-hours for an estimated labor cost of up to \$723. The parts cost for an upper LH bolt would be approximately \$196 and the parts cost for the other bolts would be approximately \$89 per bolt. The parts cost for four new nuts would be approximately \$680. The parts cost to apply torque stripes would be a nominal amount. The estimated cost for these actions would be up to approximately

\$1,866 per helicopter and \$9,330 for the U.S. fleet.

For the initial requirements for Model 205A, 205A-1, and 205B helicopters, replacing the four steel alloy barrel nuts with new nickel alloy barrel nuts, inspecting or replacing up to four bolts (which includes applying a coating of grease), inspecting each bulkhead, inspecting and stabilizing the torque, and applying torque stripes would take up to approximately 8.5 work-hours for an estimated labor cost of up to \$723. The parts cost for the four new nickel alloy barrel nuts (including retainers) would be approximately \$680. The parts cost for an upper LH bolt would be approximately \$196 and the parts cost for the other bolts would be approximately \$89 per bolt. The parts cost to apply torque stripes would be a nominal amount. The estimated cost for these actions would be up to approximately \$1,866 per helicopter and \$98,898 for the U.S. fleet.

For the initial requirements for Model 210 helicopters, replacing the four steel alloy barrel nuts with new nickel alloy barrel nuts, inspecting or replacing up to four bolts (which includes applying a coating of grease), inspecting and stabilizing the torque, and applying torque stripes would take up to approximately 8.5 work-hours for an estimated labor cost of up to \$723. The parts cost for the four new nickel alloy barrel nuts (including retainers) would be approximately \$680. The parts cost for an upper LH bolt would be approximately \$196 and the parts cost for the other bolts would be approximately \$89 per bolt. The parts cost to apply torque stripes would be a nominal amount. The estimated cost for these actions would be up to approximately \$1,866 per helicopter and \$7,464 for the U.S. fleet.

For all applicable helicopters, inspecting the torque applied on each bolt would take approximately 1 work-hour for an estimated cost of \$85 per helicopter and \$5,270 for the U.S. fleet, per inspection cycle.

For all applicable helicopters, replacing an upper LH bolt, stabilizing the torque, and applying a torque stripe would take up to approximately 5 work-hours. The parts cost for an upper LH bolt would be approximately \$196 and the parts cost to apply a torque stripe would be a nominal amount. The estimated cost for these actions would be up to approximately \$621 per helicopter and \$38,502 for the U.S. fleet, per replacement cycle. Inspecting one of the other bolts, stabilizing the torque, and applying a torque stripe would take up to approximately 3.5 work-hours for an estimated cost of \$298 per other bolt

and \$18,476 for the U.S. fleet per other bolt per inspection cycle. If required, replacing a bolt following that inspection would take a minimal amount of additional time and the parts cost would be approximately \$89.

If required as a result of failing any torque inspection required by this proposed AD, visually inspecting a nut or a barrel nut, replacing a bolt, stabilizing the torque, and applying a torque stripe would take up to approximately 5.5 work-hours per failed hardware set. The parts cost for an upper LH bolt would be approximately \$196 and the parts cost for the other bolts would be approximately \$89 per bolt. The parts cost to apply a torque stripe would be a nominal amount. The estimated cost for these actions would be \$664 (upper LH bolt) or \$557 (other bolts), per failed hardware set. If required, replacing a nut following that inspection would take a minimal amount of additional time and the parts cost for a nut would be approximately \$89 per nut, and if required, replacing a barrel nut following that inspection would take a minimal amount of additional time and the parts cost for a barrel nut (including retainer) would be approximately \$173 per barrel nut.

The corrective action that may be needed as a result of the bulkhead inspection could vary significantly from helicopter to helicopter. The FAA has no data to determine the costs to accomplish the corrective action or the number of helicopters that may require corrective action.

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:

Bell Textron Inc.: Docket No. FAA-2022-0600; Project Identifier AD-2021-01160-R.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by June 24, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bell Textron Inc., Model 204B, 205A, 205A-1, 205B, and 210 helicopters, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC) 5302, Rotorcraft Tail Boom.

(e) Unsafe Condition

This AD was prompted by an accident and incidents involving failure of the tail boom attachment structure. The FAA is issuing this AD to address fatigue cracking of tail boom attachment fittings, cap angles, longerons, and bolts. The unsafe condition, if not addressed, could result in separation of the tail boom from the helicopter and subsequent loss of control of the helicopter.

(f) Compliance

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

(g) Allowable Torque Values (in-lbs)

Tail boom attachment point	Model 204B	Model 205A/ 205A-1	Model 205B	Model 210
Upper left-hand bolt	570–610	1000–1200	1000–1200	1300–1600
Upper right-hand bolt	360–380	1000–1200	1000–1200	1000–1200
Lower left-hand bolt	360–380	400–430	400–430	400–430
Lower right-hand bolt	360–380	400–430	400–430	400–430

(h) Required Actions

(1) Within 300 hours time-in-service (TIS) or 90 days after the effective date of this AD, whichever occurs first, accomplish the actions required by paragraphs (h)(1)(i), (ii), or (iii) of this AD as applicable to your model helicopter. For purposes of this AD, the word “new” is defined as having zero total hours TIS.

(i) For Model 204B helicopters, accomplish the actions required by paragraphs (h)(1)(i)(A) through (C) of this AD.

(A) With the tail boom assembly removed, remove the upper left-hand (LH) tail boom attachment bolt (bolt) from service and inspect its associated tail boom attachment nut (nut) for mechanical damage, corrosion, a crack, damaged threads, and wear, and to determine whether it is a steel alloy part number (P/N) NAS679A, NAS1291, or MS21042. If there is any mechanical damage, corrosion, a crack, a damaged thread, or wear, or if nut P/N NAS679A, NAS1291, or MS21042 is installed, before further flight, remove the nut from service.

(B) Visually inspect each bulkhead (FS 195.00 and FS 195.03) and the bolt holes for mechanical damage, corrosion, and cracks; visually inspect each attachment fitting for mechanical damage, corrosion, cracks, and loose fasteners; determine if any of the three other nuts are a steel alloy P/N NAS679A, NAS1291, or MS21042; and visually inspect the other three nuts, the upper right-hand (RH) bolt, and two lower bolts for mechanical damage, corrosion, cracks, damaged threads, and wear, including the bolt shank and head radii of the bolts for a damaged thread, wear, and mechanical damage.

(1) If there is any mechanical damage, corrosion, or cracks on any bulkhead (FS 195.00 or FS 195.03), or any mechanical damage, corrosion, or cracks on any bolt holes, or if there is any mechanical damage, corrosion, cracks, or loose fasteners on any attachment fitting, before further flight, repair or replace the affected bulkhead or the affected attachment fitting, as appropriate, in accordance with FAA-approved procedures.

(2) If there is any mechanical damage, corrosion, a crack, a damaged thread, or wear on any nut, or if nut P/N NAS679A, NAS1291, or MS21042 is installed, before further flight, remove the affected nut from service. If there is a crack on any nut, before further flight, also remove its associated bolt from service.

(3) If there is any mechanical damage, corrosion, a crack, a damaged thread, or wear on the upper RH bolt or two lower bolts, which includes the bolt shank or head

radii, before further flight, remove the affected bolt from service.

(C) Apply a coating of Aerial Thixo #2 (3810–0) or Aerial Thixo SYN (3820–0) aviation grease to each bolt shank only. Install the hardware set of each tail boom attachment point (nickel alloy nut P/N 90–132L7 or 90–132L6, as applicable to the affected tail boom attachment point, new upper LH bolt P/N NAS627–21, upper RH and two lower bolts P/N NAS626–20, countersunk washer, and plain washers). Torque each bolt by using the torque value information identified in paragraph (g) of this AD.

(ii) For Model 205A, 205A–1, and 205B helicopters, accomplish the actions required by paragraphs (h)(1)(ii)(A) through (C) of this AD.

(A) With the tail boom assembly removed, remove the upper LH bolt from service and inspect its associated tail boom attachment barrel nut (barrel nut) and retainer for mechanical damage, corrosion, a crack, damaged threads, and wear, and to determine whether it is a steel alloy barrel nut P/N NAS577B8A. If there is any mechanical damage, corrosion, a crack, a damaged thread, or wear, or if barrel nut P/N NAS577B8A is installed, before further flight, remove the barrel nut and its associated retainer from service.

(B) Visually inspect each bulkhead (BS 17.31 and FS 243.89) and the bolt holes for mechanical damage, corrosion, and cracks; visually inspect each attachment fitting for mechanical damage, corrosion, cracks, and loose fasteners; determine if any of the three other barrel nuts are steel alloy P/N NAS577B8A or P/N NAS577B6A; and visually inspect the other three barrel nuts and the associated retainers, the upper RH bolt, and two lower bolts for mechanical damage, corrosion, cracks, damaged threads, and wear, including the bolt shank and head radii of the bolts for a damaged thread, wear, and mechanical damage.

(1) If there is any mechanical damage, corrosion, or cracks on any bulkhead (BS 17.31 or FS 243.89), or any mechanical damage, corrosion, or cracks on any bolt holes, or if there is any mechanical damage, corrosion, cracks, or loose fasteners on any attachment fitting, before further flight, repair or replace the affected bulkhead or the affected attachment fitting, as appropriate, in accordance with FAA-approved procedures.

(2) If there is any mechanical damage, corrosion, a crack, a damaged thread, or wear on any barrel nut or retainer, or if barrel nut P/N NAS577B8A or NAS577B6A is installed,

before further flight, remove the affected barrel nut and retainer (as a pair) from service. If there is a crack on any nut, before further flight, also remove its associated bolt from service.

(3) If there is any mechanical damage, corrosion, a crack, a damaged thread, or wear on the upper RH bolt or two lower bolts, which includes the bolt shank or head radii, before further flight, remove the affected bolt from service.

(C) Apply a coating of Aerial Thixo #2 (3810–0) or Aerial Thixo SYN (3820–0) aviation grease to each bolt shank only. Install the hardware set of each tail boom attachment point (nickel alloy barrel nut P/N NAS577C6A or P/N NAS577C8A and retainer P/N NAS578C6A or P/N NAS578C8A, as applicable to the affected tail boom attachment point, new upper LH bolt P/N NAS628–22, upper RH and two lower bolts P/N NAS628–22 or NAS626–18, as applicable to the affected tail boom attachment point, countersunk washer, and plain washers). Torque each bolt by using the torque value information identified in paragraph (g) of this AD.

(iii) For Model 210 helicopters, accomplish the actions required by paragraphs (h)(1)(iii)(A) through (C) of this AD.

(A) With the tail boom supported, remove the upper LH bolt, and the steel alloy barrel nut P/N NAS577B9A, including the retainer, from service. Remove the countersunk washer, and plain washers, and install new nickel alloy barrel nut P/N NAS577C9A, new retainer P/N NAS578C9A, airworthy countersunk washer, airworthy plain washers, and a new bolt in accordance with the Accomplishment Instructions, Part I, paragraphs 5 through 7 of Bell Alert Service Bulletin (ASB) 210–21–15, Revision A, dated February 23, 2022 (ASB 210–21–15, Rev A).

(B) Remove the upper RH bolt, steel alloy barrel nut P/N NAS577B8A, countersunk washer, and plain washers. Visually inspect the upper RH bolt for any corrosion, damaged threads, wear, and fatigue cracking. If the upper RH bolt has any corrosion, damaged threads, wear, or fatigue cracking, before further flight, remove the upper RH bolt from service. Visually inspect the removed barrel nut for cracking. If there is any cracking in the barrel nut, before further flight, remove the upper RH bolt from service. Regardless of the result of the upper RH steel alloy barrel nut inspection, replace the barrel nut with a new nickel alloy barrel nut P/N NAS577C8A and new retainer P/N NAS578C8A. Install a new upper RH bolt or reinstall the existing upper RH bolt (if no cracks in the barrel nut,

and no corrosion, damaged threads, wear, or fatigue cracking in the bolt were identified), by following the Accomplishment Instructions, part I, paragraphs 11 and 12, including the caution above paragraph 11, of ASB 210–21–15, Rev A.

(C) Remove one of the lower bolts, its lower steel alloy barrel nut P/N NAS577B6A, countersunk washer, and plain washers. Visually inspect that lower bolt for any corrosion, damaged threads, wear, and fatigue cracking. If the lower bolt has any corrosion, damaged threads, wear, or fatigue cracking, before further flight, remove the lower bolt from service. Visually inspect the removed lower barrel nut for cracking. If there is any cracking in the lower barrel nut, before further flight, remove the lower bolt from service. Regardless of the result of that lower steel alloy barrel nut inspection, replace the barrel nut with a new nickel alloy barrel nut P/N NAS577C6A and new retainer P/N NAS578C6A. Install a new lower bolt or reinstall the existing lower bolt (if no cracks in the barrel nut, and no corrosion, damaged threads, wear, or fatigue cracking in the bolt were identified), by following the Accomplishment Instructions, part I, paragraphs 16 through 17, including the caution above paragraph 16, of ASB 210–21–15, Rev A. Repeat the actions required by this paragraph for the other lower attachment point.

(2) For helicopters identified in paragraph (c) of this AD, after accumulating 1 hour TIS, but not to exceed 5 hours TIS, after accomplishing the actions required by paragraph (h)(1) of this AD, using the torque value information identified in paragraph (g) of this AD, as applicable to your model helicopter, inspect the torque applied on each bolt. Thereafter, repeat the torque inspection of each bolt after accumulating 1 hour TIS, but not to exceed 5 hours TIS, to determine if the torque has stabilized. Do not exceed three torque inspections total for each bolt, and accomplish the actions required by paragraphs (h)(2)(i) and (ii) of this AD.

(i) If the torque on a bolt is below the minimum allowable torque limit as a result of any instance of the torque inspection or if after three torque inspection attempts, the torque on any bolt has not stabilized, before further flight, accomplish the actions required by paragraphs (h)(2)(i)(A) and (B) of this AD.

(A) Remove the hardware set of one failed tail boom attachment point (nut, bolt, countersunk washer, and plain washers for Model 204B helicopters, and barrel nut, bolt, retainer, countersunk washer, and plain washers for Model 205A, 205A–1, 205B, and 210 helicopters). For Model 204 helicopters, remove the nut from service and for Model 205A, 205A–1, 205B, and 210 helicopters remove the barrel nut and retainer from service as applicable to the affected tail boom attachment point. Visually inspect the removed bolt for any corrosion, damaged threads, wear, and fatigue cracking. If the bolt has any corrosion, a damaged thread, wear, or fatigue cracking, before further flight, remove the bolt from service.

(B) Apply a coating of Aerial Thixo #2 (3810–0) or Aerial Thixo SYN (3820–0) aviation grease to the bolt shank only. Install

a new bolt or reinstall the existing bolt (if no corrosion, damaged threads, wear, or fatigue cracking in the bolt were identified), and the hardware set of the affected tail boom attachment point (new nut P/N 90–132L6 or 90–132L7, countersunk washer, and plain washers for Model 204B helicopters, and new nickel alloy barrel nut P/N NAS577C6A, NAS577C8A or P/N NAS577C9A and new retainer P/N NAS578C6A, NAS578C8A, or P/N NAS577C9A, countersunk washer, and plain washers for Model 205A, 205A–1, 205B, and 210 helicopters) as applicable to the affected tail boom attachment point. Torque the bolt by using the torque value information identified in paragraph (g) of this AD. Repeat the actions required by paragraphs (h)(2)(i)(A) and (B) of this AD, for each failed tail boom attachment point, one hardware set at a time. Then repeat the actions required by paragraph (h)(2) of this AD just for each newly installed or reinstalled bolt until the torque for all four tail boom attachment points stabilize.

(ii) If the torque for all four tail boom attachment points has stabilized, before further flight, apply a torque stripe to all four bolts.

(3) For helicopters identified in paragraph (c) of this AD, within 600 hours TIS or 12 months, whichever occurs first, after applying torque stripes to all four bolts as required by paragraph (h)(2)(ii) of this AD, and thereafter within intervals not to exceed 600 hours TIS or 12 months, whichever occurs first, inspect the torque applied on each bolt using the torque value information identified in paragraph (g) of this AD, as applicable to your model helicopter. If the torque on any bolt is below the minimum allowable torque limit, accomplish the actions required by paragraphs (h)(3)(i) and (ii) of this AD.

(i) Before further flight, remove the hardware set of one failed tail boom attachment point (nut, bolt, countersunk washer, and plain washers for Model 204B helicopters, and barrel nut, retainer, bolt, countersunk washer, and plain washers for Model 205A, 205A–1, 205B, and 210 helicopters) and then accomplish the actions required by paragraphs (h)(3)(i)(A), (B), or (C) of this AD as applicable to your model helicopter.

(A) For Model 204B helicopters, visually inspect the removed nut for cracking, corrosion, and loss of tare torque. If the nut has any cracking, corrosion, or loss of tare torque, before further flight, remove the nut from service and replace with a new nut P/N 90–132L7 or 90–132L6 as applicable to the tail boom attachment point. Regardless of the result of the nut inspection, remove the bolt from service and replace it with a new bolt by applying a coating of Aerial Thixo #2 (3810–0) or Aerial Thixo SYN (3820–0) aviation grease to the bolt shank only, and install the hardware set of the tail boom attachment point (nut, bolt, and countersunk washer, and plain washers). Torque each bolt by using the torque value information identified in paragraph (g) of this AD. Repeat the actions required by this paragraph for each failed tail boom attachment point, one hardware set at a time.

(B) For Model 205A, 205A–1, and 205B, helicopters, visually inspect the removed

barrel nut for cracking, corrosion, and loss of tare torque. If the barrel nut has any cracking, corrosion, or loss of tare torque, before further flight, remove the barrel nut and retainer from service and replace them with a new nickel alloy barrel nut P/N NAS577C6A, or NAS577C8A, and new retainer P/N NAS578C6A, or NAS578C8A, with the P/N of the new nickel alloy barrel nut and the P/N of the new retainer being as applicable to the affected tail boom attachment point. Regardless of the result of the barrel nut inspection, remove the bolt from service and replace it with a new bolt. Apply a coating of Aerial Thixo #2 (3810–0) or Aerial Thixo SYN (3820–0) aviation grease to each bolt shank only. Install the hardware set of each tail boom attachment point (nickel alloy barrel nut, retainer, bolt, countersunk washer, and plain washers). Torque each bolt by using the torque value information identified in paragraph (g) of this AD. Repeat the actions required by this paragraph for each failed tail boom attachment point, one hardware set at a time.

(C) For Model 210 helicopters, visually inspect the removed barrel nut for cracking, corrosion, and loss of tare torque. If the barrel nut has any cracking, corrosion, or loss of tare torque, before further flight, remove the barrel nut and retainer from service and replace them with a new nickel alloy barrel nut P/N NAS577C6A, NAS577C8A, or NAS577C9A, and new retainer P/N NAS578C6A, NAS578C8A, or NAS578C9A, with the P/N of the new nickel alloy barrel nut and the P/N of the new retainer being as applicable to the affected tail boom attachment point. Regardless of the result of the barrel nut inspection, remove the bolt from service and replace it with a new bolt, apply a coating of Aerial Thixo #2 (3810–0) or Aerial Thixo SYN (3820–0) aviation grease to each bolt shank only, and torque each bolt by using the torque value information identified in paragraph (g) of this AD. Repeat the actions required by this paragraph for each failed tail boom attachment point, one hardware set at a time.

(ii) After accumulating 1 hour TIS, but not to exceed 5 hours TIS after accomplishing the actions required by paragraph (h)(3)(i) of this AD, using the torque value information identified in paragraph (g) of this AD as applicable to your model helicopter, inspect the torque applied on each newly installed bolt. Thereafter, repeat the torque inspection of those bolts after accumulating 1 hour TIS, but not to exceed 5 hours TIS, to determine if the torque has stabilized. Do not exceed three torque inspections total for those bolts and accomplish the actions required by paragraphs (h)(2)(i) and (ii) of this AD.

(4) For helicopters identified in paragraph (c) of this AD, within 5,000 hours TIS or 5 years after accomplishing the actions required by paragraph (h)(1) of this AD, whichever occurs first, and thereafter, within intervals not to exceed 5,000 hours TIS or 5 years, whichever occurs first, accomplish the actions required by paragraphs (h)(4)(i) and (ii) of this AD.

(i) Accomplish the actions required by paragraphs (h)(1)(i), (ii), or (iii) of this AD, as applicable to your model helicopter.

(ii) After accumulating 1 hour TIS, but not to exceed 5 hours TIS after accomplishing the

actions required by paragraph (h)(4)(i) of this AD, using the torque value information identified in paragraph (g) of this AD as applicable to your model helicopter, inspect the torque applied on each bolt. Thereafter, repeat the torque inspection of those bolts after accumulating 1 hour TIS, but not to exceed 5 hours TIS, to determine if the torque has stabilized. Do not exceed three torque inspections total for those bolts and accomplish the actions required by paragraphs (h)(2)(i) and (ii) of this AD.

(5) As of the effective date of this AD, do not install the following parts identified in paragraphs (h)(5)(i) and (ii) of this AD on any helicopter.

(i) For Model 204B helicopters; steel alloy nut P/N NAS679A, NAS1291, or MS21042.

(ii) For Model 205A, 205A-1, 205B, and 210 helicopters; steel alloy barrel nut P/N NAS577B9A, P/N NAS577B8A, or P/N NAS577B6A.

(i) Special Flight Permit

A one-time special flight permit may be issued in accordance with 14 CFR 21.197 and 21.199 in order to fly to a maintenance area to perform the required actions in this AD.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Central Certification 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 local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (k) of this AD. Information may be emailed to fwaco@faa.gov.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(k) Related Information

For more information about this AD, contact Michael Perrin, Aviation Safety Engineer, FAA, 1801 S Airport Road, Wichita, KS 67209; phone: (562) 627-5362; email: Michael.j.perrin@faa.gov.

(l) Material Incorporated by Reference

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

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

(i) Bell Alert Service Bulletin 210-21-15, Revision A, dated February 23, 2022.

(ii) [Reserved]

(3) For service information identified in this AD, contact Bell Textron Inc., P.O. Box 482, Fort Worth, TX 76101; phone (450) 437-2862 or (800) 363-8023; fax (450) 433-0272; email productsupport@bellflight.com; or website: bellflight.com/support/contact-support.

(4) You may view this service information at the FAA, Office of Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222-5110.

(5) You may view this material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations or email fr.inspection@nara.gov.

Issued on April 26, 2024.

James D. Foltz,

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

[FR Doc. 2024-09572 Filed 5-1-24; 4:15 pm]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 382

[Docket No. DOT-OST-2022-0144]

RIN 2105-AF14

Ensuring Safe Accommodations for Air Travelers With Disabilities Using Wheelchairs

AGENCY: Office of the Secretary (OST), Department of Transportation (DOT or the Department).

ACTION: Proposed rule; extension of comment period.

SUMMARY: The Department is extending through June 12, 2024, the period for interested persons to submit comments to its proposed rule on Ensuring Safe Accommodations for Air Travelers with Disabilities Using Wheelchairs.

DATES: The comment period for the proposed rule published March 12, 2024, at 89 FR 17766, is extended. Comments should be filed by June 12, 2024. Late-filed comments will be considered to the extent practicable.

ADDRESSES: You may file comments identified by the docket number DOT-OST-2022-0144 by any of the following methods:

- *Federal eRulemaking Portal:* Go to <https://www.regulations.gov> and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12-140, 1200 New Jersey Ave. SE, Washington, DC, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

- *Fax:* (202) 493-2251.

Instructions: You must include the agency name and docket number DOT-OST-2022-0144 or the Regulatory Identification Number (RIN 2105-AF14) for the rulemaking at the beginning of your comment. All comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided.

Privacy Act: Anyone can search the electronic form of all comments received in any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the **Federal Register** published on April 11, 2000 (65 FR 19477-78), or you may visit <https://www.transportation.gov/privacy>.

Docket: For access to the docket to read background documents and comments received, go to <https://www.regulations.gov> or to the street address listed above. Follow the online instructions for accessing the docket.

FOR FURTHER INFORMATION CONTACT:

Christopher Miller, Staff Attorney, Office of Aviation Consumer Protection, U.S. Department of Transportation, 1200 New Jersey Ave. SE, Washington, DC 20590, 202-366-9342 (phone), 202-366-7152 (fax), christopher.miller1@dot.gov.

SUPPLEMENTARY INFORMATION: On February 29, 2024, the Department publicly announced and posted to its website a notice of proposed rulemaking (NPRM) to ensure airline passengers who use wheelchairs can travel safely and with dignity. In the NPRM, which was published in the **Federal Register** on March 12, 2024, the Department proposed to change the way airlines provide accommodations for individuals who use wheelchairs. The NPRM proposed to set new standards for prompt, safe, and dignified assistance, to mandate enhanced training for airline employees and contractors who physically assist passengers with disabilities and handle passengers' wheelchairs, and to specify actions that airlines must take to protect passengers when a wheelchair is damaged during transport. The proposed rulemaking also clarified that any mishandling of a passenger's checked wheelchair or other assistive device is a violation of the Air Carrier Access Act (ACAA) and proposed to make the mishandling of a wheelchair or other assistive device a per se violation. In addition, the Department solicited comment on various issues including the size standards for

lavatories on twin-aisle aircraft and reimbursements of the fare difference when the fare on a flight a wheelchair user took and the fare on a flight that a wheelchair would have taken if the wheelchair had been able to fit in the aircraft differ. The NPRM provided for a comment period of 60 days after publication of the NPRM in the **Federal Register**, *i.e.*, May 13, 2024.

On March 20, 2024, Airlines for America, the International Air Transport Association, the National Air Carriers Association, the Regional Airline Association, and the Airline Service Providers Association (collectively “Associations”) filed a joint request to extend the public comment period for an additional 90 days. The Associations state that this additional time is needed because of the number of questions and requests for comment posed in the NPRM and the significance of the proposed changes to the accessibility obligations of airlines and airlines’ service providers. The Associations also ask questions regarding the proposal and assert that answers to these questions are necessary to understand the NPRM’s benefits and impact. The Department’s responses to the questions raised in the joint request are posted in the rulemaking docket at <https://www.regulations.gov/docket/DOT-OST-2022-0144>.

On April 26, 2024, 16 disability rights organizations filed a joint comment urging the Department to deny the Associations’ requests for an extension to the comment period for the NPRM. These organizations are: Access Living, American Association of People with Disabilities, The Arc of the United States, Blinded Veterans Association, Christopher & Dana Reeve Foundation, Cure SMA, Disability Rights Education & Defense Fund, Epilepsy Foundation, I AM ALS, Muscular Dystrophy Association, National Council on Independent Living, National Disability Rights Network, National MS Society, Paralyzed Veterans of America, Parent Project Muscular Dystrophy, and United Spinal Association. The disability rights organizations assert the Department has provided a sufficient time for relevant stakeholders to review and comment on the NPRM considering the multiple years’ effort to improve the air travel experience of passengers who are wheelchair users, and the significant concerns for their safety and dignity in air travel.

The Department has carefully considered the request for extension of the comment period and the request to deny the extension and has determined to extend the comment period for the proposed rule for 30 days from May 13,

2024, to June 12, 2024. The Department believes that granting a one-month extension of the original comment period is sufficient to allow stakeholders to review potential impacts, to assess the Department’s responses to the clarification requests, and to prepare comments.

Given the request from the disability rights organizations to deny the request to extend the comment period, the Department encourages all persons to submit comments when ready rather than waiting until the end of the extended period.

Signed in Washington, DC, on or around this 1st day of May 2024, under authority delegated at 49 CFR 1.27(n).

Blane A. Workie,

Assistant General Counsel DOT’s Office of Aviation Consumer Protection.

[FR Doc. 2024–09976 Filed 5–7–24; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 110

[Docket No. USCG–2023–0749]

RIN 1625–AA01

Establish Anchorage Ground; Port Westward Anchorage, Columbia River, Oregon and Washington

AGENCY: Coast Guard, DHS.

ACTION: Notice; reopening of comment period.

SUMMARY: The Coast Guard is reopening the comment period for the notice of proposed rulemaking (NPRM) entitled “Establish Anchorage Ground; Port Westward Anchorage, Columbia River, Oregon and Washington,” published on December 28, 2023. Reopening the comment period will allow additional time for the public to review and submit comments on the proposed rule.

DATES: The comment period for the notice of proposed rulemaking published on December 28, 2023 (88 FR 89644) is reopened. Comments and related material must be submitted to the docket by June 7, 2024.

ADDRESSES: You may submit comments identified by docket number USCG–2023–0749 using the Federal Decision Making Portal at <https://www.regulations.gov>. See the “Public Participation and Request for Comments” portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: For information about this document call or email LT Carlie Gilligan, Sector Columbia River Waterways Management Division, U.S. Coast Guard; telephone 503–240–9319, email SCRWWM@uscg.mil.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

The Coast Guard views public participation as essential to effective rulemaking and will consider all comments and material received on this notice of proposed rulemaking during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this proposed rule, 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–2023–0749 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 you cannot submit your material by using <https://www.regulations.gov>, call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions.

Viewing material in docket. To view documents mentioned in this 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 the document. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

Personal information. 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 to the docket in response to this document, see DHS’s eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

Public meeting. We are not planning to hold a public meeting but will consider doing so if we determine from public comments that a meeting would

be helpful. We would issue a separate **Federal Register** notice to announce the date, time, and location of such a meeting.

Dated: April 29, 2024.

Charles E. Fosse,
*Rear Admiral, U.S. Coast Guard Commander,
Thirteenth Coast Guard District.*

[FR Doc. 2024–09691 Filed 5–7–24; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 110

[Docket No. USCG–2023–0485]

RIN 1625–AA01

Establish Anchorage Ground; Rice Island Anchorage, Columbia River, Oregon and Washington

AGENCY: Coast Guard, DHS.

ACTION: Notice; reopening of comment period.

SUMMARY: The Coast Guard is reopening the comment period for the notice of proposed rulemaking (NPRM) entitled “Establish Anchorage Ground; Rice Island Anchorage, Columbia River, Oregon and Washington,” published on December 28, 2023. Reopening the comment period will allow additional time for the public to review and submit comments on the proposed rule.

DATES: The comment period for the notice of proposed rulemaking published on December 28, 2023 (88 FR 89646) is reopened. Comments and related material must be submitted to the docket by June 7, 2024.

ADDRESSES: You may submit comments identified by docket number USCG–2023–0485 using the Federal Decision Making Portal at <https://www.regulations.gov>. See the “Public Participation and Request for Comments” portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: For information about this document call or email LT Carlie Gilligan, Sector Columbia River Waterways Management Division, U.S. Coast Guard; telephone 503–240–9319, email SCRWWM@uscg.mil.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

The Coast Guard views public participation as essential to effective rulemaking and will consider all comments and material received on this notice of proposed rulemaking during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this proposed rule, 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–2023–0485 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 you cannot submit your material by using <https://www.regulations.gov>, call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions.

Viewing material in docket. To view documents mentioned in this 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 the document. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

Personal information. 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 to the docket in response to this document, see DHS’s eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

Public meeting. We are not planning to hold a public meeting but will consider doing so if we determine from public comments that a meeting would be helpful. We would issue a separate **Federal Register** notice to announce the date, time, and location of such a meeting.

Dated: April 29, 2024.

Charles E. Fosse,
*Rear Admiral, U.S. Coast Guard, Commander,
Thirteenth Coast Guard District.*

[FR Doc. 2024–09693 Filed 5–7–24; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2024–0222]

RIN 1625–AA00

Safety Zone; 2024 Duluth Air Spectacular, Lake Superior, Duluth, MN

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to establish a temporary safety zone for certain waters of Lake Superior. This action is necessary to provide for the safety of life on these navigable waters near Canal Park in Duluth, MN during an air show on July 31, 2024. This proposed rulemaking would prohibit persons and vessels from being in the safety zone unless authorized by the Captain of the Port Marine Safety Unit Duluth or a designated representative. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before June 7, 2024.

ADDRESSES: You may submit comments identified by docket number USCG–2024–0222 using the Federal Decision-Making Portal at <https://www.regulations.gov>. See the “Public Participation and Request for Comments” portion of the

SUPPLEMENTARY INFORMATION section for further instructions on submitting comments. This notice of proposed rulemaking with its plain-language, 100-word-or-less proposed rule summary will be available in this same docket.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email Chief Petty Officer Kyle Weitzell, Marine Safety Unit Duluth, Waterways Management Division, U.S. Coast Guard; telephone 218–725–3825, email Kyle.W.Weitzell@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, Purpose, and Legal Basis

On October 10, 2023, the Coast Guard was notified of an air show that will take place over the waters of Lake Superior near Canal Park in Duluth, MN from 3 p.m. to 6 p.m. on July 31, 2024. During this air show, planes will be flying low over the water within the boundary of a zone marked by buoys and small boat on scene. Hazards from this air show include low flying aircraft and jet exhaust produced by the engines and distraction to the pilots if general boating traffic were to be present within this area. The Captain of the Port Marine Safety Unit Duluth (COTP) has determined that potential hazards associated with the air show at this location would be a safety concern for anyone within an area defined by the following positions, beginning at N 46°47'34.81", W 092°03'46.70", then proceeding southwest to N 46°46'52.73", W 092°05'05.47", then proceeding southwest to N 46°46'48.00", W 092°05'28.02", the following the shoreline northward to N 46°48'1.98", W 092°04'16.02", and then returning to the starting point.

The purpose of this rulemaking is to ensure the safety of vessels and the navigable waters within this area before, during, and after the scheduled event. The Coast Guard is proposing this rulemaking under authority in 46 U.S.C. 70034.

III. Discussion of Proposed Rule

The COTP is proposing to establish a safety zone from noon to 9 p.m. on July 31, 2024. The safety zone would cover all navigable waters of Lake Superior within an area defined by the following positions, beginning at N 46°47'34.81", W 092°03'46.70", then proceeding southwest to N 46°46'52.73", W 092°05'05.47", then proceeding southwest to N 46°46'48.00", W 092°05'28.02", the following the shoreline northward to N 46°48'1.98", W 092°04'16.02", and then returning to the starting point near Canal Park in Duluth, MN. The duration of the zone is intended to ensure the safety of vessels and these navigable waters before, during, and after the scheduled 3 p.m. to 6 p.m. air show. No vessel or person would be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative. The regulatory text we are proposing appears at the end of this document.

IV. Regulatory Analyses

We developed this proposed 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 NPRM has not been designated a "significant regulatory action," under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the short duration and small size of the safety zone as well as the ability for most boats to transit between the Duluth Shipping Canal and Lake Superior without entering the zone.

B. Impact on Small Entities

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

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

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 proposed rule. If the

proposed 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. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

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

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 proposed rule would not result in such an expenditure, we do discuss the potential effects of this proposed rule elsewhere in this preamble.

F. Environment

We have analyzed this proposed 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 made a preliminary determination 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 proposed rule involves a safety zone lasting not more than 9 hours that would prohibit entry within an area under the flight path of aircraft participating in an air show. Normally such actions are categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A preliminary 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. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

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.

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, 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-2024–0222 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 you cannot submit your material by using <https://www.regulations.gov>, call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions.

Viewing material in docket. To view documents mentioned in this proposed rule 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. Also, if you click on the Dockets tab and then the proposed rule, you should see a “Subscribe” option for email alerts. The option will notify you when comments are posted, or a final rule is published.

We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

Personal information. 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 to the docket in response to this document, see DHS’s eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

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 is proposing to amend 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.T09–0222 to read as follows:

§ 165.T09–0222 Safety Zone; 2024 Duluth Air Spectacular, Lake Superior, Duluth, MN.

(a) **Location.** The following area is a safety zone: All navigable waters of Lake Superior within an area defined by the following positions, beginning at N 46°47′34.81″, W 092°03′46.70″, then proceeding southwest to N 46°46′52.73″, W 092°05′05.47″, then proceeding

southwest to N 46°46′48.00″, W 092°05′28.02″, the following the shoreline northward to N 46°48′1.98″, W 092°04′16.02″, and then returning to the starting point near Canal Park in Duluth, MN.

(b) **Enforcement period.** July 31, 2024, from noon to 9 p.m. The specific time frame for waterway closure will be announce via Broadcast Notice to Mariners.

(c) **Definitions.** The following definitions apply to this section:

(1) **On-scene representative** means any Coast Guard commissioned, warrant, or petty officer designated by the Captain of the Port Duluth to monitor a safety zone, permit entry into the zone, give legally enforceable orders to persons or vessels within the zones, and take other actions authorized by the Captain of the Port.

(2) **Public vessel** means vessels owned, chartered, or operated by the United States, or by a State or political subdivision thereof.

(d) **Regulations.** (1) In accordance with the general regulations in § 165.23, entry into, transiting, or anchoring within this safety zone identified in paragraph (a) of this section is prohibited unless authorized by the Captain of the Port Duluth or his designated on-scene representative.

(2) The safety zone identified in paragraph (a) of this section is closed to all vessel traffic, except as may be permitted by the Captain of the Port Duluth or his designated on-scene representative.

(3) Vessel operators desiring to enter or operate within the safety zone must contact the Captain of the Port Duluth or his on-scene representative to obtain permission to do so. The Captain of the Port Duluth or his on-scene representative may be contacted via VHF Channel 16. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port Duluth, or his on-scene representative.

(e) **Exemption.** Public vessels, as defined in paragraph (c) of this section, are exempt from the requirements in this section.

(f) **Waiver.** For any vessel, the Captain of the Port Duluth or his designated representative may waive any of the requirements of this section, upon finding that operational conditions or other circumstances are such that application of this section is unnecessary or impractical for the purposes of public or environmental safety.

Dated: May 2, 2024.

Sean V. Murphy,

*Lieutenant, U.S. Coast Guard, Acting Captain
of the Port Marine Safety Unit Duluth.*

[FR Doc. 2024–10024 Filed 5–7–24; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2024–0261]

RIN 1625–AA11

Safety Zones, Lake Erie and Cuyahoga River, Cleveland, OH

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to establish temporary safety zones for certain waters of Lake Erie, Cleveland Harbor, and the Cuyahoga River. This action is necessary to provide for the safety of life on these navigable waters near Cleveland, Ohio during the 2024 Pan-American Masters Games (Aquatic Sporting Events) from July 12 through July 15, 2024. This proposed rulemaking would prohibit persons and vessels from entering these safety zones unless authorized by the Captain of the Port Sector Eastern Great Lakes or a designated representative. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before June 7, 2024.

ADDRESSES: You may submit comments identified by docket number USCG–2024–0261 using the Federal Decision-Making Portal at <https://www.regulations.gov>. See the “Public Participation and Request for Comments” portion of the

SUPPLEMENTARY INFORMATION section for further instructions on submitting comments. This notice of proposed rulemaking with its plain-language, 100-word-or-less proposed rule summary will be available in this same docket.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, contact LT Jared Stevens, Waterways Management Division, MSU Cleveland, U.S. Coast Guard; via telephone at 216–937–0124, or by email at Jared.M.Stevens@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, Purpose, and Legal Basis

On January 22, 2024, the Greater Cleveland Sports Commission notified the Coast Guard that it will be hosting the 2024 Pan-American Masters Games (Aquatic Sporting Events) from July 12 through July 15, 2024. The five (5) Aquatic Sporting Events will be: Sailing, Triathlon (swim portion), Stand Up Paddleboard—Technical, Stand-Up Paddleboard—Distance, and Rowing. These events are to take place in Lake Erie, Cleveland Harbor’s East Basin Channel, Edgewater Beach, and the Cuyahoga River in Cleveland, Ohio. The Captain of the Port Sector Eastern Great Lakes has determined that safety zones covering certain navigable waters of Lake Erie, the Cleveland Harbor East Basin, and the Cuyahoga River in Cleveland, Ohio, are needed to protect participants during the 2024 Pan-American Masters Games’ Aquatic Events.

The purpose of this rulemaking is to ensure the safety of participants, vessels, and the navigable waters before, during, and after the scheduled events. The Coast Guard is proposing this rulemaking under its authority granted in 46 U.S.C. 70034.

III. Discussion of Proposed Rule

The Captain of the Port Sector Eastern Great Lakes (COTP) is proposing to establish the following safety zones covering certain navigable waters of Lake Erie, including the Cleveland Harbor East Basin Channel, Edgewater Beach, and the Cuyahoga River. The duration and location of these zones are intended to ensure the safety of participants on these navigable waters before, during, and after each of the 2024 Pan-American Masters Games’ aquatic sporting events. The zones may require enforcement beyond the stated times if the marine events run into unforeseen delays. No vessel or person would be permitted to enter the safety zones listed directly below without permission from the COTP or a designated representative. The regulatory text we are proposing appears at the end of this document.

(1) *Sailing:* The boundaries of the four (4) sailing race course safety zones are: “Area 1” centered on 41°30′50.4″ N, 081°45′00.0″ W with a radius of 2,700 yards, “Area 2” centered on 41°33′00.0″ N, 081°45′00.0″ W with a radius of 2,700 yards, “Area 3” centered on 41°34′01.2″

N, 081°38′24.0″ W with a radius of 2,700 yards, and “Area 4” which forms a rectangle of which the four corners of the polygon would be located in positions: (1) 41°30′49.64″ N, 081°42′9.81″ W; (2) 41°32′37.78″ N, 081°39′33.01″ W, (3) 41°32′20.99″ N, 081°38′49.79″ W, (4) 41°30′42.27″ N, 81°42′01.59″ W. The COTP is proposing to establish the safety zones for Areas 1, 2, and 3 from 7:30 a.m. to 5:00 p.m. on July 12 through July 14, and the safety zone for Area 4 from 11:30 a.m. to 3:30 p.m. on July 13, 2024.

(2) *Triathlon:* The boundaries of the safety zone would form a rectangle of which the four corners of the polygon would be located in the following positions: The boundaries of the safety zone form a rectangle with the four corners of the polygon located in the following positions: (1) 41°29′15.76″ N, 081°44′46.34″ W; (2) 41°29′27.96″ N, 081°44′49.87″ W, (3) 41°29′31.98″ N, 081°44′24.01″ W, (4) 41°29′27.46″ N, 81°44′22.51″ W. The COTP is proposing to establish this safety zone from 1:30 p.m. to 4:30 p.m. on July 13, 2024, and again from 5:30 a.m. to 9:30 a.m. on July 14, 2024.

(3) *Stand Up Paddleboard—Technical:* The boundaries of the safety zone form a rectangle with the four corners of the polygon located in the following positions: (1) 41°29′15.76″ N, 081°44′46.34″ W; (2) 41°29′27.96″ N, 081°44′49.87″ W, (3) 41°29′31.98″ N, 081°44′24.01″ W, (4) 41°29′27.46″ N, 81°44′22.51″ W. The COTP is proposing to establish the safety zone from 5:30 a.m. to 12:30 p.m. on July 13, 2024, with a back-up rain day from 5:30 a.m. to 12:30 p.m. on July 15, 2024.

(4) *Stand Up Paddleboard—Distance:* The safety zone would cover all navigable waters of the Cuyahoga River in Cleveland, Ohio between the following two boundaries, which are formed by lines extending perpendicular from bank to bank, centered on: (1) 41°29′55.37″ N, 081°42′21.26″ W (near the Route 2 Bridge), and (2) 41°29′14.79″ N, 081°40′47.87″ W (near Marathon Bend). The COTP is proposing to establish the safety zone from 12:30 p.m. to 5:30 p.m. on July 14, 2024.

(5) *Rowing:* The safety zone would cover all navigable waters of the Cuyahoga River in Cleveland, Ohio between the following two boundaries, which are formed by lines extending perpendicular from bank to bank, centered on: (1) 41°29′35.09″ N, 081°42′14.19″ W (near Center Street Bridge), and (2) 41°29′23.64″ N, 081°41′37.28″ W (near Carnegie Avenue Bridge). The COTP is proposing to

establish the safety zone from 5:30 a.m. to 1:30 p.m. on July 14, 2024.

IV. Regulatory Analyses

We developed this proposed 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 NPRM has not been designated a “significant regulatory action,” under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on size, location, and duration of the proposed rule. These safety zones would restrict navigation through the five (5) Aquatic Sports areas: (1) Sailing for eight (8) hours on one day, and nine and one-half (9.5) hours on three (3) days; (2) Triathlon for three (3) hours on one day, and four (4) hours on one day; (3) Stand Up Paddleboard—Technical for seven (7) hours on one day; (4) Stand Up Paddleboard—Distance for five (5) hours on one day; and (5) Rowing for eight (8) hours on one day.

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 proposed rule would 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 IV.A above, this proposed rule would not have a significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have

a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

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 proposed rule. If the proposed 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. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

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

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 proposed rule would not result in such an expenditure, we do discuss the potential effects of this proposed rule elsewhere in this preamble.

F. Environment

We have analyzed this proposed 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 made a preliminary determination 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 proposed rule involves the following safety zones:

(1) *Sailing*: (1) safety zones lasting 9.5 hours each day that would prohibit entry in, out or thorough the Lake Erie sailing race Areas 1–3 north of Cleveland, Ohio on July 12 through July 14, 2024, and (2) a safety zone lasting 4.0 hours that would prohibit entry in, out, or through the Cleveland Harbor East Basin.

(2) *Triathlon*: safety zone lasting 3.0 hours that would prohibit entry in, out, or through waters of Lake Erie adjacent to Edgewater Beach in Cleveland, Ohio on July 13, 2024, and then again for 4.0 hours on July 14, 2024.

(3) *Stand Up Paddleboard—Technical*: safety zone lasting 7.0 hours that would prohibit entry in, out, or through waters of Lake Erie adjacent to Edgewater Beach in Cleveland, Ohio on July 13, 2024.

(4) *Stand Up Paddleboard—Distance*: safety zone lasting 5.0 hours that would prohibit entry in, out, or through the Cuyahoga River near the Route 2 Bridge (adjacent to Great Lakes Water Sports) to Marathon Bend on July 14, 2024.

(5) *Rowing*: safety zone lasting 8.0 hours that would prohibit entry in, out, or through the Cuyahoga River from the Center Street Bridge to the Carnegie Avenue Bridge on July 14, 2024.

Normally such actions are categorically excluded from further review under paragraph L63a of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A preliminary 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. We seek any comments or information that may lead to the

discovery of a significant environmental impact from this proposed rule.

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.

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, 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–2024–0261 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 you cannot submit your material by using <https://www.regulations.gov>, call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions.

Viewing material in docket. To view documents mentioned in this proposed rule 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. Also, if you click on the Dockets tab and then the proposed rule, you should see a “Subscribe” option for email alerts. The option will notify you when comments are posted, or a final rule is published.

We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

Personal information. 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 to the docket in

response to this document, see DHS’s eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

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 is proposing to amend 33 CFR part 165 as follows:

PART 165—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 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.T09–0261 to read as follows:

§ 165.T09–0261 Safety Zones, Lake Erie and Cuyahoga River, Cleveland, OH.

(a) *Location and enforcement period.* The following safety zones will be enforced from July 12, 2024, through July 15, 2024, as described in paragraphs (a)(1) through (5) of this section within the Captain of the Port Zone Eastern Great Lakes (COTP) in the vicinity of Cleveland, Ohio.

Event	Location ¹	Enforcement dates and times ²	
(1)	Sailing	(i) Lake Erie: All navigable waters within a 2,700 yd radius centered on the following points: “Area 1” centered on 41°30’50.4” N, 081°45’00.0” W, “Area 2” centered on 41°33’00.0” N, 081°45’00.0” W, and “Area 3” centered on 41°34’01.2” N, 081°38’24.0” W; and. (ii) Cleveland Harbor East Basin: “Area 4” All navigable waters within a rectangle with the four corners of the polygon located in the following positions: (1) 41°30’49.64” N, 081°42’9.81” W; (2) 41°32’37.78” N, 081°39’33.01” W, (3) 41°32’20.99” N, 081°38’49.79” W, (4) 41°30’42.27” N, 81°42’01.59” W.	“Areas 1–3” July 12–14 from 7:30 a.m. to 5 p.m. “Area 4” July 13 from 11:30 a.m. to 3:30 p.m.
(2)	Triathlon	All navigable waters of Lake Erie adjacent to Edgewater Beach in Cleveland, Ohio, within a rectangle of which the four corners of the polygon are located in the following positions: (1) 41°29’15.76” N, 081°44’46.34” W; (2) 41°29’27.96” N, 081°44’49.87” W, (3) 41°29’31.98” N, 081°44’24.01” W, (4) 41°29’27.46” N, 81°44’22.51” W.	July 13, from 1:30 p.m. to 4:30 p.m. and again on July 14 from 5:30 a.m. to 9:30 a.m.
(3)	Stand Up Paddleboard—Technical..	All navigable waters of Lake Erie adjacent to Edgewater Beach in Cleveland, Ohio, within a rectangle of which the four corners of the polygon are located in the following positions: (1) 41°29’15.76” N, 081°44’46.34” W; (2) 41°29’27.96” N, 081°44’49.87” W, (3) 41°29’31.98” N, 081°44’24.01” W, (4) 41°29’27.46” N, 81°44’22.51” W.	July 13 from 5:30 a.m. to 12:30 p.m. with a back-up rain day on July 15 from 5:30 a.m. to 12:30 p.m.
(4)	Stand Up Paddleboard—Distance.	All navigable waters of the Cuyahoga River in Cleveland, Ohio between the following two boundaries, which are formed by lines extending perpendicular from bank to bank, centered on: (1) 41°29’55.37” N, 081°42’21.26” W (near the Route 2 Bridge), and (2) 41°29’14.79” N, 081°40’47.87” W (near Marathon Bend).	July 14 from 12:30 p.m. to 5:30 p.m.

Event	Location ¹	Enforcement dates and times ²	
(5)	Rowing	All navigable waters of the Cuyahoga River in Cleveland, Ohio between the following two boundaries, which are formed by lines extending perpendicular from bank to bank, centered on: (1) 41°29'35.09" N, 081°42'14.19" W (near Center Street Bridge), and (2) 41°29'23.64" N, 081°41'37.28" W (near Carnegie Avenue Bridge).	July 14 from 5:30 a.m. to 1:30 p.m.

¹ All coordinates listed in paragraphs (a)(1) through (5) reference Datum NAD 1983.

² The enforcement dates and times for each of the listed safety zones are subject to change. In the event of a change, the COTP will provide notice to the public by issuing a Broadcast Notice to Mariner and by updating the Local Notice to Mariners (if practicable).

(b) *Definitions. Official Patrol Vessel* means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the COTP, in the enforcement of the regulations in this section. *Participant* means all persons and vessels attending the event.

(c) *Regulations.* (1) The Coast Guard may patrol the event areas under the direction of a designated Coast Guard Patrol Commander. The Patrol Commander may be contacted on Channel 16 VHF–FM (156.8 MHz) by the call sign “PATCOM.”

(2) All persons and vessels not registered with the sponsor as participants or official patrol vessels are considered spectators. The “official patrol vessels” consist of any Coast Guard, state or local law enforcement

and sponsor provided vessels designated or assigned by the Captain of the Port Sector Eastern Great Lakes, to patrol the event.

(3) Spectator vessels desiring to transit the regulated area may do so only with prior approval of the Patrol Commander and when so directed by that officer; spectator vessels will be operated at a no-wake speed in a manner which will not endanger participants in the event or any other craft.

(4) No spectator shall anchor, block, loiter, or impede the through-transit of official patrol vessels in the regulated area during the effective dates and times, unless cleared for entry by or through an official patrol vessel.

(5) The Patrol Commander may forbid and control the movement of all vessels in the regulated area. When hailed or signaled by an official patrol vessel, a vessel shall come to an immediate stop

and comply with the directions given. Failure to do so may result in expulsion from the area, citation for failure to comply, or both.

(6) Any spectator vessel may anchor outside the regulated areas specified in this chapter, but may not anchor in, block, or loiter in a navigable channel.

(7) The Patrol Commander may terminate the event or the operation of any vessel at any time it is deemed necessary for the protection of life or property.

(8) The Patrol Commander will terminate enforcement of the special regulations at the conclusion of each individual event.

Dated: May 2, 2024.

M.I. Kuperman,
Captain, U.S. Coast Guard, Captain of the Port Eastern Great Lakes.
[FR Doc. 2024–10023 Filed 5–7–24; 8:45 am]

BILLING CODE 9110–04–P

Notices

Federal Register

Vol. 89, No. 90

Wednesday, May 8, 2024

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

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

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

Comments regarding this information collection received by June 7, 2024 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: FNS Quick Response Surveys (QRS).

OMB Control Number: 0584–0613.

Summary of Collection: This information collection request is for a revision to the currently approved Special Nutrition Programs Quick Response Surveys (SNP QRS). This revision makes some changes to the information collection as previously approved. The Food and Nutrition Service (FNS) intends to request the renewal of a generic clearance that allows FNS to conduct short, quick-turnaround surveys of State, local, and Tribal agencies and businesses that receive food, funds, and nutrition information through programs administered by FNS. Section 28 (42 U.S.C. 1769i) of the Richard B. Russell National School Lunch Act (as amended through Pub. L. 113–79, enacted February 07, 2014, sec. 28) mandates programs under its authorization, including the Child Nutrition programs and WIC, to cooperate with USDA program research and evaluation activities. This generic clearance also enables FNS to better meet the goals of Executive Order 14058, Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government, by allowing FNS to expeditiously gather information from program operators to improve and refine customer experience and service delivery.

Need and Use of the Information:

This collection is necessary to collect and analyze specific information from State and local administrators of FNS Nutrition Assistance Programs in a timely way. Traditionally, FNS conducts large, program-specific studies to collect information on numerous features of each program. Such studies often take several years to complete. The quick response surveys (QRS) provide a mechanism for succinct, quick-turnaround studies to complement the larger FNS studies and to answer policy and implementation questions that result from the larger studies. The FNS QRS information collection enables FNS to administer the programs more effectively by facilitating rapid collection of current information on specific and time-sensitive topics.

Description of Respondents: State, Local and Tribal Governments, Businesses.

Number of Respondents: 58,878.
Frequency of Responses: Reporting: On Occasion.

Total Burden Hours: 27,406.

Rachelle Ragland-Greene,

Acting Departmental Information Collection Clearance Officer.

[FR Doc. 2024–09997 Filed 5–7–24; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

[Docket No. NRCS–2024–0006]

Notice of Intent To Prepare an Environmental Impact Statement for the Pleasant Creek Supplemental Watershed Plan in Sanpete County, Utah

AGENCY: Natural Resources Conservation Service, USDA.

ACTION: Notice of intent (NOI) to prepare an environmental impact statement (EIS).

SUMMARY: The Natural Resources Conservation Service (NRCS) Utah State Office announces its intent to prepare an EIS for the Pleasant Creek watershed in Sanpete County, Utah. The proposed EIS will examine alternative solutions to address watershed structure rehabilitation, flood damage prevention and reduction, agricultural water management, water conservation, and public recreational efforts in Mt. Pleasant City and portions of unincorporated Sanpete County. The Pleasant Creek watershed includes Mt. Pleasant City; existing water resource facilities, including the Upper Debris Basin, Lower Debris Basin, the Surge Pond, and the Agricultural Reservoir; private agricultural land; and U.S. Forest Service-managed land in the upper watershed. NRCS is requesting comments to identify significant issues, potential alternatives, information, and analyses relevant to the proposed action from all interested individuals, Federal and State agencies, and Tribes.

DATES: We will consider comments that we receive by June 7, 2024. We will consider comments received after close of the comment period to the extent possible.

ADDRESSES: We invite you to submit comments in response to this notice.

You may submit your comments through one of the methods below:

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov> and search for docket ID NRCS-2024-0006. Follow the online instructions for submitting comments; or

- **Mail or Hand Delivery:** Derek Hamilton, Water Resources Coordinator, USDA, NRCS, Utah State Office, 125 S State Street, #4010, Salt Lake City, Utah 84138. In your comments, specify the docket ID NRCS-2024-0006.

All comments received will be posted without change and made publicly available on www.regulations.gov.

FOR FURTHER INFORMATION CONTACT:

Derek Hamilton; telephone: (801) 524-4560; email: derek.hamilton@usda.gov. Individuals who require alternative means for communication should contact the U.S. Department of Agriculture (USDA) Target Center at (202) 720-2600 (voice and text telephone (TTY)) or dial 711 for Telecommunications Relay service (both voice and text telephone users can initiate this call from any telephone).

SUPPLEMENTARY INFORMATION:

Purpose and Need

The primary purpose for the supplemental watershed plan is to rehabilitate debris basins and holding ponds in the watershed to prevent flooding and reduce flood damage; improve agricultural water delivery, supply, and conservation; and provide public recreation opportunities. Watershed planning is authorized under the Watershed Protection and Flood Prevention Act of 1954 (Pub. L. 83-566), as amended, and the Flood Control Act of 1944 (Pub. L. 78-534).

This supplemental watershed plan is sponsored by Mt. Pleasant City and cosponsored by Pleasant Creek Irrigation Company and Twin Creek Irrigation Company. The proposed action is needed to address flood prevention in Mt. Pleasant City and portions of unincorporated Sanpete County and reduce flood damage now that existing facilities and infrastructure are beyond their useful design life. The existing facilities do not provide adequate flood protection for Mt. Pleasant City and surrounding areas and do not meet NRCS and Utah Dam Safety standards. The current pipe network for Mt. Pleasant City has aged and is in constant need of costly maintenance and repair. The system was installed in the 1980s, experiences significant water losses, and no longer functions effectively as a shared system for agricultural and residential irrigation users. Drought, city growth, water

shortages, and operations and maintenance challenges have caused strain to the system. Pressure surges and pipe failure often occur during system filling operations and inadequate valving requires large segments or the entire system to be shut down for essential repairs.

Estimated federal funds required for the construction of the proposed action may exceed \$25 million and the proposed action will, therefore, require congressional approval per the 2018 Agriculture Appropriations Act amended funding threshold. In accordance with the regulation in 7 CFR 650.7(a)(2), an EIS is required for projects requiring congressional approval.

Preliminary Proposed Action and Alternatives, Including No Action

The EIS objective is to formulate and evaluate alternatives for flood control and prevention, agricultural water management, and recreational opportunities in the approximately 84,180 acre Pleasant Creek watershed area. The EIS is expected to evaluate three alternatives: two action alternatives, and one no action alternative. The alternatives that may be considered for detailed analysis include:

- **Alternative 1—No Action Alternative:** Taking no action would consist of activities conducted if no federal action or funding were provided. If the No Action Alternative is selected, the existing infrastructure would not be improved, and no capital investment would be required. Sediment would continue to accumulate and water storage volumes would continue to decrease. The existing water storage structures would continue to operate in their current condition, providing inadequate flood protection and overflow during large runoff events. The existing agricultural water infrastructure would continue to incur large water losses resulting in conflicts between agricultural and residential users. The existing infrastructure does not meet the purpose and need to prevent flooding; to reduce flooding risks; to improve agricultural water delivery, supply and conservation; or to provide recreational opportunities.

- **Alternative 2—Proposed Action—Existing Structure Improvement Alternative:** The proposed action would rehabilitate and enlarge the Upper Debris Basin for a total water storage capacity of 840 acre-feet to provide additional flood protection capacity and 50–80 days of irrigation water storage; decommission the Lower Debris Basin; rehabilitate the Agricultural Reservoir and Surge Pond to address current dam

safety deficiencies and add dedicated irrigation water storage for residential secondary water users; construct a new 20 acre-foot Twin Creek Irrigation Storage Reservoir to provide additional dedicated residential secondary water storage; replace the existing secondary irrigation water pipeline system within Mt. Pleasant City to separate residential secondary water and agricultural water; install meters on the agricultural and residential secondary water system for more accurate usage calculations and billing; and construct a day use recreational facility and trail for additional recreational opportunities.

- **Alternative 3—Proposed Action—Twin Creek Reservoir Alternative:** The proposed action would include the measures outlined in Alternative 2 and would also construct a new 1,000 acre-foot Twin Creek Flood Control and Storage Multi-Purpose Reservoir to manage floodwater; provide additional water storage; and assist in ongoing water conservation efforts. This proposed action would also replace the existing, deteriorated Agricultural Transmission Pipeline to provide reliable agricultural water supply and pipe the existing Northwest Irrigation Ditches to reduce water losses, decrease maintenance costs, and improve public safety.

Summary of Expected Impacts

As mentioned above, the estimated Federal contribution to construction cost will exceed \$25 million.

The EIS will be prepared as required by section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA); the Council on Environmental Quality Regulations (40 CFR parts 1500–1508); and NRCS regulations that implement NEPA in 7 CFR part 650.

Resource concerns for scoping were identified and categorized as relevant or not relevant to the proposed action. Mt. Pleasant City, Pleasant Creek Irrigation Company, Twin Creek Irrigation Company, and NRCS evaluated the current condition of watershed structures, flood risk, agricultural water management, water conservation efforts, and recreational opportunities in the Pleasant Creek watershed along with relevant resource concerns for each proposed solution. Environmental resources in the project area consist of the natural and man-made resources. Resource concerns to be identified and addressed in the Supplemental Watershed Plan-EIS include: wetland and channel alteration, disturbances to wildlife and riparian areas during construction, land use changes, and impacts to visual resources.

Anticipated Permits and Authorizations

The following permits and authorizations are anticipated to be required:

- *Dam Safety*. Coordination with the State Engineer and the Utah Division of Water Rights would be required to ensure all development and engineering requirements for the design and construction of the Upper Debris Basin, Agricultural Reservoir and Surge Pond, and Twin Creek Reservoir are implemented.

- *Stream Alteration Permit*. The proposed action would require coordination and permits with the Utah Division of Water Rights for the proposed improvements.

- *Federal Emergency Management Agency (FEMA) Floodplain Development Permit*. Implementation of the proposed action would require coordination with the local floodplain administrator and may require a Floodplain Development Permit to ensure all development and engineering requirements for construction within the Special Flood Hazard Areas are implemented. Additionally, a Letter of Map Revision from FEMA would be required prior to construction.

- *Clean Water Act (CWA) and National Pollutant Discharge Elimination System (NPDES)*. The proposed action may require water quality certification under section 401 of the CWA, permitting under section 402 of the NPDES, and section 404 of the CWA for potential impacts to wetlands and Waters of the United States.

- *National Historic Preservation Act (NHPA) Section 106*. Consultation with Tribal Nations and interested parties would be conducted as required by the NHPA.

- *Local Encroachment*. Consultation and potential encroachment permits would be required with Mt. Pleasant City and Sanpete County for all construction work within the local roadway rights-of-way.

Schedule of Decision-Making Process

A Draft EIS (DEIS) will be prepared and circulated for review and comment by agencies, Tribes, consulting parties, and the public for 45 days as required by the regulations in 40 CFR 1503.1, 1502.20, 1506.11, and 1502.17, and 7 CFR 650.13. The DEIS is anticipated to be published in the **Federal Register**, approximately 24 months after publication of this NOI. A Final EIS is anticipated to be published within 8 months of completion of the public comment period for the DEIS.

NRCS will decide whether to implement one of the action alternatives

as evaluated in the EIS. A Record of Decision will be completed after the required 30-day waiting period and will be publicly available. The responsible Federal official and decision maker for NRCS is the Utah State Conservationist.

Public Scoping Process

A public scoping meeting was held on April 11, 2019. Comments received, including the names and addresses of those who commented, are part of the public record. Scoping meeting presentation materials were available for review and comment for 30 days from Thursday, March 28, 2019, through Friday, April 26, 2019. The date, time, and location for a second meeting will be announced on the project website.

Federal, State, Tribal, local agencies and representatives, and the public were invited to take part in the watershed plan scoping period. Mt. Pleasant City, Pleasant Creek Irrigation Company, Twin Creek Irrigation Company, and NRCS organized the public scoping meeting to provide an opportunity to review and evaluate the project alternatives, express concern, or support, and gain further information regarding the project. To determine the most viable alternatives to carry forward to the EIS, Mt. Pleasant City, Pleasant Creek Irrigation Company, Twin Creek Irrigation Company, and NRCS used input obtained during public scoping discussions to focus on relevant resource concerns and issues and eliminated those that were not relevant from further detailed study.

NRCS will coordinate the scoping process to correspond with section 106 of the NHPA (54 U.S.C. 306108), as allowed in the regulations in 36 CFR 800.2(d)(3) and 800.8.

Identification of Potential Alternatives, Information, and Analyses

NRCS invites agencies, Tribes, consulting parties, and individuals that have special expertise, legal jurisdiction, or interest in the Pleasant Creek Supplemental Watershed Plan to provide written comments concerning the scope of the analysis and identification of potential alternatives, information, and analyses relevant to the Proposed Action.

Information about historic and cultural resources within the area potentially affected by the proposed project will assist NRCS in identifying and evaluating impacts to such resources in the context of both NEPA and NHPA.

NRCS will consult with Native American Tribes on a government-to-government basis in accordance with the regulations in 36 CFR 800.2 and

800.3, Executive Order 13175, and other policies. Tribal concerns, including impacts on Indian trust assets and potential impacts to cultural resources and historic properties, will be given due consideration.

Authorities

This document is published as specified by the NEPA regulations regarding publication of an NOI to issue an EIS (40 CFR 1501.9(d)). Watershed planning is authorized under the Watershed Protection and Flood Prevention Act of 1954, as amended and the Flood Control Act of 1944.

Federal Assistance Programs

The title and number of the Federal Assistance Program as found in the Assistance Listing¹ to which this document applies is 10.904, Watershed Protection and Flood Prevention.

Executive Order 12372

Executive Order 12372, "Intergovernmental Review of Federal Programs," requires consultation with State and local officials that would be directly affected by proposed Federal financial assistance. The objectives of the Executive order are to foster an intergovernmental partnership and a strengthened federalism, by relying on State and local processes for State and local government coordination and review of proposed Federal financial assistance and direct Federal development. This project is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

USDA Non-Discrimination Policy

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

Individuals who require alternative means of communication for program information (for example, braille, large

¹ See <https://sam.gov/content/assistance-listings>.

print, audiotope, American Sign Language, etc.) should contact the responsible Agency or USDA TARGET Center at (202) 720-2600 (voice and telephone) or dial 711 for Telecommunications Relay Service (both voice and text telephone users can initiate this call from any phone). Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD-3027, found online at: <https://www.usda.gov/oascr/how-to-file-a-program-discrimination-complaint> and at any USDA office or write a letter addressed to USDA and provide in the letter all the information requested in the form. To request a copy of the complaint form, call (866) 632-9992. Submit your completed form or letter to USDA by: (1) mail to: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250-9410; (2) Fax: (202) 690-7442; or (3) email: program.intake@usda.gov.

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

Travis Mote,

Acting Utah State Conservationist, Natural Resources Conservation Service.

[FR Doc. 2024-10064 Filed 5-7-24; 8:45 am]

BILLING CODE 3410-16-P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

[Docket No. NRCS-2024-0003]

Notice of Intent To Prepare an Environmental Impact Statement for the Wellsville Canyon Watershed Plan, Cache County, Utah

AGENCY: Natural Resources Conservation Service, USDA.

ACTION: Notice of intent (NOI) to prepare an environmental impact statement (EIS).

SUMMARY: The Natural Resources Conservation Service (NRCS) Utah State Office, in cooperation with the U.S. Bureau of Reclamation (USBR), the Environmental Protection Agency (EPA), and Cache Water District (project sponsor), announces its intent to prepare an EIS for the Wellsville Canyon Watershed Plan located within the Little Bear River Watershed in Cache County, Utah. The proposed Wellsville Canyon Watershed Plan will examine alternative solutions to provide flood

protection and conveyance infrastructure, reduce irrigation water loss, enhance recreational facilities, and reduce erosion and nutrient loading to the Little Bear River in Wellsville and Mendon cities and portions of unincorporated Cache County. NRCS is requesting comments to identify significant issues, potential alternatives, information, and analyses relevant to the proposed action from all interested individuals, Federal and State agencies, and Tribes.

DATES: We will consider comments received by June 7, 2024. We will consider comments received after close of the comment period to the extent possible.

ADDRESSES: We invite you to submit comments in response to this notice. You may submit your comments through one of the methods below:

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov> and search for docket ID NRCS-2024-0003. Follow the online instructions for submitting comments; or
- **Mail or Hand Delivery:** Derek Hamilton, Water Resources Coordinator, USDA, NRCS, Utah State Office, 125 S State Street, #4010, Salt Lake City, Utah 84138. In your comments, specify the docket ID NRCS-2024-0003.

All comments received will be posted without change and made publicly available on www.regulations.gov.

FOR FURTHER INFORMATION CONTACT:

Derek Hamilton; telephone: (801) 524-4560; email: derek.hamilton@usda.gov. Individuals who require alternative means for communication should contact the U.S. Department of Agriculture (USDA) Target Center at (202) 720-2600 (voice and text telephone (TTY)) or dial 711 for Telecommunications Relay service (both voice and text telephone users can initiate this call from any telephone).

SUPPLEMENTARY INFORMATION:

Purpose and Need

The purpose of this watershed plan is to prevent or reduce potential flooding in Wellsville, Mendon, and other unincorporated areas of Cache County, Utah; to provide more reliable management of agricultural water in the area; and to increase opportunities for public recreation in the watershed. Watershed planning is authorized under the Watershed Protection and Flood Prevention Act of 1954 (Pub. L. 83-566), as amended, and the Flood Control Act of 1944 (Pub. L. 78-534).

The Wellsville Canyon Watershed Plan will reduce flood risks and improve public safety in the Wellsville Canyon watershed. It will greatly reduce

flooding concerns associated with intense rain-on-snow and frozen ground events within the Wellsville Canyon Watershed Plan project area. More dependable floodwater management will benefit homes, businesses, agricultural fields, roads, and public utilities in the Wellsville Canyon Watershed Plan project area.

The Wellsville Canyon Watershed Plan will implement improved culinary and agricultural water conservation techniques in the Wellsville Canyon watershed. A more efficient irrigation delivery system within Mendon City and Wellsville City will help mitigate the heavy seepage losses experienced by the current earthen canal irrigation distribution systems. The Wellsville Canyon Watershed Plan improvements will also reduce demand for the existing culinary water systems within the watershed and capital expenditures to meet peak summer irrigation demands.

The Wellsville Canyon Watershed Plan will address limited public recreational facilities and opportunities within the Wellsville Canyon watershed available for the growing population of Cache County. Recreational improvements will provide residents with a higher quality of life and will increase the public's well-being by providing new opportunities for leisure and enjoyment.

Preliminary Proposed Action and Alternatives

The objective of the EIS is to formulate and evaluate alternatives for the flood control, agricultural water management, and public recreation needs in the approximately 70,845-acre Wellsville Canyon Watershed-focused planning area. The EIS is expected to evaluate three alternatives: two action alternatives, and one no action alternative. The alternatives that may be considered for detailed analysis include:

- **Alternative 1—No Action**
Alternative: Taking no action would consist of activities carried out if no federal action or funding were provided. This alternative would not address flooding into the canals. The canals would continue to overtop during rain-on-snow events, and flooding in the Wellsville Canyon Watershed Plan area would continue. The canals would be maintained in their existing condition as earthen channels, and irrigation conveyance within the communities of Wellsville and Mendon would be unchanged. The additional recreational access to Wellsville Reservoir would not be built, and erosion and sedimentation from the alluvial plains above the canals would continue unaltered under this alternative. The existing infrastructure

would continue to operate in its current condition and would not improve flood control, conserve irrigation water, improve recreational access, or reduce watershed erosion as described above. Residents would continue to use culinary water for irrigation (that is, watering lawns and gardens), putting stress on existing water supply and infrastructure.

- **Alternative 2—Proposed Action—Pipe the Canals and Improve the Lower Canal for Flood Flows:** The proposed action is to enclose the Wellsville-Mendon Canal (Lower Canal) and convey water through piping in Wellsville and Mendon cities and part of unincorporated Cache County, Utah. The existing Wellsville-Mendon Canal would be improved with the addition of open channel overflow systems at 2900 South (Unincorporated Cache County) and 200 South (Mendon City). This would be accomplished through a combination of conduits and channels to convey floodwaters from the west side of Cache Valley between Wellsville and Petersboro to the natural floodplain of the Little Bear River east of the communities. This proposed action would continue to divert the water for the Wellsville-Mendon Conservation District from below Hyrum Reservoir at the existing diversion points. This proposed action would enclose and pipe a portion of the Wellsville Eastfield Canal beginning at the existing diversion at the base of Hyrum Dam and passing through Hyrum and ending in unincorporated Cache County, Utah. This proposed action would pressurize Wellsville City Irrigation Company's irrigation system within Wellsville City and within Mendon City's irrigation system managed by the Mendon North, Mendon Central, Mendon South, Mendon Second North, and Greater Mendon Irrigation companies. This proposed action would also install regulating ponds to stabilize peak demands on the pressurized irrigation systems. A new access ramp limited to non-motorized personal watercraft would be constructed at Wellsville Reservoir for recreational activities.

- **Alternative 3—Line the Canal and Improve the Lower Canal for Flood Flows:** All Wellsville Canyon Watershed Plan project measures would be the same as Alternative 2 with the following exceptions. Alternative 3 would line and increase the capacity of the Wellsville-Mendon Canal (Lower Canal) to carry both irrigation and flood water from the west alluvial plains between Wellsville and Petersboro in Cache County instead of enclosing and piping. This would include the reconstruction of the existing Murray Spring overflow

structure and the addition of overflow structures at 2900 South in unincorporated Cache County and 200 South in Mendon City.

Summary of Expected Impacts

The EIS will be prepared as required by section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA); the Council on Environmental Quality Regulations (40 CFR parts 1500–1508); and NRCS regulations that implement NEPA in 7 CFR part 650.

An NRCS evaluation of this federally assisted action indicates that the proposed alternatives may have significant local, regional, or national impacts on the environment. Potential resource impacts include alteration or disturbance of wetlands and riparian zones, disruptions to wildlife, compaction or displacement of soils, and temporary disturbances to air quality, migratory birds, transportation routes, aesthetic resources, and water quality.

The proposed alternatives may have long-term environmental benefits, such as reduction of long-term carbon emissions due to pumping, improvement of public health and safety, increased recreational opportunities, reduction of erosion and nutrient loading into the Little Bear River, improved surface water quality, and increased surface water quantity as a result of water conservation measures. The proposed alternatives would minimize flooding by reducing flood risks and flood damages from runoff, erosion, and sediment deposition to areas downstream of the sub-basin, as well as improving agricultural water management by reducing seepage losses. It would also create new recreational opportunities for public use by providing reservoir access for non-motorized personal watercraft.

Anticipated Permits and Authorizations

The following permits and other authorizations are anticipated to be required:

- **Federal Emergency Management Agency Floodplain Development Permit.** Implementation of the proposed action would require coordination with the local floodplain administrator and may require a Floodplain Development Permit to ensure all development and engineering requirements for construction within the Special Flood Hazard Areas are implemented. The proposed action will require a Conditional Letter of Map Revision (CLOMR) and a Letter of Map Revision (LOMR) since the floodplain maps include the canal and flows from the benches in Zone A.

- **Clean Water Act (CWA) and National Pollutant Discharge Elimination System (NPDES) Permits.** The proposed action would require water quality certification under section 401 of the CWA, permitting under section 402 of the NPDES, and Section 404 of the CWA for potential Waters of the United States impacts.

- **Encroachment Permit.** The proposed action would require coordination and permitting with Utah Department of Transportation for temporary construction work within State and federal roadway rights-of-way.

- **Utah Pollutant Discharge Elimination System (UPDES) Construction Permit.** A construction permit would be required through the UPDES.

- **Railroad Permits.** The proposed action may require railroad permits to allow for the right of entry and crossings of the railroad.

- **Stream Alteration Permit.** The proposed action would require coordination and permits with the Utah Division of Water Rights for potential crossings of the Little Bear River and other natural water ways.

- **National Historic Preservation Act (NHPA) Section 106.** Consultation with Tribal Nations and interested parties would be conducted as required by the NHPA.

- **Local Encroachment.** Consultation and potential encroachment permits would be required with Wellsville City, Mendon City, and Cache County for all construction work within the local roadway rights-of-way.

Schedule of Decision-Making Process

A Draft EIS (DEIS) will be prepared and circulated for review and comment by agencies, Tribes, consulting parties, and the public for at least 45 days as required by 40 CFR 1503.1, 1502.20, 1506.11, and 1502.17, and 7 CFR 650.13. The DEIS is anticipated to be published in the **Federal Register**, approximately 21 months after publication of this NOI. A Final EIS is anticipated to be published within 3 months of completion of the public comment period for the DEIS.

NRCS will decide whether to implement one of the action alternatives as evaluated in the EIS. A Record of Decision will be completed after the required 30-day waiting period and will be publicly available. The responsible Federal official and decision maker for NRCS is the Utah State Conservationist.

Public Scoping Process

A virtual scoping meeting was held on May 10, 2021, at 9:00 a.m. MST. Scoping meeting presentation materials

are available on NRCS' website, along with Wellsville Canyon Watershed Plan background information at <https://www.nrcs.usda.gov/wellsville-mendon-watershed-sponsor-cache-water-district>. The meeting included a Wellsville Canyon Watershed Plan presentation followed by a group question and answer period. Wellsville Canyon Watershed Plan team members were also available to address individual questions. Comments received, including the names and addresses of those who commented, were part of the public record.

NRCS invited Federal, State, Tribal, local agencies and representatives and the public to take part in the scoping period for the Wellsville Canyon Watershed Plan. Based on funding limitations and project scope, NRCS determined an EIS was necessary, and is seeking further public comment to help determine the range of actions, alternatives, and impacts to be evaluated and included in the EIS. NRCS will include the comments received from the previous scoping efforts into the EIS analysis.

NRCS will coordinate the scoping process to correspond with Section 106 of the NHPA (54 U.S.C. 306108), as allowed in 36 CFR 800.2(d)(3) and 800.8.

Identification of Potential Alternatives, Information, and Analyses

NRCS invites agencies, Tribes, consulting parties, and individuals that have special expertise, legal jurisdiction, or interest in the Wellsville Canyon Watershed Plan to provide written comments concerning the scope of the analysis and identification of potential alternatives, information, analyses relevant to the Proposed Action.

The information about historic and cultural resources within the area potentially affected by the proposed Wellsville Canyon Watershed Plan will assist NRCS in identifying and evaluating impacts to such resources in the context of both NEPA and NHPA.

NRCS will consult with Native American Tribes on a government-to-government basis in accordance with 36 CFR 800.2 and 800.3, Executive Order 13175, and other policies. Tribal concerns, including impacts on Indian trust assets and potential impacts to cultural resources and historic properties, will be given due consideration.

Authorities

This document is published pursuant to the NEPA regulations regarding publication of an NOI to issue an EIS

(40 CFR 1501.9(d)). Watershed planning is authorized under the Watershed Protection and Flood Prevention Act of 1954, as amended, and the Flood Control Act of 1944.

Federal Assistance Programs

The title and number of the Federal Assistance Program as found in the Assistance Listing¹ to which this document applies is 10.904, Watershed Protection and Flood Prevention.

Executive Order 12372

Executive Order 12372, "Intergovernmental Review of Federal Programs," requires consultation with State and local officials that would be directly affected by proposed Federal financial assistance. The objectives of the Executive Order are to foster an intergovernmental partnership and a strengthened federalism, by relying on State and local processes for State and local government coordination and review of proposed Federal financial assistance and direct Federal development. This Wellsville Canyon Watershed Plan is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

USDA Non-Discrimination Policy

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

Individuals who require alternative means of communication for program information (for example, Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA TARGET Center at (202) 720-2600 (voice and text telephone) or dial 711 for Telecommunications Relay Service (both voice and text telephone users can initiate this call from any phone). Additionally, program information may

be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD-3027, found online at <https://www.usda.gov/oascr/how-to-file-a-program-discrimination-complaint> and at any USDA office or write a letter addressed to USDA and provide in the letter all the information requested in the form. To request a copy of the complaint form, call (866) 632-9992. Submit your completed form or letter to USDA by: (1) mail to: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250-9410; (2) fax: (202) 690-7442; or (3) email: program.intake@usda.gov.

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

Travis Mote,

Acting Utah State Conservationist, Natural Resources Conservation Service.

[FR Doc. 2024-10063 Filed 5-7-24; 8:45 am]

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DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B-2-2024]

Foreign-Trade Zone (FTZ) 134; Authorization of Production Activity; Volkswagen Group of America, Inc.; (Passenger Motor Vehicles); Chattanooga, Tennessee

On January 4, 2024, Volkswagen Group of America, Inc., submitted a notification of proposed production activity to the FTZ Board for its facility within FTZ 134, in Chattanooga, Tennessee.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (89 FR 1520, January 10, 2024). On May 3, 2024, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including section 400.14.

Dated: May 3, 2024.

Elizabeth Whiteman,

Executive Secretary.

[FR Doc. 2024-10050 Filed 5-7-24; 8:45 am]

BILLING CODE 3510-DS-P

¹ See <https://sam.gov/content/assistance-listings>.

DEPARTMENT OF COMMERCE**Foreign-Trade Zones Board****[S-49-2024]****Approval of Subzone Status; Bentex Group Inc.; Piscataway, New Jersey**

On March 18, 2024, the Executive Secretary of the Foreign-Trade Zones (FTZ) Board docketed an application submitted by the State of New Jersey, Department of State, grantee of FTZ 44, requesting subzone status subject to the existing activation limit of FTZ 44, on behalf of Bentex Group Inc., in Piscataway, New Jersey.

The application was processed in accordance with the FTZ Act and Regulations, including notice in the **Federal Register** inviting public comment (89 FR 20162, March 21, 2024). The FTZ staff examiner reviewed the application and determined that it meets the criteria for approval. Pursuant to the authority delegated to the FTZ Board Executive Secretary (15 CFR 400.36(f)), the application to establish Subzone 44Q was approved on May 3, 2024, subject to the FTZ Act and the Board's regulations, including section 400.13, and further subject to FTZ 44's 407.5-acre activation limit.

Dated: May 3, 2024.

Elizabeth Whiteman,
Executive Secretary.

[FR Doc. 2024-10049 Filed 5-7-24; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE**International Trade Administration****[A-823-815]****Oil Country Tubular Goods From Ukraine: Notice of Amended Final Results of Antidumping Duty Administrative Review Pursuant to Settlement**

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

SUMMARY: The U.S. Department of Commerce (Commerce) is issuing these amended final results pursuant to a settlement agreement with Interpipe Ukraine LLC and North American Interpipe Inc. with respect to the final results of the administrative review of oil country tubular goods (OCTG) from Ukraine during the period of review (POR) July 10, 2019, through June 30, 2020.

DATES: Applicable May 8, 2024.

FOR FURTHER INFORMATION CONTACT: Toni Page, AD/CVD Operations, Office VII,

Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-1398.

SUPPLEMENTARY INFORMATION:**Background**

On February 10, 2022, the Department of Commerce (Commerce) published the final results of its administrative review of the antidumping duty order on OCTG from Ukraine.¹ The POR is July 10, 2019 through June 30, 2020.

The administrative review covers Interpipe,² a producer and exporter of OCTG from Ukraine to the United States. In the *Final Results*, Commerce assigned to Interpipe a weighted-average dumping margin of 27.80 percent for the POR.³

Following the publication of the *Final Results*, Interpipe filed a lawsuit with the U.S. Court of International Trade (CIT) challenging certain aspects of Commerce's *Final Results* including Commerce's decision not to grant a constructed export price offset to Interpipe and Commerce's decision to include Section 232 duties in the U.S. price when calculating the margin.

On April 30, 2024, the United States and Interpipe entered into an agreement to settle this dispute. Pursuant to the terms of settlement and the stipulation for entry of judgment, the amended final weighted-average dumping margin for Interpipe is 0.01 percent. The CIT issued its order of judgment by stipulation on May 2, 2024.⁴

Assessment Rates

Consistent with the settlement agreement and May 2, 2024, order of judgment by stipulation, Commerce will instruct U.S. Customs and Border Protection (CBP) to liquidate all unliquidated entries of OCTG from Ukraine produced and exported by Interpipe, and entered, or withdrawn from warehouse, for consumption in the United States during the POR at the importer-specific per-unit assessment rates determined by setting Interpipe's weighted-average dumping margin at 0.01 percent (*de minimis*). Pursuant to section 751(a)(2)(C) of the Tariff Act of

¹ See *Oil Country Tubular Goods from Ukraine: Final Results of Antidumping Duty Administrative Review; 2019-2020*, 87 FR 7801 (February 10, 2022) (*Final Results*).

² Commerce has previously determined that Interpipe Europe S.A.; Interpipe Ukraine LLC; PJSC Interpipe Nizhnedneprovsky Tube Rolling Plant; and LLC Interpipe Niko Tube are affiliated and treated as a single entity (*i.e.*, Interpipe).

³ See *Final Results* at 87 FR 7801.

⁴ See *Interpipe Ukraine LLC and North America Interpipe, Inc. v. United States*, Court No. 22-00066, Doc. No. 36 (May 2, 2024).

1930, as amended (the Act), and 19 CFR 351.212(b)(1), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with these revised final results of review.⁵ For Interpipe, we will calculate importer-specific assessment rates on the basis of the ratio of the total amount of antidumping duties calculated for each importer's examined sales and the total entered value of the sales, in accordance with 19 CFR 351.212(b)(1). Because Interpipe's weighted average dumping margin is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

Consistent with Commerce's assessment practice, for entries of subject merchandise during the POR produced by Interpipe for which it did not know that the merchandise was destined for the United States, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.⁶

Cash Deposit Requirements

Because Interpipe has a superseding cash deposit rate, *i.e.*, there have been final results published in a subsequent administrative review, we will not issue revised cash deposit instructions to CBP. This notice will not affect the current cash deposit rate for Interpipe.

Notification to Interested Parties

We are issuing this determination and publishing these amended final results and notice in accordance with section 516a(e) of the Act.

Dated: May 2, 2024.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2024-10052 Filed 5-7-24; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE**International Trade Administration****Initiation of Antidumping and Countervailing Duty Administrative Reviews**

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

⁵ See *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

SUMMARY: The U.S. Department of Commerce (Commerce) has received requests to conduct administrative reviews of various antidumping duty (AD) and countervailing duty (CVD) orders with March anniversary dates. In accordance with Commerce's regulations, we are initiating those administrative reviews.

DATES: Applicable May 8, 2024.

FOR FURTHER INFORMATION CONTACT: Brenda E. Brown, AD/CVD Operations, Customs Liaison Unit, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482-4735.

SUPPLEMENTARY INFORMATION:

Background

Commerce has received timely requests, in accordance with 19 CFR 351.213(b), for administrative reviews of various AD and CVD orders with March anniversary dates.

All deadlines for the submission of various types of information, certifications, or comments or actions by Commerce discussed below refer to the number of calendar days from the applicable starting time.

Respondent Selection

In the event that Commerce limits the number of respondents for individual examination for administrative reviews initiated pursuant to requests made for the orders identified below, Commerce intends to select respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports during the period of review (POR). We intend to place the CBP data on the record within five days of publication of the initiation notice and to make our decision regarding respondent selection within 35 days of publication of the initiation **Federal Register** notice. Comments regarding the CBP data and respondent selection should be submitted within seven days after the placement of the CBP data on the record of this review. Parties wishing to submit rebuttal comments should submit those comments within five days after the deadline for the initial comments.

In the event that Commerce decides it is necessary to limit individual examination of respondents and conduct respondent selection under section 777A(c)(2) of the Tariff Act of 1930, as amended (the Act), the following guidelines regarding collapsing of companies for purposes of respondent selection will apply. In general, Commerce has found that determinations concerning whether

particular companies should be "collapsed" (e.g., treated as a single entity for purposes of calculating AD rates) require a substantial amount of detailed information and analysis, which often require follow-up questions and analysis. Accordingly, Commerce will not conduct collapsing analyses at the respondent selection phase of this review and will not collapse companies at the respondent selection phase unless there has been a determination to collapse certain companies in a previous segment of this AD proceeding (e.g., investigation, administrative review, new shipper review, or changed circumstances review). For any company subject to this review, if Commerce determined, or continued to treat, that company as collapsed with others, Commerce will assume that such companies continue to operate in the same manner and will collapse them for respondent selection purposes. Otherwise, Commerce will not collapse companies for purposes of respondent selection.

Parties are requested to (a) identify which companies subject to review previously were collapsed, and (b) provide a citation to the proceeding in which they were collapsed. Further, if companies are requested to complete the Quantity and Value (Q&V) Questionnaire for purposes of respondent selection, in general, each company must report volume and value data separately for itself. Parties should not include data for any other party, even if they believe they should be treated as a single entity with that other party. If a company was collapsed with another company or companies in the most recently completed segment of this proceeding where Commerce considered collapsing that entity, complete Q&V data for that collapsed entity must be submitted.

Notice of No Sales

With respect to AD administrative reviews, we intend to rescind the review where there are no suspended entries for a company or entity under review and/or where there are no suspended entries under the company-specific case number for that company or entity. Where there may be suspended entries, if a producer or exporter named in this notice of initiation had no exports, sales, or entries during the POR, it may notify Commerce of this fact within 30 days of publication of this notice in the **Federal Register** for Commerce to consider how to treat suspended entries under that producer's or exporter's company-specific case number.

Deadline for Withdrawal of Request for Administrative Review

Pursuant to 19 CFR 351.213(d)(1), a party that has requested a review may withdraw that request within 90 days of the date of publication of the notice of initiation of the requested review. The regulation provides that Commerce may extend this time if it is reasonable to do so. Determinations by Commerce to extend the 90-day deadline will be made on a case-by-case basis.

Deadline for Particular Market Situation Allegation

Section 504 of the Trade Preferences Extension Act of 2015 amended the Act by adding the concept of a particular market situation (PMS) for purposes of constructed value under section 773(e) of the Act.¹ Section 773(e) of the Act states that "if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology." When an interested party submits a PMS allegation pursuant to section 773(e) of the Act, Commerce will respond to such a submission consistent with 19 CFR 351.301(c)(2)(v). If Commerce finds that a PMS exists under section 773(e) of the Act, then it will modify its dumping calculations appropriately.

Neither section 773(e) of the Act nor 19 CFR 351.301(c)(2)(v) set a deadline for the submission of PMS allegations and supporting factual information. However, in order to administer section 773(e) of the Act, Commerce must receive PMS allegations and supporting factual information with enough time to consider the submission. Thus, should an interested party wish to submit a PMS allegation and supporting new factual information pursuant to section 773(e) of the Act, it must do so no later than 20 days after submission of initial responses to section D of the questionnaire.

Separate Rates

In proceedings involving non-market economy (NME) countries, Commerce begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single AD deposit rate. It is Commerce's policy to assign all exporters of merchandise subject to an administrative review in

¹ See Trade Preferences Extension Act of 2015, Public Law 114-27, 129 Stat. 362 (2015).

an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.

To establish whether a firm is sufficiently independent from government control of its export activities to be entitled to a separate rate, Commerce analyzes each entity exporting the subject merchandise. In accordance with the separate rates criteria, Commerce assigns separate rates to companies in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* government control over export activities.

All firms listed below that wish to qualify for separate rate status in the administrative reviews involving NME countries must complete, as appropriate, either a Separate Rate Application or Certification, as described below.

For these administrative reviews, in order to demonstrate separate rate eligibility, Commerce requires entities for whom a review was requested, that were assigned a separate rate in the most recent segment of this proceeding in which they participated, to certify that they continue to meet the criteria for obtaining a separate rate. The Separate Rate Certification form will be available on Commerce's website at <https://access.trade.gov/Resources/nme/>

[nme-sep-rate.html](#) on the date of publication of this **Federal Register** notice. In responding to the certification, please follow the "Instructions for Filing the Certification" in the Separate Rate Certification. Separate Rate Certifications are due to Commerce no later than 30 calendar days after publication of this **Federal Register** notice. The deadline and requirement for submitting a Separate Rate Certification applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers who purchase and export subject merchandise to the United States.

Entities that currently do not have a separate rate from a completed segment of the proceeding² should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. In addition, companies that received a separate rate in a completed segment of the proceeding that have subsequently made changes, including, but not limited to, changes to corporate structure, acquisitions of new companies or facilities, or changes to their official company name,³ should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. The Separate Rate Application will be available on Commerce's website at <https://>

access.trade.gov/Resources/nme/nme-sep-rate.html on the date of publication of this **Federal Register** notice. In responding to the Separate Rate Application, refer to the instructions contained in the application. Separate Rate Applications are due to Commerce no later than 30 calendar days after publication of this **Federal Register** notice. The deadline and requirement for submitting a Separate Rate Application applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers that purchase and export subject merchandise to the United States.

Exporters and producers must file a timely Separate Rate Application or Certification if they want to be considered for individual examination. Furthermore, exporters and producers who submit a Separate Rate Application or Certification and subsequently are selected as mandatory respondents will no longer be eligible for separate rate status unless they respond to all parts of the questionnaire as mandatory respondents.

Initiation of Reviews

In accordance with 19 CFR 351.221(c)(1)(i), we are initiating administrative reviews of the following AD and CVD orders and findings. We intend to issue the final results of these reviews not later than March 31, 2025.

	Period to be Reviewed
AD Proceedings	
BRAZIL: Certain Uncoated Paper A-351-842	3/1/23-2/29/24
Suzano S.A. ⁴	
Sylvamo do Brasil Ltda. and Sylvamo Exports Ltda.	
INDIA: Granular Polytetrafluoroethylene Resin A-533-899	3/1/23-2/29/24
Gujarat Fluorochemicals Limited	
INDIA: Certain New Pneumatic Off-The-Road Tires A-533-869	3/1/23-2/29/24
Aakriti Manufacturing Pvt. Ltd.	
Apollo Tyres Ltd.	
Asian Tire Factory Ltd.	
ATC Tyres Private Ltd.	
Balkrishna Industries Ltd. ⁵	
Carrier Wheels Private Limited	
Cavendish Industries Ltd.	
CEAT Ltd.	
Celite Tyre Corporation	
Emerald Resilient Tyre Manufacturer	
HRI Tyres India	
JK Tyres and Industries Ltd.	
John Deere India Pvt. Ltd.	
K.R.M. Tyres	
Mahansaria Tyres Private Limited	
MRF Limited	
MRL Tyres Limited	
OTR Laminated Tyres (I) Pvt. Ltd.	
Ralson Tyres Limited	

² Such entities include entities that have not participated in the proceeding, entities that were preliminarily granted a separate rate in any currently incomplete segment of the proceeding (e.g., an ongoing administrative review, new

shipper review, etc.) and entities that lost their separate rate in the most recently completed segment of the proceeding in which they participated.

³ Only changes to the official company name, rather than trade names, need to be addressed via a Separate Rate Application. Information regarding new trade names may be submitted via a Separate Rate Certification.

	Period to be Reviewed
Royal Tyres Private Limited	
Speedways Rubber Company	
Sun Tyres & Wheel Systems	
Sundaram Industries Private Limited	
TVS Srichakra Limited	
Tyre Experts LLP	
Ultra Mile	
PORTUGAL: Certain Uncoated Paper A-471-807	3/1/23-2/29/24
The Navigator Company, S.A.	
THAILAND: Circular Welded Carbon Steel Pipes and Tubes A-549-502	3/1/23-2/29/24
Apex International Logistics	
Aquatec Maxcon Asia	
Asian Unity Part Co., Ltd.	
Better Steel Pipe Company Limited	
Bis Pipe Fitting Industry Co., Ltd.	
Blue Pipe Steel Center Co. Ltd.	
Chuhatsu (Thailand) Co., Ltd.	
CSE Technologies Co., Ltd.	
Expeditors International (Bangkok)	
Expeditors Ltd.	
FS International (Thailand) Co., Ltd.	
Kerry-Apex (Thailand) Co., Ltd.	
K Line Logistics	
Oil Steel Tube (Thailand) Co., Ltd.	
Otto Ender Steel Structure Co., Ltd.	
Pacific Pipe and Pump	
Pacific Pipe Public Company Limited	
Panalpina World Transport Ltd.	
Polypipe Engineering Co., Ltd.	
Saha Thai Steel Pipe Public Co., Ltd.	
Schlumberger Overseas S.A.	
Siam Fittings Co., Ltd.	
Siam Steel Pipe Co., Ltd.	
Sino Connections Logistics (Thailand) Co., Ltd.	
Thai Malleable Iron and Steel	
Thai Oil Group	
Thai Oil Pipe Co., Ltd.	
Thai Premium Pipe Co. Ltd.	
Vatana Phaisal Engineering Company	
Visavakit Patana Corp., Ltd.	
REPUBLIC OF KOREA: Acetone A-580-899	3/1/23-2/29/24
Kumho P&B Chemicals, Inc.	
LG Chem, Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Certain Corrosion Inhibitors A-570-122	3/1/23-2/29/24
Anhui Trust Chem Co., Ltd.; Nanjing Trust Chem Co., Ltd.;	
Jiangsu Trust Chem. Co., Ltd.	
Connect Chemicals China Co. Ltd.	
Connect Chemicals GMBH	
Gold Chemical Limited	
Jiangyin Delian Chemical Co., Ltd.	
Kanghua Chemical Co., Ltd. (formerly known as Nantong Kanghua Chemical Co., Ltd.)	
Nantong Botao Chemical Co., Ltd.	
Nantong Botao Chemical Co., Ltd.	
Relic Chemicals	
Sagar Speciality Chemicals Pvt., Ltd.	
Vcare Medicines	
Yasho Industries Pvt. Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Certain Vertical Shaft Engines Between 225CC and 999CC, and Parts Thereof A-570-119	3/1/23-2/29/24
Changzhou Kawasaki Engine Co., Ltd.	
Chongqing Dajiang Power Equipment Co., Ltd.	
Chongqing Rato Technology Co., Ltd.	
Chongqing Zongshen General Power Machine Co., Ltd.	
Honda Power Products (China) Co., Ltd.	
Jialing-Honda Motors Co., Ltd.	
Kawasaki Motors Shanghai, Ltd.	
Liquid Combustion Technology, LLC	
Loncin Motor Co., Ltd.	
Longwin Power Technology	
Yamaha Motor (China) Co., Ltd.	
Yamaha Motor Corporation	
Yamaha Motor Powered Products Jiangsu Co., Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Difluoromethane (R-32) A-570-121	3/1/23-2/29/24

	Period to be Reviewed
Taizhou Qingsong Refrigerant New Material Co., Ltd.; Taixing Meilan New Materials Co., Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Pentafluoroethane (R-125) A-570-137	3/1/23-2/29/24
Shandong Dongyue Chemical Co., Ltd.	
Zhejiang Sanmei Chemical Ind. Co., Ltd.	
Zhejiang Yonghe Refrigerant Co., Ltd.	
UKRAINE: Carbon and Certain Alloy Steel Wire Rod A-823-816	3/1/23 -2/29/24
ArcelorMittal Steel Kryvyi Rih	
Public Joint Stock Company Yenakieve Iron and Steel Works	
PrJSC Electrometallurgical Works Dneprospeksstal	
PJSC Dneprovsky Iron & Steel Integrated Works	
Metinvest Holding LLC	
Variant Agro Build Ltd.	
CVD Proceedings	
INDIA: Barium Chloride C-533-909	6/17/22-12/31/23
Chaitanya Chemicals	
INDIA: Granular Polytetrafluoroethylene Resin C-533-900	1/1/23-12/31/23
Gujarat Fluorochemicals Limited	
INDIA: Certain New Pneumatic Off-The-Road Tires C-533-870	1/1/23-12/31/23
A.M. Pinard & Fils Inc	
Aakriti Manufacturing Pvt. Ltd.	
Ammann India Private Limited	
Apollo Tyres Ltd.	
Asian Tire Factory Limited	
Asiatic Tradelinks Private Limited	
ATC Tires Private Limited; ATC Tires AP Private Ltd.; Yokohama India Private Limited	
Balkrishna Industries Ltd.	
Carrier Wheels Private Limited	
Cavendish Industries Ltd	
Ceat Ltd.	
Celite Tyre Corporation	
Emerald Resilient Tyre Manufacturer	
Forech India Private Limited	
HRI Tires India	
Innovative Tyres & Tubes Limited	
JCB Service Ltd.	
JK Tyre & Industries Ltd	
John Deere India Pvt. Ltd.	
K.R.M. Tyres	
Mahansaria Tyres Private Limited	
MRF Limited	
MRL Tyres Limited (Malhotra Rubbers Ltd.)	
Neosym Industry Limited	
OTR Laminated Tyres (I) Pvt. Ltd.	
Ralson Tyres Limited	
Royal Tyres Private Limited	
Rubberman Enterprises Pvt. Ltd	
Speedways Rubber Company	
Sun Tyre And Wheel Systems	
Sundaram Industries Private Limited	
Superking Manufacturers (Tyre) Pvt., Ltd.	
TVS Srichakra Limited	
Tyre Experts LLP	
Ultra Mile	
THE PEOPLE'S REPUBLIC OF CHINA: Certain Corrosion Inhibitors C-570-123	1/1/23-12/31/23
Anhui Trust Chem Co., Ltd; Nanjing Trust Chem Co., Ltd.; Jiangsu Trust Chem Co., Ltd. ⁶	
Connect Chemicals China Co. Ltd.	
Connect Chemicals GMBH	
Gold Chemical Limited	
Jiangyin Delian Chemical Co., Ltd.	
Kanghua Chemical Co., Ltd.	
Nantong Botao Chemical Co., Ltd; Nantong Yutu Group Co., Ltd.; Rugao Connect Chemical Co., Ltd.; Rugao Jinling Chemical Co., Ltd. ⁷	
Nantong Kanghua Chemical Co., Ltd.	
Relic Chemicals	
Sagar Speciality Chemicals Pvt., Ltd.	
Vcare Medicines	
Yasho Industries Pvt. Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Certain Vertical Shaft Engines Between 225CC and 999CC, and Parts Thereof C-570-120	1/1/23-12/31/23
Changzhou Kawasaki Engine Co., Ltd.	
Chongqing Daijiang Power Equipment Co., Ltd.	
Chongqing Rato Technology Co., Ltd.	

	Period to be Reviewed
Chongqing Zongshen General Power Machine Co., Ltd.	
Honda Power Products (China) Co., Ltd.	
Jialing-Honda Motors Co., Ltd.	
Kawasaki Motors Shanghai, Ltd.	
Liquid Combustion Technology, LLC	
Loncin Motor Co., Ltd.	
Longwin Power Technology	
Yamaha Motor (China) Co., Ltd.	
Yamaha Motor Corporation	
Yamaha Motor Powered Products Jiangsu Co., Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Pentafluoroethane (R-125) C-570-138	1/1/23-12/31/23
Zhejiang Sanmei Chemical Ind. Co., Ltd.	
Zhejiang Yonghe Refrigerant Co., Ltd.	
Suspension Agreements	
None.	

Duty Absorption Reviews

During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an AD order under 19 CFR 351.211 or a determination under 19 CFR 351.218(f)(4) to continue an order or suspended investigation (after sunset review), Commerce, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will

⁴ Commerce also received a request for review of “Suzano Papel e Celulose S.A.” However, prior to the period of review, Commerce determined that Suzano S.A. is the successor-in-interest to Suzano Papel e Celulose S.A. See *Certain Uncoated Paper from Brazil: Final Results of Antidumping Duty Administrative Review; 2019–2020*, 86 FR 55820 (October 7, 2021). Therefore, we are initiating this review on Suzano S.A.

⁵ Subject merchandise produced and exported by Balkrishna Industries Ltd. (BKT) was excluded from the order. See *Certain New Pneumatic Off-the-Road Tires from India: Notice of Correction to Antidumping Duty Order*, 82 FR 25598 (June 2, 2017). Accordingly, Commerce is initiating this administrative review with respect to BKT only for subject merchandise produced in India where BKT acted as either the manufacturer or exporter (but not both).

⁶ Commerce previously found Anhui Trust Chem Co., Ltd; Nanjing Trust Chem Co., Ltd.; and Jiangsu Trust Chem Co., Ltd. to be cross-owned. See *Certain Corrosion Inhibitors from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review and Rescission of Review, in Part; 2020–2021*, 88 FR 20475 (April 6, 2023) (*Corrosion Inhibitors from China 2020–2021 Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM) at 10, unchanged in *Certain Corrosion Inhibitors from the People's Republic of China: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2020–2021 (Corrosion Inhibitors from China 2020–2021 Final Results)*, 88 FR 69122 (October 5, 2023).

⁷ Commerce previously found Nantong Botao Chemical Co., Ltd; Nantong Yutu Group Co., Ltd.; Rugao Connect Chemical Co., Ltd.; and Rugao Jinling Chemical Co., Ltd. to be cross-owned. See *Corrosion Inhibitors from China 2020–2021 Preliminary Results*, and accompanying PDM at 10, unchanged in *Corrosion Inhibitors from China 2020–2021 Final Results*.

determine whether ADs have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. The request must include the name(s) of the exporter or producer for which the inquiry is requested.

Gap Period Liquidation

For the first administrative review of any order, there will be no assessment of antidumping or countervailing duties on entries of subject merchandise entered, or withdrawn from warehouse, for consumption during the relevant “gap” period of the order (*i.e.*, the period following the expiry of provisional measures and before definitive measures were put into place), if such a gap period is applicable to the POR.

Administrative Protective Orders and Letters of Appearance

Interested parties must submit applications for disclosure under administrative protective orders in accordance with the procedures outlined in Commerce’s regulations at 19 CFR 351.305. Those procedures apply to administrative reviews included in this notice of initiation. Parties wishing to participate in any of these administrative reviews should ensure that they meet the requirements of these procedures (*e.g.*, the filing of separate letters of appearance as discussed at 19 CFR 351.103(d)).

Factual Information Requirements

Commerce’s regulations identify five categories of factual information in 19 CFR 351.102(b)(21), which are summarized as follows: (i) evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available

information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by Commerce; and (v) evidence other than factual information described in (i)–(iv). These regulations require any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct. The regulations, at 19 CFR 351.301, also provide specific time limits for such factual submissions based on the type of factual information being submitted. Please review the *Final Rule*,⁸ available at <https://www.govinfo.gov/content/pkg/FR-2013-07-17/pdf/2013-17045.pdf>, prior to submitting factual information in this segment. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).⁹

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy and completeness of that information using the formats provided at the end of the *Final Rule*.¹⁰ Commerce intends to

⁸ See *Certification of Factual Information To Import Administration During Antidumping and Countervailing Duty Proceedings*, 78 FR 42678 (July 17, 2013) (*Final Rule*); see also the frequently asked questions regarding the *Final Rule*, available at https://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.

⁹ *Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings; Final Rule*, 88 FR 67069 (September 29, 2023).

¹⁰ See section 782(b) of the Act; see also *Final Rule*; and the frequently asked questions regarding the *Final Rule*, available at <https://>

reject factual submissions in any proceeding segments if the submitting party does not comply with applicable certification requirements.

Extension of Time Limits Regulation

Parties may request an extension of time limits before a time limit established under Part 351 expires, or as otherwise specified by Commerce.¹¹ In general, an extension request will be considered untimely if it is filed after the time limit established under Part 351 expires. For submissions which are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10:00 a.m. on the due date. Examples include, but are not limited to: (1) case and rebuttal briefs, filed pursuant to 19 CFR 351.309; (2) factual information to value factors under 19 CFR 351.408(c), or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2), filed pursuant to 19 CFR 351.301(c)(3) and rebuttal, clarification and correction filed pursuant to 19 CFR 351.301(c)(3)(iv); (3) comments concerning the selection of a surrogate country and surrogate values and rebuttal; (4) comments concerning CBP data; and (5) Q&V questionnaires. Under certain circumstances, Commerce may elect to specify a different time limit by which extension requests will be considered untimely for submissions which are due from multiple parties simultaneously. In such a case, Commerce will inform parties in the letter or memorandum setting forth the deadline (including a specified time) by which extension requests must be filed to be considered timely. This policy also requires that an extension request must be made in a separate, stand-alone submission, and clarifies the circumstances under which Commerce will grant untimely-filed requests for the extension of time limits. Please review the *Final Rule*, available at <https://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm>, prior to submitting factual information in these segments.

These initiations and this notice are in accordance with section 751(a) of the Act (19 U.S.C. 1675(a)) and 19 CFR 351.221(c)(1)(i).

Dated: May 2, 2024.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2024-09970 Filed 5-7-24; 8:45 am]

BILLING CODE 3510-DS-P

enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.

¹¹ See 19 CFR 351.302.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD937]

Endangered and Threatened Species; Notice of Initiation of a 5-Year Review for the Non-U.S. Distinct Population Segment of Smalltooth Sawfish (*Pristis pectinata*)

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

ACTION: Notice of initiation; request for information.

SUMMARY: NMFS announces the initiation of a 5-year review for the non-U.S. distinct population segment (DPS) of smalltooth sawfish (*Pristis pectinata*). NMFS is required by the Endangered Species Act (ESA) to conduct 5-year reviews to ensure that the listing classifications of species are accurate. The 5-year review must be based on the best scientific and commercial data available at the time of the review. We request submission of any such information on the non-U.S. DPS of smalltooth sawfish, particularly information on the status, threats, and recovery of the species, that has become available since it was listed in 2015.

DATES: To allow us adequate time to conduct this review, we must receive your information no later than July 8, 2024.

ADDRESSES: You may submit information on this document, identified by NOAA-NMFS-2024-0062, by the following method:

- **Electronic Submission:** Submit electronic information via the Federal e-Rulemaking Portal. Go to <https://www.regulations.gov> and enter NOAA-NMFS-2024-0062 in the Search box. Click on the "Comment" icon, complete the required fields, and enter or attach your comments.

Instructions: Information sent by any other method, to any other address or individual, or received after the end of the specified period, may not be considered by NMFS. All information received is a part of the public record and will generally be posted for public viewing on <https://www.regulations.gov> without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive or protected information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous submissions (enter "N/A" in the

required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT:

Adrienne Lohe, Office of Protected Resources, (301) 427-8442, Adrienne.Lohe@noaa.gov.

SUPPLEMENTARY INFORMATION: This notice announces our review of the non-U.S. DPS of smalltooth sawfish (*Pristis pectinata*) listed as endangered under the ESA. Section 4(c)(2)(A) of the ESA requires that we conduct a review of listed species at least once every 5 years. This will be the first review of this species since it was listed in 2015 under the ESA (79 FR 73977, December 12, 2014). The regulations in 50 CFR 424.21 require that we publish a notice in the **Federal Register** announcing species currently under active review. On the basis of such reviews under section 4(c)(2)(B), we determine whether any species should be removed from the list (i.e., delisted) or reclassified from endangered to threatened or from threatened to endangered (16 U.S.C. 1533(c)(2)(B)). As described by the regulations in 50 CFR 424.11(e), a species will be delisted if the Secretary determines, based on consideration of the factors and standards set forth in 50 CFR 424.11(c), that the best scientific and commercial data available substantiate that: (1) the species is extinct; (2) the species has recovered to the point at which it no longer meets the definition of an endangered species or a threatened species; (3) new information that has become available since the original listing decision shows the listed entity does not meet the definition of an endangered species or a threatened species; or (4) new information that has become available since the original listing decision shows the listed entity does not meet the definition of a species. Any change in Federal classification would require a separate rulemaking process.

Background information on the species is available on the NMFS website at: <https://www.fisheries.noaa.gov/species/smalltooth-sawfish>.

Public Solicitation of New Information

To ensure that the review is complete and based on the best available scientific and commercial information, we are soliciting new information from the public, governmental agencies, tribes, the scientific community, industry, environmental entities, and any other interested parties concerning the status of the DPS. Categories of requested information include: (1) species biology including, but not limited to, population trends,

distribution, abundance, demographics, and genetics; (2) habitat conditions including, but not limited to, amount, distribution, and important features for conservation; (3) status and trends of threats to the DPS and its habitats; (4) conservation measures that have been implemented that benefit the DPS, including monitoring data demonstrating effectiveness of such measures; and (5) other new information, data, or corrections including, but not limited to, taxonomic or nomenclatural changes and improved analytical methods for evaluating extinction risk.

If you wish to provide information for the review, you may submit your information and materials electronically (see **ADDRESSES** section). We request that all information be accompanied by supporting documentation such as maps, bibliographic references, or reprints of pertinent publications.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: May 3, 2024.

Angela Somma,

Chief, Endangered Species Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2024-10031 Filed 5-7-24; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD901]

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Ad Hoc Ecosystem Workgroup (EWG) will hold an online meeting, which is open to the public.

DATES: The online meeting will be held Friday, May 24, 2024, from 10 a.m. to 2 p.m. or until business for the day is completed.

ADDRESSES: This meeting will be held online. Specific meeting information, including directions on how to join the meeting and system requirements will be provided in the meeting announcement on the Pacific Council's website (see www.pcouncil.org). You may send an email to Mr. Kris Kleinschmidt (kris.kleinschmidt@noaa.gov) or contact him at (503) 820-2412 for technical assistance.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220-1384.

FOR FURTHER INFORMATION CONTACT: Kit Dahl, Staff Officer, Pacific Council; telephone: (503) 820-2422.

SUPPLEMENTARY INFORMATION: During this meeting the EWG will (1) review progress on Fishery Ecosystem Plan Initiative 4 and (2) discuss the contents of reports on agenda items for the June 2024 Pacific Council meeting.

In March 2024, the Pacific Council provided guidance on the further development of risk assessment methodologies, as part of Initiative 4, to bring climate and ecosystem information into harvest specification processes. Proposed methodologies will be reviewed by the Scientific and Statistical Committee Ecosystem-Based Management Subcommittee on August 5, 2024, and considered by the Pacific Council at its September 2024 meeting.

At its June meeting, the Pacific Council will discuss and provide guidance on potential changes to Council operations. The EWG may provide recommendations on recommended changes and other agenda topics, as appropriate. Other matters related to the work of the EWG may also be discussed.

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

Special Accommodations

Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (kris.kleinschmidt@noaa.gov; (503) 820-2412) at least 10 days prior to the meeting date.

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

Dated: May 3, 2024.

Rey Israel Marquez,

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

[FR Doc. 2024-10056 Filed 5-7-24; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD934]

North Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of web conference.

SUMMARY: The North Pacific Fishery Management Council (Council) Pacific Northwest Crab Industry Advisory Committee (PNCIAC) will meet May 22, 2024.

DATES: The meeting will be held on Wednesday, May 22, 2024, from 9 a.m. to 11 a.m., Alaska Time.

ADDRESSES: The meeting will be a web conference. Join online through the link at <https://meetings.npfmc.org/Meeting/Details/3050>.

Council address: North Pacific Fishery Management Council, 1007 W 3rd Ave, Suite 400, Anchorage, AK 99501-2252; telephone: (907) 271-2809. Instructions for attending the meeting via video conference are given under **SUPPLEMENTARY INFORMATION**, below.

FOR FURTHER INFORMATION CONTACT: Sarah Marrinan, Council staff; phone: (907) 271-2809; email: sarah.marrinan@noaa.gov. For technical support, please contact our admin Council staff, email: npfmc.admin@noaa.gov.

SUPPLEMENTARY INFORMATION:

Agenda

Wednesday, May 22, 2024

The Committee will discuss (a) crab rationalization program review; and (b) other business. The agenda is subject to change, and the latest version will be posted <https://meetings.npfmc.org/Meeting/Details/3050> prior to the meeting, along with meeting materials.

Connection Information

You can attend the meeting online using a computer, tablet, or smart phone, or by phone only. Connection information will be posted online at: <https://meetings.npfmc.org/Meeting/Details/3050>.

Public Comment

Public comment letters will be accepted and should be submitted electronically to <https://meetings.npfmc.org/Meeting/Details/3050>.

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

Dated: May 3, 2024.

Rey Israel Marquez,

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

[FR Doc. 2024–10057 Filed 5–7–24; 8:45 am]

BILLING CODE 3510–22–P

COMMISSION OF FINE ARTS

Notice of Meeting

Per 45 CFR chapter XXI section 2102.3, the next meeting of the U.S. Commission of Fine Arts is scheduled for May 16, 2024, at 9 a.m. and will be held via online videoconference. Items of discussion may include buildings, infrastructure, parks, memorials, and public art.

Draft agendas, the link to register for the online public meeting, and additional information regarding the Commission are available on our website: www.cfa.gov. Inquiries regarding the agenda, as well as any public testimony, should be addressed to Thomas Luebke, Secretary, U.S. Commission of Fine Arts, at the above address; by emailing cfastaff@cfa.gov; or by calling 202–504–2200. Individuals requiring sign language interpretation for the hearing impaired should contact the Secretary at least 10 days before the meeting date.

Dated May 3, 2024 in Washington, DC.

Zakiya N. Walters,

Administrative Officer.

[FR Doc. 2024–10058 Filed 5–7–24; 8:45 am]

BILLING CODE 6330–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 10:00 a.m. EDT, Friday, May 10, 2024.

PLACE: CFTC Headquarters Conference Center, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commodity Futures Trading Commission (“Commission” or “CFTC”) will hold this meeting to consider the Proposed Rule regarding Event Contracts.

The agenda for this meeting will be available to the public and posted on the Commission’s website at <https://www.cftc.gov>. Members of the public are free to attend the meeting in person, or have the option to listen by phone or view a live stream. Instructions for listening to the meeting by phone and

connecting to the live video stream will be posted on the Commission’s website.

In the event that the time, date, or place of this meeting changes, an announcement of the change, along with the new time, date, or place of the meeting, will be posted on the Commission’s website.

CONTACT PERSON FOR MORE INFORMATION: Christopher Kirkpatrick, Secretary of the Commission, 202–418–5964.

Authority: 5 U.S.C. 552b.

Dated: May 3, 2024.

Christopher Kirkpatrick,

Secretary of the Commission.

[FR Doc. 2024–10120 Filed 5–6–24; 11:15 am]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 1:00 p.m. EDT, Friday, May 10, 2024.

PLACE: CFTC headquarters office, Washington, DC.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

Enforcement matters. In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission’s website at <https://www.cftc.gov/>.

CONTACT PERSON FOR MORE INFORMATION: Christopher Kirkpatrick, 202–418–5964.

Authority: 5 U.S.C. 552b.

Dated: May 3, 2024

Christopher Kirkpatrick,

Secretary of the Commission.

[FR Doc. 2024–10118 Filed 5–6–24; 11:15 am]

BILLING CODE 6351–01–P

DEPARTMENT OF EDUCATION

Federal Need Analysis Methodology for the 2024–25 Award Year—Federal Pell Grant, Federal Work-Study, Federal Supplemental Educational Opportunity Grant, William D. Ford Federal Direct Loan, and TEACH Grant Programs

AGENCY: Federal Student Aid, Department of Education.

ACTION: Notice.

SUMMARY: The Secretary announces the annual updates to the tables used in the statutory Federal Need Analysis Methodology that determines a student’s Student Aid Index (SAI) for award year (AY) 2024–25 for student

financial aid programs, Assistance Listing Numbers (ALN) 84.063, 84.033, 84.007, 84.268, and 84.379. The intent of this notice is to alert the financial aid community and the broader public to these required annual updates used in the determination of student aid eligibility.

FOR FURTHER INFORMATION CONTACT: Heather Hall Lewis. Telephone: (202) 417–1981. Email: heather.halllewis@ed.gov.

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7–1–1.

SUPPLEMENTARY INFORMATION: Part F of title IV of the Higher Education Act of 1965, as amended (HEA), specifies the criteria, data elements, calculations, and tables the Department of Education (Department) uses in the Federal Need Analysis Methodology to determine the SAI.

Enacted into law as part of the Consolidated Appropriations Act, 2021, Division FF, Title VII (116 Pub. L. 260), the FAFSA Simplification Act makes many significant changes to the Higher Education Act of 1965, as amended (HEA), regarding Federal Need Analysis Methodology, including how the Secretary must update the tables used in the formula. Due to the magnitude of these (and other) changes and to ensure that both the Department and the higher education community were prepared to fully implement the FAFSA Simplification Act, in June 2021, Federal Student Aid (FSA) announced a phased approach to implementation. As part of this approach, in the FAFSA Simplification Act Technical Corrections Act, Division R (Pub. L. 117–103) of the Consolidated Appropriations Act, 2022 (CAA 2022), Congress extended the full implementation of the FAFSA Simplification Act until the 2024–25 award year.

Section 478 of the HEA, as amended by the FAFSA Simplification Act, requires the Secretary to annually update the following five tables for inflation—the Income Protection Allowance (IPA), the Adjusted Net Worth (NW) of a Business or Farm, the Asset Protection Allowance, the Assessment Schedules and Rates, and the Employment Expense Allowance. The updates are based, in general, upon increases in items such as, but not limited to, the Consumer Price Index (CPI).

The Secretary is charged with updating the IPA, adjusted NW of a business or farm, the asset protection allowance, the assessment schedules

and rates, and the employment expense allowance to account for inflation that took place between April 2020 and April in the year prior to the beginning of each award year. The increases in the tables must be based on a percentage equal to the percentage increase in the Consumer Price Index for All Urban Consumers (CPI-U) for April of the applicable year.

This notice includes the new 2024–25 AY values for the five tables listed above, which reflect the FAFSA Simplification Act amendments. The updated tables are in sections 1 (Income Protection Allowance), 2 (Adjusted Net Worth of a Business or Farm), 3 (Asset Protection Allowance), 4 (Assessment Schedules and Rates), and 5 (Employment Expense Allowance) of this notice.

The HEA requires the following annual updates:

1. Income Protection Allowance. This allowance is the amount of living expenses associated with the maintenance of an individual or family that may be offset against the family's income. The allowance varies by family size and marital status. The IPA for dependent students is \$11,130. The IPAs for parents of dependent students and independent students are listed in the tables below.

PARENTS OF DEPENDENT STUDENTS

Family size	Income protection allowance
2	\$27,600
3	34,350
4	42,430
5	50,060
6	58,560

For each additional family member add \$6,610.

MARRIED INDEPENDENT STUDENTS WITH DEPENDENTS OTHER THAN A SPOUSE

Family size	Income protection allowance
3	\$54,580
4	67,400
5	79,530
6	93,010

For each additional family member add \$10,510.

SINGLE INDEPENDENT STUDENTS WITH DEPENDENTS OTHER THAN A SPOUSE

Family size	Income protection allowance
2	\$51,960
3	64,700
4	79,880
5	94,260
6	110,230

For each additional family member add \$12,460.

INDEPENDENT STUDENTS WITHOUT DEPENDENTS OTHER THAN A SPOUSE

Marital status	Income protection allowance
Single	\$17,310
Married	27,750

2. Adjusted Net Worth of a Business or Farm. A portion of the full NW (assets less debts) of a business or farm is excluded from the calculation of a SAI because (1) the income produced from these assets is already assessed in another part of the formula; and (2) the

formula protects a portion of the value of the assets.

The portion of these assets included in the contribution calculation is computed according to the following schedule. This schedule is used for parents of dependent students, independent students without dependents other than a spouse, and independent students with dependents other than a spouse.

ADJUSTED NET WORTH OF A BUSINESS OR FARM

If the NW of a business or farm is	Then the adjusted NW is
Less than \$1	\$0.
\$1 to \$165,000	\$0 + 40% of NW.
\$165,001 to \$490,000	\$66,000 + 50% of NW over \$165,000.
\$490,001 to \$820,000	\$228,500 + 60% of NW over \$490,000.
\$820,001 or more	\$426,500 + 100% of NW over \$820,000.

3. Asset Protection Allowance. This allowance protects a portion of NW (assets less debts) from being considered available for postsecondary educational expenses. There is one asset protection allowance table for parents of dependent students, independent students without dependents other than a spouse, and independent students with dependents other than a spouse.

PARENTS OF DEPENDENT STUDENTS, INDEPENDENT STUDENTS WITH DEPENDENTS OTHER THAN A SPOUSE, AND INDEPENDENT STUDENTS WITHOUT DEPENDENTS OTHER THAN A SPOUSE

If the age of the older parent or the independent student is	And the older parent or the independent student is	
	Married	Single
Then the allowance is		
25 or less	0	0
26	0	0
27	0	0
28	0	0
29	0	0
30	0	0
31	0	0
32	0	0
33	0	0
34	0	0
35	0	0

PARENTS OF DEPENDENT STUDENTS, INDEPENDENT STUDENTS WITH DEPENDENTS OTHER THAN A SPOUSE, AND
INDEPENDENT STUDENTS WITHOUT DEPENDENTS OTHER THAN A SPOUSE—Continued

If the age of the older parent or the independent student is	And the older parent or the independent student is	
	Married	Single
	Then the allowance is	
36	0	0
37	0	0
38	0	0
39	0	0
40	0	0
41	0	0
42	0	0
43	0	0
44	0	0
45	0	0
46	0	0
47	0	0
48	0	0
49	0	0
50	0	0
51	0	0
52	0	0
53	0	0
54	0	0
55	0	0
56	0	0
57	0	0
58	0	0
59	0	0
60	0	0
61	0	0
62	0	0
63	0	0
64	0	0
65 or older	0	0

4. Assessment Schedules and Rates.

Two schedules that are subject to updates—one for parents of dependent students and one for independent students with dependents other than a spouse—are used to determine the SAI from family financial resources toward educational expenses. For dependent

students, the SAI is derived from an assessment of the parents' adjusted available income (AAI). For independent students with dependents other than a spouse, the SAI is derived from an assessment of the family's AAI. The AAI represents a measure of a

family's financial strength, which considers both income and assets.

The contribution of parents of dependent students, and independent students with dependents other than a spouse, is computed according to the following schedule:

ASSESSMENT OF AVAILABLE INCOME

If AAI is	Then the contribution is
Less than – \$6,820	– \$1,500,
– \$6,820 to \$20,600	22% of AAI.
\$20,601 to \$25,800	\$4,532 + 25% of AAI over \$20,600.
\$25,801 to \$31,000	\$5,832 + 29% of AAI over \$25,800.
\$31,001 to \$36,300	\$7,340 + 34% of AAI over \$31,000.
\$36,301 to \$41,500	\$9,142 + 40% of AAI over \$36,300.
\$41,501 or more	\$11,222 + 47% of AAI over \$41,500.

5. Employment Expense Allowance.

This allowance for employment-related expenses recognizes additional expenses incurred by working individuals. For parents of dependent students, the employment expense allowance is the lesser of \$4,730 or 35% of the total earned income of the

student's parent and parent's spouse, if applicable. The employment expense allowance for independent students is zero if the student is not married (single, separated or divorced/widowed) or the lesser of \$4,730 or 35% of the combined earned income for the student and student spouse if the student is married.

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or

text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at www.govinfo.gov. At this site, you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at this site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at www.federalregister.gov. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Program Authority: 20 U.S.C. 1087 *et seq.*

Richard Cordray,

Chief Operating Officer, Federal Student Aid.

[FR Doc. 2024-09966 Filed 5-7-24; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF ENERGY

Advanced Scientific Computing Advisory Committee

AGENCY: Office of Science, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an open meeting of the DOE Advanced Scientific Computing Advisory Committee (ASCAC). The Federal Advisory Committee Act requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Wednesday, May 29, 2024; 10 a.m. to 5 p.m. EDT.

ADDRESSES: The Pitch at the Wharf, the Penthouse Room, 800 Maine Ave SW, Washington, DC 20024. Teleconference: Remote attendance of the ASCAC meeting will be possible via Zoom. Instructions will be posted on the ASCAC website at <https://science.energy.gov/ascr/ascac/> prior to the meeting and can also be obtained by contacting Christine Chalk by email at christine.chalk@science.doe.gov or by telephone at (301) 903-7486. Advanced registration is required.

FOR FURTHER INFORMATION CONTACT: Christine Chalk, Office of Advanced Scientific Computing Research; SC-ASCR/Germantown Building; U.S.

Department of Energy; 1000 Independence Avenue SW, Washington, DC 20585-1290; Telephone (301) 903-7486; email at christine.chalk@science.doe.gov.

SUPPLEMENTARY INFORMATION:

Purpose of the Committee: The purpose of the committee is to provide advice and guidance on a continuing basis to the Office of Science and the Department of Energy on scientific priorities within the field of advanced scientific computing research.

Purpose of the Meeting: This meeting is the semi-annual meeting of the Committee.

Tentative Agenda:

- View from Germantown
- Completion of the Exascale Computing Project
- Update on ASCR Facilities
- Report from SIAM on the Future of Computational Science
- Update on Frontiers in Artificial intelligence for Science Security and Technology (FASST)
- Report from Subcommittee on Facilities of the Future
- Technical presentations
- Public Comment (10-minute rule)

The meeting agenda includes an update on the budget, accomplishments, and planned activities of the Advanced Scientific Computing Research program and the exascale computing project; technical presentations from funded researchers and industry collaborations; updates from subcommittees, and there will be an opportunity for comments from the public. The meeting will conclude at 5 p.m. (eastern time) on May 29, 2024. Agenda updates and presentations will be posted on the ASCAC website prior to the meeting: <https://science.osti.gov/ascr/ascac>.

Public Participation: The meeting is open to the public in-person and virtually. Individuals and representatives of organizations who would like to offer comments and suggestions may do so during the meeting. Approximately 30 minutes will be reserved for public comments. The time allotted per speaker will depend on the number who wish to speak but will not exceed 10 minutes. If you have any questions or need a reasonable accommodation under the Americans with Disabilities Act for this event, please send your request to Christine Chalk at Christine.chalk@science.doe.gov two weeks, but no later than 48 hours, prior to the event. Closed captions will be enabled. The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Those wishing to

speak should submit their request at least five days before the meeting. Those not able to attend the meeting or who have insufficient time to address the committee are invited to send a written statement to Christine Chalk, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585, email to Christine.Chalk@science.doe.gov.

Minutes: The minutes of this meeting will be available within 90 days on the Advanced Scientific Computing website at <https://science.osti.gov/ascr/ascac>.

Signing Authority: This document of the Department of Energy was signed on May 2, 2024, by David Borak, Deputy Committee Management Officer, 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 May 3, 2024.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2024-10047 Filed 5-7-24; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

National Nuclear Security Administration

Notice of Update to Advance Consent List

AGENCY: National Nuclear Security Administration, Department of Energy.

ACTION: Notice of update to advance consent list.

SUMMARY: The Department of Energy's National Nuclear Security Administration is providing notice of an update to the advance consent list of countries eligible to receive retransfers from the European Atomic Energy Community ("Euratom") of low enriched uranium, non-nuclear material, equipment, and source material transferred pursuant to Article 8.1(C)(i) of the Agreement for Cooperation in the Peaceful Uses of Nuclear Energy between the United States of America and the European Atomic Energy Community, signed at

Brussels November 7, 1995 and March 29, 1996, entered into force April 12, 1996 (“U.S.-Euratom 123 Agreement”).

FOR FURTHER INFORMATION CONTACT: Ms. Andrea Ferkile, Director, Office of Nonproliferation Policy, National Nuclear Security Administration, Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585, telephone: (202) 586–8868 or email: andrea.ferkile@nnsa.doe.gov.

SUPPLEMENTARY INFORMATION: Article 8.1(C)(i) of the U.S.-Euratom 123 Agreement permits retransfers of the following to third countries: low enriched uranium, non-nuclear material, equipment, and source material transferred pursuant to the U.S.-Euratom 123 Agreement or of low enriched uranium produced through the use of nuclear material or equipment transferred pursuant to the U.S.-Euratom 123 Agreement, for nuclear fuel cycle activities other than the production of high enriched uranium. Paragraph B.2 of the Agreed Minute to the U.S.-Euratom 123 Agreement requires the United States and Euratom to exchange lists of third countries to which retransfers pursuant to Article 8.1(C)(i) of the Agreement may be made (“advance consent lists”). To be eligible for inclusion on the advance consent lists, third countries must have made effective non-proliferation commitments and, for countries on the U.S. advance consent list, must be a party to a civil nuclear cooperation agreement with the United States. Such agreements are entered into under the authority of section 123 of the Atomic Energy Act of 1954, as amended (“123 Agreement”). Paragraph B.4 of the Agreed Minute provides that either the United States or Euratom may delete third countries from its lists following consultations with the other Party.

The Agreement for Cooperation between the Government of the United States of America and the Government of the Arab Republic of Egypt Concerning Peaceful Uses of Nuclear Energy (with annex and agreed minute), signed at Washington June 29, 1981, expired December 29, 2021. The Agreement for Cooperation between the United States of America and the Republic of South Africa Concerning Peaceful Uses of Nuclear Energy, done at Pretoria August 25, 1995, entered into force December 4, 1997, expired December 4, 2022. In the absence of 123 agreements with Egypt and South Africa, these countries are being deleted from the advance consent list of countries eligible to receive retransfers from Euratom of low enriched uranium, non-nuclear material, equipment, and

source material transferred, and low enriched uranium produced through the use of nuclear material or equipment transferred for nuclear fuel cycle activities other than the production of high enriched uranium.

Signing Authority

This document of the Department of Energy was signed on April 29, 2024, by Corey Hinderstein, Deputy Administrator for Defense Nuclear Nonproliferation, National Nuclear Security Administration, 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 May 2, 2024.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2024–09962 Filed 5–7–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

National Nuclear Security Administration

Notice of Update to Advance Consent List

AGENCY: National Nuclear Security Administration, Department of Energy.

ACTION: Notice of update to advance consent list.

SUMMARY: The Department of Energy’s National Nuclear Security Administration is providing notice of an update to the advance consent list of countries or destinations eligible to receive retransfers from the Republic of Korea (ROK) of unirradiated low enriched uranium, unirradiated source material, equipment, and components subject to paragraph 2 of Article 10 of the Agreement for Cooperation between the Government of the United States of America and the Government of the Republic of South Africa Concerning Peaceful Uses of Nuclear Energy, done at Washington June 15, 2015, entered into force November 25, 2015 (“U.S.-ROK 123 Agreement”).

FOR FURTHER INFORMATION CONTACT: Ms. Andrea Ferkile, Director, Office of Nonproliferation Policy, National Nuclear Security Administration, Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585, telephone: (202) 586–8868 or email: andrea.ferkile@nnsa.doe.gov.

SUPPLEMENTARY INFORMATION: Paragraph 2 of Article 10 of the U.S.-ROK 123 Agreement permits retransfers of the following to areas beyond the territorial jurisdiction of the receiving party if the United States and the ROK agree: nuclear material, moderator material, equipment, and components transferred pursuant to the U.S.-ROK 123 Agreement, and any special fissionable material produced through the use of any such nuclear material, moderator material, or equipment. Subsection 1.a. of Section 3 of the Agreed Minute to the U.S.-ROK 123 Agreement permits the United States and the ROK to retransfer unirradiated low enriched uranium, unirradiated source material, equipment, and components subject to paragraph 2 of Article 10 of the U.S.-ROK 123 Agreement to third countries or destinations. The United States and ROK exchanged lists of third countries or destinations for which retransfers of unirradiated low enriched uranium, unirradiated source material, equipment, and components subject to paragraph 2 of Article 10 of the U.S.-ROK 123 Agreement could be made by the other Party (“advance consent lists”). Subsection 1.a. of Section 3 permits either the United States or the ROK to delete third countries or destinations from either list temporarily or permanently following consultations with and written notice to the other Party.

The Agreement for Cooperation between the Government of the United States of America and the Government of the Arab Republic of Egypt Concerning Peaceful Uses of Nuclear Energy, signed at Washington June 29, 1981, expired December 29, 2021. The Agreement for Cooperation between the United States of America and the Republic of South Africa Concerning Peaceful Uses of Nuclear Energy, done at Pretoria August 25, 1995, entered into force December 4, 1997, expired December 4, 2022. In the absence of 123 agreements with Egypt and South Africa, these countries are being deleted from the advance consent list of countries or destinations eligible to receive retransfers from the ROK of unirradiated low enriched uranium, unirradiated source material, equipment, and components subject to

paragraph 2 of Article 10 of the U.S.-ROK 123 Agreement.

Signing Authority

This document of the Department of Energy was signed on April 16, 2024, by Corey Hinderstein, Deputy Administrator for Defense Nuclear Nonproliferation, National Nuclear Security Administration, 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 May 2, 2024.

Treena V. Garrett,

*Federal Register Liaison Officer, U.S.
Department of Energy.*

[FR Doc. 2024-09963 Filed 5-7-24; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

National Nuclear Security Administration

Notice of Update to Advance Consent List

AGENCY: National Nuclear Security Administration, Department of Energy.

ACTION: Notice of update to advance consent list.

SUMMARY: The Department of Energy's National Nuclear Security Administration is providing notice of an update to the advance consent list of countries or destinations eligible to receive retransfers from the United Kingdom of Great Britain and Northern Ireland of byproduct material, non-nuclear material, unirradiated low enriched uranium, unirradiated source material, and equipment subject to Article 6 of the Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for Cooperation in Peaceful Uses of Nuclear Energy, done at Washington May 4, 2018, entered into force December 31, 2020 ("U.S.-UK 123 Agreement").

FOR FURTHER INFORMATION CONTACT: Ms. Andrea Ferkile, Director, Office of Nonproliferation Policy, National

Nuclear Security Administration, Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585, telephone: (202) 586-8868 or email: andrea.ferkile@nnsa.doe.gov.

SUPPLEMENTARY INFORMATION: Article 6 of the U.S.-UK 123 Agreement permits retransfers of the following beyond the territory, jurisdiction, or control of the recipient party if the U.S. and the UK agree in writing: material, equipment, sensitive nuclear facilities, or major critical components transferred pursuant to the U.S.-UK 123 Agreement, and special fissionable material produced through the use of nuclear material, non-nuclear material, equipment, sensitive nuclear facilities, or major critical components so transferred. Subsection A of Section 4 of the Agreed Minute of the U.S.-UK 123 Agreement permits the United States and the UK to retransfer material, other than irradiated nuclear material, and equipment subject to Article 6 of the Agreement to third countries or destinations identified in advance ("advance consent lists"). To be eligible for inclusion on the advance consent lists, third countries or destinations must have made effective non-proliferation commitments and, for countries on the U.S. advance consent list, must be a party to a civil nuclear cooperation agreement with the United States. Such agreements are entered into under the authority of section 123 of the Atomic Energy Act of 1954, as amended ("123 agreement"). Subsection C of Section 4 permits either the United States or the UK to delete third countries or destinations from either list temporarily or permanently following consultations with the other Party.

The Agreement for Cooperation between the Government of the United States of America and the Government of the Arab Republic of Egypt Concerning Peaceful Uses of Nuclear Energy, signed at Washington June 29, 1981, expired December 29, 2021. The Agreement for Cooperation between the United States of America and the Republic of South Africa Concerning Peaceful Uses of Nuclear Energy, done at Pretoria August 25, 1995, entered into force December 4, 1997, expired December 4, 2022. In the absence of 123 agreements with Egypt and South Africa, these countries are being deleted from the advance consent list of countries or destinations eligible to receive retransfers from the United Kingdom of Great Britain and Northern Ireland of byproduct material, non-nuclear material, unirradiated low enriched uranium, unirradiated source

material, and equipment subject to Article 6 of the U.S.-UK 123 Agreement.

Signing Authority

This document of the Department of Energy was signed on April 26, 2024, by Corey Hinderstein, Deputy Administrator for Defense Nuclear Nonproliferation, National Nuclear Security Administration, 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 May 2, 2024.

Treena V. Garrett,

*Federal Register Liaison Officer, U.S.
Department of Energy.*

[FR Doc. 2024-09961 Filed 5-7-24; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC24-75-000.

Applicants: Happy Solar 1, LLC, Oxbow Solar Farm 1, LLC.

Description: Joint Application for Authorization under Section 203 of the Federal Power Act of Happy Solar 1, LLC, et al.

Filed Date: 5/1/24.

Accession Number: 20240501-5421.

Comment Date: 5 p.m. ET 5/22/24.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG24-172-000

Applicants: Morris Ridge Solar Energy Center, LLC.

Description: Morris Ridge Solar Energy Center, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 5/1/24.

Accession Number: 20240501-5415.

Comment Date: 5 p.m. ET 5/22/24.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10-2727-009; ER10-1451-011; ER10-1467-012; ER10-1269-002; ER10-1473-012; ER10-1474-012; ER10-1478-014; ER10-2687-011; ER10-2688-014; ER10-2689-015; ER10-2728-013; ER11-3907-005.

Applicants: The Toledo Edison Company, Green Valley Hydro, LLC, West Penn Power Company, The Potomac Edison Company, Monongahela Power Company, Pennsylvania Electric Company, Metropolitan Edison Company, Pennsylvania Power Company, The Cleveland Electric Illuminating Company, Ohio Edison Company, Jersey Central Power & Light, Allegheny Energy Supply Company, LLC.

Description: Notice of Non-Material Change in Status of Allegheny Energy Supply Company, LLC, et al.

Filed Date: 4/30/24.

Accession Number: 20240430-5641.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER11-3859-025; ER14-1699-015; ER17-436-011; ER21-1810-002.

Applicants: Marco DM Holdings, L.L.C., Marcus Hook Energy, L.P., Milford Power, LLC, Dighton Power, LLC.

Description: Notice of Change in Status of Dighton Power, LLC, et al.

Filed Date: 4/30/24.

Accession Number: 20240430-5639.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER12-21-028; ER10-2381-015; ER11-2206-016; ER11-2207-016; ER11-2209-016; ER11-2210-016; ER11-2211-016; ER11-2855-030; ER11-2856-030; ER11-2857-030; ER11-3727-022; ER12-1711-022; ER13-1150-014; ER13-1151-014; ER13-1991-030; ER13-1992-030; ER17-1217-005; ER18-814-007; ER19-672-007; ER19-843-007; ER19-1061-007; ER19-1063-007; ER19-1200-011; ER20-486-007; ER21-963-004; ER23-175-004; ER23-1577-002; ER23-2403-001; ER23-2406-001.

Applicants: Arica Solar, LLC, Victory Pass I, LLC, Daggett Solar Power 2 LLC, Daggett Solar Power 3 LLC, Silverstrand Grid, LLC, Golden Fields Solar III, LLC, Clearway Power Marketing LLC, Solar Borrego I LLC, Solar Alpine LLC, Solar Blythe LLC, Marsh Landing LLC, Carlsbad Energy Center LLC, TotalEnergies Gas & Power North America, Inc., Desert Sunlight 300, LLC, Desert Sunlight 250, LLC, Alta Wind XI, LLC, Alta Wind X, LLC, High Plains Ranch II, LLC, El Segundo Energy Center LLC, Sun City Project LLC, Sand Drag LLC, Avenal Park LLC, Alta Wind I, LLC, Alta Wind III, LLC, Alta Wind II,

LLC, Alta Wind IV, LLC, Alta Wind V, LLC, Walnut Creek Energy, LLC, Agua Caliente Solar, LLC.

Description: Notice of Change in Status of Agua Caliente Solar, LLC, et al.

Filed Date: 4/30/24.

Accession Number: 20240430-5640.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER15-793-002.

Applicants: Southern Indiana Gas and Electric Company, Inc.

Description: Notice of Change in Status of Southern Indiana Gas and Electric Company.

Filed Date: 4/30/24.

Accession Number: 20240430-5634.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER17-256-020; ER17-242-019; ER17-243-019; ER17-245-019; ER17-652-019.

Applicants: Lightstone Marketing LLC, Waterford Power, LLC, Lawrenceburg Power, LLC, Gavin Power, LLC, Darby Power, LLC.

Description: Notice of Non-Material Change in Status of Darby Power, LLC, et al.

Filed Date: 5/1/24.

Accession Number: 20240501-5408.

Comment Date: 5 p.m. ET 5/22/24.

Docket Numbers: ER17-1794-007.

Applicants: Innovative Solar 42, LLC.

Description: Notice of Change in Status of Innovative Solar 42, LLC.

Filed Date: 4/30/24.

Accession Number: 20240430-5637.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER18-1978-013; ER10-1852-092; ER10-1951-067; ER11-2192-022; ER11-4462-091; ER17-838-065; ER18-772-012; ER19-1392-011; ER22-96-005; ER24-61-002.

Applicants: Sky Ranch Solar, LLC, Route 66 Solar Energy Center, LLC, High Lonesome Mesa Wind, LLC, New Mexico Wind, LLC, NextEra Energy Marketing, LLC, NEPM II, LLC, Red Mesa Wind, LLC, NextEra Energy Services Massachusetts, LLC, Florida Power & Light Company, Casa Mesa Wind, LLC.

Description: Notice of Change in Status of Casa Mesa Wind, LLC, et al.

Filed Date: 4/30/24.

Accession Number: 20240430-5642.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER20-711-003.

Applicants: Cambria Wind, LLC.

Description: Notice of Change in Status of Cambria Wind LLC.

Filed Date: 4/30/24.

Accession Number: 20240430-5638.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER23-2221-001; ER17-1984-003; ER17-1988-003; ER23-1005-001.

Applicants: Vitrol PA Wind Marketing LLC, Patton Wind Farm, LLC, Highland North LLC, Twin Ridges LLC.

Description: Notice of Change in Status of Twin Ridges LLC, et al.

Filed Date: 4/30/24.

Accession Number: 20240430-5636.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24-1915-000.

Applicants: New York Independent

System Operator, Inc.

Description: Compliance filing:

NYISO Compliance: Order No. 2023 and

2023-A Interconnection Procedures to

be effective 5/2/2024.

Filed Date: 5/1/24.

Accession Number: 20240501-5351.

Comment Date: 5 p.m. ET 5/22/24.

Docket Numbers: ER24-1916-000.

Applicants: Stones DR, LLC.

Description: Tariff Amendment: Notice of Cancellation to be effective 5/2/2024.

Filed Date: 5/1/24.

Accession Number: 20240501-5358.

Comment Date: 5 p.m. ET 5/22/24.

Docket Numbers: ER24-1917-000.

Applicants: Idaho Power Company.

Description: § 205(d) Rate Filing: SA #525—KCE ID 1 LGIA to be effective 1/29/2024.

Filed Date: 5/1/24.

Accession Number: 20240501-5363.

Comment Date: 5 p.m. ET 5/22/24.

Docket Numbers: ER24-1918-000.

Applicants: Idaho Power Company.

Description: § 205(d) Rate Filing: SA 526—Olney Generating Facility LGIA to be effective 2/1/2024.

Filed Date: 5/1/24.

Accession Number: 20240501-5377.

Comment Date: 5 p.m. ET 5/22/24.

Docket Numbers: ER24-1919-000.

Applicants: Idaho Power Company.

Description: § 205(d) Rate Filing: SA #527—Martha Fields Energy Center LGIA to be effective 3/7/2024.

Filed Date: 5/1/24.

Accession Number: 20240501-5383.

Comment Date: 5 p.m. ET 5/22/24.

Docket Numbers: ER24-1920-000.

Applicants: NorthWestern Corporation.

Description: § 205(d) Rate Filing: SA 992—Conditional Firm PTP Trans. Service with WAPA to be effective 7/1/2024.

Filed Date: 5/1/24.

Accession Number: 20240501-5395.

Comment Date: 5 p.m. ET 5/22/24.

Docket Numbers: ER24-1921-000.

Applicants: NorthWestern Corporation.

Description: § 205(d) Rate Filing: SA 991—Conditional Firm PTP Trans. Service with WAPA to be effective 7/1/2024.

Filed Date: 5/1/24.

Accession Number: 20240501-5401.

Comment Date: 5 p.m. ET 5/22/24.

Docket Numbers: ER24–1922–000.
Applicants: Idaho Power Company.
Description: § 205(d) Rate Filing: SA #528—Sole Rest LGIA to be effective 3/13/2024.

Filed Date: 5/2/24.

Accession Number: 20240502–5002.

Comment Date: 5 p.m. ET 5/23/24.

Docket Numbers: ER24–1923–000.
Applicants: Idaho Power Company.
Description: § 205(d) Rate Filing: SA #529—Blacks Creek Energy Center LGIA to be effective 4/4/2024.

Filed Date: 5/2/24.

Accession Number: 20240502–5003.

Comment Date: 5 p.m. ET 5/23/24.

Docket Numbers: ER24–1924–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2024–05–02_SA 3134 ETI-Liberty County Solar Project 1st Rev GIA (J483) to be effective 4/22/2024.

Filed Date: 5/2/24.

Accession Number: 20240502–5041.

Comment Date: 5 p.m. ET 5/23/24.

Docket Numbers: ER24–1925–000.
Applicants: PJM Interconnection, L.L.C.

Description: Tariff Amendment: Notice of Cancellation of WMPA, SA No. 6171; Queue No. AF2–276 to be effective 6/4/2024.

Filed Date: 5/2/24.

Accession Number: 20240502–5062.

Comment Date: 5 p.m. ET 5/23/24.

Docket Numbers: ER24–1926–000.
Applicants: Ameren Illinois Company.
Description: § 205(d) Rate Filing: Filing of a Reimbursement Agreement to be effective 7/2/2024.

Filed Date: 5/2/24.

Accession Number: 20240502–5063.

Comment Date: 5 p.m. ET 5/23/24.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercsearch.asp>) by querying the docket number.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) 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.

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: May 2, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–10038 Filed 5–7–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1333–068]

Tule Hydro, LLC; Notice of Application for Non-Capacity Amendment of License Accepted for Filing, 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. *Application Type:* Non-Capacity Amendment of License.

b. *Project No:* 1333–068.

c. *Date Filed:* June 5, 2023.

d. *Applicant:* Kern and Tule Hydro, LLC.

e. *Name of Project:* Tule River Hydroelectric Project.

f. *Location:* The project is located on the North Fork of the Middle Fork Tule River, Hossack Creek, and Doyle Springs in Tulare County, California. The project occupies lands of the Sequoia National Forest.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Ted Sorenson, Manager, Tule Hydro, LLC, 711 Turtle Point Drive, Ivins, UT 84738, 208–589–6908.

i. *FERC Contact:* Gregory Morris, (202) 502–8116, gregory.morris@ferc.gov.

j. *Deadline for filing comments, motions to intervene, and protests:* June 3, 2024.

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](http://www.ferc.gov/docs-filing/ecomment.asp). Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <http://www.ferc.gov/docs-filing/ecomment.asp>. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov, (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include the docket number P–1333–068. Comments emailed to Commission staff are not considered part of the Commission record.

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 whose name appears 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:* Tule Hydro, LLC proposes to: (1) designate the existing secondary 12kV interconnection, spanning from the Project's switchyard to a point of interconnection with Southern California Edison's 12kV Soda Springs distribution line, as the Project's "primary" line; (2) perform minor construction activities, including replacing a span of approximately 500 feet of 12-kV distribution line within the project boundary, replacing in-kind three existing poles, and installing three new poles, two of which are within the alignment of the existing distribution line, and one of which would be within the existing fenced switchyard needed to install the Project's new primary line; and (3) remove from the license certain lands and Project works, including the Doyle Springs 12kV line, that would no longer be needed for Project purposes.

The proposed maintenance activities would involve minimal ground disturbance on already disturbed lands.

l. *Locations of the Application:* This filing may be viewed on the

Commission's website at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at <http://www.ferc.gov/docs-filing/esubscription.asp> to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1-866-208-3676 or email FERCOnlineSupport@ferc.gov, for TTY, call (202) 502-8659. Agencies may obtain copies of the application directly from the applicant.

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, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. 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, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Documents:* Any filing must (1) bear in all capital letters the title "COMMENTS", "PROTEST", or "MOTION TO INTERVENE" as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; 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. Any filing made by an intervenor 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: May 2, 2024.

Debbie-Anne A. Reese,
Acting Secretary.

[FR Doc. 2024-10040 Filed 5-7-24; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG24-171-000.

Applicants: Yum Yum Solar LLC.

Description: Yum Yum Solar LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 4/30/24.

Accession Number: 20240430-5577.

Comment Date: 5 p.m. ET 5/21/24.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10-1823-005; ER10-2498-007; ER13-412-006; ER10-1410-008; ER16-1750-011; ER16-2601-009; ER17-339-002; ER17-1037-005; ER17-2292-009; ER17-2381-008; ER19-1656-008; ER20-2123-006; ER20-2768-006; ER23-666-002.

Applicants: Foxhound Solar, LLC, Greenville County Solar Project, LLC, Hardin Solar Energy LLC, Wilkinson Solar LLC, Scott-II Solar LLC, Southampton Solar, LLC, Innovative Solar 37, LLC, 96WI 8ME, LLC, Summit Farms Solar, LLC, Eastern Shore Solar LLC, Virginia Electric and Power Company, Dominion Nuclear Connecticut, Inc., South Carolina Electric & Gas Transmission, Dominion Energy Marketing, Inc.

Description: Notice of Change in Status of Dominion Energy Marketing, Inc., et al.

Filed Date: 4/30/24.

Accession Number: 20240430-5603.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER10-2881-042; ER10-2882-042; ER10-2883-040; ER10-2884-040; ER16-2509-011; ER17-2400-012; ER17-2401-012; ER17-2403-012; ER17-2404-012.

Applicants: SP Sandhills Solar, LLC, SP Pawpaw Solar, LLC, SP Decatur Parkway Solar, LLC, SP Butler Solar, LLC, Rutherford Farm, LLC, Georgia Power Company, Mississippi Power Company, Southern Power Company, Alabama Power Company.

Description: Notice of Non-Material Change in Status of Alabama Power Company, et al.

Filed Date: 4/30/24.

Accession Number: 20240430-5605.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER10-2984-066.

Applicants: Merrill Lynch

Commodities, Inc.

Description: Notice of Change in Status of Merrill Lynch Commodities, Inc.

Filed Date: 4/30/24.

Accession Number: 20240430-5607.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER17-1394-010;

ER10-1328-006; ER10-1330-011; ER10-1331-006; ER10-1332-006; ER10-1427-010; ER10-2522-007; ER10-2567-007; ER12-1502-009; ER12-1504-009; ER12-2313-009; ER13-1139-026; ER14-2630-019; ER16-61-006; ER16-63-006; ER16-64-006; ER16-141-008; ER16-355-006; ER16-2527-006; ER17-2-007; ER17-360-005; ER17-361-005; ER17-362-005; ER17-539-004; ER17-540-004; ER17-2336-009; ER18-1343-018; ER19-89-002; ER19-529-016; ER19-1074-016; ER19-1075-016; ER19-1819-008; ER19-1820-008; ER19-1821-008; ER19-2684-004; ER20-1487-005; ER21-2426-004; ER22-398-003; ER22-1627-004; ER22-1883-004; ER22-2042-004; ER23-921-003; ER23-1939-003; ER23-2203-003; ER23-2363-003; ER24-443-002; ER24-444-002; ER24-957-001.

Applicants: Franklin Solar LLC, Deriva Energy Beckjord Storage LLC, Deriva Energy Services, LLC, HXOap Solar One, LLC, Wildflower Solar, LLC, Pike Solar LLC, Black Mesa Energy, LLC, Jackpot Holdings, LLC, Ledyard Windpower, LLC, AM Wind Repower LLC, Mesa Wind Power LLC, CPRE 1 Lessee, LLC, Frontier Windpower II, LLC, Palmer Solar, LLC, Speedway Solar NC, LLC, Stony Knoll Solar, LLC, Broad River Solar, LLC, Brookfield Renewable Energy Marketing US LLC, Brookfield Energy Marketing Inc., Renewable Trading and Marketing LP, North Rosamond Solar, LLC, Carolina Solar Power, LLC, Shoreham Solar Commons LLC, Wildwood Solar II, LLC, Wildwood Solar I, LLC, Rio Bravo Solar II, LLC, Pumpjack Solar I, LLC, Rio Bravo Solar I, LLC, Frontier Windpower, LLC, Caprock Solar I LLC, Colonial Eagle Solar, LLC, Conetoe II Solar, LLC, Tallbear Seville LLC, Seville Solar Two, LLC, Seville Solar One LLC, Regulus Solar, LLC, Imperial Valley Solar 1, LLC, Laurel Hill Wind Energy, LLC, Cimarron Windpower II, LLC, Ironwood Windpower, LLC, Kit Carson Windpower, LLC, Top of the World

Wind Energy, LLC, Brookfield Energy Marketing LP, Three Buttes Windpower, LLC, Silver Sage Windpower, LLC, North Allegheny Wind, LLC, Happy Jack Windpower, LLC, 83WI 8me, LLC.
Description: Notice of Non-Material Change in Status of 83WI 8me, LLC, et al.

Filed Date: 4/29/24.

Accession Number: 20240429–5455.

Comment Date: 5 p.m. ET 5/20/24.

Docket Numbers: ER19–158–014; ER10–1547–016; ER10–1975–032; ER10–2421–012; ER10–2616–026; ER10–2617–013; ER10–2619–014; ER10–2674–016; ER10–2677–017; ER11–2449–003; ER11–2457–012; ER11–4400–023; ER12–75–015; ER12–192–018; ER12–1769–014; ER12–2250–013; ER12–2251–013; ER12–2252–014; ER12–2253–013; ER13–2475–015; ER14–883–018; ER14–1569–019; ER14–2245–013; ER15–1596–019; ER15–1598–010; ER15–1599–019; ER15–1600–009; ER15–1602–009; ER15–1605–009; ER15–1607–009; ER19–102–012; ER19–2803–011; ER19–2807–011; ER19–2809–011; ER19–2810–011; ER19–2811–011; ER20–1436–005; ER20–1438–005; ER20–2414–006; ER20–2415–006; ER22–2736–002.

Applicants: Moss Landing Energy Storage 3, LLC, Moss Landing Energy Storage 2, LLC, Moss Landing Energy Storage 1, LLC, Energy Harbor Nuclear Generation LLC, Energy Harbor LLC, Viridian Energy, LLC, Viridian Energy PA, LLC, Viridian Energy NY, LLC, Energy Rewards, LLC, Cincinnati Bell Energy LLC, Luminant Energy Company LLC, Washington Power Generation LLC, Miami Fort Power Company LLC, Hanging Rock Power Company LLC, Fayette Power Company LLC, Dynegy Energy Services (East), LLC, Dicks Creek Power Company LLC, Luminant Commercial Asset Management LLC, TriEagle Energy, LP, Dynegy Energy Services, LLC, Illinois Power Marketing Company, Kincaid Generation, L.L.C., Public Power & Utility of Maryland, LLC, Public Power (PA), LLC, Public Power & Utility of NY, Inc, Everyday Energy NJ, LLC, Everyday Energy, LLC, Liberty Electric Power, LLC, Public Power LLC, Dynegy Power Marketing, LLC, Massachusetts Gas & Electric, Inc., Connecticut Gas & Electric, Inc., Pleasants Energy, LLC, Calumet Energy Team, LLC, Kendall Power Company, LLC, Ontelaunee Power Operating Company LLC, Dynegy Marketing and Trade, LLC, Energy Services Providers, LLC, Sayreville Power Generation LP, Hopewell Power Generation, LLC, Ambit Northeast, LLC.

Description: Notice of Non-Material Change in Status of Ambit Northeast, LLC, et al.

Filed Date: 4/30/24.

Accession Number: 20240430–5604.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER22–1101–002; ER22–1102–002.

Applicants: Sierra Energy Storage, LLC, Cascade Energy Storage, LLC.

Description: Notice of Change in Status of Cascade Energy Storage, LLC, et al.

Filed Date: 4/30/24.

Accession Number: 20240430–5609.

Comment Date: 5 pm ET 5/21/24.

Docket Numbers: ER23–2668–003.

Applicants: Richfield Solar Energy LLC.

Description: Notice of Change in Status of Richfield Solar Energy LLC.

Filed Date: 4/30/24.

Accession Number: 20240430–5611.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER23–2746–002.

Applicants: El Sol Storage LLC.

Description: Notice of Change in Status of El Sol Storage LLC.

Filed Date: 4/30/24.

Accession Number: 20240430–5610.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–188–001.

Applicants: Wild Springs Solar, LLC.

Description: Notice of Change in Status of Wild Springs Solar, LLC.

Filed Date: 4/30/24.

Accession Number: 20240430–5608.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1191–000.

Applicants: Midcontinent

Independent System Operator, Inc.
Description: Report Filing: 2024–04–30_Supplemental Filing to Forced-Off Asset Reforms to be effective N/A.

Filed Date: 4/29/24.

Accession Number: 20240429–5347.

Comment Date: 5 p.m. ET 5/6/24.

Docket Numbers: ER24–1384–001.

Applicants: Tampa Electric Company.

Description: Compliance filing: Compliance Filing—FERC Order 2023–A to be effective 5/1/2024.

Filed Date: 4/30/24.

Accession Number: 20240430–5353.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1898–000.

Applicants: Midcontinent

Independent System Operator, Inc., Otter Tail Power Company.

Description: 205(d) Rate Filing: Midcontinent Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii): 2024–04–30_SA 4282 OTP–GRE T–T (Erie) to be effective 6/15/2024.

Filed Date: 4/30/24.

Accession Number: 20240430–5328.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1899–000.

Applicants: AEP Texas Inc.

Description: 205(d) Rate Filing: AEPTX-Corpus Battery Storage Generation Interconnection Agreement to be effective 4/9/2024.

Filed Date: 4/30/24.

Accession Number: 20240430–5339.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1900–000.

Applicants: Duke Energy Carolinas, LLC.

Description: 205(d) Rate Filing: DEC-Lockhart RS No. 332 to be effective 1/1/2023.

Filed Date: 4/30/24.

Accession Number: 20240430–5400.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1901–000.

Applicants: Yum Yum Solar LLC.
Description: Baseline eTariff Filing: Application for Market Based Rate Authorization to be effective 5/1/2024.

Filed Date: 4/30/24.

Accession Number: 20240430–5409.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1902–000.

Applicants: Nevada Power Company.

Description: 205(d) Rate Filing: Service Agreement for Conditional LTF Point to Point Service with Powerex Corp. to be effective 4/1/2024.

Filed Date: 5/1/24.

Accession Number: 20240501–5001.

Comment Date: 5 p.m. ET 5/22/24.

Docket Numbers: ER24–1904–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: 205(d) Rate Filing: 2024–05–01 SA 4281 Ameren IL-Grain Belt MPFCA (J1488 J1490) to be effective 4/22/2024.

Filed Date: 5/1/24.

Accession Number: 20240501–5091.

Comment Date: 5 p.m. ET 5/22/24.

Docket Numbers: ER24–1905–000.

Applicants: Midcontinent Independent System Operator, Inc., Entergy Services, LLC.

Description: 205(d) Rate Filing: Midcontinent Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii): 2024–05–01 Entergy Companies Revisions to Schedule 41 to be effective 7/1/2024.

Filed Date: 5/1/24.

Accession Number: 20240501–5188.

Comment Date: 5 p.m. ET 5/22/24.

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, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) 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.

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Dated: May 1, 2024.

Debbie-Anne A. Reese,
Acting Secretary.

[FR Doc. 2024-09984 Filed 5-7-24; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER24-1901-000]

Yum Yum Solar LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Yum Yum Solar LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket

authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is May 21, 2024.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

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: May 1, 2024.

Debbie-Anne A. Reese,
Acting Secretary.

[FR Doc. 2024-09978 Filed 5-7-24; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10-1819-041; ER10-1817-031; ER10-1818-038; ER10-1820-044.

Applicants: Northern States Power Company, a Wisconsin corporation, Public Service Company of Colorado, Southwestern Public Service Company, Northern States Power Company, a Minnesota corporation.

Description: Notice of Change in Status of Northern States Power

Company, a Minnesota corporation, et al.

Filed Date: 4/30/24.

Accession Number: 20240430-5623.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER10-2249-010.

Applicants: Portland General Electric Company.

Description: Notice of Change in Status of Portland General Electric Company.

Filed Date: 4/30/24.

Accession Number: 20240430-5630.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER10-3069-011; ER10-3070-011.

Applicants: Alcoa Power Marketing LLC, Alcoa Power Generating Inc.

Description: Triennial Market Power Analysis and Notice of Non-Material Change in Status for Central Region of Alcoa Power Generating Inc., et al.

Filed Date: 4/30/24.

Accession Number: 20240430-5625.

Comment Date: 5 p.m. ET 7/1/24.

Docket Numbers: ER11-4051-006; ER14-1656-014.

Applicants: CSOLAR IV West, LLC, CSOLAR IV South, LLC.

Description: Notice of Change in Status of CSOLAR IV South, LLC, et al.

Filed Date: 4/30/24.

Accession Number: 20240430-5618.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER17-1531-011; ER13-342-019; ER13-343-015; ER22-729-003; ER22-784-005; ER22-2580-004.

Applicants: CPV Three Rivers, LLC, CPV Maple Hill Solar, LLC, CPV Retail Energy LP, CPV Maryland, LLC, CPV Shore, LLC, CPV Fairview, LLC.

Description: Notice of Change in Status of CPV Fairview, LLC, et al.

Filed Date: 4/30/24.

Accession Number: 20240430-5633.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER18-53-004;

ER10-3310-016; ER10-2757-010;

ER23-283-002; ER11-3051-006.

Applicants: CP Energy Marketing (US) Inc., Arlington Valley, LLC, New Harquahala Generating Company, LLC, CXA La Paloma, LLC, Macho Springs Power I, LLC.

Description: Notice of Change in Status of CXA La Paloma, LLC, et al.

Filed Date: 4/30/24.

Accession Number: 20240430-5632.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER18-397-003;

ER18-398-003.

Applicants: SunE Beacon Site 5 LLC, SunE Beacon Site 2 LLC.

Description: Notice of Non-Material Change in Status of SunE Beacon Site 2 LLC, et al.

Filed Date: 4/30/24.
Accession Number: 20240430–5628.
Comment Date: 5 p.m. ET 5/21/24.
Docket Numbers: ER21–573–004;
 ER21–574–004; ER21–575–004.
Applicants: Lanyard Power Marketing, LLC, Dickerson Power, LLC, Chalk Point Power, LLC.
Description: Notice of Change in Status of Chalk Point Power, LLC, et al.
Filed Date: 4/30/24.
Accession Number: 20240430–5620.
Comment Date: 5 p.m. ET 5/21/24.
Docket Numbers: ER21–1755–008; ER23–1642–005; ER14–2498–016; ER14–2500–016.
Applicants: Newark Energy Center, LLC, EIF Newark, LLC, NE Renewable Power, LLC, Hartree Partners, LP.
Description: Notice of Change in Status of Hartree Partners, LP, et al.
Filed Date: 4/30/24.
Accession Number: 20240430–5629.
Comment Date: 5 p.m. ET 5/21/24.
Docket Numbers: ER22–381–011; ER10–1781–007; ER19–2626–009; ER21–714–010; ER22–399–005.
Applicants: Meadow Lake Solar Park LLC, Indiana Crossroads Wind Farm LLC, Rosewater Wind Farm LLC, Northern Indiana Public Service Company, Dunns Bridge Solar Center, LLC.
Description: Notice of Non-Material Change in Status of Dunns Bridge Solar Center, LLC, et al.
Filed Date: 4/30/24.
Accession Number: 20240430–5635.
Comment Date: 5 p.m. ET 5/21/24.
Docket Numbers: ER22–1777–003.
Applicants: Madison Fields Solar Project, LLC.
Description: Notice of Change in Status of Madison Fields Solar Project, LLC.
Filed Date: 4/30/24.
Accession Number: 20240430–5624.
Comment Date: 5 p.m. ET 5/21/24.
Docket Numbers: ER24–1906–000.
Applicants: Cheyenne Light, Fuel and Power Company.
Description: Compliance filing: Order 2023 Open Access Transmission Tariff Revisions to be effective 7/1/2024.
Filed Date: 5/1/24.
Accession Number: 20240501–5211.
Comment Date: 5 p.m. ET 5/22/24.
Docket Numbers: ER24–1907–000.
Applicants: Michigan Electric Transmission Company, LLC.
Description: 205(d) Rate Filing: Filing of a Transition Services Agreement—Rate Schedule No. 83 to be effective 7/1/2024.
Filed Date: 5/1/24.
Accession Number: 20240501–5236.
Comment Date: 5 p.m. ET 5/22/24.

Docket Numbers: ER24–1908–000.
Applicants: Soldier Creek Wind, LLC.
Description: 205(d) Rate Filing: Amended Shared Interconnection Facilities Co-Owners Agreement to be effective 5/2/2024.
Filed Date: 5/1/24.
Accession Number: 20240501–5245.
Comment Date: 5 p.m. ET 5/22/24.
Docket Numbers: ER24–1909–000.
Applicants: Southwest Power Pool, Inc.
Description: 205(d) Rate Filing: 3825R1 Prairie Hills Wind GIA to be effective 4/17/2024.
Filed Date: 5/1/24.
Accession Number: 20240501–5286.
Comment Date: 5 p.m. ET 5/22/24.
Docket Numbers: ER24–1910–000.
Applicants: AEP Texas Inc.
Description: 205(d) Rate Filing: AEPTX-Charter Oak Solar Generation Interconnection Agreement to be effective 4/5/2024.
Filed Date: 5/1/24.
Accession Number: 20240501–5288.
Comment Date: 5 p.m. ET 5/22/24.
Docket Numbers: ER24–1911–000.
Applicants: MidAmerican Central California Transco, LLC.
Description: Petition for Limited Waiver of MidAmerican Central California Transco, LLC.
Filed Date: 4/30/24.
Accession Number: 20240430–5627.
Comment Date: 5 p.m. ET 5/21/24.
Docket Numbers: ER24–1912–000.
Applicants: Public Service Company of New Mexico.
Description: 205(d) Rate Filing: NTUA Pseudo-Tie Coordination Agreement—RS 195 to be effective 5/1/2024.
Filed Date: 5/1/24.
Accession Number: 20240501–5339.
Comment Date: 5 p.m. ET 5/22/24.
Docket Numbers: ER24–1913–000.
Applicants: Bartonville Energy Facility, LLC.
Description: 205(d) Rate Filing: Revised Market-Based Rate Tariff Filing to be effective 7/1/2024.
Filed Date: 5/1/24.
Accession Number: 20240501–5341.
Comment Date: 5 p.m. ET 5/22/24.
Docket Numbers: ER24–1914–000.
Applicants: Idaho Power Company.
Description: 205(d) Rate Filing: SA #521—Kuna Storage LGIA to be effective 1/4/2024.
Filed Date: 5/1/24.
Accession Number: 20240501–5344.
Comment Date: 5 p.m. ET 5/22/24.
 The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercensearch.asp>) by querying the docket number.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) 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.

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: May 1, 2024.

Debbie-Anne A. Reese,
Acting Secretary.

[FR Doc. 2024–09983 Filed 5–7–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER24–1863–000]

BCD 2024 Fund 3 Lessee, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of BCD 2024 Fund 3 Lessee, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice

and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is May 21, 2024.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

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: May 1, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024-09979 Filed 5-7-24; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Effectiveness of Exempt Wholesale Generator Status

	Docket Nos.
CPV Backbone Solar, LLC	EG24-100-000
Prescott Wind Energy LLC	EG24-101-000
Wythe County Solar Project, LLC.	EG24-102-000

	Docket Nos.
AP Sunray, LLC	EG24-103-000
Delilah Solar Energy II LLC	EG24-104-000
Samson Solar Energy II LLC.	EG24-105-000
68SF 8me LLC	EG24-106-000
Tyson Nick Solar Project, LLC.	EG24-107-000
SR Toombs, LLC	EG24-108-000
Russellville Solar LLC	EG24-109-000
SR Ailey, LLC	EG24-110-000
SR Toombs Lessee, LLC ..	EG24-111-000
Crossett Solar Energy, LLC	EG24-112-000
Catalyze Bronx Bassett Ave Microgrid, LLC.	EG24-114-000
Yuma Solar Energy LLC ...	EG24-115-000
20SD 8me LLC	EG24-116-000
FL Solar 7, LLC	EG24-117-000
White Wing Ranch North, LLC.	EG24-118-000
EDPR Scarlet II BESS LLC	EG24-119-000
EDPR Scarlet II LLC	EG24-120-000
Elawan Pitts Dudik Solar II, LLC.	EG24-121-000
Flatland Storage LLC	EG24-122-000
Hickory Solar LLC	EG24-123-000
Ragsdale Solar, LLC	EG24-124-000
Randolph Solar Park LLC	EG24-125-000
Wolf Run Solar LLC	EG24-126-000
Bartonsville Energy Facility, LLC.	EG24-127-000

Take notice that during the month of April 2024, the status of the above-captioned entities as Exempt Wholesale Generators became effective by operation of the Commission's regulations. 18 CFR 366.7(a) (2023).

Dated: May 1, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024-09981 Filed 5-7-24; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: PR24-68-000.
Applicants: TC Louisiana Intrastate Pipeline LLC.
Description: § 284.123 Rate Filing: TC Louisiana Intrastate Pipeline LLC Petition for Rate Approval and SOC Baseline to be effective 5/1/2024.
Filed Date: 5/1/24.
Accession Number: 20240501-5303.
Comment Date: 5 p.m. ET 5/22/24.
Docket Numbers: RP24-738-000.
Applicants: Portland Natural Gas Transmission System.

Description: § 4(d) Rate Filing: Revised Fuel Allocation for PXP and WXP to be effective 6/1/2024.

Filed Date: 5/1/24.

Accession Number: 20240501-5213.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24-739-000.

Applicants: Rover Pipeline LLC.

Description: § 4(d) Rate Filing:

Summary of Negotiated Rate Capacity Release Agreements 5-1-2024 to be effective 5/1/2024.

Filed Date: 5/1/24.

Accession Number: 20240501-5228.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24-740-000.

Applicants: ANR Pipeline Company.

Description: Compliance filing: 2024 Operational Purchases and Sales Report to be effective N/A.

Filed Date: 5/1/24.

Accession Number: 20240501-5229.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24-741-000.

Applicants: El Paso Natural Gas

Company, L.L.C.

Description: § 4(d) Rate Filing: Non-Conforming Agreements Update (AEPCO) to be effective 6/1/2024.

Filed Date: 5/1/24.

Accession Number: 20240501-5233.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24-742-000.

Applicants: ANR Pipeline Company.

Description: § 4(d) Rate Filing:

Cashout Surcharge 2024 to be effective 6/1/2024.

Filed Date: 5/1/24.

Accession Number: 20240501-5238.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24-743-000.

Applicants: Gulf South Pipeline

Company, LLC.

Description: § 4(d) Rate Filing:

Regulatory Cost Recovery Mechanism to be effective 11/1/2024.

Filed Date: 5/1/24.

Accession Number: 20240501-5255.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24-744-000.

Applicants: Southern Natural Gas

Company, L.L.C.

Description: § 4(d) Rate Filing: SNG Rate Case—2024 to be effective 11/1/2024.

Filed Date: 5/1/24.

Accession Number: 20240501-5258.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24-745-000.

Applicants: Gulfstream Natural Gas

System, L.L.C.

Description: Compliance filing: 2024 GNGS TUP/SBA Annual Filing to be effective N/A.

Filed Date: 5/1/24.

Accession Number: 20240501-5295.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–746–000.
Applicants: Sabal Trail Transmission, LLC.
Description: § 4(d) Rate Filing: 2024 TUP/SBA Annual Filing to be effective 6/1/2024.

Filed Date: 5/1/24.

Accession Number: 20240501–5308.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–747–000.
Applicants: Gulf Run Transmission, LLC.

Description: Compliance filing: System Balancing Adjustment filed on 5–1–2024 to be effective N/A.

Filed Date: 5/1/24.

Accession Number: 20240501–5388.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–748–000.
Applicants: Gulf Run Transmission, LLC.

Description: Compliance filing: Operational Purchases and Sales of Gas Report Filed on 5–1–2024 to be effective N/A.

Filed Date: 5/1/24.

Accession Number: 20240501–5391.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–749–000.
Applicants: Gulf Run Transmission, LLC.

Description: § 4(d) Rate Filing: Transporter's Use Filing—Effective 6–1–2024 to be effective 6/1/2024.

Filed Date: 5/1/24.

Accession Number: 20240501–5397.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–750–000.
Applicants: Double E Pipeline, LLC.

Description: Annual System Balancing Adjustment of Double E Pipeline, LLC.

Filed Date: 5/1/24.

Accession Number: 20240501–5447.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–751–000.
Applicants: BBT Midla, LLC.
Description: Annual Unaccounted for Gas Retention Percentage of BBT Midla, LLC.

Filed Date: 5/1/24.

Accession Number: 20240501–5450.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–752–000.
Applicants: Ozark Gas Transmission, L.L.C.

Description: Annual Fuel Filing of Ozark Gas Transmission, L.L.C.

Filed Date: 5/1/24.

Accession Number: 20240501–5453.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–753–000.
Applicants: PDC Permian, Inc., Chevron U.S.A. Inc.

Description: Joint Petition for Temporary Waiver of Capacity Release Regulations, et al. of PDC Permian, Inc., et al.

Filed Date: 5/1/24.

Accession Number: 20240501–5487.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–754–000.

Applicants: Equitrans, L.P.

Description: § 4(d) Rate Filing: Formula Based Negotiated Rate Agreement—6/19/2024 to be effective 6/19/2024.

Filed Date: 5/2/24.

Accession Number: 20240502–5039.

Comment Date: 5 p.m. ET 5/14/24.

Docket Numbers: RP24–755–000.
Applicants: Dauphin Island Gathering Partners.

Description: § 4(d) Rate Filing: Chevron—Negotiated Rate effective 5–1–24 to be effective 5/1/2024.

Filed Date: 5/2/24.

Accession Number: 20240502–5082.

Comment Date: 5 p.m. ET 5/14/24.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) 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: RP24–744–001.

Applicants: Southern Natural Gas Company, L.L.C.

Description: Tariff Amendment: Amendment RP24–744 SNG Rate Case—2024 to be effective 6/1/2024.

Filed Date: 5/2/24.

Accession Number: 20240502–5112.

Comment Date: 5 p.m. ET 5/14/24.

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.

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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: May 2, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–10035 Filed 5–7–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2735–104]

Pacific Gas and Electric Company; Notice of Application Tendered for Filing With the Commission and Soliciting Additional Study Requests and Establishing Procedural Schedule for Relicensing and a Deadline for Submission of Final Amendments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 2735–104.

c. *Date Filed:* April 18, 2024.

d. *Applicant:* Pacific Gas and Electric Company (PG&E).

e. *Name of Project:* Helms Pumped Storage Project.

f. *Location:* About 50 miles northeast of the city of Fresno, on the North Fork Kings River and Helms Creek, in Fresno and Madera Counties, California. The project occupies 3,346.6 acres of National Forest Service land, 28.36 acres of Bureau of Reclamation land, 0.07 acre of Bureau of Land Management land.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Dave Gabbard, Vice President Power Generation, Pacific Gas and Electric Company, 300 Lakeside Drive, Oakland, CA 94612; telephone at (650) 207–9705; email at David.gabbard@pge.com.

i. *FERC Contact:* Evan Williams, Project Coordinator, West Branch, Division of Hydropower Licensing; telephone at (202) 502–8138; email at Evan.Williams@ferc.gov.

j. Cooperating agencies: Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues

that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See* 94 FERC ¶ 61,076 (2001).

k. Pursuant to section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.

l. *Deadline for filing additional study requests and requests for cooperating agency status:* June 17, 2024.

The Commission strongly encourages electronic filing. Please file additional study requests and requests for cooperating agency status using the Commission's eFiling system at <https://ferconline.ferc.gov/FEROnline.aspx>. For assistance, please contact FERC Online Support at FEROnlineSupport@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: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852. All filings must clearly identify the project name and docket number on the first page: Helms Pumped Storage Project (P-2735-104).

m. The application is not ready for environmental analysis at this time.

n. *Project Description:* The Helms Pumped Storage Project (project) includes: (1) a 132-foot-long, by 89-foot-wide, by 58.5-foot-high concrete intake-discharge structure (Courtright Intake-Discharge Structure), with metal trash racks, in Courtright Lake; (2) one 4,243-foot-long tunnel (Tunnel 1) composed of two sections: (a) a 3,312-foot-long, 27-foot-diameter concrete-lined section; and (b) a 931-foot-long, 22-foot-diameter steel-lined section; (3) a 32.5-foot-long, by 38-foot-wide, by 45-foot-high gatehouse; (4) a 206-foot-long, 22-foot-

diameter, above-ground steel pipe that connects Tunnel 1 and Tunnel 2; (5) one 9,016-foot-long tunnel (Tunnel 2) composed of two sections: (a) a 764-foot-long, 22-foot-diameter steel-lined section; and (b) a 8,252-foot-long, 27-foot-diameter concrete-lined section; (6) a 600-foot-long adit of an unknown diameter, with an adit plug with frame and gate; (7) a 535-foot-high, vertical shaft surge chamber for Tunnel 2 with a 47-foot-diameter lower section and 60-foot-diameter upper section, with 12 feet of the chamber exposed above grade; (8) a 2,205-foot-long penstock composed of three sections: (a) a 1,070-foot-long, 27-foot-diameter concrete-lined section; (b) a 300-foot-long, 27-foot-diameter concrete-lined section; and (c) a 330-foot-long, 27-foot-diameter concrete-lined manifold section, that branches into three, 505-foot-long steel-lined penstocks, that reduce in diameter from 15.5 feet, to 11.5 feet, to 10.5 feet until connecting to the turbine-generator; (9) a 336-foot-long, by 83-foot-wide, by 125-foot-high excavated rock chamber underground powerhouse that includes three, 360-megawatt (MW) vertical Francis-type pump-turbine units, for a total installed capacity of 1,080 MW, and three, vertical indoor generators with an approximate total nameplate capacity of 1,212 MW; (10) a 3,727-foot-long, 27-foot-diameter concrete-lined tunnel (Tunnel 3); (11) a 984-foot-tall, vertical shaft surge chamber for Tunnel 3 with a 27-foot-diameter lower section and a 44-foot-diameter upper section that transitions into a 10-foot-diameter air shaft topped by a 10-foot-tall, 14-foot-diameter protective device above grade; (12) an 88-foot-long, by 78-foot-wide, by 51-foot-high concrete intake-discharge structure (Wishon Intake-Discharge Structure), with metal trash racks, in Lake Wishon; (13) a 220-foot by- 265-foot above ground, fenced switchyard; (14) an underground transformer bank of 10 transformers with a capacity of 150,000 kilo-volt-amperes each; (15) a 3,723-foot-long, 30-foot-wide, 25-foot-high powerhouse access tunnel; and (16) appurtenant facilities.

Although the project facilities do not include any dam or reservoir, PG&E operates the project for power generation using Courtright Lake (upper reservoir) and Lake Wishon (lower reservoir), impounded by Courtright Dam and Wishon Dam, respectively, which are licensed project facilities of the Hass-Kings River Hydroelectric Project (Project No. P-1988). Courtright Lake has a usable storage area of approximately 123,184 acre-feet and normal maximum and minimum water

surface elevations of 8,184 feet and 8,050 feet, respectively. Lake Wishon has a usable storage area of approximately 128,606 acre-feet and normal maximum and minimum water surface elevations of 6,550 feet and 6,428.9 feet, respectively. To generate power, water is released from Courtright Lake through the Courtright Intake-Discharge Structure, Tunnel 1, Tunnel 2, and the penstock, into the powerhouse and is discharged through Tunnel 3 and the Wishon Intake-Discharge Structure into Lake Wishon. During periods of low energy demand, water is pumped through these project facilities in reverse (*i.e.*, from Lake Wishon to Courtright Lake).

The project generators are connected to the regional electric grid by: (1) an underground transformer bank of 10 transformers with a capacity of 150,000 kilo-volt-amperes each; (2) a 220-foot by- 265-foot above ground, fenced switchyard; and (3) a 60.7-mile-long, double-circuit 230-kilovolt (kV) transmission line that connects the Helms switchyard to PG&E's interconnection point with the grid at the non-project Gregg Substation. The project also includes an approximately 1.8-mile-long, 21-kV distribution line from the non-project Woodchuck Substation to the Helms Headquarters and Helms Powerhouse and an approximately 2-mile-long, 21-kV distribution line from the non-project Woodchuck Substation to the Helms Support Facility and non-project Wishon Village Recreational Vehicle Park.

The project also includes: (1) the Helms Headquarters facility with ancillary facilities; (2) the Helms Support Facility with ancillary facilities; (3) project recreation facilities including the: (a) Courtright Boat Launch; (b) Trapper Springs Campground; (c) Marmot Rock Campground; (d) Wee-Mee-Kute Fishing Access; (e) Wishon Boat Launch; (f) Lily Pad Campground; (g) Upper Kings River Group Campground; (h) Wishon Dam Fishing Access; (i) Short Hair Creek Fishing Access; (j) Coolidge Meadow Fishing Access; (k) Helms Picnic Area; (l) Upper Kings River Fishing Access, and their ancillary facilities and amenities; (3) an approximately 80-acre Wildlife Habitat Management Area; (4) three, approximately 87-foot-diameter asphalt-surfaced helicopter landing pads; (5) 36.45 miles of non-recreation, vehicular project roads and trails; and (6) 1.08 miles of non-recreation, pedestrian project trails.

In generating mode, each pump-turbine unit has a rated capacity of 3,400 cubic feet per second (cfs), at the

design head of 1,625 feet. The maximum hydraulic capacity of the powerhouse in generating mode when all three units are operating at or near full load is 10,500 cfs. In pumping mode, each pump-turbine has a rated capacity of 2,400 cfs at a design head of 1,500 feet, with a total maximum capacity of 7,350 cfs and 7,530 cfs. The average annual energy production of the project from 2015 through 2020 was 736.6 gigawatt-hours.

The current license requires PG&E to maintain water levels as high as possible, to the extent consistent with efficient project operation, in Courtright Lake on weekends during the recreation season for the benefit of recreational use at the lake, and to coordinate operational use of Courtright Lake and Lake Wishon with its Haas-Kings River Hydroelectric Project No. 1988 (Haas-Kings River Project). PG&E currently maintains the surface elevation of the impoundment between 363.5 feet and 364.0 feet BCD, with a normal impoundment elevation of 363.8 feet BCD. PG&E currently coordinates operation of the project with its Haas-Kings River Hydroelectric Project No. 1988 and Balch Hydroelectric Project No. 175.

PG&E proposes to continue operating the project in a manner that is consistent with current operation. Additionally, PG&E proposes the following plans and measures to protect and enhance environmental resources: (1) Recreation Management Plan; (2) Coordination Between P-2735 and P-1988; (3) Biological Resources Management Plan; (4) Hazardous Substance Plan; (5) Ownership of P-2735 and/or P-1988; (6) Visual Resources Management; (7) Fire Management and Response Plan; (8) Transportation System Management; (9) Historic Properties Management Plan; and (10) Supplemental Fish Stocking.

PG&E proposes to modify the existing project boundary to encompass all facilities necessary for operation and maintenance of the project. Conversely, PG&E proposes to modify the boundary to remove lands and facilities from the existing project boundary that are not necessary for operation and maintenance of the project. PG&E proposes to modify the project boundary around the Haas-Kings River Project's Courtright Lake and Lake Wishon to remove land from the boundary around the reservoirs that is not required for project operations and maintenance. PG&E also proposes to modify the project boundary around: Trapper Springs Campground; Marmot Rock Water Pipe Access Road; Lost Canyon Pipe; Lost Canyon Crossing Road; Helms

Switchyard; Haas 21-kV distribution line #1; Helms Headquarters, including water tank and water tank access road; Lily Pad Campground; and numerous project access roads and trails. With these proposed changes, the area of PG&E-owned land within the project boundary will decrease to 807.74 acres, and federal lands will decrease to 2,918.42 acres. The area of private lands encompassed by the project boundary will increase to 583.1 acres.

o. In addition to publishing the full text of this notice in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this notice, as well as other documents in the proceeding (e.g., license application) via the internet through the Commission's Home Page (<http://www.ferc.gov>) using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document (P-4113). For assistance, contact FERC at FERCOnlineSupport@ferc.gov, (866) 208-3676 (toll free), or (202) 502-8659 (TTY).

You may also register online at <https://ferconline.ferc.gov/FERConline.aspx> to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

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.

q. *Procedural Schedule*: The application will be processed according to the following preliminary schedule. Revisions to the schedule will be made as appropriate.

Issue Deficiency Letter and Request Additional Information—June 2024
Issue Scoping Document 1 for comments—August 2024
Request Additional Information (if necessary)—September 2024
Issue Acceptance Letter—September 2024
Issue Scoping Document 2 (if necessary)—November 2024
Issue Notice of Ready for Environmental Analysis—November 2024
r. Final amendments to the application must be filed with the

Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: May 2, 2024.

Debbie-Anne A. Reese,
Acting Secretary.

[FR Doc. 2024-10039 Filed 5-7-24; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2300-052]

Great Lakes Hydro America, LLC; Notice of Availability of Draft Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR part 380, the Office of Energy Projects has reviewed the application for license for the Shelburne Hydroelectric Project, located on the Androscoggin River in Coos County, New Hampshire and has prepared a Draft Environmental Assessment (DEA) for the project. No Federal land is occupied by project works or located within the project boundary.

The DEA contains staff's analysis of the potential environmental impacts of the project and concludes that licensing the project, with appropriate environmental protective measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

The Commission provides all interested persons with an opportunity to view and/or print the DEA via the internet through the Commission's Home Page (<http://www.ferc.gov/>), using the "eLibrary" link. Enter the docket number, excluding the last three digits in the docket number field, to access the document. For assistance, contact FERC Online Support at FERCOnlineSupport@ferc.gov, or toll-free at (866) 208-3676, or for TTY, (202) 502-8659.

You may also register online at <https://ferconline.ferc.gov/eSubscription.aspx> to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Any comments should be filed within 30 days from the date of this notice.

The Commission strongly encourages electronic filing. Please file comments using the Commission's eFiling system at <https://ferconline.ferc.gov/>

FERCOnline.aspx. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <https://ferconline.ferc.gov/> *QuickComment.aspx*. For assistance, please contact FERC Online Support. In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Debbie-Anne A. Reese, Acting 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. The first page of any filing should include docket number P-2300-052.

Any questions regarding this notice may be directed to Ryan Hansen at (202) 502-8074 or ryan.hansen@ferc.gov.

Dated: May 1, 2024.

Debbie-Anne A. Reese,
Acting Secretary.

[FR Doc. 2024-09977 Filed 5-7-24; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER24-1862-000]

Kimmel Road Solar, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Kimmel Road Solar, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and

assumptions of liability, is May 21, 2024.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

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: May 1, 2024.

Debbie-Anne A. Reese,
Acting Secretary.

[FR Doc. 2024-09980 Filed 5-7-24; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 175-032]

Pacific Gas and Electric Company; Notice of Application Tendered for Filing With the Commission and Soliciting Additional Study Requests and Establishing Procedural Schedule for Relicensing and a Deadline for Submission of Final Amendments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 175-032.

c. *Date Filed:* April 18, 2024.

d. *Applicant:* Pacific Gas and Electric Company (PG&E).

e. *Name of Project:* Balch Hydroelectric Project.

f. *Location:* On the North Fork Kings River in Fresno County, California. The project occupies 506.28 acres of Federal land managed by the U.S. Forest Service.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Dave Gabbard, Vice President, Power Generation, Pacific Gas and Electric Company, 300 Lakeside Drive, Oakland, California 94612; telephone at (620) 207-9705; email at david.gabbard@pge.com.

i. *FERC Contact:* Benjamin Mann, Project Coordinator, West Branch, Division of Hydropower Licensing; telephone at (202) 502-8127; email at benjamin.mann@ferc.gov.

j. *Cooperating agencies:* Federal, State, local, and Tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. See 94 FERC ¶ 61,076 (2001).

k. Pursuant to section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.

l. *Deadline for filing additional study requests and requests for cooperating agency status:* June 17, 2024.

The Commission strongly encourages electronic filing. Please file additional study requests and requests for cooperating agency status using the Commission's eFiling system at <https://ferconline.ferc.gov/ferconline.aspx>. 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: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 888 First Street

NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852. All filings must clearly identify the project name and docket number on the first page: Balch Hydroelectric Project (P-175-032).

m. The application is not ready for environmental analysis at this time.

n. *Project Description:* The Balch Hydroelectric Project (project) consists of the following facilities: (1) a 135-foot-high, 396-foot-long diversion dam with a crest elevation of 4,098 feet that includes a 364-foot-long spillway and is located on the North Fork Kings River 9.9 miles upstream of the confluence with Kings River; (2) the 35-acre Black Rock Reservoir with a usable storage capacity of 1,260 acre-feet at a normal water surface elevation of 4,097 feet; (3) an 11-foot-high, concrete tunnel intake; (4) a water conveyance system consisting of: (a) a 19,336-foot-long tunnel with a maximum hydraulic capacity of 760 cubic feet per second (cfs) that includes the 308-foot-long Black Rock Adit, the 350-foot-long Weir Creek Adit, an unlined surge chamber, and two sluice channels; (5) a 4,905.6-foot-long penstock leading to the Balch No. 1 Powerhouse and a 4,933.3-foot-long penstock leading to the Balch No. 2 Powerhouse; (6) the 65.5-foot-long, 80.5-foot-wide Balch No. 1 Powerhouse housing one turbine-generator unit with an authorized installed capacity of 31.02 megawatts (MW) and a maximum hydraulic capacity of 213 cfs; (7) the 149-foot-long, 84-foot-wide Balch No. 2 Powerhouse housing two turbine-generator units with a total authorized installed capacity of 105 MW and a maximum hydraulic capacity of 315 cfs; (8) a 165-foot-high, 238-foot-long afterbay dam with a crest elevation of 1,704 feet that includes a 238-foot-long spillway; (9) a 7-acre afterbay with a usable storage capacity of 135 acre-feet; (10) project roads and trails; (11) recreation facilities; (12) a 22-mile-long, 115-kilovolt (kV) transmission line connecting the project with the grid at Piedra Junction; (13) the 76-acre Balch Camp, which is the project operating headquarters and includes personnel housing; (14) a 6.2-mile-line, 12-kV distribution line connecting Balch Camp with the project's diversion dam; and (15) appurtenant facilities.

The Balch Project is located downstream of PG&E's Haas-Kings River Hydroelectric Project No. 1988 and Helms Pumped Storage Project No. 2735, which use the same reservoirs (Courtright Lake and Lake Wilshon) for

operation. The project is operated as a peaking facility to generate power that is released from upstream storage to meet power demand and for irrigation purposes. Project operation is coordinated with Project No. 1988, whose releases from Lake Wilshon largely control inflow to Black Rock Reservoir; however, spill fluctuations at the project are possible at times when inflow exceeds powerhouse capacity and during powerhouse outages.

The current license requires PG&E to maintain the following continuous minimum flows in the North Kings River: (1) during normal water years: (a) from June 1 through November 31, 5 cfs from Black Rock Reservoir, 15 cfs from Balch Afterbay, and 30 cfs of total river flow; and (b) from December 1 through May 31, 2.5 cfs from Black Rock Reservoir, 10 cfs from Balch Afterbay, and 30 cfs of total river flow; (2) during dry water years, as defined by the California Department of Water Resources, year-round flows of 2.5 cfs from Black Rock Reservoir, 10 cfs from Balch Afterbay, and 20 cfs of total river flow.

PG&E proposes to continue operating the project in a manner that is consistent with current operation, with the exception of the following new proposed measures: (1) minimum flows and water year types, (2) a recreation plan, (3) a biological resources management plan, (4) a historic properties management plan, (5) low-level operations, (6) flood period operations, (7) a hazardous substance plan, (8) a gaging plan, (9) visual resources management, (10) a fire management and response plan, and (11) a transportation system management plan.

o. In addition to publishing the full text of this notice in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this notice, as well as other documents in the proceeding (e.g., license application) via the internet through the Commission's Home Page (<http://www.ferc.gov>) using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document (P-175). For assistance, contact FERC at FERCOnlineSupport@ferc.gov, (866) 208-3676 (toll free), or (202) 502-8659 (TTY).

You may also register online at <https://ferconline.ferc.gov/FERCOnline.aspx> to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

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.

q. *Procedural Schedule:* The application will be processed according to the following preliminary schedule. Revisions to the schedule will be made as appropriate.

Issue Deficiency Letter and Request Additional Information—June 2024
Issue Scoping Document 1 for comments—August 2024
Request Additional Information (if necessary)—September 2024
Issue Acceptance Letter—November 2024
Issue Scoping Document 2 (if necessary)—November 2024
Issue Notice of Ready for Environmental Analysis—November 2024

r. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: May 2, 2024.

Debbie-Anne A. Reese,
Acting Secretary.

[FR Doc. 2024-10041 Filed 5-7-24; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 3063-029]

Blackstone Hydro Associates; Notice of Effectiveness of Withdrawal of Operations Compliance Monitoring Plan

On August 4, 2023 and supplemented on August 21, 2023, Blackstone Hydro Associates (licensee), filed an Operation Compliance Monitoring Plan for the Central Falls Hydroelectric Project No. 3063. On April 9, 2024, the licensee filed a request to withdraw its Operation Compliance Monitoring Plan.

No motion in opposition to the request for withdrawal has been filed, and the Commission has taken no action to disallow the withdrawal. Pursuant to Rule 216(b) of the Commission's Rules

of Practice and Procedure,¹ the withdrawal of the application became effective on April 24, 2024, and this proceeding is hereby terminated.

Dated: May 2, 2024.

Debbie-Anne A. Reese,
Acting Secretary.

[FR Doc. 2024–10037 Filed 5–7–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: PR24–67–000.
Applicants: NET Mexico Pipeline Partners, LLC.

Description: 284.123 Rate Filing: Audit Compliance to be effective 5/1/2024.

Filed Date: 4/30/24.

Accession Number: 20240430–5261.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: RP24–717–000.

Applicants: Rover Pipeline LLC.

Description: 4(d) Rate Filing:

Amended Non-Conforming Agreement—Ascent to be effective 5/1/2024.

Filed Date: 4/30/24.

Accession Number: 20240430–5193.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–718–000.

Applicants: Transcontinental Gas Pipe Line Company, LLC.

Description: 4(d) Rate Filing: LSS and SS–2 Tracker Filing effective May 1, 2024 to be effective 5/1/2024.

Filed Date: 4/30/24.

Accession Number: 20240430–5202.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–719–000.

Applicants: Tennessee Gas Pipeline Company, L.L.C.

Description: 4(d) Rate Filing: Negotiated Rate Agreement Filing Various Effective May 1, 2024 to be effective 5/1/2024.

Filed Date: 4/30/24.

Accession Number: 20240430–5246.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–720–000.

Applicants: Northern Natural Gas Company.

Description: 4(d) Rate Filing: 20240430 Negotiated Rate to be effective 5/1/2024.

Filed Date: 4/30/24.

Accession Number: 20240430–5260.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–721–000.

Applicants: Ruby Pipeline, L.L.C.

Description: 4(d) Rate Filing: RP 2024–04–30 FL&U and EPC Rate Adjustment to be effective 6/1/2024.

Filed Date: 4/30/24.

Accession Number: 20240430–5269.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–722–000.

Applicants: Sierrita Gas Pipeline LLC.

Description: 4(d) Rate Filing: 2024

Apr Quarterly FL&U Filing to be effective 6/1/2024.

Filed Date: 4/30/24.

Accession Number: 20240430–5272.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–723–000.

Applicants: Cove Point LNG, LP.

Description: 4(d) Rate Filing: Cove Point—LTD–1 Abandonment Implementation (CP23–539) to be effective 5/1/2024.

Filed Date: 4/30/24.

Accession Number: 20240430–5284.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–724–000.

Applicants: Cheyenne Plains Gas Pipeline Company, L.L.C.

Description: 4(d) Rate Filing: Fuel and LU Annual Update and OPS Report 2024 to be effective 6/1/2024.

Filed Date: 4/30/24.

Accession Number: 20240430–5325.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–725–000.

Applicants: Alliance Pipeline L.P.

Description: Annual Report of Operational Purchases and Sales of Alliance Pipeline L.P.

Filed Date: 4/30/24.

Accession Number: 20240430–5335.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–726–000.

Applicants: Wyoming Interstate Company, L.L.C.

Description: 4(d) Rate Filing: Fuel LU Quarterly Update Filing Eff June 2024 to be effective 6/1/2024.

Filed Date: 4/30/24.

Accession Number: 20240430–5344.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–727–000.

Applicants: Double E Pipeline, LLC.

Description: 4(d) Rate Filing:

Negotiated Rate & Non-Conforming Agreement—MRC Permian Company to be effective 5/1/2024.

Filed Date: 4/30/24.

Accession Number: 20240430–5374.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–728–000.

Applicants: Transcontinental Gas Pipe Line Company, LLC.

Description: 4(d) Rate Filing: GT&C Section 49—Open Season Postings for

Future (91Day–3Yr) Capacity to be effective 6/1/2024.

Filed Date: 5/1/24.

Accession Number: 20240501–5003.

Comment Date: 5 pm ET 5/13/24.

Docket Numbers: RP24–729–000.

Applicants: Northern Natural Gas Company.

Description: 4(d) Rate Filing: 20240501 Winter PRA to be effective 11/1/2024.

Filed Date: 5/1/24.

Accession Number: 20240501–5084.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–730–000.

Applicants: Texas Eastern Transmission, LP.

Description: 4(d) Rate Filing: Negotiated Rates—Various Releases eff 5–1–24 to be effective 5/1/2024.

Filed Date: 5/1/24.

Accession Number: 20240501–5115.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–731–000.

Applicants: Southeast Supply Header, LLC.

Description: 4(d) Rate Filing: 2024 SESH TUP/SBA Annual Filing to be effective 6/1/2024.

Filed Date: 5/1/24.

Accession Number: 20240501–5118.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–732–000.

Applicants: Alliance Pipeline L.P.

Description: 4(d) Rate Filing:

Negotiated Rates—Various May 1 2024 Releases to be effective 5/1/2024.

Filed Date: 5/1/24.

Accession Number: 20240501–5120.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–733–000.

Applicants: Gulf South Pipeline Company, LLC.

Description: 4(d) Rate Filing: Cap Rel Neg Rate Agmts (Santa Rosa 42487 to Southern Company Services 58164) to be effective 5/1/2024.

Filed Date: 5/1/24.

Accession Number: 20240501–5129.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–734–000.

Applicants: Maritimes & Northeast Pipeline, L.L.C.

Description: 4(d) Rate Filing: Negotiated Rates—Northern to NRG Business 3093 eff 5–1–24 to be effective 5/1/2024.

Filed Date: 5/1/24.

Accession Number: 20240501–5131.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–735–000.

Applicants: NEXUS Gas Transmission, LLC.

Description: 4(d) Rate Filing: Negotiated Rates—Various Releases eff 5–1–2024 to be effective 5/1/2024.

Filed Date: 5/1/24.

¹ 18 CFR 385.216(b) (2023).

Accession Number: 20240501–5139.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–736–000.

Applicants: Northern Border Pipeline Company.

Description: 4(d) Rate Filing: Administrative Clean Up to be effective 6/1/2024.

Filed Date: 5/1/24.

Accession Number: 20240501–5152.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–737–000.

Applicants: Equitrans, L.P.

Description: 4(d) Rate Filing: Negotiated Rate Capacity Release Agreements 05012024 to be effective 5/1/2024.

Filed Date: 5/1/24.

Accession Number: 20240501–5175.

Comment Date: 5 p.m. ET 5/13/24.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

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: May 1, 2024.

Debbie-Anne A. Reese,
Acting Secretary.

[FR Doc. 2024–09982 Filed 5–7–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC24–41–001.

Applicants: Tri-State Generation and Transmission Association, Inc.

Description: Notice of Non-Material Change in Circumstances of Tri-State Generation and Transmission Association, Inc.

Filed Date: 5/1/24.

Accession Number: 20240501–5489.

Comment Date: 5 p.m. ET 5/22/24.

Docket Numbers: EC24–76–000.

Applicants: David Energy Supply, LLC.

Description: Application for Authorization under Section 203 of the Federal Power Act of David Energy Supply, LLC.

Filed Date: 5/1/24.

Accession Number: 20240501–5490.

Comment Date: 5 p.m. ET 5/22/24.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1852–093; ER19–774–012; ER10–2641–047.

Applicants: Oleander Power Project, Limited Partnership, Stanton Clean Energy, LLC, Florida Power & Light Company.

Description: Notice of Change in Status of Florida Power & Light Company, et al.

Filed Date: 5/1/24.

Accession Number: 20240501–5492.

Comment Date: 5 p.m. ET 5/22/24.

Docket Numbers: ER10–2475–032; ER10–1520–015; ER10–1521–015; ER10–2474–031; ER10–3246–025; ER11–4666–006; ER11–4667–006; ER12–295–005; ER13–1266–050; ER15–2211–047; ER20–2493–010; ER22–1385–009; ER23–674–006; ER23–676–006.

Applicants: BHE Power Watch, LLC, BHE Wind Watch, LLC, BHER Market Operations, LLC., OTCF, LLC, MidAmerican Energy Services, LLC, CalEnergy, LLC, NaturEner Rim Rock Wind Energy, LLC, NaturEner Glacier Wind Energy 2, LLC, NaturEner Glacier Wind Energy 1, LLC, PacifiCorp, Sierra Pacific Power Company, Occidental Power Marketing, L.P., Occidental Power Services, Inc., Nevada Power Company.

Description: Notice of Non-Material Change in Status of Nevada Power Co., et al.

Filed Date: 4/30/24.

Accession Number: 20240430–5644.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER20–720–001; ER16–1804–004; ER20–721–001; ER20–886–001; ER21–6–002; ER21–2140–001; ER21–2217–005; ER22–484–002; ER23–101–002; ER23–102–002; ER23–103–002; ER23–104–002; ER23–1812–001; ER24–966–002.

Applicants: Eleven Mile Solar Center, LLC, Sunflower Energy Center, LLC, Sunrise Wind LLC, South Fork Wind, LLC, Revolution Wind, LLC, North East Offshore, LLC, Ford County Wind Farm LLC, Lincoln Land Wind, LLC, Haystack Wind Project, LLC, Muscle Shoals Solar, LLC, Orsted US Trading LLC, Willow Creek Wind Power LLC, Deepwater Wind Block Island, LLC, Plum Creek Wind, LLC.

Description: Notice of Change in Status of Plum Creek Wind, LLC, et al.
Filed Date: 4/30/24.

Accession Number: 20240430–5645.

Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER23–1762–003; ER23–1764–003; ER23–1820–003.

Applicants: Evergy Kansas Central, Inc., Southwest Power Pool, Inc., Evergy Kansas Central, Inc.

Description: Settlement Implementation Compliance Filing of Evergy Kansas Central, Inc., et al.

Filed Date: 5/1/24.

Accession Number: 20240501–5493.

Comment Date: 5 p.m. ET 5/22/24.

Docket Numbers: ER24–1581–001.

Applicants: Alabama Power Company, Georgia Power Company, Mississippi Power Company.

Description: Tariff Amendment: Alabama Power Company submits tariff filing per 35.17(b): Kirkham Solar Farms I (Kirkham L&MA) LGIA Amendment Filing to be effective 3/8/2024.

Filed Date: 5/2/24.

Accession Number: 20240502–5117.

Comment Date: 5 p.m. ET 5/23/24.

Docket Numbers: ER24–1611–001.

Applicants: Alabama Power Company, Georgia Power Company, Mississippi Power Company.

Description: Tariff Amendment: Alabama Power Company submits tariff filing per 35.17(b): Pine Belt Solar LGIA Amendment Filing to be effective 3/12/2024.

Filed Date: 5/2/24.

Accession Number: 20240502–5121.

Comment Date: 5 p.m. ET 5/23/24.

Docket Numbers: ER24–1891–001.

Applicants: Idaho Power Company.

Description: Tariff Amendment: Amendment to RS No. 175—Concurrence—Jackpot Holdings, LLC SFA to be effective 5/1/2024.

Filed Date: 5/2/24.

Accession Number: 20240502–5146.

Comment Date: 5 p.m. ET 5/23/24.
Docket Numbers: ER24–1892–001.
Applicants: Idaho Power Company.
Description: Tariff Amendment:
Amendment to RS No. 176—
Concurrence—Franklin Solar SFA to be
effective 5/1/2024.
Filed Date: 5/2/24.
Accession Number: 20240502–5147.
Comment Date: 5 p.m. ET 5/23/24.
Docket Numbers: ER24–1914–002.
Applicants: Idaho Power Company.
Description: Tariff Amendment:
Amend Tariff Name—SA 521—Kuna
Storage to be effective 1/4/2024.
Filed Date: 5/2/24.
Accession Number: 20240502–5122.
Comment Date: 5 p.m. ET 5/23/24.
Docket Numbers: ER24–1928–000.
Applicants: Midcontinent
Independent System Operator, Inc.
Description: § 205(d) Rate Filing:
2024–05–02_SA 3478 Dairyland Power-
Fillmore County Solar 2nd Rev GIA
(J718) to be effective 4/19/2024.
Filed Date: 5/2/24.
Accession Number: 20240502–5086.
Comment Date: 5 p.m. ET 5/23/24.
Docket Numbers: ER24–1929–000.
Applicants: Willowbrook Solar I, LLC.
Description: Baseline eTariff Filing:
Rate Schedule FERC No. 1 Reactive
Power Compensation Baseline to be
effective 5/24/2024.
Filed Date: 5/2/24.
Accession Number: 20240502–5098.
Comment Date: 5 p.m. ET 5/23/24.
Docket Numbers: ER24–1930–000.
Applicants: Pawtucket Power
Associates Limited Partnership.
Description: Tariff Amendment:
Notice of Cancellation to be effective 5/
3/2024.
Filed Date: 5/2/24.
Accession Number: 20240502–5123.
Comment Date: 5 p.m. ET 5/23/24.
Docket Numbers: ER24–1931–000.
Applicants: PJM Interconnection,
L.L.C.
Description: § 205(d) Rate Filing:
Amendment to WMPA, Service
Agreement No. 6213; AF1–147 to be
effective 7/2/2024.
Filed Date: 5/2/24.
Accession Number: 20240502–5135.
Comment Date: 5 p.m. ET 5/23/24.
Docket Numbers: ER24–1932–000.
Applicants: The Empire District
Electric Company.
Description: Compliance filing:
Compliance with Order 872 Amending
Cost-Based Generation Formula Rate to
be effective 5/31/2024.
Filed Date: 5/2/24.
Accession Number: 20240502–5136.
Comment Date: 5 p.m. ET 5/23/24.
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, to
protest, or to answer a complaint in any
of the above proceedings must file in
accordance with Rules 211, 214, or 206
of the Commission's Regulations (18
CFR 385.211, 385.214, or 385.206) 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.

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: May 2, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–10036 Filed 5–7–24; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–11925–01–R6]

Clean Air Act Operating Permit Program; Petition for Objection to State Operating Permit for Oxbow Calcining LLC, Jefferson County, Texas

AGENCY: Environmental Protection
Agency (EPA).

ACTION: Notice of final order on petition.

SUMMARY: The Environmental Protection
Agency (EPA) Administrator signed an
Order dated April 12, 2024, denying a
petition dated August 8, 2023, from the
Port Arthur Community Action Network
and Environmental Integrity Project (the
Petitioners). The petition requested that
the EPA object to a Clean Air Act (CAA)
title V operating permit issued by the
Texas Commission on Environmental

Quality (TCEQ) to Oxbow Calcining
located in Jefferson County, Texas.

FOR FURTHER INFORMATION CONTACT:

Jonathan Ehrhart, EPA Region 6 Office,
Air Permits Section, (214) 665–2295,
ehrhart.jonathan@epa.gov. The final
order and petition are available
electronically at: <https://www.epa.gov/title-v-operating-permits/title-v-petition-database>.

SUPPLEMENTARY INFORMATION: The EPA
received a petition from the Port Arthur
Community Action Network and
Environmental Integrity Project dated
August 8, 2023, requesting that the EPA
object to the issuance of operating
permit no. O1493, issued by TCEQ to
Oxbow Calcining in Jefferson County,
Texas. On April 12, 2024, the EPA
Administrator issued an order denying
the petition. The order itself explains
the basis for the EPA's decision.

Sections 307(b) and 505(b)(2) of the
CAA provide that a petitioner may
request judicial review of those portions
of an order that deny issues in a
petition. Any petition for review shall
be filed in the United States Court of
Appeals for the appropriate circuit no
later than July 8, 2024.

Dated: May 2, 2024.

David Garcia,

*Director, Air and Radiation Division, Region
6.*

[FR Doc. 2024–09985 Filed 5–7–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2021–0245; FRL–11924–
01–OCSPP]

Agency Information Collection Activities; Proposed Renewal of an Existing ICR Collection and Request for Comment; EPA's Safer Choice Program Product and Partner Recognition Activities (Consolidation)

AGENCY: Environmental Protection
Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the
Paperwork Reduction Act (PRA), this
document announces the availability of
and solicits public comment on the
following Information Collection
Request (ICR) that EPA is planning to
submit to the Office of Management and
Budget (OMB): “EPA's Safer Choice
Program Product and Partner
Recognition Activities (Consolidation),”
identified by EPA ICR No. 2692.02 and
OMB Control No. 2070–0221. This ICR
represents a renewal of an existing ICR
that is currently approved through May

31, 2025. Before submitting the ICR to OMB for review and approval under the PRA, EPA is soliciting comments on specific aspects of the information collection that is summarized in this document. The ICR and accompanying material are available in the docket for public review and comment.

DATES: Comments must be received on or before July 8, 2024.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2021–0245, through the Federal eRulemaking Portal at <https://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT: Katherine Sleasman, Mission Support Division (7602M), Office of Program Support, Office of Chemical Safety and Pollution Prevention, Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460–0001; telephone number: (202) 566–1204; email address: sleasman.katherine@epa.gov.

SUPPLEMENTARY INFORMATION:

I. What information is EPA particularly interested in?

Pursuant to PRA section 3506(c)(2)(A) (44 U.S.C. 3506(c)(2)(A)), EPA specifically solicits comments and information to enable it to:

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 estimates of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
3. Enhance the quality, utility, and clarity of the information to be collected.
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of

specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

II. What information collection activity or ICR does this action apply to?

Title: EPA's Safer Choice Program Product and Partner Recognition Activities (Consolidation).

EPA ICR No.: 2692.02.

OMB Control No.: 2070–0221.

ICR status: This ICR is currently approved through May 31, 2025. Under the PRA, 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 OMB control numbers for EPA's regulations in title 40 of the Code of Federal Regulations (CFR), after appearing in the **Federal Register** when approved, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers for certain EPA regulations is consolidated in 40 CFR 9.

Abstract: This ICR renewal covers the information collection activities associated with the reporting and recordkeeping requirements for individuals, businesses, organizations, and government entities participating in or collaborating with EPA's Safer Choice and Design for the Environment (DfE) programs (referred to collectively as "the Safer Choice program" in this document unless otherwise indicated). This ICR also includes additional sections for the Safer Choice cleaning service certification and third-party profiler (TPP) solicitations. These components are designed to:

- Improve data efficiency by electronic data collection via a cloud-based Salesforce system called the Safer Choice Community;
- Monitor the public's awareness of the Safer Choice program and the Safer Choice label and DfE logo;
- Clarify the Safer Choice Partner of the Year Awards application process and form;
- Describe information collected through the new Safer Choice cleaning service certification program; and,
- Clarify the TPP application process and form.

Burden statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average of 17 to 58 hours per response. Burden is defined in 5 CFR 1320.3(b).

The ICR, which is available in the docket along with other related

materials, provides a detailed explanation of the collection activities and the burden estimate that is only briefly summarized here:

Respondents/affected entities: Entities potentially affected are those that involve a wide range of sectors that participation in the Safer Choice Program including chemical manufactures, paint and coating manufacturing, merchant wholesalers, janitorial services, and environmental consulting firms. The ICR includes a list of potentially affected entities with North American Industrial Classification System (NAICS) codes provided to assist in determining potential applicability.

Respondent's obligation to respond: Voluntary.

EPA Form Numbers: 9600–017, 9600–018, 9600–019, 9600–020, 9600–021, 9600–022, 9600–023, 9600–058, 9600–059, 9600–60, 9600–061.

Frequency of response: On occasion.

Total estimated number of potential respondents: 4,539.

Total estimated average number of responses for each respondent: 1.

Total estimated annual burden hours: 4,511 hours.

Total estimated annual respondent costs: \$854,358, which includes an estimated cost of \$0 for capital investment or maintenance and operational costs.

III. Are there changes in the estimates from the last approval?

There is an increase of 1,279 hours in the total estimated respondent burden compared with that identified in the ICR currently approved by OMB. This change reflects increase in annual consumer online surveys, which increased from 2,000 to 4,000 annually, the inclusion of a new program, the "Safer Choice Cleaning Service Certification," and the inclusion of the TPP solicitation process. These changes qualify as a program change.

IV. What is the next step in the process for this ICR?

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 pursuant to 5 CFR 1320.12. EPA will issue another **Federal Register** document pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: May 2, 2024.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2024–10009 Filed 5–7–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–R02–OAR–2023–0522; FRL 11887–01–R2]

Issuance of Outer Continental Shelf Air Permit for Empire Offshore Wind, LLC; Notice of Final Action

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of final action.

SUMMARY: This notice announces that the EPA issued a final Outer Continental Shelf (OCS) air permit decision under section 328 of the Clean Air Act (CAA) and the implementing Outer Continental Shelf (OCS) air regulations of the Code of Federal Regulations (CFR) for Empire Offshore Wind, LLC to construct and operate an offshore wind farm. This final permit is for the construction and operation of the Empire Wind Project, an offshore wind farm located on the OCS within Renewable Energy Lease Area OCS–A 0512 about 12 nautical miles south of Long Island, New York, and 17 nautical miles east of Long Branch, New Jersey.

DATES: The EPA issued OCS air permit No. OCS–EPA–R2 NY 01 to Empire Offshore Wind, LLC on February 15, 2024. The permit became effective on March 16, 2024.

FOR FURTHER INFORMATION CONTACT: Viorica Petriman, Environmental Engineer, Air and Radiation Division, EPA, Region 2, at (212) 637–4021 or at petriman.viorica@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document whenever “we”, “us”, or “our” is used, we mean EPA. This **SUPPLEMENTARY INFORMATION** section is arranged as follows:

I. How can I get copies of this document and other related information?

Docket. The EPA has established a docket for this action under Docket ID Number EPA–R02–OAR–2023–0522. Publicly available docket materials, including the final OCS air permit, the EPA’s response to comments and all additional related information, are available electronically in the docket at <https://www.regulations.gov>.

II. Background

On December 1, 2023, the EPA Region 2 proposed a draft OCS air permit (draft permit) to Empire Offshore Wind, LLC, to construct and operate an offshore wind farm on Renewable Energy Lease Area OCS–A 0512 and requested public comment on the draft permit. During the public comment period, which ended on January 5, 2024, we received only one comment letter, from Empire Offshore Wind, LLC. The letter’s comments addressed only very specific permit conditions and did not raise any substantial questions. The EPA carefully reviewed the comments from Empire Offshore Wind, LLC and made only minor revisions and/or updates to a limited number of the draft permit conditions, and on February 15, 2024, issued the final OCS air permit in accordance with 40 CFR part 55. The EPA provided to the commenter and all attendees at the January 3, 2024 public hearing, among others, notice of this final permit issuance and information regarding the opportunity to appeal the final OCS air permit administratively by filing a petition with the Environmental Appeals Board (EAB) within thirty (30) days of the EPA’s notice of the final permit decision, consistent with 40 CFR 124.19.

40 CFR 124.19(l)(3)(ii) requires that the EPA provide notice in the **Federal Register** of any final agency action regarding OCS Air Permits issued pursuant to 40 CFR part 55.

Section 307(b)(1) of the CAA provides for judicial review of the final agency action within sixty (60) days from the date on which notice of the action appears in the **Federal Register**. A petition to the EAB for administrative review is a prerequisite to seeking judicial review. 40 CFR 124.19(l). Since no such petitions for administrative review were submitted for the Empire Offshore Wind final OCS air permit, no judicial review for this final OCS air permit may be sought. Under section 307(b)(2) of the CAA, this determination to issue a final OCS air permit shall not be subject to later judicial review in civil or criminal proceedings for enforcement.

III. Effect of This Action

Since changes were made from draft to the final permit, but no petition for review was filed with the EAB, the final OCS air permit became effective on March 16, 2024, consistent with 40 CFR 124.15(b). This final OCS air permit will expire as provided within its permit conditions.

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

Lisa Garcia,

Regional Administrator, Region 2.

[FR Doc. 2024–10029 Filed 5–7–24; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0355; FR ID 218494]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission’s burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before July 8, 2024. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email PRA@fcc.gov and to nicole.ongele@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele, (202) 418-2991.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060-0355.

Title: Rate-of-Return Reports.

Form Numbers: FCC Form 492.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 35 respondents; 35 responses.

Estimated Time per Response: 10 hours.

Frequency of Response: Annual reporting requirement and recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 160, 161, 209(b) and 220 as amended by the Communications Act of 1934, as amended.

Total Annual Burden: 350 hours.

Total Annual Cost: No cost.

Needs and Uses: The filing of FCC Form 492 is required by 47 CFR 65.600 of the Commission's rules. The annual filing of FCC Form 492 is required from the National Exchange Carrier Association (NECA) collectively for carriers that participate in both its tariffs and revenue-sharing pools and each local exchange carrier that is subject to section 61.38 of the Commission's Rules and that has filed individual access tariffs during the enforcement period, excluding carriers that elected incentive regulation for business data services (BDS) pursuant to the *Rate-of-Return BDS Order*, WC Docket No. 16-143 et al., Report and Order, 33 FCC Rcd 10403 (2018).

These data provide the necessary detail to enable the Commission to fulfill its regulatory responsibilities. The Commission has granted AT&T, Verizon, legacy Qwest, and other similarly-situated carriers forbearance from FCC Form 492-A. See Petition of AT&T Inc. for Forbearance under 47 U.S.C. 160 from Enforcement of Certain of the Commission's Cost Assignment Rules, WC Docket Nos. 07-21, 05-342, Memorandum Opinion and Order, 23 FCC Rcd 7302 (2008) (AT&T Cost Assignment Forbearance Order).

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2024-10010 Filed 5-7-24; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060-0807, OMB 3060-1186, OMB 3060-1259; FR ID 218444]

Information Collections Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before July 8, 2024. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email PRA@fcc.gov and to nicole.ongele@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele, (202) 418-2991.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060-0807.

Title: Section 51.803 and Supplemental Procedures for Petitions Pursuant to Section 252(e)(5) of the Communications Act of 1934, as amended.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities and State, Local or Tribal government.

Number of Respondents and Responses: 60 respondents; 60 responses.

Estimated Time per Response: 40 hours per requirement.

Frequency of Response: On occasion reporting requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 252(e)(5) as amended by the Communications Act of 1934, as amended.

Total Annual Burden: 1,600 hours.

Total Annual Cost: No cost.

Needs and Uses: Any interested party seeking preemption of a state commission's jurisdiction based on the state commission's failure to act shall notify the Commission as follows: (1) File with the Secretary of the Commission a detailed petition, supported by an affidavit, that states with specificity the basis for any claim that it has failed to act; and (2) serve the state commission and other parties to the proceeding on the same day that the party serves the petition on the Commission. Within 15 days of filing the petition, the state commission and parties to the proceeding may file a response to the petition. In an OMB-approved Public Notice, DA 97-2540, released December 4, 1997, the Commission set forth procedures for filing petitions for preemption pursuant to section 252(e)(5). Section 252(e)(5) provides that "if a state commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the state commission's jurisdiction of the proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the state commission under this section with respect to the proceeding or matter and act for the state commission." All of the requirements are used to ensure that petitioners have complied with their obligations under the Communications Act of 1934, as amended.

OMB Control Number: 3060-1186.

Title: Rural Call Completion, WC Docket No. 13-39.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and

Responses: 56 respondents; 56 responses.

Estimated Time per Response: 1 hour.

Frequency of Response: Third-party disclosure requirement.

Obligation to Respond: Mandatory. Statutory authority for this collection is contained in sections 201, 202, 217, 218, 220(a), 251(a), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 201, 202, 217, 218, 220(a), 251(a), 403.

Total Annual Burden: 56 hours.

Total Annual Cost: No Cost.

Needs and Uses: The Commission has found that rural call completion is a continuing problem imposing needless economic and personal costs on local communities, and that continued Commission focus on the issue is warranted. The rural call completion contact information will be used to facilitate industry collaboration to address call completion issues.

OMB Control Number: 3060–1259.

Title: Intermediate Provider Registry, WC Docket No. 13–39.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and

Responses: 100 respondents; 100 responses.

Estimated Time per Response: 1 hour.

Frequency of Response: Third-party disclosure; one-time reporting requirement; on occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this collection is contained in sections 1, 4(i), 201(b), 202(a), 217, and 262 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 201(b), 202(a), 217, and 262.

Total Annual Burden: 100 hours.

Total Annual Cost: No cost.

Needs and Uses: The Improving Rural Call Quality and Reliability Act of 2017 (RCC Act), Public Law 115–129, requires the Commission to establish a registry for intermediate providers and requires intermediate providers register with the Commission before offering to transmit covered voice communications. The information that would continue to be collected through this information collection will be used to implement Congress's direction to the Commission to establish an intermediate provider registry.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2024–09988 Filed 5–7–24; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments, relevant information, or documents regarding the agreements to the Secretary by email at Secretary@fmc.gov, or by mail, Federal Maritime Commission, 800 North Capitol Street, Washington, DC 20573. Comments will be most helpful to the Commission if received within 12 days of the date this notice appears in the **Federal Register**, and the Commission requests that comments be submitted within 7 days on agreements that request expedited review. Copies of agreements are available through the Commission's website (www.fmc.gov) or by contacting the Office of Agreements at (202) 523–5793 or tradeanalysis@fmc.gov.

Agreement No.: 201428.

Agreement Name: ONE/COSCO WIN Slot Charter Agreement.

Parties: COSCO Shipping Lines Co., Ltd.; Ocean Network Express Pte. Ltd.

Filing Party: Joshua Stein; Cozen O'Connor.

Synopsis: The purpose of this Agreement is to authorize ONE to charter space to COSCO in the Trade between India, Pakistan, Sri Lanka, Egypt, the Mediterranean coast of Spain, the United Arab Emirates, and the Red Sea area on the one hand, and the U.S. Gulf and East Coast on the other.

Proposed Effective Date: 04/29/2024.

Location: <https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/86564>.

Agreement No.: 201427.

Agreement Name: Seven Seals Co., Ltd./Hyundai Glovis Space Charter Agreement.

Parties: Hyundai Glovis Co., Ltd.; Seven Seals Co., Ltd.

Filing Party: Wayne Rohde; Cozen O'Connor.

Synopsis: The Agreement authorizes Seven Seals to charter space to Hyundai Glovis in the trade between Japan and the U.S. Pacific Coast.

Proposed Effective Date: 04/29/2024.

Location: <https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/86563>.

Agreement No.: 201103–017.

Agreement Name: Memorandum Agreement of December 14, 1983

Concerning Assessments to Pay ILWU–PMA Employee Benefit Costs.

Parties: International Longshoremen's and Warehousemen's Union; Pacific Maritime Association.

Filing Party: Robert Magovern; Cozen O'Connor.

Synopsis: The amendment revises the divisor for the man-hour base assessment rate in the agreement, and also accordingly revises various figures set forth in Appendix 1.

Proposed Effective Date: 05/02/2024.

Location: <https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/10164>.

Dated: May 3, 2024.

Carl Savoy,

Federal Register Alternate Liaison Officer.

[FR Doc. 2024–10026 Filed 5–7–24; 8:45 am]

BILLING CODE 6730–02–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Savings and Loan Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Home Owners' Loan Act (12 U.S.C. 1461 *et seq.*) (HOLA), Regulation LL (12 CFR part 238), and Regulation MM (12 CFR part 239), and all other applicable statutes and regulations to become a savings and loan holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a savings association.

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 whether the proposed transaction complies with the standards enumerated in the HOLA (12 U.S.C. 1467a(e)).

Comments received are subject to public disclosure. In general, comments received will be made available without change and will not be modified to remove personal or business information including confidential,

contact, or other identifying information. Comments should not include any information such as confidential information that would not be appropriate for public disclosure.

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 7, 2024.

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. *The Scott J. Seligman 1993 Long Term Irrevocable Dynasty Trust and the Scott J. Seligman 1993 Irrevocable Dynasty Trust, both of Sioux Falls, South Dakota*; to register as savings and loan holding companies and to retain voting shares of Sterling Bancorp, Inc., and thereby indirectly retain voting shares of Sterling Bank and Trust, FSB, both of Southfield, Michigan.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2024-10045 Filed 5-7-24; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Solicitation of Nominations for Appointment to CDC's Advisory Committee to the Director (ACD)

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, the Centers for Disease Control and Prevention (CDC) is seeking nominations for membership on the Advisory Committee to the Director (ACD). The ACD consists of up to 15 experts knowledgeable in areas pertinent to the CDC mission, such as public health, global health, health disparities, biomedical research, and other fields, as applicable.

DATES: Nominations for membership on the ACD must be received no later than June 7, 2024. Late nominations received after this time will not be considered for the current membership cycle.

ADDRESSES: All nominations (cover letters and curriculum vitae) should be

emailed to ACDDirector@cdc.gov with the subject line: "Nomination for CDC ACD."

FOR FURTHER INFORMATION CONTACT:

Tiffany Brown JD, MPH, Centers for Disease Control and Prevention, Office of the Chief of Staff, 1600 Clifton Road NE, MS H21-10, Atlanta, Georgia 30329-4027. Telephone: (404) 498-6655; Email Address: ACDDirector@cdc.gov.

SUPPLEMENTARY INFORMATION:

Nominations are being sought for individuals who have the expertise and qualifications necessary to contribute to the accomplishments of the committee's objectives. Nominees will be selected based on expertise in the fields of public health, global health, frontline experience and lived experiences relevant to ACD areas, communication science, health systems and prevention research, and public health core capabilities such as data, lab, and workforce. Federal employees will not be considered for membership. Members may be invited to serve for four-year terms. Selection of members is based on candidates' qualifications to contribute to the accomplishment of ACD objectives. To ensure a diverse committee composition, nominees with front line and field experience at the local, state, tribal and territorial levels are encouraged to apply. This includes nominees with experience working for, and with, community-based organizations and other non-profit organizations. Selection of members is based on candidates' qualifications to contribute to the accomplishment of the ACD's objectives (<https://www.cdc.gov/faca/committees/acd.html>). Members will be required to attend ACD meetings at least two times per year (virtually or in-person), and contribute time in between meetings for research, consultation, discussion, and writing assignments.

The U.S. Department of Health and Human Services policy stipulates that committee membership be balanced in terms of points of view represented, and the Committee's function.

Appointments shall be made without discrimination basis of age, race, ethnicity, gender, sexual orientation, gender identity, HIV status, disability, and cultural, religious, or socioeconomic status. Nominees must be U.S. citizens and cannot be full-time employees of the U.S. Government. Current participation on federal workgroups or prior experience serving on a federal advisory committee does not disqualify a candidate; however, HHS policy is to avoid excessive individual service on advisory

committees and multiple committee memberships. Committee members are Special Government Employees, requiring the filing of financial disclosure reports at the beginning of and annually during their terms. CDC reviews potential candidates for ACD membership each year and provides a slate of nominees for consideration to the Secretary of HHS for final selection. HHS notifies selected candidates of their appointment near the start of the term, or as soon as the HHS selection process is completed. Note that the need for different expertise varies from year to year and a candidate who is not selected in one year may be reconsidered in a subsequent year. SGE nominees must be U.S. citizens and cannot be full-time employees of the U.S. Government. Candidates should submit the following items:

- A one-half to one-page cover letter that includes your understanding of, and commitment to, the time and work necessary; one to two sentences on your background and experience; and one to two sentences on the skills/perspective you would bring to the ACD.

- At least one letter of recommendation from person(s) not employed by the U.S. Department of Health and Human Services. (Candidates may submit letter(s) from current HHS employees if they wish, but at least one letter must be submitted by a person not employed by an HHS agency (e.g., CDC, NIH, FDA, etc.).

- Current curriculum vitae which highlights the experience and work history being sought relevant to the criteria set forth above, including complete contact information (telephone numbers, mailing address, email address).

Nominations may be submitted by the candidate him- or herself, or by the person/organization recommending the candidate.

The Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2024-10021 Filed 5-7-24; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Centers for Medicare & Medicaid Services**

[Document Identifiers: CMS–10706]

Agency Information Collection Activities: Submission for OMB Review; Comment Request**AGENCY:** Centers for Medicare & Medicaid Services, Health and Human Services (HHS).**ACTION:** Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by June 7, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: <https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing>.

FOR FURTHER INFORMATION CONTACT: William Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term "collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Extension of a currently approved information collection; *Title of Information Collection:* Generic Clearance for the Center for Clinical Standards and Quality IT Product and Support Teams; *Use:* The CMS Center for Clinical Standards and Quality (CCSQ) is responsible for administering appropriate information systems so that the public can submit healthcare-related information. While beneficiaries ultimately benefit, the primary users of CCSQ IT Product and Support Teams (CIPST) systems are healthcare facility employees and contractors. They are responsible for the collection and submission of appropriate beneficiary data to CMS to receive merit-based compensation.

The systems that support CCSQ programs includes but is not limited to: End-Stage Renal Disease Quality Reporting System (EQRS), Enterprise Shared Services (ESS), HCQIS ServiceNow (SNOW), Hospital Quality Reporting (HQR), Quality Improvement and Evaluation System (iQIES), Quality Management and Reporting System (QMARS), and Quality Payment Program (QPP).

The generic clearance will allow CMS to gather information to improve information systems that serve CMS audiences. CMS will gather this information using a mixture of qualitative and quantitative consumer research strategies (including formative research studies and methodological tests). CMS implements human-centered

methods and activities for the improvement of policies, services, and products. This collection of information is necessary to enable CMS to garner customer and stakeholder feedback in an efficient, timely manner, in accordance with our commitment to improving service delivery.

As information systems and technologies are developed or improved upon, they can be tested and evaluated for end-user feedback regarding utility, usability, and desirability. The overall goal is to apply a human-centered engagement model to maximize the extent to which CIPST can gather ongoing feedback from consumers. Feedback helps engineers and designers arrive at better solutions, therefore minimizing the burden on consumers and meeting their needs and goals.

The activities under this clearance involve voluntary engagement with target CCSQ users to receive design and research feedback. The respondents will be voluntary end-users from self-selected customers, as well as convenience samples. It is our intent that selected respondents will either cover a broad range of customers or include specific characteristics related to certain products or services. All collections of information will allow us to continually refine our processes, systems, and services for the benefit of internal and external stakeholders. *Form Number:* CMS–10706 (OMB control number: 0938–1397); *Frequency:* Occasionally; *Affected Public:* Individuals and Private Sector (Business or other for-profit and Not-for-profit institutions); *Number of Respondents:* 54,750; *Total Annual Responses:* 54,750; *Total Annual Hours:* 17,850. (For policy questions regarding this collection contact Brandy Barnette at 410–786–6455.)

William N. Parham, III,

Director, Division of Information Collections and Regulatory Impacts, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2024–09998 Filed 5–7–24; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Food and Drug Administration****[Docket No. FDA-2024-N-1869]****Peripheral and Central Nervous System Drugs Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments—Biologics License Application 761248, for Donanemab Solution for Intravenous Infusion****AGENCY:** Food and Drug Administration, HHS.**ACTION:** Notice; establishment of a public docket; request for comments.

SUMMARY: The Food and Drug Administration (FDA) announces a forthcoming public advisory committee meeting of the Peripheral and Central Nervous System Drugs Advisory Committee (the Committee). The general function of the Committee is to provide advice and recommendations to FDA on regulatory issues. The meeting will be open to the public. FDA is establishing a docket for public comment on this document.

DATES: The meeting will be held on June 10, 2024, from 9 a.m. to 5 p.m. Eastern Time.

ADDRESSES: FDA and invited participants may attend the meeting at FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993-0002. The public will have the option to participate via an online teleconferencing and/or video conferencing platform, and the advisory committee meeting will be heard, viewed, captioned, and recorded through an online teleconferencing and/or video conferencing platform.

Answers to commonly asked questions about FDA advisory committee meetings may be accessed at: <https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm>.

FDA is establishing a docket for public comment on this meeting. The docket number is FDA-2024-N-1869. The docket will close on June 7, 2024. 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 June 7, 2024. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Comments received on or before May 24, 2024, will be provided to the Committee. Comments received after that date will be taken into consideration by FDA. In the event that the meeting is cancelled, FDA will continue to evaluate any relevant applications or information, and consider any comments submitted to the docket, as appropriate.

You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand Delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA-2024-N-1869 for "Peripheral and Central Nervous System Drugs Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments." Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed

in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240-402-7500.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." FDA will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify the information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-402-7500.

FOR FURTHER INFORMATION CONTACT:

Jessica Seo, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993-0002, 301-796-7699, email: PCNS@fda.hhs.gov, or FDA Advisory Committee Information Line, 1-800-741-8138 (301-443-0572 in the Washington, DC area). A notice in the **Federal Register** about last-minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly

enough to provide timely notice. Therefore, you should always check FDA's website at <https://www.fda.gov/AdvisoryCommittees/default.htm> and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before the meeting.

SUPPLEMENTARY INFORMATION:

Agenda: The meeting presentations will be heard, viewed, captioned, and recorded through an online teleconferencing and/or video conferencing platform. The Committee will discuss biologics license application 761248, for donanemab solution for intravenous infusion, submitted by Eli Lilly and Co., for the treatment of early symptomatic Alzheimer's disease.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its website prior to the meeting, the background material will be made publicly available on FDA's website at the time of the advisory committee meeting. Background material and the link to the online teleconference and/or video conference meeting will be available at <https://www.fda.gov/AdvisoryCommittees/Calendar/default.htm>. Scroll down to the appropriate advisory committee meeting link. The meeting will include slide presentations with audio and video components to allow the presentation of materials for online participants in a manner that most closely resembles an in-person advisory committee meeting.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the Committee. All electronic and written submissions to the Docket (see **ADDRESSES**) on or before May 24, 2024, will be provided to the Committee. Oral presentations from the public will be scheduled between approximately 1:30 p.m. and 2:30 p.m. Eastern Time and will take place entirely through an online meeting platform. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before May 16, 2024. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably

accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by May 17, 2024.

For press inquiries, please contact the Office of Media Affairs at fdaoma@fda.hhs.gov or 301-796-4540.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact Jessica Seo (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our website at <https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm> for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. 1001 *et seq.*). This meeting notice also serves as notice that, pursuant to 21 CFR 10.19, the requirements in 21 CFR 14.22(b), (f), and (g) relating to the location of advisory committee meetings are hereby waived to allow for this meeting to take place both in-person and using an online meeting platform. This waiver is in the interest of allowing greater transparency and opportunities for public participation, in addition to convenience for advisory committee members, speakers, and guest speakers. The conditions for issuance of a waiver under 21 CFR 10.19 are met.

Dated: May 3, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024-10051 Filed 5-7-24; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2024-N-1938]

Psychopharmacologic Drugs Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments—Midomafetamine Capsules

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; establishment of a public docket; request for comments.

SUMMARY: The Food and Drug Administration (FDA) announces a forthcoming public advisory committee meeting of the Psychopharmacologic Drugs Advisory Committee (the Committee). The general function of the Committee is to provide advice and recommendations to FDA on regulatory issues. The meeting will be open to the public. FDA is establishing a docket for public comment on this document.

DATES: The meeting will be held on June 4, 2024, from 8:30 a.m. to 4:30 p.m. Eastern Time.

ADDRESSES: FDA and invited participants may attend the meeting at FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993-0002. The public will have the option to participate via an online teleconferencing and/or video conferencing platform, and the advisory committee meeting will be heard, viewed, captioned, and recorded through an online teleconferencing and/or video conferencing platform.

Answers to commonly asked questions about FDA advisory committee meetings, including information regarding special accommodations due to a disability, visitor parking, and transportation, may be accessed at: <https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm>.

FDA is establishing a docket for public comment on this meeting. The docket number is FDA-2024-N-1938. The docket will close on June 3, 2024. 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 June 3, 2024. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Comments received on or before May 23, 2024, will be provided to the Committee. Comments received after that date will be taken into consideration by FDA. In the event that the meeting is cancelled, FDA will continue to evaluate any relevant applications or information, and consider any comments submitted to the docket, as appropriate.

You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the

instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA-2024-N-1938 for "Psychopharmacologic Drugs Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments." Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240-402-7500.

- **Confidential Submissions**—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." FDA

will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify the information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-402-7500.

FOR FURTHER INFORMATION CONTACT:

Joyce Frimpong, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993-0002, 301-796-7973, email: PDAC@fda.hhs.gov, or FDA Advisory Committee Information Line, 1-800-741-8138 (301-443-0572 in the Washington, DC area). A notice in the **Federal Register** about last-minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check FDA's website at <https://www.fda.gov/AdvisoryCommittees/default.htm> and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before the meeting.

SUPPLEMENTARY INFORMATION:

Agenda: The meeting presentations will be heard, viewed, captioned, and recorded through an online teleconferencing and/or video conferencing platform. The Committee will discuss new drug application 215455, for midomafetamine (MDMA) capsules, submitted by Lykos

Therapeutics, for the proposed indication of treatment of post-traumatic stress disorder. The Committee will be asked to discuss the overall benefit-risk profile of MDMA, including the potential public health impact.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its website prior to the meeting, the background material will be made publicly available on FDA's website at the time of the advisory committee meeting. Background material and the link to the online teleconference and/or video conference meeting will be available at <https://www.fda.gov/AdvisoryCommittees/Calendar/default.htm>. Scroll down to the appropriate advisory committee meeting link. The meeting will include slide presentations with audio and video components to allow the presentation of materials for online participants in a manner that most closely resembles an in-person advisory committee meeting.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the Committee. All electronic and written submissions to the Docket (see **ADDRESSES**) on or before May 23, 2024, will be provided to the Committee. Oral presentations from the public will be scheduled between approximately 2 p.m. and 3 p.m. Eastern Time and will take place entirely through an online meeting platform. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before May 17, 2024. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by May 20, 2024.

For press inquiries, please contact the Office of Media Affairs at fdaoma@fda.hhs.gov or 301-796-4540.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact Joyce

Frimpong (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our website at <https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm> for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. 1001 *et seq.*). This meeting notice also serves as notice that, pursuant to 21 CFR 10.19, the requirements in 21 CFR 14.22(b), (f), and (g) relating to the location of advisory committee meetings are hereby waived to allow for this meeting to take place both in-person and using an online meeting platform. This waiver is in the interest of allowing greater transparency and opportunities for public participation, in addition to convenience for advisory committee members, speakers, and guest speakers. The conditions for issuance of a waiver under 21 CFR 10.19 are met.

Dated: May 3, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024-10053 Filed 5-7-24; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice for Public Comments on Potential Viral Hepatitis Quality Measures in Medicaid

AGENCY: Office of Infectious Disease and HIV/AIDS Policy, Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice for public comment.

SUMMARY: The Department of Health and Human Services' (HHS) Office of Infectious Disease and HIV/AIDS Policy (OIDP) in the Office of the Assistant Secretary for Health (OASH) invites public comment on potential viral hepatitis quality measures for implementation at the state and territory level. In March 2024, OIDP hosted a technical consultation meeting (<https://youtu.be/YCVC8GwFE7E>) to initiate the process of understanding the needs and developing national consensus on clinically meaningful and feasible viral hepatitis quality measures for proposal to the Medicaid Adult Core Set.

DATES: All comments must be received by 5 p.m. ET on June 7, 2024 to be considered.

ADDRESSES: All comments must be submitted electronically to OIDPViralHepatitis@hhs.gov to be considered.

FOR FURTHER INFORMATION CONTACT: Jessica Deerin, Ph.D., MPH, OIDP, Viral Hepatitis Policy Advisor at Jessica.Deerin@hhs.gov or 202-795-7625.

SUPPLEMENTARY INFORMATION: CDC released updated hepatitis C and hepatitis B screening recommendations to screen all adults aged 18 years and older at least once in a lifetime and all pregnant women during each pregnancy in April 2020 and March 2023, respectively. Screening is an important first step in the viral hepatitis continuum of care and a necessary tool to reach viral hepatitis elimination by 2030.

Additionally, hepatitis C has a life-saving treatment resulting in a cure in >95% of patients. Yet, many patients are not linked to care and complete treatment. Less than 1 in 3 people with health insurance initiated DAA treatment within a year of hepatitis C diagnosis and people with Medicaid were less likely to initiate treatment than those with private insurance. Hepatitis B treatment can reduce hepatitis B viral load, lowering the risk of liver cancer and mortality.

Quality measures are tools to monitor and improve the quality of health care. Scaling up viral hepatitis screening, linkage to care, and access to treatment will ultimately reduce transmission, incidence of new infections, prevent liver cancer and mortality, and allow the U.S. to make strides in reaching viral hepatitis elimination by 2030.

There are currently no viral hepatitis quality measures in the Medicaid Adult Core Set. The Medicaid Adult Core Set is a core set of health care quality measures related to physical and behavioral health for adult Medicaid enrollees. The Adult Core Set encourages standardized reporting by States on a uniform set of measures to drive quality improvement. Since Medicaid provides coverage for a disproportionate number of people with hepatitis B and hepatitis C, OIDP is leading an initiative to develop consensus around clinically meaningful and feasible state level viral hepatitis quality measures to propose to the Medicaid Adult Core Set.

OIDP hosted a Viral Hepatitis Quality Measures Technical Consultation Meeting on March 7, 2024. State panelists from Medicaid and public health departments shared their experience in selection, testing, and implementation of current state viral

hepatitis quality measures, as well as recommendations for measures to propose to the Medicaid Adult Core Set. State panelists reached consensus to prioritize the development, use, and adoption of a hepatitis C screening and treatment initiation measure based on the following rationale:

- Clinical and public health insights are high, leading to an understanding of the cascade of care for infected people who access treatment and cure;
- The measure drives screening and linkage to care by translating recently updated CDC recommendations into routine practice in the health care delivery system;
- Data for a screening and treatment initiation measure is available to state Medicaid programs through administrative claims and encounter data, and is consistent and comparable across states; and
- The method of using administrative data sources to represent hepatitis C treatment through pharmacy claims was explained as an acceptable proxy for receipt of treatment.

HHS hereby requests public comment on the clinical significance, usability, feasibility, and likely uptake of hepatitis C screening and hepatitis C treatment initiation quality measures, as well as recommendations with adequate justifications on other feasible viral hepatitis measures to consider.

Information Needs

HHS is seeking responses with adequate justification to the questions listed below.

1. Are you in support of adopting a hepatitis C screening and treatment initiation measure within state Medicaid programs?

a. If you represent a state Medicaid program, what is the likely uptake of this measure?

2. What other measures should HHS consider for testing and proposal to the Medicaid Adult Core Set (*i.e.*, hepatitis B screening, hepatitis B linkage to care, hepatitis C sustained virological response (SVR))? Please provide support for how that measure is clinically meaningful, feasible, and actionable for state Medicaid programs. What data source or data element can be utilized to calculate the measure?

3. Would it be feasible and clinically meaningful to implement a hepatitis B screening, hepatitis C screening and hepatitis C treatment initiation quality measure within state Medicaid programs? If you represent a state Medicaid program, what is the likely uptake of this measure?

Dated: May 2, 2024.

B. Kaye Hayes,

Deputy Assistant Secretary for Infectious Disease, Department of Health and Human Services.

[FR Doc. 2024–10006 Filed 5–7–24; 8:45 am]

BILLING CODE 4150–44–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Interagency Coordinating Committee on the Validation of Alternative Methods; Notice of Public Meeting; Request for Public Input

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The Interagency Coordinating Committee on the Validation of Alternative Methods (ICCVAM) will hold a public forum to share information and facilitate direct communication of ideas and suggestions from stakeholders. Interested persons may attend in person or view the meeting remotely by webcast. Time will be set aside for questions and public statements on the topics discussed. Registration is requested for attending in person and required for viewing the webcast. Registration is also required for presenting oral statements, whether in person or online. Information about the meeting and registration are available at <https://ntp.niehs.nih.gov/go/iccvamforum-2024>.

DATES:

Meeting: May 20, 2024, 1 p.m. to approximately 5 p.m. EDT; Tuesday, May 21, 2024, 9 a.m. to approximately 4:30 p.m. EDT.

Registration for Onsite Meeting: Deadline is May 17, 2024.

Registration for Webcast: Deadline is May 21, 2024.

Registration for Oral Statements: Deadline is May 15, 2024.

Registration to attend in person is requested; registration to view the webcast and to present oral public statements (in person or online) is required.

ADDRESSES:

Meeting Location: William H. Natcher Conference Center, National Institutes of Health (NIH), Bethesda, MD 20892.

Meeting web page: Registration and other meeting materials are at <https://ntp.niehs.nih.gov/go/iccvamforum-2024>. A preliminary agenda will be posted on this page by May 3.

FOR FURTHER INFORMATION CONTACT: Dr. Nicole Kleinstreuer, Director, National

Toxicology Program Interagency Center for the Evaluation of Alternative Toxicological Methods (NICEATM), email: nicole.kleinstreuer@nih.gov, telephone: 984–287–3150.

SUPPLEMENTARY INFORMATION:

Background: ICCVAM, a congressionally mandated committee, coordinates the development and validation of alternative testing strategies that protect human health and the environment while replacing, reducing, or refining animal use.

ICCVAM's goals include promotion of national and international partnerships between governmental and nongovernmental groups, including academia, industry, advocacy groups, and other key stakeholders. To foster these partnerships ICCVAM initiated annual public forums in 2014 to share information and facilitate direct communication of ideas and suggestions from stakeholders (79 FR 25136).

This year's meeting will be held on May 20 and 21, 2024. NICEATM and ICCVAM members will give presentations on current activities related to the development and validation of alternative test methods and approaches.

There will be opportunities for participants to ask clarifying or follow-up questions of the ICCVAM members about their presentations. Instructions for submitting these questions will be provided to webcast viewers prior to the event. The agenda will also include time for public oral statements relevant to the ICCVAM mission and current activities from participants who have registered to do so in advance.

Preliminary Agenda and Other Meeting Information: A preliminary agenda will be posted by May 3 at <https://ntp.niehs.nih.gov/go/iccvamforum-2024>. Interested individuals are encouraged to visit this web page to stay abreast of the most current meeting information.

Meeting and Registration: This meeting is open to the public. The public may attend the meeting at NIH, where attendance is limited only by the space available, or view remotely by webcast. Those planning to attend the meeting in person are encouraged to register at <https://ntp.niehs.nih.gov/go/iccvamforum-2024> by May 15, 2024, to facilitate planning for appropriate meeting space. Registration for the webcast is required and is open through 4:30 p.m. EDT on May 21, 2024, at <https://ntp.niehs.nih.gov/go/iccvamforum-2024>. Registrants will receive instructions on how to access and participate in the webcast in the email confirming their registration.

NIH visitor and security information is available at <http://www.nih.gov/about/visitor/index.htm>. Individuals with disabilities who need accommodation to participate in this event should contact Nicole Kleinstreuer at phone: 919–407–1609 or email: nicole.kleinstreuer@nih.gov. 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.

Request for Oral Public Statements: In addition to time for clarifying or follow-up questions following scheduled presentations, time will be allotted during the meeting for oral public statements with associated slides on topics relevant to ICCVAM's mission. Separate registration for those wishing to provide public statements is required and is open through May 15, 2024, at <https://ntp.niehs.nih.gov/go/iccvamforum-2024>. Any meeting attendee or webcast viewer may ask clarifying questions during the appropriate times in the agenda. The additional registration is only required for those who wish to give separate public statements. The number and length of presentations may be limited based on available time. Submitters will be identified by their name and affiliation and/or sponsoring organization, if applicable. Participants registered to present oral public statements must email their statement to ICCVAMquestions@niehs.nih.gov by May 15, 2024, to allow time for review by NICEATM and ICCVAM and posting to the meeting page prior to the forum. Persons submitting public statements and/or associated slides should include their name, affiliation (if any), mailing address, telephone, email, and sponsoring organization (if any) with the document. Guidelines for public statements are at http://ntp.niehs.nih.gov/ntp/about_ntp/guidelines_public_comments_508.pdf. Persons presenting oral public statements will be contacted to arrange the logistics of their presentations. Presenters should plan for their presentation to run seven minutes or less; each public statement presentation will be followed by up to three minutes to allow for clarifying or follow-up questions. Time allotted for presentations and follow-up questions may be reduced depending on the time available.

Written statements on topics relevant to ICCVAM's mission may be submitted to support an oral public statement or as standalone documents. These should be emailed to ICCVAMquestions@niehs.nih.gov by May 15, 2024. Public statements received prior to the May 15

deadline will be distributed to NICEATM and ICCVAM members before the meeting. Written public statements received after the deadline may be reviewed by NICEATM and ICCVAM at a future date. Materials submitted to accompany oral public statements or standalone written statements should include the submitters name, affiliation (if any), mailing address, telephone, email, and sponsoring organization (if any) with the document. Guidelines for public statements are at http://ntp.niehs.nih.gov/ntp/about_ntp/guidelines_public_comments_508.pdf.

Responses to this notice are voluntary. No proprietary, classified, confidential, or sensitive information should be included in statements submitted in response to this notice or presented during the meeting. This request for input is for planning purposes only and is not a solicitation for applications or an obligation on the part of the U.S. Government to provide support for any ideas identified in response to the request. Please note that the U.S. Government will not pay for the preparation of any information submitted or for its use of that information.

Background Information on ICCVAM and NICEATM: ICCVAM is an interagency committee composed of representatives from 17 Federal regulatory and research agencies that require, use, generate, or disseminate toxicological and safety testing information. ICCVAM conducts technical evaluations of new, revised, and alternative safety testing methods and integrated testing strategies with regulatory applicability. ICCVAM also promotes the scientific validation and regulatory acceptance of testing methods that more accurately assess the safety and hazards of chemicals and products and replace, reduce, or refine animal use.

The ICCVAM Authorization Act of 2000 (42 U.S.C. 285l-3) establishes ICCVAM as a permanent interagency committee of the National Institute of Environmental Health Sciences and provides the authority for ICCVAM involvement in activities relevant to the development of alternative test methods. Additional information about ICCVAM can be found at <https://ntp.niehs.nih.gov/go/iccvam>.

NICEATM administers ICCVAM, provides scientific and operational support for ICCVAM-related activities, and conducts and publishes analyses and evaluations of data from new, revised, and alternative testing approaches. NICEATM and ICCVAM work collaboratively to evaluate new

and improved testing approaches applicable to the needs of U.S. Federal agencies. NICEATM and ICCVAM welcome the public nomination of new, revised, and alternative test methods and strategies for validation studies and technical evaluations. Additional information about NICEATM can be found at <https://ntp.niehs.nih.gov/go/niceatm>.

Dated: May 3, 2024

Richard P. Woychik,

Director, National Institute of Environmental Health Sciences and National Toxicology Program, National Institutes of Health.

[FR Doc. 2024-10061 Filed 5-7-24; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Resilience to AD.

Date: June 5, 2024.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Maurizio Grimaldi, M.D., Ph.D., Scientific Review Officer, National Institutes of Health, National Institute on Aging, Gateway Building, 7201 Wisconsin, ROOM 2C218, Bethesda, MD 20892, 301-496-9374, grimaldim2@mail.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: May 2, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024-10019 Filed 5-7-24; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; NIDDK X01 Central Repository Non-Renewable Sample Access Review Meeting.

Date: July 11, 2024.

Time: 2:30 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, NIDDK, Democracy II, Suite 7000A, 6707 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Paul A. Rushing, Ph.D., Scientific Review Officer, Review Branch, Division of Extramural Activities, NIDDK, National Institutes of Health, Room 7345, 6707 Democracy Boulevard, Bethesda, MD 20892-5452, (301) 594-8895, rushingp@extra.nidk.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: May 2, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024-10016 Filed 5-7-24; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as

amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Developmental Brain Disorders Study Section.

Date: June 5–7, 2024.

Time: 9:30 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Pat Manos, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5200, MSC 7846, Bethesda, MD 20892, (301) 408–9866, manospa@csr.nih.gov.

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Auditory System Study Section.

Date: June 6–7, 2024.

Time: 8:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Garden Inn, Bethesda, 7301 Waverly Street, Bethesda, MD 20814.

Contact Person: Brian H. Scott, Ph.D., Scientific Review Officer, National Institutes of Health, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, 301–827–7490, brianscott@mail.nih.gov.

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group; Genomics, Computational Biology and Technology Study Section.

Date: June 6–7, 2024.

Time: 8:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency, Bethesda One, Bethesda Metro Center, Bethesda, MD 20814.

Contact Person: Methode Bacanamwo, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2200, Bethesda, MD 20892, 301–827–7088, methode.bacanamwo@nih.gov.

Name of Committee: Vascular and Hematology Integrated Review Group; Atherosclerosis and Vascular Inflammation Study Section.

Date: June 6–7, 2024.

Time: 8:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Gaithersburg Marriott Washingtonian Center, 9751 Washingtonian Blvd., Gaithersburg, MD 20878.

Contact Person: Natalia Komissarova, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5207, MSC 7846, Bethesda, MD 20892, (301) 435–1206, komissar@mail.nih.gov.

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group; Clinical Data Management and Analysis Study Section.

Date: June 6–7, 2024.

Time: 8:30 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW, Washington, DC 20015.

Contact Person: Shivakumar V Chittari, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 408–9098, chittari.shivakumar@nih.gov.

Name of Committee: Risk, Prevention and Health Behavior Integrated Review Group; Lifestyle Change and Behavioral Health Study Section.

Date: June 6–7, 2024.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Hybrid Meeting).

Contact Person: Pamela Jeter, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 10J08, Bethesda, MD 20892, (301) 827–6401, pamela.jeter@nih.gov.

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Aging Systems and Geriatrics Study Section.

Date: June 6–7, 2024.

Time: 9:00 a.m. to 10:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Roger Alan Bannister, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1010–D, Bethesda, MD 20892, (301) 435–1042, bannisterra@csr.nih.gov.

Name of Committee: Oncology 1-Basic Translational Integrated Review Group; Cancer Cell Biology Study Section.

Date: June 6–7, 2024.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Hybrid Meeting).

Contact Person: Charles Morrow, Ph.D., MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6202, MSC 7804, Bethesda, MD 20892, 301–408–9850, morrowcs@csr.nih.gov.

Name of Committee: Infectious Diseases and Immunology A Integrated Review Group; Pathogenic Eukaryotes Study Section.

Date: June 6–7, 2024.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: Jennifer Chien Villa, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, 301–496–5436, jennifer.villa@nih.gov.

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group; Interdisciplinary Clinical Care in Specialty Care Settings Study Section.

Date: June 6–7, 2024.

Time: 9:30 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Abu Saleh Mohammad Abdullah, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 827–4043, abuabdullah.abdullah@nih.gov.

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Neurogenesis and Cell Fate Study Section.

Date: June 6, 2024.

Time: 9:30 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Canopy by Hilton, 940 Rose Avenue, North Bethesda, MD 20852.

Contact Person: Adem Can, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4190, MSC 7850, Bethesda, MD 20892, (301) 435–1042, cana2@csr.nih.gov.

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Human Studies of Diabetes and Obesity Study Section.

Date: June 6–7, 2024.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Hui Chen, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6164, Bethesda, MD 20892, (301) 435–1044, chenhui@csr.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: May 2, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–09996 Filed 5–7–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****National Heart, Lung, and Blood Institute; Notice of Closed Meeting**

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of meeting of the Board of Scientific Counselors of the National Heart, Lung, and Blood Institute.

This meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Heart, Lung, and Blood Institute, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors of the National Heart, Lung, and Blood Institute.

Date: May 31, 2024.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate personnel qualifications and performance, and competence of individual investigators.

Place: National Institutes of Health, Building 10, 10 Center Drive, Bethesda, MD 20892 (Virtual Meeting).

Date: June 3, 2024.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate personnel qualifications and performance, and competence of individual investigators.

Place: National Institutes of Health, Building 10, 10 Center Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Richard Childs, M.D., Scientific Director, Division of Intramural Research, National Heart, Lung, and Blood Institute, National Institutes of Health, 10 Center Drive, Bethesda, MD 20892, 301-827-1396, childs@nhlbi.nih.gov.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's homepage: <https://www.nhlbi.nih.gov/about/advisory-and-peer-review-committees/board-scientific-counselors>, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: May 3, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024-10059 Filed 5-7-24; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****National Institute of Environmental Health Sciences; Notice of Closed Meetings**

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel; SUPERFUND P42 Review.

Date: June 5-7, 2024.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Environmental Health Science, Keystone Building, 530 Davis Drive, Durham, NC 27709 (Virtual Meeting).

Contact Person: Varsha Shukla, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research and Training, National Institute of Environmental Health Science, 530 Davis Drive, Keystone Building, Room 3094, Durham, NC 27713, 984-287-3288, Varsha.shukla@nih.gov.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel; Virtual Consortium for Translational/Transdisciplinary Environmental Research (ViCTER).

Date: June 21, 2024.

Time: 11:00 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Environmental Health Science, Keystone Building, 530 Davis Drive, Durham, NC 27709 (Virtual Meeting).

Contact Person: Alfonso R. Latoni, Ph.D., Senior Advisor to the Director and Scientific Review Officer, Office of the Division Director, Division of Extramural Research and Training, National Institute of Environmental Health Sciences, Research Triangle Park, NC 27709, (984) 287-3279 alfonso.latoni@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk

Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: May 2, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024-10015 Filed 5-7-24; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****National Institute on Aging; Notice of Closed Meeting**

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; AD/ADRD Early-Stage Clinical Drug Development.

Date: July 3, 2024.

Time: 12:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Mariel Jais, Ph.D., M.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Gateway Bldg. Suite E400, Bethesda, MD 20814, (301) 594-2614, mariel.jais@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: May 2, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024-10018 Filed 5-7-24; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Initial Review Group; Diabetes, Endocrinology and Metabolic Diseases B Study Section.

Date: June 5–7, 2024.

Time: 5:30 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW, Washington, DC 20015 (In-Person Meeting).

Contact Person: Charlene J. Repique, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7347, 6707 Democracy Boulevard Bethesda, MD 20892–5452, (301) 594–7791, charlene.repique@nih.gov.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Initial Review Group; Fellowships in Digestive Diseases and Nutrition.

Date: June 13–14, 2024.

Time: 8:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/Rockville, 1750 Rockville Pike Rockville, MD 20852, (In-Person Meeting).

Contact Person: Jian Yang, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7011, 6707 Democracy Blvd., Bethesda, MD 20892–5452, (301) 594–7799, yangj@extra.niddk.nih.gov.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Initial Review Group; Kidney, Urologic and Hematologic Diseases D Study Section.

Date: June 26–27, 2024.

Time: 8:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW, Washington, DC 20015 (In-Person Meeting).

Contact Person: Jason D. Hoffert, Ph.D., Scientific Review Officer, Review Branch,

Division of Extramural Activities, NIDDK, National Institutes of Health, Room 7343, 6707 Democracy Boulevard, Bethesda, MD 20892, 301–496–9010, hoffertj@niddk.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: May 2, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–10017 Filed 5–7–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Cancer Advisory Board and NCI Board of Scientific Advisors.

This will be a hybrid meeting held in-person and virtually and will be open to the public as indicated below.

Individuals who plan to attend in-person or view the virtual meeting and need special assistance or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. The meeting can be accessed from the NIH Videocast at the following link: <https://videocast.nih.gov/>.

A portion of the National Cancer Advisory Board meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Advisory Board.

Date: June 11, 2024.

Open: 6:00 p.m. to 9:00 p.m.

Agenda: National Cancer Advisory Board Subcommittee Meetings.

Place: Gaithersburg Marriott Washingtonian Center, Room—TBD, 9751 Washington Boulevard, Gaithersburg, MD 20878 (In Person Meeting).

Contact Person: Paulette S. Gray, Ph.D., Director Division of Extramural Activities, National Cancer Institute—Shady Grove, National Institutes of Health, 9609 Medical Center Drive, 7th Floor, Room 7W444, Bethesda, MD 20892, 240–276–6340, grayp@mail.nih.gov.

Name of Committee: National Cancer Advisory Board and NCI Board of Scientific Advisors.

Date: June 12, 2024.

Open: 9:00 a.m. to 3:50 p.m.

Agenda: Joint meeting of the National Cancer Advisory Board and NCI Board of Scientific Advisors, NCI Director's Report and Presentations.

Place: National Cancer Institute—Shady Grove, 9609 Medical Center Drive, Room TE406 & 408, Rockville, MD 20850 (In Person and Virtual Meeting).

Contact Person: Paulette S. Gray, Ph.D., Director Division of Extramural Activities, National Cancer Institute—Shady Grove, National Institutes of Health, 9609 Medical Center Drive, 7th Floor, Room 7W444, Bethesda, MD 20892, 240–276–6340, grayp@mail.nih.gov.

Name of Committee: National Cancer Advisory Board.

Date: June 12, 2024.

Closed: 3:50 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute—Shady Grove, 9609 Medical Center Drive, Room TE406 & 408, Rockville, MD 20850 (In Person and Virtual Meeting).

Contact Person: Paulette S. Gray, Ph.D., Director Division of Extramural Activities, National Cancer Institute—Shady Grove, National Institutes of Health, 9609 Medical Center Drive, 7th Floor, Room 7W444, Bethesda, MD 20892, 240–276–6340, grayp@mail.nih.gov.

Name of Committee: National Cancer Advisory Board and NCI Board of Scientific Advisors

Date: June 13, 2024.

Open: 9:00 a.m. to 12:00 p.m.

Agenda: Joint meeting of the National Cancer Advisory Board and NCI Board of Scientific Advisors Concepts Review and Presentations.

Place: National Cancer Institute—Shady Grove, 9609 Medical Center Drive, Room TE406 & 408, Rockville, MD 20850 (In Person and Virtual Meeting).

Contact Person: Paulette S. Gray, Ph.D., Director Division of Extramural Activities, National Cancer Institute—Shady Grove, National Institutes of Health, 9609 Medical Center Drive, 7th Floor, Room 7W444, Bethesda, MD 20892, 240–276–6340, grayp@mail.nih.gov.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NCI-Shady Grove campus. All visitors will be asked to show one form of identification (for example, a government-

issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: NCAB: <http://deainfo.nci.nih.gov/advisory/ncab/ncab.htm>, BSA: <http://deainfo.nci.nih.gov/advisory/bsa/bsa.htm>, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: May 3, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–10060 Filed 5–7–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; AD and ADRD Infrastructure.

Date: June 17, 2024.

Time: 10:00 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Nijaguna Prasad, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Gateway Bldg. Suite 2W200, Bethesda, MD 20892, (301) 496–9667, prasadnb@nia.nih.gov.

Name of Committee: National Institute on Aging Special Emphasis Panel; Aging Courses.

Date: July 3, 2024.

Time: 11:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Bitu Nakhai, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Gateway Bldg. Suite 2C212, Bethesda, MD 20892, 301–402–7701, nakhaib@nia.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: May 2, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–10020 Filed 5–7–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2023–0027]

Programmatic/Class Floodplain Review Procedures for Specific Preparedness Grant Projects

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Final notice.

SUMMARY: On October 4, 2023, FEMA published a notice requesting public comment on its determination that a programmatic/class review is appropriate for six categories of activities, in specific grant programs that do not have an adverse impact, individually or cumulatively, on floodplain values placing property and persons at risk. FEMA received no comments and is now publishing final notice of its determination in compliance with Federal regulations.

FOR FURTHER INFORMATION CONTACT: Frederick Holycross, Coordinator, Grant Programs Directorate, Environmental Planning and Historic Preservation, FEMA, frederick.holycross@fema.dhs.gov, or 202–812–4938.

SUPPLEMENTARY INFORMATION:

I. Background

FEMA's floodplain management regulations are found at 44 CFR part 9. Part 9 sets forth the policy, procedure, and responsibilities to implement and enforce Executive Order 11988, Floodplain Management.¹ Part 9 sets

¹ “This regulation sets forth the policy, procedure, and responsibilities to implement and

forth an eight-step process which FEMA must follow when taking actions in floodplains² which have the potential to affect floodplains or their occupants, or which are subject to potential harm by location in floodplains.³ FEMA completes the eight-step process for each action it is taking in a floodplain as part of the comprehensive environmental and historic preservation (EHP) compliance reviews that are required for all projects funded under its disaster and non-disaster grant programs.⁴

For such actions, FEMA is required to take the following steps: (1) determine whether the proposed action is located in the 100-year floodplain (500-year floodplain for critical actions), and whether it has the potential to affect or be affected by the floodplain;⁵ (2) notify the public at the earliest possible time of the intent to carry out an action in a floodplain, and involve the affected and interested public in the decision-making process; (3) identify and evaluate practicable alternatives to locating the proposed action in a floodplain (including alternative sites, actions and the “no action” option); (4) identify the potential direct and indirect impacts associated with the occupancy or modification of floodplains and the potential direct and indirect support of floodplain development that could result from the proposed action; (5) minimize the potential adverse impacts and support to or within floodplains to be identified under Step 4, restore and preserve the natural and beneficial values served by floodplains; (6) reevaluate the proposed action to determine first, if it is still practicable in light of its exposure to flood hazards, the extent to which it will aggravate the hazards to others, and its potential to disrupt floodplain values and second, if alternatives preliminarily rejected at Step 3 are practicable in light of the information gained in Steps 4 and 5; (7) prepare and provide the public with a finding and public explanation of any final decision that the floodplain is the only practicable alternative; and (8)

enforce Executive Order 11988, Floodplain Management, and Executive Order 11990, Protection of Wetlands.” 44 CFR 9.1.

² The 8-step process set forth in 44 CFR part 9 also governs agency actions that take place in wetlands.

³ 44 CFR 9.5(a)(1).

⁴ See generally FEMA's website at Environmental Planning and Historic Preservation for a description of the EHP process and the applicable regulations, directives, and legal mandates which govern it. (Last accessed on April 12, 2024.)

⁵ Any project considered for streamlined process will also be subject to a determination of whether the proposed action is located in a wetland and/or floodplain.

review the implementation and post-implementation phases of the proposed action to ensure that the minimization requirements are fully implemented.⁶

FEMA completes the eight-step process for each action it is taking in a floodplain as part of the comprehensive environmental and historic preservation (EHP) compliance reviews that are required for all projects funded under its disaster and non-disaster grant programs.⁷ The implementing guidance for E.O. 11988 (Guidelines) allows for an altered or shortened decision-making floodplain evaluation “class review” process for certain routine or recurring actions, known as repetitive actions.⁸ Class reviews or programmatic approaches allow for efficient and effective ways to meet EHP requirements, including floodplain reviews.

In considering whether to undertake such a review, the Guidelines instruct Federal agencies to examine past actions that have been reviewed on an individual basis with public notice and opportunity to comment.⁹ If the individual reviews have indicated uniformly that the actions would not have an adverse impact individually or cumulatively on floodplain values placing property and persons at risk, and little or no public comments to the contrary were received, a class review to streamline agency coordination and processing efforts may be appropriate.¹⁰ Agencies may conduct class reviews of routine or recurring actions when: (1) consideration of whether to locate in a floodplain is substantially similar; (2) there is no practicable alternative(s), consistent with any Executive Orders and applicable agency codes, to siting in a floodplain for each action within the class; and (3) all practical measures to minimize harm to the floodplain are included in the review criteria that, if followed, will minimize any adverse impacts that may be associated with the individual actions covered in the class review.¹¹

FEMA reviewed six project categories from 13 grant programs and determined they were appropriate for the shortened

class review procedures.¹² For the specific project categories, FEMA completed steps 3–6 of the eight-step process by cumulatively considering the potential that the project types might directly or indirectly have adverse impacts to floodplains, might promote floodplain development directly or indirectly, and whether there could be any practicable alternative locations or actions. FEMA determined that the projects would not have direct or indirect adverse impacts to floodplains, would not promote floodplain development directly or indirectly, and that there were no practicable alternatives outside the floodplain. On October 4, 2023, FEMA published an initial notice of its determination; the comment period closed November 3, 2023, with no comments received.¹³

II. Final Notice: Compliance With Step 7 of the Eight-Step Process

Step 7 of the eight-step process requires FEMA to prepare and provide the public with a finding and public explanation of any final decision that the floodplain is the only practicable alternative for the identified actions.¹⁴ The final notice is required to include the following: (1) a statement of why the proposed action must be located in an area affecting or affected by a floodplain or a wetland; (2) a description of all significant facts considered in making this determination; (3) a list of the alternatives considered; (4) a statement indicating whether the action conforms to applicable State and local floodplain protection standards; (5) a statement indicating how the action affects or is affected by the floodplain and/or wetland, and how mitigation is to be achieved; (6) identification of the responsible official or organization for implementation and monitoring of the proposed action, and from whom further information can be obtained; and (7) a map of the area or a statement that such map is available for public inspection, including the location at which such map may be inspected and a telephone number to call for information.¹⁵

FEMA reviewed six project categories that must be located in the floodplain because the project categories involve modifications of structures or features that currently exist in the floodplain.¹⁶

Within these project categories, FEMA conducted a review of 570 project types funded through the Grant Programs Directorate¹⁷(GPD) from 2008 to 2023 that previously received floodplain reviews on an individual basis. The results of those individual reviews indicate that these identified types of activities will not have an adverse impact on floodplain values and that the activities should remain in the floodplain because they support existing facilities or structures. FEMA did not receive public comments suggesting that there would be impacts or that the activities should not be located in the floodplain. FEMA did not consider alternative sites outside of the floodplain because the projects are small-scale security improvements or modifications made to existing facilities or structures. There are no practicable alternatives because the existing facility or structure would need to be relocated outside the floodplain and no alternative actions would serve the same purpose and have less potential to affect or be affected by the floodplain.

FEMA will condition grant funding for the listed activities in accordance with local floodplain ordinances and applicable codes and standards. The activities will not alter floodplain characteristics nor materially extend the life of existing structures or facilities. The activities will not modify the floodplain or increase the risk of flood loss. Construction associated with the listed activities may create short term, direct adverse impacts through the discharge of runoff water containing pollutants and sediment into a floodplain. The installation of temporary structures may create temporary, direct impacts to the floodplain by affecting flow characteristics and by capturing debris. However, mitigation of the short-term, direct adverse impacts associated with construction activities will be achieved through the application of typical construction practices including runoff controls.

For covered activities in participating National Flood Insurance Program

⁶ 44 CFR 9.6.

⁷ See generally FEMA’s website at Environmental Planning and Historic Preservation for a description of the EHP process and the applicable regulations, directives, and legal mandates which govern it. (Last accessed on April 12, 2024).

⁸ See Guidelines for Implementing Executive Order 11988, Floodplain Management, and Executive Order 13690, Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input at 44.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² See 88 FR 68644.

¹³ 88 FR 68644.

¹⁴ 44 CFR 9.6(b); 9.12.

¹⁵ 44 CFR 9.12(e).

¹⁶ See 88 FR 68644; FEMA’s class review does not apply to actions located in regulatory floodways or coastal high hazard areas, including V/VE Zones; construction of new buildings, structures, infrastructure or facilities.

¹⁷ GPD’s mission is to deliver and support grant programs that help the Nation before, during and after disasters to make the country more resilient. GPD administers and manages FEMA grants to ensure critical and measurable results for customers and stakeholders, while also ensuring transparency in the grant process; consolidates the grant business operations, systems, training, policy and oversight of all FEMA grants; establishes and promotes consistent outreach and communication with State, local, Tribal and territorial (SLTTs) stakeholders; and offers information about FEMA’s preparedness grants funding provided to SLTT governments in the form of non-disaster grants. For more information, please visit <https://www.fema.gov/about/offices/grant-programs>.

(NFIP) communities, FEMA will require a floodplain development permit or documentation from the local floodplain administrator that the work is consistent with NFIP requirements.¹⁸ FEMA will include a condition for all projects located in the floodplain that the Recipient and sub recipient must coordinate with the local floodplain administrator/permitting official to obtain any required permitting. Further information about these activities can be obtained from GPD, at GPDEHPinfo@fema.dhs.gov. When FEMA provides funding for these activities, a map of the location may be available at GPDEHPinfo@fema.dhs.gov.

This serves as FEMA's final public notice that the floodplain is the only practicable alternative for the six categories of activities in the thirteen specified grant programs identified in its October 4, 2023 initial notice.¹⁹ Pursuant to 44 CFR 9.12(f), FEMA will wait 15 days from the date of this determination to carry out any actions subject to this notice.

Deanne Criswell,
Administrator, Federal Emergency
Management Agency.

[FR Doc. 2024–10042 Filed 5–7–24; 8:45 am]

BILLING CODE 9111–78–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7093–N–01]

60-Day Notice of Proposed Information Collection: HUD FOIAXpress (FMS2) Tracking System FOIA Portal; OMB Control No.: 2501–NEW

AGENCY: Office of Administration,
Freedom of Information Act (FOIA)
Office, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* July 8, 2024.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection can be sent within 60 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 60-day Review—Open for Public Comments” or by using the search function. Interested persons are also invited to submit comments regarding this proposal and comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Anna Guido, Clearance Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000; email PaperworkReductionActOffice@hud.gov.

FOR FURTHER INFORMATION CONTACT: Anna Guido, Paperwork Reduction Act Compliance Officer, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email at Anna.P.Guido@hud.gov, 202–402–5535. This is not a toll-free

number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs>.

Copies of available documents submitted to OMB may be obtained from Anna Guido.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection:—HUD FOIAXpress (FMS2) Tracking System FOIA Portal.

OMB Approval Number: 2501–Pending.

Type of Request: New Collection.

Description of the need for the information and proposed use: Respondents have the ability to submit their electronic requests through the Public Access Link. HUD accepts electronic submissions from respondents through the Public Access Link, which would reduce the burden on the public.

The Department has used this information to provide appropriate responses specific to the inquiries. In addition, we have been able to create specific template responses for like inquiries to ensure a rapid response.

Information collection/form number	Estimated number of respondents	Frequency of response	Responses per annum	Average burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
Public Access Link	11,510	1	11,510	.33	\$3,798.30	\$29.76	\$113,037.41

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of

information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of

the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

¹⁸ Created by Congress in 1968, the NFIP provides insurance to help reduce the socio-economic impact of floods. Flood insurance is a separate policy that can cover buildings, the contents in a building, or both. The NFIP provides flood insurance to property owners, renters, and businesses, and having this coverage helps them recover faster when floodwaters recede. The NFIP is a public-private partnership between the Federal Government, the property and casualty insurance industry, States, local officials, lending institutions,

and property owners. The NFIP is administered by FEMA, while insurance policies are sold and serviced by a network of more than 50 insurance companies and the NFIP Direct. For more information, please visit floodsmart.gov.

¹⁹ 88 FR 86844; the non-disaster preparedness grant programs to which FEMA's determination applies are as follows: (1) Assistance to Firefighters Grant Program; (2) Fire Prevention and Safety Grant Program; (3) Staffing for Adequate Fire and

Emergency Response Grant Program; (4) Nonprofit Security Grant Program; (5) Tribal Homeland Security Grant Program; (6) Emergency Management Performance Grant Program; (7) Operation Stonegarden; (8) State Homeland Security Program; (9) Urban Area Security Initiative; (10) Intercity Bus Security Grant Program; (11) Intercity Passenger Rail Program; (12) Port Security Grant Program; and (13) Transit Security Grant Program.

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

HUD encourages interested parties to submit comments in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Kevin McNeely,

General Deputy Assistant Secretary, Office of Administration.

[FR Doc. 2024–10012 Filed 5–7–24; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX24GG00995TR00]

Call for Nominations for the Scientific Earthquake Studies Advisory Committee

AGENCY: U.S. Geological Survey, Department of the Interior.

ACTION: Call for nominations.

SUMMARY: The Department of the Interior is seeking nominations to serve on the Scientific Earthquake Studies Advisory Committee (SESAC). The SESAC advises the Director of the U.S. Geological Survey (USGS) on matters relating to the USGS's participation in the National Earthquake Hazards Reduction Program (NEHRP).

DATES: All nominations must be received no later than June 7, 2024.

ADDRESSES: Send nominations electronically to ghayes@usgs.gov or by mail to Dr. Gavin Hayes, U.S. Geological Survey, U.S. Department of the Interior, PO Box 25046, MS–966, Denver, Colorado 80225.

FOR FURTHER INFORMATION CONTACT: Dr. Gavin Hayes, U.S. Geological Survey, U.S. Department of the Interior, P.O. Box 25046, MS–966, Denver, Colorado 80225, ghayes@usgs.gov, 303–273–8421.

SUPPLEMENTARY INFORMATION: The SESAC conducts its operations in accordance with the provisions of the Federal Advisory Committee Act. The SESAC provides recommendations and advice to the Director of the USGS (Director), and functions solely as an

advisory body. The SESAC advises the Director on matters relating to USGS's participation in the NEHRP, including the USGS's roles, goals, and objectives within the NEHRP, its capabilities and research needs, guidance on achieving major objectives, and establishing and measuring performance goals.

The SESAC includes up to 10 members not employed by the Federal Government, who are qualified in the seismic sciences and other appropriate fields involved in national earthquake research activities. Selection of individuals for the SESAC shall be based solely on established records of distinguished service, and the Director shall ensure that a reasonable cross-section of views and expertise is represented. Members are appointed as a special Government employees (SGEs) and will be required, prior to appointment, to file a Confidential Financial Disclosure Report in order to avoid involvement in real or apparent conflicts of interest. You may find a copy of the Confidential Financial Disclosure Report at the following website: <https://www.doi.gov/ethics/special-government-employees/financial-disclosure>. Additionally, after appointment, members appointed as SGEs will be required to meet applicable financial disclosure and ethics training requirements. Please contact 202–208–7960 or DOI_Ethics@sol.doi.gov with any questions about the ethics requirements for members appointed as SGEs.

In selecting individuals to serve on the SESAC, the Director shall seek and give due consideration to recommendations from the National Academy of Sciences, professional societies, and other appropriate organizations. SESAC members are appointed for staggered terms to ensure continuity. Nominations received through this call may be used to fill future vacancies on the SESAC. Nominations will be reviewed by the USGS, and additional information may be requested from nominees. Final selection and appointment of SESAC members will be made by the Director.

The SESAC meets approximately 1–2 times per year. SESAC members will serve without compensation, but travel and per diem costs will be provided by the USGS. The USGS will also provide necessary support services to the SESAC. SESAC meetings are open to the public.

Nominations may come from individuals, employers, associations, professional organizations, or other geospatial organizations. Nominations should include a resume or curriculum vitae providing an adequate description

of the nominee's qualifications sufficient for the USGS to make an informed decision regarding meeting the membership requirements of the SESAC and permit the nominated person to be contacted. Nominations may optionally include supporting letters from employers, associations, professional organizations, and/or other organizations.

Additional information about the SESAC and the nomination process is posted on the SESAC web page.

Authority: 5 U.S.C. ch. 10.

Gary Latzke,

Chief of Staff, Natural Hazards Mission Area, U.S. Geological Survey.

[FR Doc. 2024–09992 Filed 5–7–24; 8:45 am]

BILLING CODE 4338–11–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

[19XD4523WS/DWSN0000.000000/DS61500000/DP.61501]

Invasive Species Advisory Committee; Second Request for Nominations

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of second request for nominations.

SUMMARY: The U.S. Department of the Interior, on behalf of the interdepartmental National Invasive Species Council (NISC), proposes to appoint new members to the Invasive Species Advisory Committee (ISAC). The Secretary of the Interior, acting as administrative lead, is requesting nominations for qualified persons to serve as members of the ISAC.

DATES: The deadline for submissions for the notice published February 27, 2024 at 89 FR 14519 has been extended. Nominations must be postmarked by June 7, 2024.

ADDRESSES: Electronic nominations packages are preferred and should be sent to invasive_species@ios.doi.gov. As necessary, hard copy nominations can be sent to Stanley W. Burgiel, Executive Director, National Invasive Species Council (OS/NISC), Regular/Express Mail: 1849 C Street NW (Mailstop 3530), Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Kelsey Brantley, NISC Operations Director, at (202) 208–4122, or by email at Kelsey_Brantley@ios.doi.gov.

SUPPLEMENTARY INFORMATION:

Advisory Committee Scope and Objectives

Executive Order (E.O.) 13112 authorized the National Invasive

Species Council (NISC) to provide interdepartmental coordination, planning, and leadership for the Federal Government on the prevention, eradication, and control of invasive species. This authorization was reiterated in E.O. 13751. NISC is currently comprised of the senior-most leadership of twelve Federal Departments/Agencies and four Executive Offices of the President. The Co-chairs of NISC are the Secretaries of the Interior, Agriculture, and Commerce. The Invasive Species Advisory Committee (ISAC) advises NISC. NISC is requesting nominations for individuals to serve on the ISAC.

NISC provides high-level interdepartmental coordination of Federal invasive species actions and works with other Federal and non-Federal groups to address invasive species issues at the national level. NISC duties, consistent with E.O. 13751, are to provide national leadership necessary to coordinate, sustain and expand efforts to safeguard the interest of the United States through the prevention, eradication and control of invasive species through the restoration of ecosystems and other assets impacted by invasive species. These duties and work priorities are further identified and outlined in NISC's annual Work Plans.

ISAC is chartered under the Federal Advisory Committee Act (FACA; 5 U.S.C. ch. 10). At the request of NISC, ISAC provides advice to NISC members on topics related to NISC's duties as described above, and emerging issues prioritized by the Administration. As a multi-stakeholder advisory committee, ISAC is intended to play a key role in recommending plans and actions to be taken in different sectors, geographies, and/or scales to accomplish the activities set forth in NISC Work Plans. It is hoped that, collectively, ISAC will represent the views of the broad range of individuals and communities knowledgeable of and affected by invasive species. NISC is requesting nominations for individuals to serve on the ISAC.

Membership Criteria

Prospective members of ISAC should meet the following criteria:

1. knowledge related to the prevention, eradication, and/or control of invasive species;
2. familiarity with relevant Federal government programs and policy making procedures, as well as their interface with non-federal entities;
3. experience in advising individuals in leadership positions;

4. demonstrated ability to network with and/or represent interests of their peer-community of interest; and

5. teamwork, project management, and communication skills.

ISAC members need not be scientists. Membership from a wide range of disciplines and professional sectors is encouraged. At this time, we are particularly interested in applications from representatives of: non-Federal government agencies (e.g., State, territorial, Tribal, local); academia, research institutions, and scientific societies; the private sector and industry/trade associations; landowners, farmers, ranchers, foresters and other resource users; public health specialists; regional organizations and citizen scientists, recreationists, and other public interest groups. Additionally, ISAC will include one representative from each of the following organizations, serving in a non-voting, "adviser" capacity: the Association of Fish and Wildlife Agencies (AFWA); the National Association of Conservation Districts (NACD); the National Association of State Departments of Agriculture (NASDA); the National Plant Board (NPB); The Native American Fish and Wildlife Society (NAFWS); and the North American Invasive Species Management Association (NAISMA).

After consultation with the other members of NISC, the Secretary of the Interior will appoint members to ISAC. Members will be selected based on their individual qualifications as detailed in their nomination package, as well as the overall need to achieve a balanced representation of viewpoints, subject matter expertise, regional knowledge, and representation of communities of interest. ISAC member terms are limited to two (2) years from their date of appointment to ISAC. Following completion of their first term, an ISAC member may request consideration for reappointment (see *How to Nominate* section below); however, reappointment is NOT guaranteed.

ISAC will hold approximately one or two in-person or virtual meetings per year. Between meetings, ISAC members are expected to participate in committee work via web-based meetings, teleconferences, and email exchanges. Members of the ISAC and its subcommittees serve without pay. However, while away from their homes or regular places of business in the performance of services of the ISAC, members may be reimbursed for travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the government service, as authorized by 5

U.S.C. 5703. Employees of the Federal Government ARE NOT eligible for nomination or appointment to ISAC.

Individuals who are federally registered lobbyists are ineligible to serve on all FACA and non-FACA boards, committees, or councils in an individual capacity. The term "individual capacity" refers to individuals who are appointed to exercise their own individual best judgment on behalf of the government, such as when they are designated special Government employees (SGEs), rather than being appointed to represent a particular interest.

As appropriate, certain ISAC members may be appointed as SGEs. Please be aware that applicants selected to serve as SGEs will be required, prior to appointment, to file a Confidential Financial Disclosure Report, to avoid involvement in real or apparent conflicts of interest. Applicants can access a copy of the Confidential Financial Disclosure Report at: [https://www.oge.gov/web/oge.nsf/0GE%20Forms/2026049D943E0C34852585B6005A23CE/\\$FILE/0GE%20Form%20450%20Dec%202023%20Accessible.pdf?open](https://www.oge.gov/web/oge.nsf/0GE%20Forms/2026049D943E0C34852585B6005A23CE/$FILE/0GE%20Form%20450%20Dec%202023%20Accessible.pdf?open).

Additionally, after appointment, members appointed as SGEs will be required to meet applicable financial disclosure and ethics training requirements. Please contact (202) 208-7960 or DOI_Ethics@sol.doi.gov with any questions about the ethics requirements for members appointed as SGEs.

How To Nominate

Nomination packets should include a resume that provides an adequate description of the nominee's qualifications, which specifically relate to the criteria stated in this notice (see *Membership Criteria* section, para. 1). Included content should enable the Department of the Interior to evaluate the nominee's potential to meet the membership requirements of the Committee. To enable the Department of the Interior to contact a potential member, all nomination packets must include, at a minimum, the nominee's name and a valid email address. Nominees are strongly encouraged to include supporting letters from employers, associations, professional organizations, and/or other organizations that indicate support for the nominee by a meaningful constituency. Nomination packets should be no more than twelve pages.

In addition to submitting the nomination packet as described, *current ISAC members seeking reappointment* must also provide details of their

accomplishments and contributions which support their selection for a second term. Again, reappointment is NOT guaranteed.

All nominations must designate which stakeholder group or community the nominee will represent (see Membership Criteria above, for stakeholder groups and required qualifications). All required documents and any letters of support must be submitted in a SINGLE nomination package. Incomplete packets, packets missing the nominee's contact information, or those with documents submitted separately WILL NOT be considered.

Nominations must be received no later than June 7, 2024. Electronic nomination packages are preferred and should be sent to invasive_species@ios.doi.gov. As necessary, hard copy nominations can be sent to Stanley W. Burgiel, Executive Director, National Invasive Species Council (OS/NISC), Regular Mail: 1849 C Street NW (Mailstop 3530), Washington, DC, 20240.

Authority: 5 U.S.C. ch. 10.

Stanley W. Burgiel,
Executive Director, National Invasive Species Council.

[FR Doc. 2024–09999 Filed 5–7–24; 8:45 am]
BILLING CODE 4334–63–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1626 (Final)]

Paper Shopping Bags From Turkey; Determination

On the basis of the record ¹ developed in the subject investigation, the United States International Trade Commission (“Commission”) determines, pursuant to the Tariff Act of 1930 (“the Act”), that an industry in the United States is materially injured by reason of imports of paper shopping bags from Turkey, provided for in subheadings 4819.30.00 and 4819.40.00 of the Harmonized Tariff Schedule of the United States, that have been found by the U.S. Department of Commerce (“Commerce”) to be sold in the United States at less than fair value (“LTFV”).²

Background

The Commission instituted this investigation effective May 31, 2023, following receipt of a petition filed with

¹ The record is defined in § 207.2(f) of the Commission’s Rules of Practice and Procedure (19 CFR 207.2(f)).
² 89 FR 19295 (March 18, 2024).

the Commission and Commerce by the Coalition for Fair Trade in Shopping Bags, a coalition whose members include Novolex Holdings, LLC, Charlotte, North Carolina, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Pittsburgh, Pennsylvania. The Commission scheduled the final phase of the investigation following notification of a preliminary determination by Commerce that imports of paper shopping bags from Turkey were being sold at LTFV within the meaning of § 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission’s investigation and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of January 18, 2024 (89 FR 3424). The Commission conducted its hearing on March 14, 2024.

The Commission made this determination pursuant to § 735(b) of the Act (19 U.S.C. 1673d(b)). It completed and filed its determination in this investigation on May 2, 2024. The views of the Commission are contained in USITC Publication 5504 (May 2024), entitled *Paper Shopping Bags from Turkey: Inv. No. 731–TA–1626 (Final)*.

By order of the Commission.

Issued: May 2, 2024.

Sharon Bellamy,
Supervisory Hearings and Information Officer.

[FR Doc. 2024–10005 Filed 5–7–24; 8:45 am]
BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1364]

Importer of Controlled Substances Application: Wedgewood Village Pharmacy, LLC

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Wedgewood Village Pharmacy, LLC has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and

applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before June 7, 2024. Such persons may also file a written request for a hearing on the application on or before June 7, 2024.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to <https://www.regulations.gov> and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on <https://www.regulations.gov>. If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment. All requests for a hearing must be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrisette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA **Federal Register** Representative/DPW, 8701 Morrisette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrisette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on April 15, 2024, Wedgewood Village Pharmacy, LLC, 7631 East Indian School Road, Suite 201, Scottsdale, Arizona 85251–3607, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Etorphine HCL	9059	II
Thiafentanil	9729	II

The company plans to import the listed controlled substances for distribution to their customers. No other activities for these drug codes are authorized for this registration.

Approval of permit applications will occur only when the registrant’s business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-

approved finished dosage forms for commercial sale.

Marsha Ikner,

Acting Deputy Assistant Administrator.

[FR Doc. 2024–10032 Filed 5–7–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

[OMB Number 1125–0003]

Agency Information Collection Activities; Proposed eCollection; eComments Requested; Extension of a Previously Approved Collection; Fee Waiver Request (EOIR–26A)

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Executive Office for Immigration Review (EOIR), Department of Justice (DOJ), will be submitting the following information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 30 days until June 7, 2024.

ADDRESSES: Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function and entering either the title of the information collection or the OMB Control Number 1125–0003.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time,

suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Raechel Horowitz, Chief, Immigration Law Division, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2500, Falls Church, VA 22041, telephone: (703) 305–0473, Raechel.Horowitz@usdoj.gov.

SUPPLEMENTARY INFORMATION: This proposed information collection was previously published in the **Federal Register** on February 27, 2024, allowing for a 60-day comment period. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and/or
- 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.

Overview of This Information Collection

1. *Type of Information Collection:* Extension of a currently approved collection.

2. *The Title of the Form/Collection:* Fee Waiver Request.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form number is EOIR–26A, Executive Office for Immigration Review, United States Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: An individual submitting an appeal or motion to the Board of Immigration Appeals. An individual submitting an application or motion to the Office of the Chief Immigration Judge. Attorneys and qualified representatives representing an alien in immigration proceedings before EOIR. The obligation to respond is required to obtain/retain a benefit (fee waiver).

Abstract: The information on the fee waiver request form is used by the Board of Immigration Appeals and the Office of the Chief Immigration Judge to determine whether the requisite fee for an application, motion or appeal will be waived due to an individual’s financial situation.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated number of respondents for the Form EOIR–26A is 2,124. The estimated time per response is 1 hour.

6. *An estimate of the total public burden (in hours) associated with the collection:* The total annual burden hours for this collection is 2,124 hours.

7. *An estimate of the total annual cost burden associated with the collection, if applicable:* There are no capital or start-up costs associated with this information collection. The estimated public cost is zero.

TOTAL BURDEN HOURS

Activity	Number of respondents	Frequency	Total annual responses	Time per response (hour)	Total annual burden (hours)
Form EOIR–26A	2,124	1/annually	2,124	1	2,124
Unduplicated Totals	2,124		2,124		2,124

If additional information is required contact: Darwin Arceo, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution

Square, 145 N Street NE, 4W–218, Washington, DC.

Dated: May 5, 2024.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2024–09991 Filed 5–7–24; 8:45 am]

BILLING CODE 4410–30–P

DEPARTMENT OF LABOR**Agency Information Collection Activities; Submission for OMB Review; Quarterly Census of Employment and Wages (QCEW)**

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Bureau of Labor Statistics (BLS)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before June 7, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency’s estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (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.

FOR FURTHER INFORMATION CONTACT: Nicole Bouchet by telephone at 202–693–0213, or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: Quarterly Census of Employment and Wages (QCEW) data, which are provided to BLS by State Workforce Agencies, are used by BLS as a sampling frame for its establishment surveys; for publishing of accurate current estimates of employment for the US, states, counties, and metropolitan areas; and publishing quarterly census totals of local establishment counts, employment, and wages. The Bureau of Economic Analysis uses the data to produce accurate personal income data in a timely matter for the US, States, and

local areas. Finally, the data is critical to the Employment Training Administration to administer unemployment insurance programs. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on February 7, 2024 (89 FR 8441).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

Agency: DOL–BLS.

Title of Collection: Quarterly Census of Employment and Wages (QCEW).

OMB Control Number: 1220–0012.

Affected Public: State, Local and Tribal Governments.

Total Estimated Number of Respondents: 53.

Total Estimated Number of Responses: 212.

Total Estimated Annual Time Burden: 748,800 hours.

Total Estimated Annual Other Costs Burden: \$0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Nicole Bouchet,

Senior Paperwork Reduction Act Analyst.

[FR Doc. 2024–09972 Filed 5–7–24; 8:45 am]

BILLING CODE 4510–24–P

DEPARTMENT OF LABOR**Agency Information Collection Activities; Submission for OMB Review; Comment Request; Trade Adjustment Assistance Administrative Collection of States (TAAACS)**

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Employment and Training Administration (ETA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before June 7, 2024.

ADDRESSES: Written comments and recommendations for the proposed

information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT:

Michael Howell by telephone at 202–693–6782, or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: This Information Collection Request (ICR) is being submitted for the Department to collect data on state practices pursuant to the Trade Adjustment Assistance (TAA) program under section 239(c) of title II, chapter 2 of the Trade Act of 1974, as amended (19 U.S.C. 2271 *et seq.*). There is currently no comprehensive collection of information regarding the organization and practices of State Workforce Agencies (SWAs) regarding how the TAA Program is administered.

The submissions will be used by Employment and Training Administration (ETA) staff to collect information regarding SWA administration and operations of the TAA Program only to evaluate best practices. Failure to collect this information would prevent the Department from identifying the most effective mechanisms for increasing program efficiency. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on February 13, 2024 (89 FR 10100).

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency’s estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (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.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject

to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–ETA.

Title of Collection: Trade Adjustment Assistance Administrative Collection of States (TAAACS).

OMB Control Number: 1205–0540.

Affected Public: State, local, and Tribal governments.

Total Estimated Number of

Respondents: 52.

Total Estimated Number of

Responses: 52.

Total Estimated Annual Time Burden: 312 hours.

Total Estimated Annual Other Costs Burden: \$0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michael Howell,

Senior Paperwork Reduction Act Analyst.

[FR Doc. 2024–09974 Filed 5–7–24; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[OSHA–2011–0029]

Underground Construction Standard; Extension of the Office of Management and Budget’s (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend the Office of Management and Budget’s (OMB) approval of the information collection requirements specified in the Underground Construction Standard.

DATES: Comments must be submitted (postmarked, sent, or received) by July 8, 2024.

ADDRESSES:

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

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

Instructions: All submissions must include the agency name and OSHA docket number (OSHA–2011–0029) for the Information Collection Request (ICR). OSHA will place all comments, including any personal information, in the public docket, which may be made 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, 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).

The following sections describe who uses the information collected under each requirement, as well as how they use it.

Seven paragraphs in the Underground Construction Standard (“the Standard”), 29 CFR 1926.800, require employers to post warning signs or notices during underground construction; these paragraphs are (b)(3), (i)(3), (j)(1)(vi)(A), (m)(2)(ii), (o)(2), (q)(11), and (t)(1)(iv)(B). The warning signs and notices required by these paragraphs enable employers to effectively alert workers to the presence of hazards or potential hazards at the job site, thereby preventing worker exposure to hazards or potential hazards associated with underground construction that could cause death or serious harm.

Paragraph (t)(3)(xxi) of the Standard requires employers to inspect and load test hoists when they install them, and at least annually thereafter. They must also inspect, and load test a hoist after making any repairs or alterations to it that affect the structural integrity, and after tripping a safety device on the hoist. Employers must also prepare a certification record of each inspection and load test that includes specified information and maintain the most recent certification record until they complete the construction project.

Establishing and maintaining a written record of the most recent inspection and load test alerts equipment mechanics to problems identified during the inspection. Prior to returning the equipment to service, employers can review the records to ensure that the mechanics performed the necessary repairs and maintenance. Accordingly, by using only equipment that is in safe working order, employers will prevent severe injury and death to the equipment operators and other workers who work near the equipment. In addition, these records provide the most efficient means for OSHA compliance officers to determine that an employer performed the required inspections and load tests, thereby assuring that the equipment is safe to operate.

Paragraph (j)(3) of the Standard mandates that employers develop records for air quality tests performed under paragraph (j), including air quality tests required by paragraphs (j)(1)(ii)(A) through (j)(1)(iii)(A), (j)(1)(iii)(B), (j)(1)(iii)(C), (j)(1)(iii)(D), (j)(1)(iv), (j)(1)(v)(A), (j)(1)(v)(B), and (j)(2)(i) through (j)(2)(v). Paragraph (j)

also requires that air quality records include specified information, and that employers maintain the records until the underground construction project is complete. They must also make the records available to OSHA compliance officers on request.

Maintaining records of air quality tests allows employers to document atmospheric hazards, ascertain the effectiveness of controls (especially ventilation) and implement additional controls if necessary. Accordingly, these requirements prevent serious injury and death to workers who work on underground construction projects. In addition, these records provide an efficient means for workers to evaluate the accuracy and effectiveness of an employer's exposure reduction program, and for OSHA compliance officers to determine those employers performed the required tests and implemented appropriate controls.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions to protect workers, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information, and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend the approval of the information collection requirements contained in Underground Construction Standard. The agency is requesting an adjustment increase in burden hours from 77,616 hours to 77,618 hours, a difference of 2 hours. This slight increase is due the result of a rounding inconsistency.

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: Underground Construction Standard.

OMB Control Number: 1218-0067.

Affected Public: Business or other for-profits.

Number of Respondents: 461.

Number of Responses: 1,172,939.

Frequency of Responses: On occasion.

Average Time per Response: Varies.

Estimated Total Burden Hours: 77,618.

Estimated Cost (Operation and Maintenance): \$165,600.

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 <https://www.regulations.gov>, which is the Federal eRulemaking Portal; (2) by facsimile (fax), if your comments, including attachments, are not longer than 10 pages you may fax them to the OSHA Docket Office at (202) 693-1648. All comments, attachments, and other material must identify the agency name and the OSHA docket number for the ICR (OSHA-2011-0029). You may supplement electronic submission by uploading document files electronically.

Comments and submissions are posted without change at <http://www.regulations.gov>. Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the <http://www.regulations.gov> index, some information (e.g., copyrighted material) is not publicly available to read or download from this website. All submission, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the <http://www.regulations.gov> website to submit comments and access the docket is available at the website's "User Tips" link.

Contact the OSHA Docket Office at (202) 693-2350, (TTY) (877) 889-5627 for information about materials not available from the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 8-2020 (85 FR 58393).

Signed at Washington, DC, on May 2, 2024.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2024-09973 Filed 5-7-24; 8:45 am]

BILLING CODE 4510-26-P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA-2024-033]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of proposed extension request.

SUMMARY: NARA proposes to request an extension from the Office of Management and Budget (OMB) of a currently approved information collection used by the public and other Federal agencies to use its official seal(s) and/or logo(s). We invite you to comment on this proposed information collection pursuant to the Paperwork Reduction Act of 1995.

DATES: We must receive written comments on or before July 8, 2024.

ADDRESSES: Send comments to Paperwork Reduction Act Comments (MP), Room 4100; National Archives and Records Administration; 8601 Adelphi Road; College Park, MD 20740-6001, or email them to tamee.fechhelm@nara.gov.

FOR FURTHER INFORMATION CONTACT: Contact Tamee Fechhelm by telephone at 301-837-1694 with requests for additional information or copies of the proposed information collection and supporting statement.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104-13), NARA invites the public and other Federal agencies to comment on proposed information collections. The comments and suggestions should address one or more of the following points: (a) whether the proposed information collections are necessary for NARA to properly perform its functions; (b) NARA's estimate of the burden of the proposed information collections and its accuracy; (c) ways NARA could enhance the quality, utility, and clarity of the information it collects; (d) ways NARA could minimize the burden on respondents of collecting the information, including through information technology; and (e) whether these collections affects small businesses. We will summarize any comments you submit and include the

summary in our request for OMB approval. All comments will become a matter of public record. In this notice, NARA solicits comments concerning the following information collection:

Title: Use of NARA Official Seals and/or Logos.

OMB number: 3095–0052.

Agency form number: N/A.

Type of review: Regular.

Affected public: Business or other for-profit, not-for-profit institutions, Federal Government.

Estimated number of respondents: 37.

Estimated time per response: 15 minutes.

Frequency of response: On occasion.

Estimated total annual burden hours: 9 hours.

Abstract: The authority for this information collection is contained in 36 CFR 1200.8. NARA's three official seals are the National Archives and Records Administration seal; the National Archives seal; and the National Archives Trust Fund Board seal. The official seals are used to authenticate various copies of official records in our custody and for other official NARA business. Occasionally, when criteria are met, we will permit the public and other Federal agencies to use our official seals. A written request must be submitted to use the official seals, which we approve or deny using specific criteria.

Sheena Burrell,

Executive for Information Services/CIO.

[FR Doc. 2024–10011 Filed 5–7–24; 8:45 am]

BILLING CODE 7515–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 72–65, 50–352, and 50–353; NRC–2024–0083]

Constellation Energy Generation, LLC.; Limerick Generating Station, Units 1 and 2; Independent Spent Fuel Storage Installation; Environmental Assessment and Finding of No Significant Impact

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an environmental assessment (EA) and a finding of no significant impact (FONSI) for an exemption request submitted by Constellation Energy Generation, LLC (Constellation) that would permit the Limerick Generating Station (LGS) to maintain three loaded and to load five new 89 multi-purpose canisters (MPC)

with continuous basket shims (CBS) in the HI–STORM Flood/Wind (FW) MPC Storage System at its LGS Units 1 and 2 Independent Spent Fuel Storage Installation (ISFSI) in a storage condition where the terms, conditions, and specifications in the Certificate of Compliance (CoC) No. 1032, Amendment No. 1, Revision No. 1, are not met.

DATES: The EA and FONSI referenced in this document are available on May 8, 2024.

ADDRESSES: Please refer to Docket ID NRC–2024–0083 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking website:* Go to <https://www.regulations.gov> and search for Docket ID NRC–2024–0083. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: Stacy.Schumann@nrc.gov. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select “Begin Web-based ADAMS Search.” For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to PDR.Resource@nrc.gov. For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the “Availability of Documents” section.

- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to PDR.Resource@nrc.gov or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Christian Jacobs, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555; telephone: 301–415–6825; email: Christian.Jacobs@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is reviewing an exemption request from Constellation, dated April 5, 2024. Constellation is requesting an exemption, pursuant to section 72.7 of title 10 of the *Code of Federal Regulations* (10 CFR), in paragraphs 72.212(a)(2), 72.212(b)(3), 72.212(b)(5)(i), 72.212(b)(11), and 72.214 that require Constellation to comply with the terms, conditions, and specifications of the CoC No. 1032, Amendment No. 1, Revision No. 1. If approved, the exemption would allow Constellation to maintain three loaded and to load five new MPC–89–CBS in the HI–STORM FW MPC Storage System at the LGS ISFSI in a storage condition where the terms, conditions, and specifications in the CoC No. 1032, Amendment No. 1, Revision No. 1, are not met.

II. Environmental Assessment

Background

The LGS is located in Limerick Township of Montgomery County, Pennsylvania, 1.7 miles (2.7 kilometers) southeast of the Borough of Pottstown. Unit 1 began operating in 1986 and Unit 2 began operating in 1990. Constellation has been storing spent fuel in an ISFSI at the LGS under a general license as authorized by 10 CFR part 72, subpart K, “General License for Storage of Spent Fuel at Power Reactor Sites.” Constellation currently uses the HI–STORM FW MPC Storage System under CoC No. 1032, Amendment No. 1, Revision No. 1, for dry storage of spent nuclear fuel in a specific MPC (*i.e.*, MPC–89) at the LGS ISFSI.

Description of the Proposed Action

The CoC is the NRC approved design for each dry cask storage system. The proposed action would exempt the applicant from the requirements of 10 CFR 72.212(a)(2), 72.212(b)(3), 72.212(b)(5)(i), 72.212(b)(11), and 72.214 only as these requirements pertain to the use of the MPC–89–CBS in the HI–STORM FW MPC Storage System for the three already loaded systems and the near-term planned loading of five new canisters. The exemption would allow Constellation to maintain loaded and to load five new MPC–89–CBS in the HI–STORM FW MPC Storage System at the LGS ISFSI, despite the MPC–89–CBS in the HI–STORM FW MPC Storage System not being in compliance with the terms, conditions, and specifications in the CoC No. 1032, Amendment No. 1, Revision No. 1.

The HI–STORM FW MPC Storage System CoC provides the requirements,

conditions, and operating limits necessary for use of the system to store spent fuel. Holtec International (Holtec), the designer and manufacturer of the HI-STORM FW MPC Storage System, developed a variant of the design with CBS for the MPC-89, known as MPC-89-CBS. Holtec originally implemented the CBS variant design under the provisions of 10 CFR 72.48, "Changes, tests, and experiments," which allows licensees to make changes to cask designs without a CoC amendment under certain conditions (listed in 10 CFR 72.48(c)). After evaluating the specific changes to the cask designs, the NRC determined that Holtec erred when it implemented the CBS variant design under 10 CFR 72.48, as this was not the type of change allowed without a CoC amendment. For this reason, the NRC issued three Severity Level IV violations to Holtec. Prior to the issuance of the violations, Constellation had already loaded three MPC-89-CBS in a HI-STORM FW MPC Storage System, which are safely in storage on the LGS ISFSI pad. Additionally, Constellation plans to load five new MPC-89-CBS in the HI-STORM FW MPC Storage System beginning in August 2024. This exemption considers the storage of the already loaded systems and the near-term planned loading of the five canisters with the CBS variant basket design.

Need for the Proposed Action

Constellation requested this exemption because Constellation is currently out of compliance with NRC requirements, resulting from the previous loading of spent fuel into a storage system with the CBS variant basket design. This exemption would allow three already loaded MPC-89-CBS in the HI-STORM FW MPC Storage System to remain in storage at the LGS ISFSI. The applicant also requested the exemption in order to allow the LGS to load five new MPC-89-CBS in HI-STORM FW MPC Storage System at the LGS ISFSI for the future loading campaign beginning in August 2024.

Approval of the exemption request would allow Constellation to effectively manage the spent fuel pool margin and capacity to enable refueling and offloading fuel from the reactor. It would also allow Constellation to effectively manage the availability of the specialized workforce and equipment needed to support competing fuel loading and operational activities at the LGS and other Constellation sites.

Environmental Impacts of the Proposed Action

This EA evaluates the potential environmental impacts of granting an exemption from the terms, conditions, and specifications in CoC No. 1032, Amendment No. 1, Revision No. 1. The exemption would allow three loaded MPC-89-CBS in the HI-STORM FW MPC Storage System to remain loaded at the LGS ISFSI. The exemption also would allow a near-term loading of five new MPC-89-CBS in the HI-STORM FW MPC Storage System and allow the MPC-89-CBS to be maintained in storage at the LGS ISFSI.

The potential environmental impacts of storing spent nuclear fuel in NRC-approved storage systems have been documented in previous assessments. On July 18, 1990, the NRC amended 10 CFR part 72 to provide for the storage of spent fuel under a general license in cask designs approved by the NRC. The EA for the 1990 final rule analyzed the potential environmental impacts of using NRC-approved storage casks. The EA for the HI-STORM FW MPC Storage System, CoC No. 1032, Amendment No. 1, Revision No. 1, published in 2015, tiers off of the EA issued for the July 18, 1990, final rule. "Tiering" off earlier EAs is a standard process encouraged by the regulations implementing the National Environmental Policy Act of 1969 (NEPA) that entails the use of impact analyses of previous EAs to bound the impacts of a proposed action where appropriate. The Holtec HI-STORM FW MPC Storage System is designed to mitigate the effects of design basis accidents that could occur during storage. Considering the specific design requirements for the accident conditions, the design of the cask would prevent loss of containment, shielding, and criticality control. If there is no loss of containment, shielding, or criticality control, the environmental impacts would not be significant.

The exemptions requested by Constellation at the LGS site as they relate to CoC No. 1032, Amendment No. 1, Revision No. 1, for the HI-STORM FW MPC Storage System are limited to the use of the CBS variant basket design only for the already loaded three canisters and near-term planned loading of five canisters utilizing the CBS variant basket design. The staff has determined that this change in the basket will not result in either radiological or non-radiological environmental impacts that significantly differ from the environmental impacts evaluated in the environmental assessment supporting the issuance of CoC No. 1032, Amendment No. 1,

Revision No. 1. If the exemption is granted, there will be no significant change in the types or amounts of any effluents released, no significant increase in individual or cumulative public or occupational radiation exposure, and no significant increase in the potential for or consequences from radiological accidents. Accordingly, the Commission concludes that there would be no significant environmental impacts associated with the proposed action.

Alternative to the Proposed Action

The staff considered the no-action alternative. The no-action alternative (denial of the exemption request) would require Constellation to unload spent fuel from the MPC-89-CBS in the HI-STORM FW MPC Storage System to bring it in compliance with the CoC terms, conditions, and specifications in the CoC No. 1032, Amendment No. 1, Revision No. 1. Unloading the cask would subject station personnel to additional radiation exposure, generate additional contaminated waste, increase the risk of a possible fuel handling accident, and increase the risk of a possible heavy load handling accident. Furthermore, the removed spent fuel would need to be placed in the spent fuel pool, where it would remain until it could be loaded into an approved storage cask. Delay in the loading of this spent fuel into other casks could affect Constellation's ability to effectively manage the spent fuel pool capacity and reactor fuel offloading. Not allowing the planned future loading campaign could also affect Constellation's ability to manage pool capacity, reactor fuel offloading, and refueling. It could also pose challenges to spent fuel heat removal and impact the availability of the specialized workforce and equipment needed to support competing fuel loading and operational activities at the LGS and other Constellation sites. The NRC has determined that the no-action alternative would result in undue potential human health and safety impacts that could be avoided by proceeding with the proposed exemption, especially given that the staff has concluded in NRC's Safety Determination Memorandum, issued with respect to the enforcement action against Holtec regarding these violations, that fuel can be stored safely in the MPC-89-CBS canisters.

Agencies Consulted

The NRC provided the Pennsylvania Department of Environmental Protection (PDEP) a copy of this draft EA for review by an email dated April 29, 2024. On May 1, 2024, PDEP provided its concurrence by email.

III. Finding of No Significant Impact

The environmental impacts of the proposed action have been reviewed in accordance with the requirements in 10 CFR part 51, which implement NEPA. Based upon the foregoing environmental assessment, the NRC finds that the proposed action of granting the exemption from the regulations in 10

CFR 72.212(a)(2), 72.212(b)(3), 72.212(b)(5)(i), 72.212(b)(11) and 72.214, which require the licensee to comply with the terms, conditions, and specifications of the CoC, in this case limited to past and specific future loadings of baskets with the CBS variant design, would not significantly impact the quality of the human environment. Accordingly, the NRC has determined

that a FONSI is appropriate, and an environmental impact statement is not warranted.

IV. Availability of Documents

The documents identified in the following table are available to interested persons through ADAMS, as indicated.

Document description	ADAMS accession No. or Federal Register notice
Constellation's request for exemption, dated April 5, 2024	ML24096A137.
NRC issuance of Certificate of Compliance No. 1032, Amendment No. 1, Revision No. 1, dated May 29, 2015	ML15152A358 (Package).
Holtec International, Inc.—Notice of Violation; The U.S. Nuclear Regulatory Commission Inspection Report No. 07201014/2022–201, EA–23–044, dated January 30, 2024.	ML24016A190.
10 CFR part 72 amendment to allow spent fuel storage in NRC-approved casks, July 18, 1990	55 FR 29181.
EA for part 72 amendment to allow spent fuel storage in NRC-approved casks, dated March 8, 1989	ML051230231.
List of Approved Spent Fuel Storage Casks: HI–STORM 100 Cask System CoC No. 1032, Amendment No. 1, Revision 1, dated March 19, 2015.	80 FR 14291.
NRC Safety Determination of a Potential Structural Failure of the Fuel Basket During Accident Conditions for the HI–STORM 100 and HI–STORM Flood/Wind Dry Cask Storage Systems, dated January 31, 2024.	ML24018A085.
NRC email to PDEP requesting review of EA/FONSI for LGS Exemption, dated April 29, 2024	ML24122C670.
Email response from PDEP regarding EA/FONSI for LGS Exemption, dated May 1, 2024	ML24122C674.

Dated: May 3, 2024.

For the Nuclear Regulatory Commission.

Yaira Diaz-Sanabria,

Chief, Storage and Transportation Licensing Branch, Division of Fuel Management, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2024–10044 Filed 5–7–24; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 72–53, 50–254, and 50–265; NRC–2024–0074]

Constellation Energy Generation, LLC.; Quad Cities Nuclear Power Station, Units 1 and 2; Independent Spent Fuel Storage Installation; Exemption

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) issued an exemption to Constellation Energy Generation, LLC. that permits Quad Cities Nuclear Power Station (QCNPS) to load four model 68M multi-purpose canisters with continuous basket shims beginning June 2024 in the HI–STORM 100 Cask System at its QCNPS Units 1 and 2 independent spent fuel storage installation in a storage condition where the terms, conditions, and specifications in the Certificate of Compliance No. 1014, Amendment No. 8, Revision No. 1 are not met.

DATES: The exemption was issued on April 30, 2024.

ADDRESSES: Please refer to Docket ID NRC–2024–0074 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking website:* Go to <https://www.regulations.gov> and search for Docket ID NRC–2024–0074. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: Stacy.Schumann@nrc.gov. For technical questions, contact the individual listed in the “For Further Information Contact” section of this document.

- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select “Begin Web-based ADAMS Search.” For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to PDR.Resource@nrc.gov. The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.

- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to PDR.Resource@nrc.gov or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern

time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Yen-Ju Chen, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555; telephone: 301–415–1018; email: Yen-Ju.Chen@nrc.gov.

SUPPLEMENTARY INFORMATION: The text of the exemption is attached.

Dated: May 3, 2024.

For the Nuclear Regulatory Commission.

Yaira Diaz-Sanabria,

Chief, Storage and Transportation Licensing Branch, Division of Fuel Management, Office of Nuclear Material Safety, and Safeguards.

Attachment—Exemption.

NUCLEAR REGULATORY COMMISSION

Docket Nos. 72–53, 50–254, and 50–265

Constellation Energy Generation, LLC; Quad Cities Nuclear Power Station Units 1 and 2; Independent Spent Fuel Storage Installation

I. Background

Constellation Energy Generation, LLC (Constellation) is the holder of Renewed Facility Operating License Nos. DPR–29 and DPR–30, which authorize operation of the Quad Cities Nuclear Power Station, Units 1 and 2 (QCNPS) in Cordova, Illinois, pursuant to Part 50 of Title 10 of the *Code of Federal Regulations* (10 CFR), “Domestic Licensing of Production and Utilization Facilities.” The licenses provide, among other things, that the facility is subject to all rules, regulations, and orders of

the U.S. Nuclear Regulatory Commission (NRC) now or hereafter in effect.

Consistent with 10 CFR part 72, subpart K, “General License for Storage of Spent Fuel at Power Reactor Sites,” a general license is issued for the storage of spent fuel in an Independent Spent Fuel Storage Installation (ISFSI) at power reactor sites to persons authorized to possess or operate nuclear power reactors under 10 CFR part 50. Constellation is authorized to operate nuclear power reactors under 10 CFR part 50 and holds a 10 CFR part 72 general license for storage of spent fuel at the QCNPS ISFSI. Under the terms of the general license, Constellation stores spent fuel at its QCNPS ISFSI using the HI-STORM 100 Cask System in accordance with Certificate of Compliance (CoC) No. 1014, Amendment No. 8, Revision No. 1.

II. Request/Action

By a letter dated March 15, 2024 (Agencywide Documents Access and Management System [ADAMS] Accession No. ML24075A001), Constellation requested an exemption from the requirements of 10 CFR 72.212(a)(2), 72.212(b)(3), 72.212(b)(5)(i), 72.212(b)(11), and 72.214 that require QCNPS to comply with the terms, conditions, and specifications of the CoC No. 1014, Amendment No. 8, Revision No. 1 (ML16041A233). If approved, Constellation’s exemption request would accordingly allow QCNPS to load four Multi-Purpose Canisters (MPC) with an unapproved variant basket design with continuous basket shims (CBS) (*i.e.*, MPC–68M–CBS) in the HI-STORM 100 Cask System, beginning June 2024, and thus, to load the systems in a storage condition where the terms, conditions, and specifications in the CoC No. 1014, Amendment No. 8, Revision No. 1 are not met.

Constellation currently uses the HI-STORM 100 Cask System under CoC No. 1014, Amendment No. 8, Revision No. 1, for dry storage of spent nuclear fuel in MPC–68M at the QCNPS ISFSI. Holtec International (Holtec), the designer and manufacturer of the HI-STORM 100 Cask System, developed a variant of the design with CBS for the MPC–68M, known as MPC–68M–CBS. Holtec performed a non-mechanistic tip-over analysis with favorable results and implemented the CBS variant design under the provisions of 10 CFR 72.48, “Changes, tests, and experiments,” which allows licensees to make changes to cask designs without a CoC amendment under certain conditions (listed in 10 CFR 72.48(c)). After

evaluating the specific changes to the cask designs, the NRC determined that Holtec erred when it implemented the CBS variant design under 10 CFR 72.48, as this is not the type of change allowed without a CoC amendment. For this reason, the NRC issued three Severity Level IV violations to Holtec (ML24016A190).

Constellation’s near-term loading campaign for the QCNPS ISFSI includes loading four MPC–68M–CBS in the HI-STORM 100 Cask System beginning in June 2024. While Holtec was required to submit a CoC amendment to the NRC to seek approval of the CBS variant design, such a process will not be completed in time to inform decisions for this near-term loading campaign. Therefore, Constellation submitted this exemption request to allow for the future loading of four new MPC–68M–CBS beginning in June 2024, at the QCNPS ISFSI. This exemption is limited to the use of four MPC–68M–CBS in the HI-STORM 100 Cask System for the specific near-term planned loading beginning June 2024.

III. Discussion

Pursuant to 10 CFR 72.7, “Specific exemptions,” the Commission may, upon application by any interested person or upon its own initiative, grant such exemptions from the requirements of the regulations of 10 CFR part 72 as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest.

A. The Exemption Is Authorized by Law

This exemption would allow Constellation to load four MPC–68M–CBS in the HI-STORM 100 Cask System beginning June 2024 at its QCNPS ISFSI in a storage condition where the terms, conditions, and specifications in the CoC No. 1014, Amendment No. 8, Revision No. 1, are not met. Constellation is requesting an exemption from the provisions in 10 CFR part 72 that require the licensee to comply with the terms, conditions, and specifications of the CoC for the approved cask model it uses. Section 72.7 allows the NRC to grant exemptions from the requirements of 10 CFR part 72. This authority to grant exemptions is consistent with the Atomic Energy Act of 1954, as amended, and is not otherwise inconsistent with NRC’s regulations or other applicable laws. Additionally, no other law prohibits the activities that would be authorized by the exemption. Therefore, the NRC concludes that there is no statutory prohibition on the issuance of the requested exemption, and the NRC

is authorized to grant the exemption by law.

B. The Exemption Will Not Endanger Life or Property or the Common Defense and Security

This exemption would allow Constellation to load four MPC–68M–CBS in the HI-STORM 100 Cask System beginning June 2024 at the QCNPS ISFSI in a storage condition where the terms, conditions, and specifications in the CoC No. 1014, Amendment No. 8, Revision No. 1, are not met. In support of its exemption request, Constellation asserts that issuance of the exemption would not endanger life or property because the administrative controls the applicant has in place prevent a tip-over or handling event and that the containment boundary would be maintained in such an event. Constellation relies, in part, on the approach in the NRC’s Safety Determination Memorandum (ML24018A085). The NRC issued this Safety Determination Memorandum to address whether, with respect to the enforcement action against Holtec regarding this violation, there was any need to take an immediate action for the cask systems that were already loaded with non-compliant basket designs. The Safety Determination Memorandum documents a risk-informed approach concluding that, during the design basis event of a non-mechanistic tip-over, the fuel in the basket in the MPC–68M–CBS remains in a subcritical condition.

Constellation also provided site-specific technical information, including information explaining why the use of the approach in the NRC’s Safety Determination Memorandum is appropriate for determining the safe use of the CBS variant baskets at the QCNPS ISFSI. Specifically, Constellation described that the analysis of the tip-over design basis event that is relied upon in the NRC’s Safety Determination Memorandum, which demonstrates that the MPC confinement barrier is maintained, is documented in the updated final safety analysis report (UFSAR) for the HI-STORM 100 Cask System CoC No. 1014, Amendment 8, Revision No. 1, that is used at the QCNPS site. Constellation also described its administrative controls for handling of the HI-STORM 100 Cask System at the QCNPS ISFSI to prevent a tip-over or handling event. Those controls include operational procedures that demonstrate that the system is handled with a single failure proof device, designed in accordance with ANSI N14.6, “Radioactive Materials—Special Lifting Devices for Shipping Containers Weighing 10 000 Pounds

(4500 kg) or More,” for heavy load lifting component, inside of the Reactor Buildings and during transport to the ISFSI. In addition, the transporter employs redundant drop features.

Additionally, Constellation provided specific information from QCNPS’s 72.212 Evaluation Report, Revision 17, indicating that during the design basis event of a non-mechanistic tip-over, QCNPS’s ISFSI would meet the requirements in 10 CFR 72.104, “Criteria for radioactive materials in effluents and direct radiation from an ISFSI or MRS,” and 72.106, “Controlled area of an ISFSI or MRS.” Specifically, Constellation described that, in the highly unlikely event of a tip-over, any potential fuel damage from a non-mechanistic tip-over event would be localized, the confinement barrier would be maintained, and the shielding material would remain intact. Coupled with the distance of the QCNPS ISFSI to the site area boundary, Constellation concluded that compliance with 72.104 and 72.106 is not impacted by approving this exemption request.

The NRC staff reviewed the information provided by Constellation and concludes that issuance of the exemption would not endanger life or property because the administrative controls that Constellation has in place at the QCNPS ISFSI sufficiently minimize the possibility of a tip-over or handling event, and that the containment boundary would be maintained in such an event. The staff confirmed that these administrative controls comply with the technical specifications and UFSAR for the HI-STORM 100 Cask System CoC No. 1014, Amendment 8, Revision No. 1, that is used at the QCNPS site. In addition, the staff confirmed that the information provided by Constellation regarding the QCNPS’s 72.212 Evaluation Report, Revision 17, demonstrates that the consequences of normal and accident conditions would be within the regulatory limits of the 10 CFR 72.104 and 10 CFR 72.106. The staff also determined that the requested exemption is not related to any aspect of the physical security or defense of the QCNPS ISFSI; therefore, granting the exemption would not result in any potential impacts to common defense and security.

For these reasons, the NRC staff has determined that under the requested exemption, the storage system will continue to meet the safety requirements of 10 CFR part 72 and the offsite dose limits of 10 CFR part 20 and, therefore, will not endanger life or property or the common defense and security.

C. The Exemption Is Otherwise in the Public Interest

The proposed exemption would allow Constellation to load four MPC-68M-CBS in the HI-STORM 100 Cask System beginning in June 2024 at the QCNPS ISFSI, even though the CBS variant basket design is not part of the approved CoC No. 1014, Amendment No. 8, Revision No. 1. According to Constellation, the exemption is in the public interest because the inability to load fuel into dry storage in the future loading campaign would impact Constellation’s ability to offload fuel from the QCNPS reactor units, consequently impacting continued safe reactor operation.

Constellation stated that delaying the future loading campaign would impact its ability to effectively manage the margin to full core discharge capacity in the QCNPS Unit 1 and Unit 2 spent fuel pools. The low spent fuel pool capacity would make it difficult to refuel and present potential risks to fuel handling operations during pre- and post-outage. In addition, a crowded spent fuel pool would challenge the decay heat removal demand of the pool and, therefore, increase the consequence of a loss of fuel pool cooling event. The additional fuel moves that would be required to manage the fuel pool loading with extra bundles in the pool would also increase the likelihood of a fuel handling accident. Furthermore, QCNPS planned the cask loading campaign years in advance based on availability of the specialized workforce and equipment that is shared throughout the Constellation fleet. These specialty resources support competing priorities including refueling outages, loading campaigns, fuel pool cleanouts, fuel inspections, fuel handling equipment upgrade and maintenance, fuel sipping, new fuel receipt, and crane maintenance and upgrades. Any delays would have a cascading impact on other scheduled specialized activities.

For the reasons described by Constellation in the exemption request, the NRC agrees that it is in the public interest to grant the exemption. If the exemption is not granted, to comply with the CoC, Constellation would have to delay future loading and keep the spent nuclear fuel in the spent fuel pool. As described by Constellation, this scenario would affect Constellation’s ability to effectively manage the spent pool capacity and reactor fuel offloading at QCNPS. In addition, a crowded spent fuel pool would challenge the decay heat removal demand of the pool increasing the consequence of a loss of fuel pool cooling event; and, because

additional fuel moves would be required, it would also increase the likelihood of a fuel handling accident. Moreover, the rescheduling of the specialized resources for the future loading campaign would impact the operations of QCNPS and other Constellation sites.

Therefore, the staff concludes that approving the exemption is in the public interest.

Environmental Consideration

The NRC staff also considered whether there would be any significant environmental impacts associated with the exemption. For this proposed action, the NRC staff performed an environmental assessment pursuant to 10 CFR 51.30. The environmental assessment concluded that the proposed action would not significantly impact the quality of the human environment. The NRC staff concluded that the proposed action would not result in any changes in the types or amounts of any radiological or non-radiological effluents that may be released offsite, and there would be no significant increase in occupational or public radiation exposure because of the proposed action. The environmental assessment and the finding of no significant impact was published on April 30, 2024 (89 FR 34282).

IV. Conclusion

Based on these considerations, the NRC has determined that, pursuant to 10 CFR 72.7, the exemption is authorized by law, will not endanger life or property or the common defense and security, and is otherwise in the public interest. Therefore, the NRC grants Constellation an exemption from the requirements of §§ 72.212(a)(2), 72.212(b)(3), 72.212(b)(5)(i), 72.212(b)(11), and 72.214 with respect to the future loading in the HI-STORM 100 Cask System of four MPC-68M-CBS beginning in June 2024.

This exemption is effective upon issuance.

Dated: April 30, 2024.

For the Nuclear Regulatory Commission.

/RA/

Yoira Diaz-Sanabria,
Chief, Storage and Transportation Licensing
Branch, Division of Fuel Management, Office
of Nuclear Material Safety, and Safeguards.

[FR Doc. 2024–10046 Filed 5–7–24; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–269–SLR–2, 50–270–SLR–2, and 50–287–SLR–2; ASLBP No. 24–985–03–SLR–BD01]

Duke Energy Carolinas, LLC; Establishment of Atomic Safety and Licensing Board

Pursuant to the Commission's regulations, see, e.g., 10 CFR 2.104, 2.105, 2.300, 2.309, 2.313, 2.318, 2.321, notice is hereby given that an Atomic Safety and Licensing Board (Board) is being established to preside over the following proceeding:

Duke Energy Carolinas, LLC (Oconee Nuclear Station, Units 1, 2, and 3)

This proceeding involves an application seeking a twenty-year subsequent license renewal of Renewed Facility Operating License Nos. DPR–38, DPR–47, and DPR–55, which authorize Duke Energy Carolinas, LLC to operate the Oconee Nuclear Station, Units 1, 2, and 3, located in Seneca, South Carolina until, respectively, February 6, 2033, October 6, 2033, and July 19, 2034. In response to a notice published in the **Federal Register** announcing the opportunity to request a hearing, see 89 FR 10107 (Feb. 13, 2024), a hearing request was filed on April 29, 2024 on behalf of Beyond Nuclear and Sierra Club.¹

The Board is comprised of the following Administrative Judges:

G. Paul Bollwerk, III, Chairman, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001

Dr. Sue H. Abreu, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001

Dr. Arielle J. Miller, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001

All correspondence, documents, and other materials shall be filed in accordance with the NRC E-Filing rule. See 10 CFR 2.302.

Rockville, Maryland.

Dated: May 2, 2024.

Edward R. Hawkens,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 2024–09975 Filed 5–7–24; 8:45 am]

BILLING CODE 7590–01–P

¹ The Secretary of the Commission extended the deadline for requesting a hearing to April 29, 2024. See Order of the Secretary (Mar. 28, 2024) (ADAMS Accession Number ML24088A303).

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 72–69 and 50–440; NRC–2024–0082]

Vistra Operations Company LLC.; Perry Nuclear Power Plant, Unit 1; Independent Spent Fuel Storage Installation; Environmental Assessment and Finding of No Significant Impact

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an environmental assessment (EA) and a finding of no significant impact (FONSI) for an exemption request submitted by Energy Harbor Nuclear Corporation¹ that would permit Perry Nuclear Power Plant (Perry) to load two Holtec 89-assembly multi-purpose canisters (MPC) with continuous basket shims (CBS) in the HI–STORM Flood/Wind (FW) MPC Storage System at its Perry Unit 1 Independent Spent Fuel Storage Installation (ISFSI) in a storage condition where the terms, conditions, and specifications in the Certificate of Compliance (CoC) No. 1032, Amendment No. 5 are not met.

DATES: The EA and FONSI referenced in this document are available on May 8, 2024.

ADDRESSES: Please refer to Docket ID NRC–2024–0082 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking website:* Go to <https://www.regulations.gov> and search for Docket ID NRC–2024–0082. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: Stacy.Schumann@nrc.gov. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the

¹ Effective March 1, 2024, the facility operating license for Perry Nuclear Power Plant was transferred from Energy Harbor Nuclear Generation LLC (owner) and Energy Harbor Nuclear Corp. (operator) to Energy Harbor Nuclear Generation LLC (owner) and Vistra Operations Company LLC. Upon completion of this license transfer, Vistra Operations Company LLC (VistraOps) assumed the responsibility for all licensing actions under NRC review at the time of the transfer and requested that the NRC continue its review of these actions.

ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select “Begin Web-based ADAMS Search.” For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to PDR.Resource@nrc.gov. For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the “Availability of Documents” section.

- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to PDR.Resource@nrc.gov or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

Bernard White, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555; telephone: 301–415–6577; email: Bernard.White@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is reviewing an exemption request from Energy Harbor Nuclear Corporation, dated February 27, 2024, and supplemented by VistraOps on March 22, 2024. VistraOps is requesting an exemption, pursuant to section 72.7 of title 10 of the *Code of Federal Regulations* (10 CFR), in paragraphs 72.212(a)(2), 72.212(b)(3), 72.212(b)(5)(i), 72.212(b)(11), and 72.214 that require VistraOps to comply with the terms, conditions, and specifications of the CoC No. 1032, Amendment No. 5. If approved, the exemption would allow VistraOps to load two MPCs which contain the 89-assembly CBS basket (MPC–89–CBS) beginning in August 2024 in the HI–STORM FW Storage System at the Perry ISFSI in a storage condition where the terms, conditions, and specifications in the CoC No. 1032, Amendment No. 5 are not met.

II. Environmental Assessment

Background

Perry is located on a 1,100 acre site on Lake Erie, 40 miles northeast of Cleveland in North Perry, Ohio. Unit 1 began operating in 1987. VistraOps has been storing spent fuel in an ISFSI at Perry under a general license as authorized by 10 CFR part 72, subpart K, “General License for Storage of Spent Fuel at Power Reactor Sites.” VistraOps

currently uses the HI-STORM FW Storage System under CoC No. 1032, Amendment No. 5 for dry storage of spent nuclear fuel in a specific MPC (i.e., MPC-89) at the Perry ISFSI.

Description of the Proposed Action

The CoC is the NRC approved design for each dry cask storage system. The proposed action would exempt the applicant from the requirements of 10 CFR 72.212(a)(2), 72.212(b)(3), 72.212(b)(5)(i), 72.212(b)(11), and 72.214 only as these requirements pertain to the use of the MPC-89-CBS in the HI-STORM FW Storage System for near-term planned cask loadings. The exemption would allow VistraOps to load two MPC-89-CBS in the HI-STORM FW Storage System at the Perry ISFSI, despite the MPC-89-CBS in the HI-STORM FW Storage System not being in compliance with the terms, conditions, and specifications in the CoC No. 1032, Amendment No. 5.

The CoC for the HI-STORM FW Storage System provides the requirements, conditions, and operating limits necessary for use of the system to store spent fuel. Holtec International (Holtec), the designer and manufacturer of the HI-STORM FW Storage System, developed a variant of the design with CBS for the MPC-89, known as MPC-89-CBS. Holtec originally implemented the CBS variant design under the provisions of 10 CFR 72.48, which allows licensees to make changes to cask designs without a CoC amendment under certain conditions (listed in 10 CFR 72.48(c)). After evaluating the specific changes to the cask designs, the NRC determined that Holtec erred when it implemented the CBS variant design under 10 CFR 72.48, as this was not the type of change allowed without a CoC amendment. For this reason, the NRC issued three Severity Level IV violations to Holtec. Perry plans to load two MPC-89-CBS canisters in the HI-STORM FW overpacks beginning in August 2024. This exemption considers the near-term planned loading of the two canisters with the CBS variant basket design.

Need for the Proposed Action

VistraOps requested this exemption in order to allow loading of two MPC-89-CBS in HI-STORM FW Storage System at the Perry ISFSI for the future loading campaign scheduled in August 2024.

Approval of the exemption request would allow VistraOps to effectively manage the spent fuel pool margin and capacity to maintain full core offload capability until its next storage cask loading campaign in 2028. Otherwise, after the refueling outages in 2025 and 2027, Perry would have an insufficient

number of open fuel cells (a deficit of 25 open cells) in the spent fuel pool. It would also allow VistraOps to effectively manage the availability of the specialized workforce and equipment needed to support competing fuel loading and operational activities at the Perry ISFSI.

Environmental Impacts of the Proposed Action

This EA evaluates the potential environmental impacts of granting an exemption from the terms, conditions, and specifications in CoC No. 1032, Amendment No. 5. The exemption would allow two MPC-89-CBS canisters to be loaded in the HI-STORM FW Storage System in the near-term loading campaign scheduled for August 2024.

The potential environmental impacts of storing spent nuclear fuel in NRC-approved storage systems have been documented in previous assessments. On July 18, 1990, the NRC amended 10 CFR part 72 to provide for the storage of spent fuel under a general license in cask designs approved by the NRC. The EA for the 1990 final rule analyzed the potential environmental impacts of using NRC-approved storage casks. The EA for the HI-STORM FW Storage System, CoC No. 1032, Amendment No. 5, published in 2020, tiers off of the EA issued for the July 18, 1990, final rule. “Tiering” off earlier EAs is a standard process encouraged by the regulations implementing the National Environmental Policy Act of 1969 (NEPA) that entails the use of impact analyses of previous EAs to bound the impacts of a proposed action where appropriate. The Holtec HI-STORM FW Storage System is designed to mitigate the effects of design basis accidents that could occur during storage. Considering the specific design requirements for the accident conditions, the design of the cask would prevent loss of containment, shielding, and criticality control. If there is no loss of containment, shielding, or criticality control, the environmental impacts would not be significant.

The exemptions requested by VistraOps at the Perry site as they relate to CoC No. 1032, Amendment No. 5 for the HI-STORM FW Storage System are limited to the near-term planned loading of two storage systems utilizing the CBS variant basket design. The staff determined that this change in the basket would not result in either radiological or non-radiological environmental impacts that significantly differ from the environmental impacts evaluated in the environmental assessment supporting the issuance of CoC No. 1032, Amendment No. 5. If the

exemption is granted, there would be no significant change in the types or amounts of any effluents released, no significant increase in individual or cumulative public or occupational radiation exposure, and no significant increase in the potential for or consequences from radiological accidents. Accordingly, the Commission concludes that there would be no significant environmental impacts associated with the proposed action.

Alternative to the Proposed Action

The staff considered the no-action alternative. The no-action alternative (denial of the exemption request) would require VistraOps to delay the near-term planned loading of spent fuel in the MPC-89-CBS in the HI-STORM FW Storage System at the Perry ISFSI. Delaying the loading of spent fuel into the two casks in August 2024 could affect VistraOps’s ability to effectively manage pool capacity, reactor fuel offloading, and refueling. It could also pose challenges to spent fuel heat removal and impact the availability of the specialized workforce and equipment needed to support competing fuel loading and operational activities at Perry and other VistraOps sites. The NRC determined that the no-action alternative would result in undue potential human health and safety impacts that could be avoided by proceeding with the proposed exemption, especially given that the staff has concluded in NRC’s Safety Determination Memorandum, issued with respect to the enforcement action against Holtec regarding these violations, that fuel can be stored safely in the MPC-89-CBS casks.

Agencies Consulted

The NRC provided the Ohio Emergency Management Agency (OH-EMA) a copy of this draft EA for review by an email dated April 25, 2024. On April 25, 2024, OH-EMA stated via email that it had no comments on the draft EA and FONSI.

III. Finding of No Significant Impact

The environmental impacts of the proposed action have been reviewed in accordance with the requirements in 10 CFR part 51, which implement NEPA. Based upon the foregoing environmental assessment, the NRC finds that the proposed action of granting the exemption from the regulations in 10 CFR 72.212(a)(2), 72.212(b)(3), 72.212(b)(5)(i), 72.212(b)(11) and 72.214, which require the licensee to comply with the terms, conditions, and specifications of the CoC, in this case limited to specific future loading of two

canisters with the 89-assembly CBS variant design basket beginning August 2024, would not significantly impact the quality of the human environment. Accordingly, the NRC has determined

that a FONSI is appropriate, and an environmental impact statement is not warranted.

IV. Availability of Documents

The documents identified in the following table are available to interested persons through ADAMS, as indicated.

Document description	ADAMS accession No. or Federal Register notice
Issuance of order for license transfer, dated September 28, 2023	ML23237B448 (Package).
VistraOps and Energy Harbor Nuclear Corporation letter providing Notice of Planned Closing of Transaction and Provision of Documents to Satisfy Order Conditions, dated February 23, 2024.	ML24054A498.
Energy Harbor Nuclear Corporation request for specific exemption, dated February 27, 2024	ML24058A180.
NRC authorization of license transfer amendment, dated March 1, 2024	ML24057A092 (Package).
VistraOps supplement to request for exemption, dated March 22, 2024	ML24082A132.
NRC issuance of Certificate of Compliance No. 1032, Amendment 5, dated June 25, 2020	ML20163A701 (Package).
Holtec International, Inc.—Notice of Violation; The U.S. Nuclear Regulatory Commission Inspection Report No. 07201014/2022–201, EA–23–044, dated January 30, 2024.	ML24016A190.
10 CFR part 72 amendment to allow spent fuel storage in NRC-approved casks, dated July 18, 1990	55 FR 29181.
EA for part 72 amendment to allow spent fuel storage in NRC-approved casks, dated March 8, 1989	ML051230231.
Final rule for List of Approved Spent Fuel Storage Casks: Holtec International HI–STORM Flood/Wind Multipurpose Canister Storage System CoC No. 1032, Amendment 5, dated May 13, 2020.	85 FR 28479.
NRC Safety Determination of a Potential Structural Failure of the Fuel Basket During Accident Conditions for the HI–STORM 100 and HI–STORM Flood/Wind Dry Cask Storage Systems, dated January 31, 2024.	ML24018A085.
NRC email to OH–EMA, “State’s review of EA/FONSI for Perry Exemption,” dated April 25, 2024	ML24120A321.
Email from OH–EMA regarding request for State review of the Perry exemption request environmental assessment, dated April 26, 2024.	ML24120A322.

Dated: May 3, 2024.

For the Nuclear Regulatory Commission.

Yoira Diaz-Sanabria,

*Chief, Storage and Transportation Branch,
Division of Fuel Management, Office of
Nuclear Material Safety and Safeguards.*

[FR Doc. 2024–10043 Filed 5–7–24; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2024–264 and CP2024–270;
MC2024–265 and CP2024–271; MC2024–266
and CP2024–272]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission’s consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* May 9, 2024.

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:

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- I. Introduction
- II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request’s acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service’s request(s) can be accessed via the Commission’s website (<http://www.prc.gov>). Non-public portions of the Postal Service’s request(s), if any, can be accessed through compliance

with the requirements of 39 CFR 3011.301.¹

The Commission invites comments on whether the Postal Service’s request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).*: MC2024–264 and CP2024–270; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 237 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* May 1, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* May 9, 2024.

2. *Docket No(s).*: MC2024–265 and CP2024–271; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 238 to Competitive

¹ See Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date*: May 1, 2024; *Filing Authority*: 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative*: Kenneth R. Moeller; *Comments Due*: May 9, 2024.

3. *Docket No(s)*: MC2024–266 and CP2024–272; *Filing Title*: USPS Request to Add Priority Mail & USPS Ground Advantage Contract 239 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date*: May 1, 2024; *Filing Authority*: 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative*: Kenneth R. Moeller; *Comments Due*: May 9, 2024.

This Notice will be published in the **Federal Register**.

Erica A. Barker,
Secretary.

[FR Doc. 2024–09990 Filed 5–7–24; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 35184; File No. 813–00398]

F&W Investments LP and Fenwick & West LLP

May 2, 2024.

AGENCY: Securities and Exchange Commission (“Commission” or “SEC”).

ACTION: Notice.

Notice of application for an order (“Order”) under sections 6(b) and 6(e) of the Investment Company Act of 1940 (the “Act”) granting an exemption from all provisions of the Act, except sections 9, 17, 30, and 36 through 53, and the rules and regulations under the Act (the “Rules and Regulations”). With respect to sections 17(a), (d), (f), (g), and (j) of the Act, sections 30(a), (b), (e), and (h) of the Act and the Rules and Regulations and rule 38a–1 under the Act, applicants request a limited exemption as set forth in the application.

SUMMARY OF APPLICATION: Applicants request an order to exempt certain limited liability companies, partnerships, trusts, corporations or other entities (“Investment Funds”) formed for the benefit of eligible employees of Fenwick & West LLP and its affiliates from certain provisions of the Act. Each Investment Fund will be an “employees’ securities company” within the meaning of section 2(a)(13) of the Act.

APPLICANTS: F&W Investments LP and Fenwick & West LLP.

FILING DATES: The application was filed on January 25, 2021, and amended on July 27, 2021, February 24, 2023, and April 23, 2024.

HEARING OR NOTIFICATION OF HEARING:

An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing on any application by emailing the SEC’s Secretary at Secretaries-Office@sec.gov and serving the Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below. Hearing requests should be received by the Commission by 5:30 p.m. on May 28, 2024, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer’s interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission’s Secretary at Secretaries-Office@sec.gov.

ADDRESSES: The Commission: Secretaries-Office@sec.gov. Applicants: Katie Lieu, KLieu@fenwick.com and Byron Dailey, BDailey@fenwick.com.

FOR FURTHER INFORMATION CONTACT:

Laura L. Solomon, Senior Counsel, or Kyle R. Ahlgren, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel’s Office).

SUPPLEMENTARY INFORMATION: For Applicants’ representations, legal analysis, and conditions, please refer to Applicants’ amendment no. 3 to application, dated April 23, 2024, which may be obtained via the Commission’s website by searching for the file number at the top of this document, or for an Applicant using the Company name search field, on the SEC’s EDGAR system.

The SEC’s EDGAR system may be searched at <http://www.sec.gov/edgar/searchedgar/legacy/companysearch.html>. You may also call the SEC’s Public Reference Room at (202) 551–8090.

For the Commission, by the Division of Investment Management, under delegated authority.

J. Matthew DeLesDernier,
Deputy Secretary.

[FR Doc. 2024–09994 Filed 5–7–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100048; File No. SR–NSCC–2024–002]

Self-Regulatory Organizations; National Securities Clearing Corporation; Order Approving of Proposed Rule Change To Accommodate a Shorter Standard Settlement Cycle and Make Other Changes

May 2, 2024.

I. Introduction

On March 8, 2024, National Securities Clearing Corporation (“NSCC”) filed with the Securities and Exchange Commission (“Commission”) proposed rule change SR–NSCC–2024–002 (“Proposed Rule Change”) pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b–4 thereunder.² The Proposed Rule Change was published for comment in the **Federal Register** on March 21, 2024.³ The Commission has received no comments on the Proposed Rule Change. For the reasons discussed below, the Commission is approving the Proposed Rule Change.

II. Background

NSCC provides central counterparty services, including clearing, settlement, risk management, and a guarantee of completion, for virtually all broker-to-broker trades involving equity securities, corporate and municipal debt securities, and certain other securities.

NSCC’s Rules⁴ consider the current standard settlement cycle of two business days after the trade date (“T+2”) as “regular way” settlement, and as such, are currently designed to accommodate this settlement cycle. The T+2 settlement cycle has been in place since 2017 when the Commission amended Exchange Act Rule 15c6–1(a)⁵

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release No. 99750 (Mar. 15, 2024), 89 FR 20267 (Mar. 21, 2024) (File No. SR–NSCC–2024–002) (“Notice of Filing”).

⁴ Capitalized terms not defined herein are defined in the Rules and Procedures of NSCC (“Rules”), available at <https://www.dtcc.com/legal/rules-and-procedures.aspx>.

⁵ Exchange Act Rule 15c6–1(a), as amended in 2017, required, with certain exceptions, that a broker or dealer shall not effect or enter into a contract for the purchase or sale of a security (other than an exempted security, government security, municipal security, commercial paper, bankers’ acceptances, or commercial bills) that provides for payment of funds and delivery of securities later than the second business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction. See 17 CFR 240.15c6–1(a).

to shorten the standard settlement cycle from three business days after the trade date, in an effort to reduce credit, market, and liquidity risk, and as a result, reduce systemic risk for U.S. market participants.⁶ In an effort to further promote investor protection, reduce risk in the financial system, and increase operational and capital efficiency in the securities market, the Commission has adopted a rule change shortening the standard settlement cycle from T+2 to one business day after the trade date (“T+1”) (“Shortened Settlement Cycle”), with a compliance date of May 28, 2024.⁷

NSCC is proposing to amend the Rules to be consistent with this upcoming industry-wide move to the Shortened Settlement Cycle. However, NSCC states that the core functions of NSCC will generally continue to operate in the same way in the Shortened Settlement Cycle.⁸

III. Description of the Proposed Rule Change

NSCC proposes changes to address two categories of rules: (A) rules that have timeframes and/or cutoff times that are tied to the standard settlement cycle, and (B) rules affected by process changes being made to accommodate the Shortened Settlement Cycle. In general, these provisions either directly track the timeframe and/or Settlement Date of the standard settlement cycle, address non-standard settlement cycles, or provide for timeframes and/or cutoff times that are connected to or are affected by the timing of the standard settlement cycle and would need to be changed to accommodate the Shortened Settlement Cycle. The proposed changes to accommodate the upcoming move to the Shortened Settlement Cycle would impact the following NSCC Rules: Definitions (Rule 1 and Procedure XIII); Supplemental Liquidity Deposits (Rule 4A); Trade Comparison and Recording (Procedure II); the Special Representative Service (Procedure IV); the Continuous Net Settlement (“CNS”) System and CNS Accounting Operation (Rule 11 and Procedure VII); the Balance Order Accounting Operation (Procedure V); the Foreign Security Accounting Operation (Procedure VI); the ACATS Settlement Accounting Operation (Procedure XVIII); and the NSCC

Guaranty (Addendum K).⁹ These proposed changes are discussed below.

NSCC is also proposing other technical changes and corrections to the Rules that are not required to accommodate the move to the Shortened Settlement Cycle but would provide additional clarity and accuracy in the Rules.¹⁰

A. Changes to Timeframes and/or Cutoff Times Tied to the Standard Settlement Cycle

The Rules contain certain provisions that refer to “T+2” as the timeframe and Settlement Date of the standard settlement cycle and consider this as “regular way” settlement. These provisions would be updated to reflect the change to “T+1” and that T+1 would be Regular Way settlement under the Shortened Settlement Cycle.¹¹ Similarly, a number of provisions in the Rules refer to timeframes and/or Settlement Dates that are intended to be shorter/earlier or later, as applicable, than the timeframe and/or Settlement Date of the standard settlement cycle. These provisions also must be changed to accommodate the Shortened Settlement Cycle.¹² Likewise, the length and timing of certain cutoff times are based on either a standard settlement cycle or a non-standard settlement cycle. Therefore, when the timeframe and Settlement Date of the standard settlement cycle and nonstandard settlement cycle are changed, these cutoff times would also need to be revised accordingly.¹³

B. Changes to Process Relating to the Shortened Settlement Cycle

Some of the Rules would require process changes to accommodate the Shortened Settlement Cycle, as described below.¹⁴

⁹ For more detailed discussion of each specific edit to the Rules, please refer to the Notice of Filing. See *id.* at 20268–73 (describing specific changes to each of the relevant sections of the Rules).

¹⁰ See *id.* at 20269–72 (Subparagraphs B, C (concerning Index Receipts (Procedure II.F)), E (concerning Consolidated Trade Summary (Procedure VII.B)), and G). See also *infra* note 9.

¹¹ See *id.* (Subparagraphs A, C (concerning Equity and Listed Debt Securities (Procedure II.B)), Debt Securities (Procedure II.C), Index Receipts (Procedure II.F), Reports and Output (Procedure II.G)), E (concerning Consolidated Trade Summary (Procedure VII.B)), and G).

¹² See *id.* (Subparagraphs B, E (concerning CNS System (Rule 11), Consolidated Trade Summary (Procedure VII.B), Controlling Deliveries to CNS (Procedure VII.D)), F, H, and I).

¹³ See *id.* (Subparagraphs C (concerning Debt Securities (Procedure II.C)), and E (concerning CNS System (Rule 11), Consolidated Trade Summary (Procedure VII.B), CNS Dividend Accounting (Procedure VII.G))).

¹⁴ See *infra* note 9.

Changes to Procedure II.F.—Index Receipts (Exchange-Traded Funds)

NSCC proposes to amend its creation/redemption input and settlement procedures for exchange-traded funds (“ETF(s),” also referred to as “index receipts” in the Rules). Aside from proposed changes to reflect that T+1 would be Regular Way settlement under the Shortened Settlement Cycle, NSCC also proposes additional amendments to allow for the creation and redemption of index receipts for same-day settlement. NSCC would add new rule language to allow Index Receipt Agents to include an additional cash collateral amount (“Index Receipt Cash Collateral Amount”) for same-day settling index receipts, which would be subject to limits established by NSCC.¹⁵ NSCC would also report any necessary adjustments to the Index Receipt Cash Collateral Amount based on end of day values (“Collateral Cash Adjustments”) for non-guaranteed payment order or money settlement between the Members on the next business day to “true-up” the Index Receipt Cash Collateral Amount amounts. In addition, NSCC would amend the procedure to provide that any creation and redemption instructions for same-day settling index receipts that exceed the Index Receipt Cash Collateral Amount limitations established by NSCC would be rejected.

NSCC states that these proposed rules for same-day creation/redemption are designed to allow Authorized Participants to cover short positions in ETF shares.¹⁶ The Rules currently allow Index Receipt Agents to elect a Settlement Date of T+1 or later for ETFs. Under the current T+2 settlement cycle, Authorized Participants may address short positions through the submission of creations/redemptions for next-day settlement (*i.e.*, T+1). However, under the Shortened Settlement Cycle, Authorized Participants may need to submit creations/redemptions on a same-day basis to cover short positions scheduled for settlement on T+1.¹⁷ NSCC states that in the absence of the proposed same-day cycle, Authorized Participants would need to process this

¹⁵ NSCC would initially establish this limit at 3% of the contract settlement amount of the order, which would be priced based on the prior night’s net asset value. NSCC will monitor the use and overall collateral buffer amounts over time and may adjust this threshold as needed. Changes to these limits would be announced to Members by Important Notice. See Notice of Filing, *supra* note 3, at 20269.

¹⁶ See *id.*

¹⁷ Currently, NSCC allows for same-day settling cash trades in the secondary market, even in the T+2 environment. The proposed rule change would allow same-day settling trades in the primary market.

⁶ See Securities Exchange Act Release No. 80295 (Mar. 22, 2017), 82 FR 15564 (Mar. 29, 2017).

⁷ See Securities Exchange Act Release No. 96930 (Feb. 15, 2023), 88 FR 13872 (Mar. 6, 2023) (S7–05–22) (Shortening the Securities Transaction Settlement Cycle) (“T+1 Adopting Release”).

⁸ See Notice of Filing, *supra* note 3, at 20268.

activity on an ex-clearing basis, which would result in excess capital expenses.¹⁸ As stated above, the proposed rule change would also provide Index Receipt Agents with the option to require an additional Index Receipt Cash Collateral Amount as part of the creation or redemption to act as a “buffer” and account for potential market moves in the ETF or underlying components between the submission of the creation or redemption earlier in the day (based on the prior day’s closing price which aligns with net asset value) and the settlement of such obligations at the end of the day during NSCC’s end-of-day settlement cycle. These same-day create/redeem transactions would be subject to NSCC’s risk management, consistent with its risk management of other ETF create/redeem orders.

Changes to Procedure II.H.—Consolidated Trade Summaries.

NSCC proposes to update its procedures concerning Consolidated Trade Summaries to reflect processes under the Shortened Settlement Cycle. NSCC’s Consolidated Trade Summary System defines the expected settlement path for each transaction received by the Universal Trade Capture (“UTC”) service as CNS or non-CNS eligible.¹⁹ NSCC would make changes regarding the reporting of Balance Order transactions under the Shortened Settlement Cycle to state, more generally, that each Consolidated Trade Summary would include Receive and Deliver instructions to each Member to settle directly with its counterparties. NSCC states that the proposed change is intended to reflect that the three Consolidated Trade Summaries made available by NSCC will not include the same information on all three reports (e.g., the first two cycles would report next-day settling Balance Order transactions while the third cycle would report same-day settling Balance Order transactions trades).²⁰

Changes to Procedure IV—Special Representative Service

NSCC proposes to delete a provision related to the Correspondent Clearing Service,²¹ which states that transactions

(other than cash, next day fixed-income transactions, or cash equity transactions received after the Corporation’s designated cut-off time) which are accepted by NSCC are then entered into the Balance Order Accounting Operation or CNS Accounting Operation which, when processed through the Balance Order Accounting Operation or CNS Accounting Operation, effectively net the Special Representative out of the original trade. NSCC proposes to delete this statement because (i) under the Shortened Settlement Cycle, there will no longer be next day fixed-income transactions (i.e., such transactions will be Regular Way) and (ii) the statement, more generally, is not a rule or procedural requirement concerning the Correspondent Clearing Service, but rather, is simply a description of an expected outcome of the service.²²

Changes to Procedure VII—CNS Accounting Operation

NSCC proposes changes to Rule 11 and Procedure VII concerning projection reports. Under the Shortened Settlement Cycle, the CNS projection report that will be issued on each Settlement Date will no longer include next day settling positions because it will only cover obligations for a one-day settlement cycle and will be issued during early morning hours on the Settlement Date. NSCC proposes to revise Section 4 of Rule 11 to remove rule text related to positions or obligations due to settle on “the next settlement day.” NSCC proposes to delete subsection D.1. of Procedure VII²³ concerning the CNS projection report and other references to it throughout Procedure VII. Under the Shortened Settlement Cycle, the CNS projection report would no longer be used for the exemption process because it will be distributed at 2:00 a.m. ET on Settlement Date, after the night cycle completes.²⁴ However, NSCC would clarify in the newly renumbered Section D.1(a) that Members may use other position reporting made available by NSCC to set exemptions and control deliveries.

other Members acting as their Special Representative to accommodate (i) a Member with multiple affiliate accounts who wishes to move a position resulting from an “original trade” in the process of clearance from one affiliate account to another or (ii) a Member that relies on its Special Representative to execute a trade in any market on its behalf to enable the resulting position to be moved from the Special Representative to that Member. *Id.*; see also Procedure IV, *supra* note 4.

²² See Notice of Filing, *supra* note 3, at 20270.

²³ Section D of Procedure VII describes the process for Members to control the delivery of securities to satisfy short positions in NSCC’s CNS system. *See id.* at 20271.

²⁴ *See id.*

NSCC also proposes changes to Section H of Procedure VII describing the timeline of actions that must occur in connection with the processing of eligible corporate reorganization events to align with the Shortened Settlement Cycle. While the processing of mandatory reorganizations occurs automatically, the processing of voluntary reorganizations through the CNS Reorganization Processing System requires certain actions to be taken by both NSCC and Members with positions in the subject security during the period of time leading up to and following the expiration of the event. This period of time is referred to in the Rules as the “protect period” and is defined by reference to the expiration date, or “E,” of a voluntary reorganization (e.g., “E+1” is one day past the expiration date of the event). NSCC would remove references to the current standard two business day protect period and replace them with references to the one business day protect period anticipated under the Shortened Settlement Cycle. NSCC also proposes to update the processing timeframes for voluntary reorganizations to reflect the new timeframes under the Shortened Settlement Cycle.²⁵

IV. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act²⁶ directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and rules and regulations thereunder applicable to such organization. After careful review of the Proposed Rule Change, the Commission finds that the Proposed Rule Change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to NSCC. In particular, the Commission finds that the Proposed Rule Change is consistent with Section 17A(b)(3)(F) of the Act.²⁷

A. Consistency with Section 17A(b)(3)(F) of the Act

Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency be designed to, among other things, promote the prompt and accurate clearance and settlement of securities transactions and to remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and

²⁵ For specific changes in processing timeframes for voluntary reorganizations, please refer to the Notice of Filing. *See id.* at 20272.

²⁶ 15 U.S.C. 78s(b)(2)(C).

²⁷ 15 U.S.C. 78q-1(b)(3)(F).

¹⁸ See Notice of Filing, *supra* note 3, at 20270.

¹⁹ NSCC’s CNS system is NSCC’s core netting, allotting, and fail-control engine in which each security is netted to one position per Member with NSCC as its central counterparty. *See id.* *See also* Rule 11, *supra* note 4.

²⁰ See Notice of Filing, *supra* note 3, at 20270.

²¹ NSCC’s Special Representative Service allows Members that are authorized by one or more other persons to act on their behalf to submit transactions in securities to NSCC. *See id.* As part of this, the Correspondent Clearing Service permits Members to clear and settle transactions executed for them by

settlement of securities transactions.²⁸ The Commission believes that the Proposed Rule Change is consistent with Section 17A(b)(3)(F) of the Act for the reasons stated below.

As discussed in Part II, the Commission has adopted a rule change shortening the standard settlement cycle from T+2 to T+1, with a compliance date of May 28, 2024. The Proposed Rule Change would align NSCC's Rules with this upcoming industry-wide move and update NSCC's Rules to accommodate anticipated processing timelines under a Shortened Settlement Cycle. The Proposed Rule Change would modify the timeframes, cutoff times, and associated outputs for certain processes related to NSCC's clearance and settlement operations for a T+1 environment, including Rules related to: Definitions (Rule 1 and Procedure XIII); Supplemental Liquidity Deposits (Rule 4A); Trade Comparison and Recording (Procedure II); the Special Representative Service (Procedure IV); the Continuous Net Settlement ("CNS") System and CNS Accounting Operation (Rule 11 and Procedure VII); the Balance Order Accounting Operation (Procedure V); the Foreign Security Accounting Operation (Procedure VI); the ACATS Settlement Accounting Operation (Procedure XVIII); and the NSCC Guaranty (Addendum K).

The Commission has reviewed and analyzed the filing materials, and agrees that these changes are necessary for NSCC to clear and settle transactions promptly and accurately under the Shortened Settlement Cycle. As described in Part III.A, the changes to update and modify timeframes and cutoff times to reflect a Shortened Settlement Cycle should help ensure that NSCC's operations and Rules are consistent with the Shortened Settlement Cycle. Similarly, the changes to modify existing processes such that they occur within the Shortened Settlement Cycle, as described in Part III.B, should also help ensure that NSCC's functions are consistent with and accommodate the Shortened Settlement Cycle. Therefore, the Commission finds that the Proposed Rule Change should support NSCC's ability to provide prompt and accurate clearance and settlement of securities transactions and to remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions, consistent with Section 17A(b)(3)(F) of the Act.²⁹ Regarding the technical

changes and corrections to the Rules not required to accommodate the move to T+1, as also described in Part III, the Commission finds these changes also consistent with Section 17A(b)(3)(F) of the Act³⁰ because the technical updates would provide additional clarity and accuracy in the Rules for Members that rely on them.

V. Conclusion

On the basis of the foregoing, the Commission finds that the Proposed Rule Change is consistent with the requirements of the Act, and in particular, with the requirements of Section 17A of the Act³¹ and the rules and regulations promulgated thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act³² that proposed rule change SR–NSCC–2024–002, be, and hereby is, *approved*.³³

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁴

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2024–10001 Filed 5–7–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100050; File No. SR–NYSEARCA–2024–27]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change to List and Trade Shares of the 7RCC Spot Bitcoin and Carbon Credit Futures ETF Under NYSE Arca Rule 8.500–E (Trust Units)

May 2, 2024.

On March 13, 2024, NYSE Arca, Inc. filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b–4 thereunder,² a proposed rule change to list and trade shares of the 7RCC Spot Bitcoin and Carbon Credit Futures ETF under NYSE Arca Rule 8.500–E (Trust Units). The proposed rule change was published for comment

³⁰ *Id.*

³¹ 15 U.S.C. 78q–1.

³² 15 U.S.C. 78s(b)(2).

³³ In approving the Proposed Rule Change, the Commission considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

³⁴ 17 CFR 200.30–3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

in the **Federal Register** on March 26, 2024.³

Section 19(b)(2) of the Act⁴ provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is May 10, 2024. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,⁵ designates June 24, 2024 as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–NYSEARCA–2024–27).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2024–10002 Filed 5–7–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–522, OMB Control No. 3235–0586]

Proposed Collection; Comment Request; Extension: Rule 38a-1

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the

³ See Securities Exchange Act Release No. 99801 (Mar. 20, 2024), 89 FR 21104. Comments on the proposed rule change are available at: <https://www.sec.gov/comments/sr-nysearca-2024-27/srnysearca202427.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ *Id.*

⁶ 17 CFR 200.30–3(a)(31).

²⁸ 15 U.S.C. 78q–1(b)(3)(F).

²⁹ *Id.*

“Commission”) is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 38a–1 (17 CFR 270.38a–1) under the Investment Company Act of 1940 (15 U.S.C. 80a) (“Investment Company Act”) is intended to protect investors by fostering better fund compliance with securities laws. The rule requires every registered investment company and business development company (“fund”) to: (i) adopt and implement written policies and procedures reasonably designed to prevent violations of the federal securities laws by the fund, including procedures for oversight of compliance by each investment adviser, principal underwriter, administrator, and transfer agent of the fund; (ii) obtain the fund board of directors’ approval of those policies and procedures; (iii) annually review the adequacy of those policies and procedures and the policies and procedures of each investment adviser, principal underwriter, administrator, and transfer agent of the fund, and the effectiveness of their implementation; (iv) designate a chief compliance officer to administer the fund’s policies and procedures and prepare an annual report to the board that addresses certain specified items relating to the policies and procedures; and (v) maintain for five years the compliance policies and procedures and the chief compliance officer’s annual report to the board.

The rule contains certain information collection requirements that are designed to ensure that funds establish and maintain comprehensive, written internal compliance programs. The information collections also assist the Commission’s examination staff in assessing the adequacy of funds’ compliance programs.

The Commission staff estimates that 13,628 funds are subject to rule 38a–1. Based on these estimates, the total annual burden hours associated with Rule 38a–1 is 476,980 hours. The estimated total annual burden hours associated with rule 38a–1 have increased 25,572 hours, from 451,408 hours to 476,980 hours and external costs increased from \$19,608,000 to \$23,876,256. These changes in burden hours and external costs reflect changes in the number of affected entities and in the external cost associated with the information collection requirements. These changes reflect revised estimates.

The estimate of average burden hours is made solely for the purposes of the

Paperwork Reduction Act. The estimate is based on communications with industry representatives and is not derived from a comprehensive or even a representative survey or study. Responses will not be kept confidential. Other information provided to the Commission in connection with staff examinations or investigations is kept confidential subject to the provisions of applicable law. If information collected pursuant to rule 38a–1 is reviewed by the Commission’s examination staff, it is accorded the same level of confidentiality accorded to other responses provided to the Commission in the context of its examination and oversight program.

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission’s estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted by July 8, 2024.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: David Bottom, Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549 or send an email to: PRA_Mailbox@sec.gov.

Dated: May 2, 2024.

J. Matthew DeLesDernier,
Deputy Secretary.

[FR Doc. 2024–09964 Filed 5–7–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100051; File No. SR–CboeEDGA–2024–003]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Change To Amend Rule 11.6(n)(4) and Rule 11.10(a)(4)(D) To Permit the Use of the Post Only Order Instruction at Prices Below \$1.00

May 2, 2024.

I. Introduction

On January 19, 2024, Cboe EDGA Exchange, Inc. (“Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b–4 thereunder,² a proposed rule change to permit the use of the Post Only order instruction (“EDGA Post Only Orders”) at prices below \$1.00. The proposed rule change was published for comment in the **Federal Register** on February 7, 2024.³ On March 19, 2024, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ The Commission did not receive any comments. The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposed rule change.

II. Description of the Proposed Rule Change⁷

The Exchange proposes to amend Rule 11.6(n)(4) and Rule 11.10(a)(4)(D) to modify the treatment of EDGA Post Only Orders priced below a dollar on the Exchange. EDGA Post Only Orders priced at or above \$1.00 will only remove liquidity if the value of the execution when removing liquidity equals or exceeds the value of such

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release No. 99458 (February 1, 2024), 89 FR 8460 (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 99765, 89 FR 20721 (March 25, 2024) (designating May 7, 2024, as the date by which the Commission shall either approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change).

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ For a more detailed description of the proposed rule change, including examples, refer to the Notice, *supra* note 3.

execution if the order instead posted to the EDGA Book and subsequently provided liquidity, including the applicable fees charged or rebates provided. Currently, all EDGA Post Only Orders priced below \$1.00 are automatically treated as orders that remove liquidity. Under the proposed rule change, EDGA Post Only Orders priced below \$1.00 will be treated in the same manner as EDGA Post Only Orders priced at or above \$1.00 in that EDGA Post Only Orders priced below \$1.00 will only remove liquidity if the value of the overall execution (taking into account all applicable fees and rebates) make it economically beneficial for the order to remove liquidity.

The Exchange also proposes to amend Rule 11.10(a)(4)(D) to permit Non-Displayed Orders⁸ and orders subject to display-price sliding (collectively, “Resting Orders”) which are not executable at their most aggressive price due to the presence of a contra-side EDGA Post Only Order to be executed at one minimum price variation less aggressive than the order’s most aggressive price.⁹ Currently, Rule 11.10(a)(4)(D) states that, for securities priced at or above \$1.00, incoming orders that are Market Orders¹⁰ or Limit Orders¹¹ priced more aggressively than an order displayed on the EDGA Book, the Exchange will execute the incoming order at, in the case of an incoming sell order, one-half minimum price variation less than the price of the displayed order, and, in the case of an incoming buy order, at one-half minimum price variation more than the price of the displayed order. The Exchange proposes

that for securities priced below \$1.00, incoming orders that are Market Orders or Limit Orders priced more aggressively than an order displayed on the EDGA Book, the Exchange will execute the incoming order at, in the case of an incoming sell order, one minimum price variation less than the price of the displayed order, and, in the case of an incoming buy order, at one minimum price variation more than the price of the displayed order.

III. Proceedings To Determine Whether To Approve or Disapprove SR–CboeEDGA–2024–003, and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act¹² to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission’s analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,¹³ the Commission is providing notice of the grounds for disapproval under consideration. As described above, the Exchange proposes to permit the use of EDGA Post Only Orders at prices below \$1.00. In addition, as described above, for securities priced below \$1.00, incoming orders that are Market Orders or Limit Orders priced more aggressively than an order displayed on the EDGA Book, the Exchange will execute the incoming order at one minimum price variation less (more) than the price of the displayed order for sell (buy) orders.¹⁴ In contrast, under the current rule for securities priced above \$1.00, the incoming order would execute at one-half minimum price variation less (more) than the price of the displayed order for sell (buy) orders.¹⁵ The Commission is instituting proceedings

to allow for additional analysis of, and input from commenters with respect to, the proposed rule change’s consistency with the Act, and in particular, Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to 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.¹⁶ In addition, Sections 6(b)(5) and 6(b)(8) of the Act, respectively, prohibit the rules of an exchange from being designed to permit unfair discrimination between customers, issuers, brokers, or dealers¹⁷ or imposing any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.¹⁸

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change.”¹⁹ The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,²⁰ and any failure of a self-regulatory organization to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.²¹

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their data, views, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change, is consistent with Sections 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be

⁸ See Rule 11.6(e)(2). A User may attach a “Non-Displayed Order” instruction to an order stating that the order is not to be displayed by the System on the EDGA Book.

⁹ See Securities Exchange Act Release No. 75700 (August 14, 2015), 80 FR 50689 (August 20, 2015), SR–EDGA–2015–33 (“EDGA Order Handling Filing”). See also Securities Exchange Act Release No. 64475 (May 12, 2011), 76 FR 28830 (May 18, 2011), SR–BATS–2011–015 (“Resting Order Execution Filing”). The Resting Order Execution Filing introduced an order handling change for certain Non-Displayed Orders and orders subject to display-price sliding that are not executable at prices equal to displayed orders on the opposite side of the market (the “locking price”) on the Exchange’s affiliate, BZX (BATS) Exchange in 2011 and is incorporated by reference in the EDGA Order Handling Filing. The Resting Order Execution Filing permits Resting Orders priced at or above \$1.00 to be executed at one-half minimum price variation less aggressive than the locking price (for bids) and one-half minimum price variation more aggressive than the locking price (for offers), under certain circumstances.

¹⁰ See Rule 11.8(a). A “Market Order” is an order to buy or sell a stated amount of a security that is to be executed at the NBBO or better when the order reaches the Exchange.

¹¹ See Rule 11.8(b). A “Limit Order” is an order to buy or sell a stated amount of a security at a specified price or better.

¹² 15 U.S.C. 78s(b)(2)(B).

¹³ *Id.*

¹⁴ According to the Exchange, executing an incoming order at the same price as the price as that of a displayed order on the same side of the market would violate the time priority of the displayed order. See Notice *supra* note 3, 89 FR at 8463; see also Exchange Rules 11.9(a) and 11.10(a)(4).

¹⁵ See Exchange Rule 11.10(a)(4)(D).

¹⁶ 15 U.S.C. 78f(b)(5).

¹⁷ 15 U.S.C. 78f(b)(5).

¹⁸ 15 U.S.C. 78f(b)(8).

¹⁹ Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

²⁰ See *id.*

²¹ See *id.*

facilitated by an oral presentation of data, views, and arguments, the Commission will consider, pursuant to Rule 19b-4 under the Act,²² any request for an opportunity to make an oral presentation.²³

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be approved or disapproved by May 29, 2024. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by June 12, 2024. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

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-CboeEDGA-2024-003 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-CboeEDGA-2024-003. 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 a.m. and 3 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-CboeEDGA-2024-003 and should be submitted by May 29, 2024. Rebuttal comments should be submitted by June 12, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

J. Matthew DeLesDernier,
Deputy Secretary.

[FR Doc. 2024-10003 Filed 5-7-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-100052; File No. SR-CboeEDGX-2024-007]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Change To Amend Rule 11.6(n)(4) and Rule 11.10(a)(4)(D) To Permit the Use of the Post Only Order Instruction at Prices Below \$1.00

May 2, 2024.

I. Introduction

On January 19, 2024, Cboe EDGX Exchange, Inc. ("Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to permit the use of the Post Only order instruction ("EDGX Post Only Orders") at prices below \$1.00. The proposed rule change was published for comment in the **Federal Register** on February 7, 2024.³ On March 19, 2024, pursuant to Section 19(b)(2) of the Act,⁴ the Commission

designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ The Commission did not receive any comments. The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposed rule change.

II. Description of the Proposed Rule Change⁷

The Exchange proposes to amend Rule 11.6(n)(4) and Rule 11.10(a)(4)(D) to modify the treatment of EDGX Post Only Orders priced below a dollar on the Exchange. EDGX Post Only Orders priced at or above \$1.00 will only remove liquidity if the value of the execution when removing liquidity equals or exceeds the value of such execution if the order instead posted to the EDGX Book and subsequently provided liquidity, including the applicable fees charged or rebates provided. Currently, all EDGX Post Only Orders priced below \$1.00 are automatically treated as orders that remove liquidity. Under the proposed rule change, EDGX Post Only Orders priced below \$1.00 will be treated in the same manner as EDGX Post Only Orders priced at or above \$1.00 in that EDGX Post Only Orders priced below \$1.00 will only remove liquidity if the value of the overall execution (taking into account all applicable fees and rebates) make it economically beneficial for the order to remove liquidity.

The Exchange also proposes to amend Rule 11.10(a)(4)(D) to permit Non-Displayed Orders⁸ and orders subject to display-price sliding (collectively, "Resting Orders") which are not executable at their most aggressive price due to the presence of a contra-side EDGX Post Only Order to be executed at one minimum price variation less aggressive than the order's most aggressive price.⁹ Currently, Rule

⁵ See Securities Exchange Act Release No. 99766, 89 FR 20735 (March 25, 2024) (designating May 7, 2024, as the date by which the Commission shall either approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change).

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ For a more detailed description of the proposed rule change, including examples, refer to the Notice, *supra* note 3.

⁸ See Rule 11.6(e)(2). A User may attach a "Non-Displayed Order" instruction to an order stating that the order is not to be displayed by the System on the EDGX Book.

⁹ See Securities Exchange Act Release No. 75479 (July 17, 2015), 80 FR 43810 (July 23, 2015), SR-EDGX-2015-33 ("EDGX Order Handling Filing"). See also Securities Exchange Act Release No. 64475

Continued

²² 17 CFR 240.19b-4.

²³ Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Public Law 94-29 (Jun. 4, 1975), grants to the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

²⁴ 17 CFR 200.30-3(a)(57).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 99459 (February 1, 2024), 89 FR 8473 ("Notice").

⁴ 15 U.S.C. 78s(b)(2).

11.10(a)(4)(D) states that, for securities priced at or above \$1.00, incoming orders that are Market Orders¹⁰ or Limit Orders¹¹ priced more aggressively than an order displayed on the EDGX Book, the Exchange will execute the incoming order at, in the case of an incoming sell order, one-half minimum price variation less than the price of the displayed order, and, in the case of an incoming buy order, at one-half minimum price variation more than the price of the displayed order. The Exchange proposes that for securities priced below \$1.00, incoming orders that are Market Orders or Limit Orders priced more aggressively than an order displayed on the EDGX Book, the Exchange will execute the incoming order at, in the case of an incoming sell order, one minimum price variation less than the price of the displayed order, and, in the case of an incoming buy order, at one minimum price variation more than the price of the displayed order.

III. Proceedings To Determine Whether To Approve or Disapprove SR–ChoeEDGX–2024–007, and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act¹² to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the

(May 12, 2011), 76 FR 28830 (May 18, 2011), SR–BATS–2011–015 (“Resting Order Execution Filing”). The Resting Order Execution Filing introduced an order handling change for certain Non-Displayed Orders and orders subject to display-price sliding that are not executable at prices equal to displayed orders on the opposite side of the market (the “locking price”) on the Exchange’s affiliate, BZX (BATS) Exchange in 2011 and is incorporated by reference in the EDGX Order Handling Filing. The Resting Order Execution Filing permits Resting Orders priced at or above \$1.00 to be executed at one-half minimum price variation less aggressive than the locking price (for bids) and one-half minimum price variation more aggressive than the locking price (for offers), under certain circumstances.

¹⁰ See Rule 11.8(a). A “Market Order” is an order to buy or sell a stated amount of a security that is to be executed at the NBBO or better when the order reaches the Exchange.

¹¹ See Rule 11.8(b). A “Limit Order” is an order to buy or sell a stated amount of a security at a specified price or better.

¹² 15 U.S.C. 78s(b)(2)(B).

Commission’s analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,¹³ the Commission is providing notice of the grounds for disapproval under consideration. As described above, the Exchange proposes to permit the use of EDGX Post Only Orders at prices below \$1.00. In addition, as described above, for securities priced below \$1.00, incoming orders that are Market Orders or Limit Orders priced more aggressively than an order displayed on the EDGX Book, the Exchange will execute the incoming order at one minimum price variation less (more) than the price of the displayed order for sell (buy) orders.¹⁴ In contrast, under the current rule for securities priced above \$1.00, the incoming order would execute at one-half minimum price variation less (more) than the price of the displayed order for sell (buy) orders.¹⁵ The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the proposed rule change’s consistency with the Act, and in particular, Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to 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.¹⁶ In addition, Sections 6(b)(5) and 6(b)(8) of the Act, respectively, prohibit the rules of an exchange from being designed to permit unfair discrimination between customers, issuers, brokers, or dealers¹⁷ or imposing any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.¹⁸

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change.”¹⁹ The description of a proposed rule change,

¹³ *Id.*

¹⁴ According to the Exchange, executing an incoming order at the same price as the price as that of a displayed order on the same side of the market would violate the time priority of the displayed order. See Notice *supra* note 3, 89 FR at 8475; see also Exchange Rules 11.9(a) and 11.10(a)(4).

¹⁵ See Exchange Rule 11.10(a)(4)(D)

¹⁶ 15 U.S.C. 78f(b)(5).

¹⁷ 15 U.S.C. 78f(b)(5).

¹⁸ 15 U.S.C. 78f(b)(8).

¹⁹ Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,²⁰ and any failure of a self-regulatory organization to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.²¹

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their data, views, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change, is consistent with Sections 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of data, views, and arguments, the Commission will consider, pursuant to Rule 19b–4 under the Act,²² any request for an opportunity to make an oral presentation.²³

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be approved or disapproved by May 29, 2024. Any person who wishes to file a rebuttal to any other person’s submission must file that rebuttal by June 12, 2024. The Commission asks that commenters address the sufficiency of the Exchange’s statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

Comments may be submitted by any of the following methods:

²⁰ See *id.*

²¹ See *id.*

²² 17 CFR 240.19b–4.

²³ Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Public Law 94–29 (Jun. 4, 1975), grants to the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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-CboeEDGX-2024-007 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-CboeEDGX-2024-007. 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 a.m. and 3 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-CboeEDGX-2024-007 and should be submitted by May 29, 2024. Rebuttal comments should be submitted by June 12, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2024-10004 Filed 5-7-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 35185; File No. 812-15450]

Crescent Capital BDC, Inc., et al.

May 2, 2024.

AGENCY: Securities and Exchange Commission ("Commission" or "SEC").

ACTION: Notice.

Notice of application for an order under sections 17(d) and 57(i) of the Investment Company Act of 1940 (the "Act") and rule 17d-1 under the Act to permit certain joint transactions otherwise prohibited by sections 17(d) and 57(a)(4) of the Act and rule 17d-1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to amend a previous order granted by the Commission that permits certain business development companies and closed-end management investment companies to co-invest in portfolio companies with each other and with certain affiliated investment entities.

APPLICANTS: Crescent Capital BDC, Inc.; Crescent Private Credit Income Corp.; Crescent Capital Group LP; Crescent Cap Advisors, LLC; Crescent Direct Lending Management, LLC; Crescent SBIC Management, LLC; Crescent Credit Europe LLP; Crescent Direct Lending SMA Management LLC; Crescent Private Credit Partners Management LLC; Crescent Cap NT Advisors, LLC; Crescent Mezzanine Partners VI, LP; Crescent Mezzanine Partners VIB, LP; Crescent Mezzanine Partners VIC, LP; Crescent Capital High Income Fund, LP; Crescent Capital High Income Fund B, L.P.; Crescent Credit Europe CAA SCS; Crescent Credit Europe MM SCS; Crescent Credit Solutions VIII, L.P.; Crescent Credit Solutions VIIB, SCSp; Crescent Credit Solutions VIIC (Solvency II), SCSp; Crescent Credit Solutions VIII A-2, LP; Crescent Credit Opportunities Fund, L.P.; Crescent Credit Opportunities Fund (Cayman), L.P.; Crescent Credit Opportunities Fund AIF, SCSp; Crescent Senior Secured Floating Rate Loan Fund, LLC; Crescent Senior Secured Floating Rate Loan Fund (Cayman), LP; Crescent/Kamehameha Schools Partnership, LP; NPS/Crescent Strategic Partnership, LP; NPS/Crescent Strategic Partnership II, LP; Crescent (TX) Direct Lending Fund, L.P.; Crescent Direct Lending Fund, L.P.; Crescent Direct Lending Levered Fund (Cayman), LP; Crescent Direct Lending Levered Fund (Delaware), LP; CDL Unit Trust (Ireland); CDL Investment Subsidiary II, LP; CDL

Levered Fund II, LP; Crescent Direct Lending Fund II (Ireland), LP; Crescent Direct Lending Fund II (Canada), LP; Crescent Direct Lending Levered Fund II (Cayman), LP; Crescent Direct Lending Levered Fund II (Delaware), LP; Crescent Direct Lending Fund II (Delaware), LP; CDL Unlevered III Investment Subsidiary LP; CDL Levered III Investment Subsidiary LP; Crescent Direct Lending Fund III LP; Crescent Direct Lending Fund III (Delaware), LP; Crescent Direct Lending Fund III (Cayman) LP; Crescent Direct Lending Fund III (Ireland) LP; Crescent Direct Lending Fund III Note Feeder LP; Crescent Direct Lending Fund III (Canada) LP; Crescent Direct Lending Levered Fund, L.P.; Crescent Direct Lending Levered Fund III (Cayman), LP; Crescent Direct Lending Levered Fund III (Delaware), LP; Crescent Direct Lending Levered Fund III Note Feeder LP; Crescent Direct Lending Levered Fund III (Ireland) LP; Crescent Direct Lending Fund III (UK) LP; Crescent Direct Lending SBIC Fund, L.P.; Crescent Special Situations Fund (Investor Group), L.P.; Crescent European Specialty Lending Fund, L.P.; Crescent European Specialty Loan Fund SCS, SICAV-FIS; Crescent European Specialty Lending Fund (Levered) LP; Crescent European Specialty Lending Fund (Cayman-Levered) LP; Crescent European Specialty Lending Fund (Cayman) LP; Crescent European Specialty Lending Fund for ERISA Plans LP; Crescent European Specialty Lending Fund II (Delaware) LP; Crescent European Specialty Lending Fund II (Levered) LP; Crescent European Specialty Lending Fund II (Cayman-Levered) LP; Crescent European Specialty Lending Fund II (Cayman-Levered EUR) LP; Crescent European Specialty Lending Fund II (Cayman) LP; Crescent European Specialty Loan Fund II SCSp; Crescent European Specialty Loan Fund II (GBP) SCSp; Crescent Mezzanine Partners VII (LTL), L.P.; Crescent Mezzanine Partners VII, L.P.; Crescent Mezzanine Partners VIIB, L.P.; Crescent Mezzanine Partners VIIC (LTL), L.P.; Crescent Mezzanine Partners VIIC, L.P.; Crescent Mezzanine Partners VII (Chengdong Co-Investment), L.P.; Crescent Mezzanine Partners VII (PA Co-Investment), LP; Crescent Mezzanine Partners VII (PA Co-Investment II), LP; Crescent Mezzanine Partners VII (PA Co-Investment III), LP; CPCP Levered Unitranche Investments LP; CPCP Unitranche Investments LP; Crescent Private Credit Partners LP; Crescent Private Credit Partners Levered Unitranche Fund (DE) LP; Crescent

²⁴ 17 CFR 200.30-3(a)(57).

Private Credit Partners Levered Unitranche Fund (Ireland) LP; Crescent Private Credit Partners Levered Unitranche Note Feeder LP; Crescent Private Credit Partners Unitranche Fund (DE) LP; Crescent Private Credit Partners Unitranche Fund TE (Cayman) LP; Crescent Private Credit Partners Unitranche Note Feeder LP; Crescent Private Credit Partners Unitranche Fund (Ireland) LP; Income Credit Strategies (Series C) LP; Crescent LACERS SMA Partnership, LP; Crescent Ginkgo LP, Crescent K Investments, L.P.; CESL—A Coinvest Fund SCSp.; Crescent CRPTF Multi-Strat L.P.; Crescent CRPTF Private Credit L.P.; Crescent/AEGIS Partnership, L.P.; Crescent European Specialty Lending Fund III (GBP) SCSp; Crescent European Specialty Lending Fund III SCSp; Crescent European Specialty Lending Fund III (Cayman-Levered) LP; CRESCENT European Specialty Lending Fund III (Delaware) LP; and Crescent CLO Equity Funding II, LP.

FILING DATES: The application was filed on April 4, 2023, and amended on October 25, 2023.

HEARING OR NOTIFICATION OF HEARING:

An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing on any application by emailing the SEC's Secretary at *Secretarys-Office@sec.gov* and serving the Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below. Hearing requests should be received by the Commission by 5:30 p.m. on May 28, 2024, and should be accompanied by proof of service on the Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at *Secretarys-Office@sec.gov*.

ADDRESSES: The Commission: *Secretarys-Office@sec.gov*. Applicants: George Hawley, Crescent Capital Group LP, at *George.Hawley@crescentcap.com*, with a copy to Michael Hoffman, Skadden, Arps, Slate, Meagher & Flom LLP, at *Michael.Hoffman@skadden.com*.

FOR FURTHER INFORMATION CONTACT: Adam S. Lovell, Senior Counsel, or Terri Jordan, Branch Chief, at (202) 551–

6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: For Applicants' representations, legal analysis, and conditions, please refer to Applicants' first amended and restated application, dated October 25, 2023, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field, on the SEC's EDGAR system.

The SEC's EDGAR system may be searched at <http://www.sec.gov/edgar/searchedgar/legacy/companysearch.html>. You may also call the SEC's Public Reference Room at (202) 551–8090.

For the Commission, by the Division of Investment Management, under delegated authority.

J. Matthew DeLesDernier,
Deputy Secretary.

[FR Doc. 2024–09995 Filed 5–7–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 35183; File No. 812–15457]

Polen Credit Opportunities Fund, et al.

May 2, 2024.

AGENCY: Securities and Exchange Commission (“Commission” or “SEC”).

ACTION: Notice.

Notice of application for an order (“Order”) under sections 17(d) and 57(i) of the Investment Company Act of 1940 (the “Act”) and rule 17d–1 under the Act to permit certain joint transactions otherwise prohibited by sections 17(d) and 57(a)(4) of the Act and rule 17d–1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit certain business development companies and closed-end management investment companies to co-invest in portfolio companies with each other and with certain affiliated investment entities.

APPLICANTS: Polen Credit Opportunities Fund, Polen Capital Credit, LLC, Polen Capital Management, LLC, Polen Capital Funds, LLC—Polen Capital Floating Rate Loan Fund, Polen Capital Funds, LLC—Polen Capital Opportunistic High Yield Fund, Polen Capital Funds, LLC—Polen Capital U.S. High Yield Fund, Polen Capital Funds, LLC—Polen Capital Total Return Credit Fund and Polen DDJ/TAF Strategic Income Fund, L.P.

FILING DATES: The application was filed on April 19, 2023, and amended on October 31, 2023 and March 8, 2024.

HEARING OR NOTIFICATION OF HEARING:

An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing on any application by emailing the SEC's Secretary at *Secretarys-Office@sec.gov* and serving the Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below. Hearing requests should be received by the Commission by 5:30 p.m. on May 27, 2024, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at *Secretarys-Office@sec.gov*.

ADDRESSES: The Commission:

Secretarys-Office@sec.gov. Applicants: Josh McCarthy, *jlmccarthy@polencapital.com*, Nicole M. Runyan, *nicole.runyan@kirkland.com*, Lisa P. Nosal, *lisa.nosal@kirkland.com*.

FOR FURTHER INFORMATION CONTACT:

Deepak T. Pai, Senior Counsel, or Terri Jordan, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: For Applicants' representations, legal analysis, and conditions, please refer to Applicants' second amended and restated application, dated March 8, 2024, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field, on the SEC's EDGAR system.

The SEC's EDGAR system may be searched at <http://www.sec.gov/edgar/searchedgar/legacy/companysearch.html>. You may also call the SEC's Public Reference Room at (202) 551–8090.

For the Commission, by the Division of Investment Management, under delegated authority.

J. Matthew DeLesDernier,
Deputy Secretary.

[FR Doc. 2024–09993 Filed 5–7–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100047; File No. SR–NYSEARCA–2024–34]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Revise Rule 10.16

May 2, 2024.

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 April 23, 2024, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the 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 revise Rule 10.16 to adopt streamlined sanction guidelines for its options marketplace based on NYSE American LLC Rule 601 and make certain conforming changes. The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to revise Rule 10.16 (NYSE Arca Sanctioning Guidelines—Options) to adopt

streamlined sanction guidelines for its options marketplace based on NYSE American LLC (“NYSE American”) Rule 601 and make certain conforming changes.

Background and Proposed Rule Change

The current Sanction Guidelines in Rule 10.16 were adopted pursuant to the provisions of Section IV.B.i of the Commission’s September 11, 2000 Order Instituting Administrative Proceedings Pursuant to Section 19(h)(1) of the Act (the “2000 Order”), which required the Exchange to adopt rules establishing, or modifying existing, sanctioning guidelines such that they are reasonably designed to effectively enforce compliance with options order handling rules, including the duty of best execution with respect to the handling of orders after the broker-dealer routes the order to such respondent exchange, limit order display, priority, firm quote, and trade reporting rules.⁴ Like its affiliate NYSE American, which also adopted sanction guidelines in response to the 2000 Order,⁵ the Exchange incorporated fine ranges in its sanctions guidelines for specific rule violations. Unlike NYSE American, the Exchange’s suggested monetary sanctions are very broad (\$10,000–\$100,000 in four instances and \$10,000–\$150,000 in two instances). The current Exchange sanction guidelines are otherwise similar to the sanction guidelines adopted by NYSE American in response to the 2000 Order.

Recently, NYSE American adopted a new Rule 601 incorporating sanctions guidelines similar to Cboe Exchange, Inc. (“Cboe”) Rule 13.11, Supplementary Material .01, in place of those original sanction guidelines.⁶ The

new, streamlined sanction guidelines adopted by NYSE American eliminated specific fine ranges for violations and continued to reflect a principles-based approach to sanctions guidelines applicable to all options rules. The Exchange believes that adopting the same NYSE American sanction guidelines that do not contain specific recommended fine ranges for a subset of rules would similarly modernize and update Rule 10.16 in important respects while continuing to provide flexible guidelines for determining appropriate remedial sanctions consistent with the intention of the original rule.⁷ Further, because both NYSE American Rule 601 and Cboe Rule 13.11 take a more streamlined approach, the Exchange believes the proposed rule would more clearly and succinctly set forth current relevant considerations regarding the adjudication of disciplinary actions.

In addition, the Exchange believes that the proposed rule would be consistent with the 2000 Order. The Exchange’s current sanction guidelines are similar to the guidelines that NYSE American replaced. Moreover, the text of NYSE American Rule 601 was based on Cboe Rule 13.11 that was also adopted to satisfy the 2000 Order. As proposed, the Exchange would reproduce the text of NYSE American Rule 601 almost verbatim. In addition, by modernizing and updating the Exchange’s sanctions guidelines, the Exchange would further enhance its disciplinary processes consistent with the 2000 Order. Finally, the proposed rule would promote regulatory consistency across options exchanges in determining appropriate remedial sanctions for violations of options rules.

As is currently the case, proposed Rule 10.16 would not apply to the equities market.⁸ As such, proposed Rule 10.16 would carry forward the current practice whereby the various bodies with responsibility for the adjudication of disciplinary actions, including Hearing Panels, Hearing Officers, the Committee for Review (“CFR”), and the Board of Directors (“Board”), defined in the proposed Rule collectively as “Adjudicatory Bodies,” would consider relevant Exchange precedent or such other precedent as they deem appropriate in determining sanctions imposed against OTP Holders or OTP Firms and their covered persons as defined in Rule 10.9120(g) of the

⁴ See Securities Exchange Act Release Nos. 45416 (February 7, 2002), 67 FR 6777 (February 13, 2002) (SR–PCX–2001–23) (Notice); 45567 (March 15, 2002), 67 FR 13392 (March 22, 2002) (SR–PCX–2001–23) (Order). See generally Securities Exchange Act Release No. 43268 (September 11, 2000), Administrative Proceeding File No. 3–10282.

⁵ Other exchanges subject to the 2000 Order, however, did not adopt specific fine ranges as part of their sanction guidelines. See, e.g., Securities Exchange Act Release Nos. 45427 (February 8, 2002), 67 FR 6958 (February 14, 2002) (Notice); 45571 (March 15, 2002), 67 FR 13382 (March 22, 2002) (SR–CBOE–2001–71) (Order Granting Accelerated Approval of Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 1 Thereto by the Chicago Board Options Exchange, Inc. To Incorporate Certain Principal Considerations in Determining Sanctions and To Incorporate in the Exchange’s Minor Rule Violation Plan Violations of the Exchange’s Order Handling Rules).

⁶ See Securities Exchange Act Release No. 98798 (October 25, 2023), 88 FR 74544 (October 31, 2023) (SR–NYSEAMER–2023–49) (Notice of Filing and Immediate Effectiveness of Proposed Change To Delete Legacy Disciplinary Rules 475, 476, 476A, and 477 and Make Conforming Changes to Rule 41,

Rules 8001, 8130(d), 8320(d), 9001, 9216(b)(1), 9810(a), and 781 of the Office Rules, Rules 2A, 12E, 3170(a)(3), 902NY and Adopt a New Rule 600 and Make Conforming Changes to Rules 3170(C)(3), and Adopt a New Rule 601).

⁷ See 67 FR at 6771.

⁸ See note 4 and accompanying text, *supra*.

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b–4.

Exchange's disciplinary rules. The proposed definition of Adjudicatory Bodies would be updated to reflect the terms provided for in the current disciplinary rules, including "Hearing Panels" and "Extended Hearing Panels" in place of "Ethics and Business Conduct Committee," and "Committee for Review" and "Chief Regulatory Officer ("CRO")," given the role of each in the disciplinary and settlement processes. In addition, for the avoidance of doubt, the Exchange would include the CRO's delegates in the definition of Adjudicatory Bodies, which corresponds to the current definition of Adjudicatory Bodies as inclusive of Exchange regulatory staff. Similarly for the avoidance of doubt, the Exchange would add letters of acceptance, waiver and consent to the list of ways a disciplinary matter can be resolved as well as summary sanctions in options-related matters governed by Rule 10.13 and appeals of Floor citations and summary sanctions governed by Rule 10.11, which are unique to the Exchange.⁹ The remainder of the proposed Rule would be identical to NYSE American Rule 601.

Finally, the Exchange would conform Rules 10.0 (Legacy Disciplinary Proceedings, Other Hearings and Appeals) and 10.9001 (Effective Date of Rule 10.9000 Series) to reflect the change in the title of Rule 10.16 replacing "Sanctioning" with "Sanctions."

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹⁰ in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. In addition, the Exchange believes that the proposed rule change furthers the objectives of Section 6(b)(7) of the Act,¹¹ in particular, in that it provides fair procedures for the disciplining of members and persons associated with members, the denial of membership to any person seeking membership therein,

the barring of any person from becoming associated with a member thereof, and the prohibition or limitation by the Exchange of any person with respect to access to services offered by the Exchange or a member thereof.

Specifically, the Exchange believes that adopting sanction guidelines that are substantively the same as NYSE American Rule 601 would continue to permit the Exchange to impose sanctions consistently and fairly by reference to a streamlined rule, thereby continuing to provide fair procedures for the disciplining of members and persons associated with members, the denial of membership to any person seeking Exchange membership, the barring of any person from becoming associated with a member, and the prohibition or limitation by the Exchange of any person with respect to access to services offered by the Exchange or a member thereof pursuant to Section 6(b)(7)¹² of the Act.

The proposed rule would provide flexible and appropriate principles-based guidelines applicable to all options rules for determining remedial sanctions consistent with the intention of the Exchange's current sanctions guidelines rule.¹³ Moreover, the Exchange believes that by adopting NYSE American Rule 601's more streamlined approach to sanctions guidelines, the Exchange believes the proposed rule would more clearly and succinctly set forth the current relevant considerations regarding the adjudication of disciplinary actions. Further, the Exchange believes that the proposed rule would also be consistent with the 2000 Order because the proposed rule is substantively the same as NYSE American Rule 601, which was in turn based on Cboe Rule 13.11 that was adopted to satisfy the same Commission order. Indeed, the Exchange believes that by modernizing and updating its sanctions guidelines, proposed Rule 10.16 would further enhance its disciplinary processes consistent with the 2000 Order and further ensure that the Exchange implements the most appropriate disciplinary mechanisms for violations and a fair process in determining same. Finally, the proposed rule would promote regulatory consistency and uniformity across options exchanges in determining appropriate remedial sanctions and the imposition of penalties.

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 Exchange Act. The proposed rule change is not intended to address competitive issues but rather is concerned solely with adopting updated, streamlined sanction guidelines based on the rules of the Exchange's affiliate that are consistent with a previous Commission order and continue to permit the Exchange to impose sanctions consistently and fairly.

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 and Rule 19b-4(f)(6) thereunder.¹⁴

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

¹⁴ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

⁹ For the further avoidance of doubt, neither the list of ways that a proposed disciplinary matter can be resolved nor the persons and entities comprising the definition of Adjudicatory Bodies in proposed Rule 10.16 are intended to be exhaustive.

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ 15 U.S.C. 78f(b)(7).

¹² 15 U.S.C. 78f(b)(7).

¹³ See 67 FR at 6771.

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-2024-34 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-2024-34. 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 a.m. and 3 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-2024-34 and should be submitted on or before May 29, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁵

J. Matthew DeLesDernier,
Deputy Secretary.

[FR Doc. 2024-10000 Filed 5-7-24; 8:45 am]

BILLING CODE 8011-01-P

SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #20312 and #20313;
Ohio Disaster Number OH-20002]**

**Presidential Declaration of a Major
Disaster for the State of Ohio**

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for the State of Ohio (FEMA-4777-DR), dated 05/02/2024.

Incident: Tornadoes.

Incident Period: 03/14/2024.

DATES: Issued on 05/02/2024.

Physical Loan Application Deadline Date: 07/01/2024.

Economic Injury (EIDL) Loan Application Deadline Date: 02/03/2025.

ADDRESSES: Visit the MySBA Loan Portal at <https://lending.sba.gov> to apply for a disaster assistance loan.

FOR FURTHER INFORMATION CONTACT:

Vanessa Morgan, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205-6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 05/02/2024, applications for disaster loans may be submitted online using the MySBA Loan Portal <https://lending.sba.gov> or other locally announced locations. Please contact the SBA disaster assistance customer service center by email at disastercustomerservice@sba.gov or by phone at 1-800-659-2955 for further assistance.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties (Physical Damage and Economic Injury Loans): Auglaize, Crawford, Darke, Delaware, Hancock, Licking, Logan, Mercer, Miami, Richland, Union.

Contiguous Counties (Economic Injury Loans Only):

Ohio: Allen, Ashland, Champaign, Clark, Coshocton, Fairfield, Franklin, Hardin, Henry, Huron, Knox, Madison, Marion, Montgomery, Morrow, Muskingum, Perry, Preble, Putnam, Seneca, Shelby, Van Wert, Wood, Wyandot
Indiana: Adams, Jay, Wayne, Randolph

The Interest Rates are:

	Percent
For Physical Damage:	

	Percent
Homeowners with Credit Available Elsewhere	5.375
Homeowners without Credit Available Elsewhere	2.688
Businesses with Credit Available Elsewhere	8.000
Businesses without Credit Available Elsewhere	4.000
Non-Profit Organizations with Credit Available Elsewhere ...	3.250
Non-Profit Organizations without Credit Available Elsewhere	3.250
<i>For Economic Injury:</i>	
Business and Small Agricultural Cooperatives without Credit Available Elsewhere	4.000
Non-Profit Organizations without Credit Available Elsewhere	3.250

The number assigned to this disaster for physical damage is 20312C and for economic injury is 203130.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,

Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2024-10014 Filed 5-7-24; 8:45 am]

BILLING CODE 8026-09-P

DEPARTMENT OF STATE

[Public Notice: 12398]

**Notice of Department of State
Sanctions Actions**

ACTION: Notice.

SUMMARY: The U.S. Department of State's Office of Economic Sanctions Policy and Implementation (SPI) is publishing the name of an individual who has been removed from the List of Specially Designated Nationals and Blocked Persons (SDN List) maintained by the Office of Foreign Assets Control (OFAC) and is consequently no longer subject to the prohibitions imposed pursuant to the Executive Order, "Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation."

DATES: The actions described in this notice were effective on September 14, 2023.

FOR FURTHER INFORMATION CONTACT: Aaron P. Forsberg, Director, Office of Economic Sanctions Policy and Implementation, Bureau of Economic and Business Affairs, Department of State, Washington, DC 20520, tel.: (202) 647 7677, email: forsbergap@state.gov.

SUPPLEMENTARY INFORMATION:

¹⁵ 17 CFR 200.30-3(a)(12).

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available from OFAC's website at <http://www.treasury.gov/ofac>.

Notice of Department of State Actions

On September 14, 2023, OFAC removed from the SDN List the individual listed below, who was subject to prohibitions imposed pursuant to E.O. 14024 of April 15, 2021.

Entity

1. GOLDFINCH, Paul Andrew, Russia; Latvia; DOB Oct 1970; nationality New Zealand; Gender Male (individual) [RUSSIA-EO14024] (Linked To: PUBLIC JOINT STOCK COMPANY BANK FINANCIAL CORPORATION OTKRITIE).

Amy E. Holman,

Principal Deputy Assistant Secretary, Bureau of Economic and Business Affairs, Department of State.

[FR Doc. 2024-10028 Filed 5-7-24; 8:45 am]

BILLING CODE 4710-07-P

DEPARTMENT OF STATE

[Public Notice: 12400]

Notice of Department of State Sanctions Actions

ACTION: Notice.

SUMMARY: The U.S. Department of State's Office of Economic Sanctions Policy and Implementation (SPI) is publishing the names of two persons that have been removed from the List of Specially Designated Nationals and Blocked Persons (SDN List) maintained by the Office of Foreign Assets Control (OFAC) and are consequently no longer subject to the prohibitions imposed pursuant to the Executive Order, "Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation."

DATES: The actions described in this notice were effective on July 20, 2023.

FOR FURTHER INFORMATION CONTACT: Aaron P. Forsberg, Director, Office of Economic Sanctions Policy and Implementation, Bureau of Economic and Business Affairs, Department of State, Washington, DC 20520, tel.: (202) 647 7677, email: ForsbergAP@state.gov.

SUPPLEMENTARY INFORMATION:**Electronic Availability**

The SDN List and additional information concerning OFAC sanctions

programs are available from OFAC's website at <http://www.treasury.gov/ofac>.

Notice of Department of State Actions

On July 20, 2023, OFAC removed from the SDN List the two persons listed below, who were subject to prohibitions imposed pursuant to E.O. 14024 of April 15, 2021.

Entities

1. GOLIKOV, Andrey Fedorovich (Cyrillic: ГОЛИКОВ, Андрей Фёдорович) (a.k.a. GOLIKOV, Andrei Fedorovich), B Hariton Evskiy Pereulok 16-18-25, Moscow 107078, Russia; DOB 14 Mar 1969; POB Volzhskiy, Volgograd Region, Russia; nationality Russia; Gender Male; Passport 717619902 (Russia) (individual) [RUSSIA-EO14024] (Linked To: PUBLIC JOINT STOCK COMPANY BANK FINANCIAL CORPORATION OTKRITIE).

2. TITOVA, Elena Borisovna (Cyrillic: ТИТОВА, Елена Борисовна) (a.k.a. TITOVA, Yelena Borisovna), Russia; DOB 16 May 1967; POB Moscow, Russia; nationality Russia; Gender Female (individual) [RUSSIA-EO14024] (Linked To: PUBLIC JOINT STOCK COMPANY BANK FINANCIAL CORPORATION OTKRITIE).

Amy E. Holman,

Principal Deputy Assistant Secretary, Bureau of Economic and Business Affairs, Department of State.

[FR Doc. 2024-10027 Filed 5-7-24; 8:45 am]

BILLING CODE 4710-07-P

DEPARTMENT OF TRANSPORTATION**Federal Highway Administration**

[Docket No. FHWA-2024-0026]

Emergency Temporary Closure of a Segment of Interstate 695, Including the Francis Scott Key Bridge, in Baltimore, Maryland; Deletion From the National Network

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice; request for comments.

SUMMARY: The Maryland Transportation Authority (MDTA) closed Interstate 695 (I-695) in both directions over the Patapsco River, which provides access to the Baltimore Harbor and the Port of Baltimore, on March 26, 2024, due to the collapse of the Francis Scott Key Bridge. The MDTA is the owner of the bridge. It is a modal administration under the Maryland Department of Transportation (MDOT). The MDTA is continuing the temporary closure of this

segment of I-695 for an indefinite period of time until the damaged bridge can be reconstructed. The FHWA is providing notice in the **Federal Register** that the FHWA is approving an emergency deletion of this segment of I-695 from the National Network (NN), in accordance with applicable regulations, due to safety considerations and the emergency closure resulting from the bridge and other infrastructure damage, as discussed in this notice. The FHWA is also requesting comments from the public for 30 days on the alternate routes selected by MDTA due to the closure.

DATES: Comments must be received on or before June 7, 2024.

ADDRESSES: To ensure that you do not duplicate your docket submissions, please submit them by only one of the following means:

- **Federal eRulemaking Portal:** Go to www.regulations.gov and follow the online instructions for submitting comments.

- **Mail:** U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, Room W12-140, Washington, DC 20590.

- **Hand Delivery or Courier:** U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC, between 9:00 a.m. and 5:00 p.m. ET, except Federal holidays.

Instructions: You must include the agency name and docket number [FHWA-2024-0026] at the beginning of your comments. All comments received will be posted without change to www.regulations.gov, including any personal information provided.

FOR FURTHER INFORMATION CONTACT:

Michael Latuszek, FHWA Office of Operations, 573-616-0415, michael.latuszek@dot.gov; William Winne, Office of Chief Counsel, 202-366-0791, william.winne@dot.gov, FHWA, 1200 New Jersey Avenue SE., Washington, DC 20590; or Valeriya Remezova, FHWA Maryland Division, 410-779-7130, valeriya.remezova@dot.gov.

SUPPLEMENTARY INFORMATION:**Electronic Access and Filing**

This document and all comments received may be viewed online through the Federal eRulemaking portal at www.regulations.gov. The website is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded by accessing the Office of the Federal Register's website at www.federalregister.gov and the U.S.

Government Publishing Office's website at www.govinfo.gov.

Background

The MDTA closed I-695 in both directions over the Patapsco River,¹ which provides access to the Baltimore Harbor and the Port of Baltimore, on March 26, 2024, due to the collapse of the Francis Scott Key Bridge. The MDTA is the owner of the bridge. It is a modal administration under the MDOT.

The FHWA is providing notice in the **Federal Register** that the MDTA is continuing the temporary closure of this segment of I-695 in both directions for an indefinite period of time until the damaged bridge can be reconstructed. The FHWA is requesting comments from the public for 30 days on the alternate routes selected by MDTA due to the closure.

The FHWA is responsible for enforcing the Federal regulations applicable to the NN that can safely and efficiently accommodate the large vehicles authorized by provisions of the Surface Transportation Assistance Act of 1982, as amended and codified at Title 49 of the United States Code (U.S.C.) Chapter 311; designated in accordance with 23 CFR part 658 (Truck Size and Weight, Route Designations—Length, Width and Weight Limitations); and listed in Appendix A to 23 CFR part 658. Under 23 CFR 658.11 (Additions, deletions, exceptions, and restrictions), FHWA may approve deletions of, or use restrictions on, the Interstate System or other NN route based upon specified justification criteria in section 658.11(d)(2). The FHWA is authorized to delete any route from the NN on an emergency basis, based on safety considerations pursuant to 23 CFR 658.11(e), which also requires publishing this notice in the **Federal Register** for comment.

At approximately 1:30 a.m. on March 26, 2024, a cargo ship leaving the Port of Baltimore struck the Francis Scott Key Bridge, which is a component of the segment of I-695 over the Patapsco River. Shortly thereafter, the bridge collapsed. The overall bridge is approximately 8,636 feet in length (or roughly 1.6 miles). The main span is 1,200 feet. The Average Daily Traffic in 2023 was approximately 34,121 vehicles.

As a result, I-695 Outer Loop was closed at Quarantine Road (exit 1), and the I-695 Inner Loop was closed at MD 157/Peninsula Expressway (exit 43); however, the situation is evolving. Maryland State transportation officials are providing public information via their web pages, which are listed at the end of this notice, regarding current closures and recommended detours. Although the recommended detours have been evolving since the onset of the incident, currently traffic on I-695 is being rerouted as follows:

Alternate routes that cross the Baltimore Harbor (Harbor Crossings) are I-95, the Fort McHenry Tunnel, or I-895, the Baltimore Harbor Tunnel. The I-95 Fort McHenry Tunnel prohibits vehicles greater than 14'6" in height and 11'0" in width. The I-895 Baltimore Harbor Tunnel prohibits vehicles greater than 13'6" in height or 8'0" in width. Both tunnels prohibit vehicles transporting hazardous materials. This includes vehicles carrying bottled propane gas in excess of 10 pounds per container (maximum of 10 containers), bulk gasoline, explosives, or significant amounts of radioactive materials. Vehicles prohibited from Harbor Crossings, including vehicles transporting hazardous materials and vehicles over 14'6" high or 11'0" wide, should use the western section of I-695 around the tunnels as an alternative route.

A detour message is being provided on overhead changeable message signs indicating the suggested use of alternate routes. Portable signs are being deployed for local roads. The Port of Baltimore is still open for truck transactions. Vessel (waterway) traffic into and out of the Port of Baltimore was suspended on March 26, 2024, until further notice (see MDTA websites and newsfeeds, listed below, for current status).

For up-to-date information on traffic advisories, commercial truck and hazardous material routing, and the bridge replacement, the MDTA and MDOT established a website at <https://mdta.maryland.gov/keybridgenews>. In addition, MDOT provides traveler information via "Maryland 511" at <https://chart.maryland.gov/>.

Comments are invited on all alternate routes.

Authority: 23 U.S.C. 127 and 315; 49 U.S.C. 31111, 31112, and 31114; 23 CFR part 658.

Shailen P. Bhatt,
Administrator, Federal Highway Administration.

[FR Doc. 2024-10025 Filed 5-7-24; 8:45 am]

BILLING CODE 4910-22-P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-2023-0010; Notice 1]

Volvo Bus Corporation, Receipt of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Receipt of petition

SUMMARY: Volvo Bus Corporation (VBC) has determined that certain model year (MY) 2009–2023 Volvo 9700 buses do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 108, *Lamps, Reflective Devices, and Associated Equipment*. VBC filed a noncompliance report dated November 15, 2022, and subsequently petitioned NHTSA (the "Agency") on December 13, 2022, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This document announces receipt of VBC's petition.

DATES: Send comments on or before June 7, 2024.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this notice and may be submitted by any of the following methods:

- **Mail:** Send comments by mail addressed to the 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 comments by hand to the U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal Holidays.

- **Electronically:** Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at <https://www.regulations.gov/>. Follow the online instructions for submitting comments.

- Comments may also be faxed to (202) 493-2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy

¹ The portion of I-695 that includes the Francis Scott Key Bridge is a part of the National Highway System (NHS) and was officially incorporated into the Interstate System effective April 29, 2024. In Appendix A to title 23 of the Code of Federal Regulations (CFR) part 658, this route is listed as MD 695 from I-695/MD 3 Glenn Burnie to I-95/695 Kenwood.

form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petition is granted or denied, notice of the decision will also be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at <https://www.regulations.gov> by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000 (65 FR 19477–78).

FOR FURTHER INFORMATION CONTACT:

Leroy Angeles, NHTSA, Office of Vehicle Safety Compliance, (202) 366–5304.

SUPPLEMENTARY INFORMATION: I.

Overview: VBC determined that certain MY 2009–2023 VBC 9700 buses do not fully comply with paragraph S7.7.15.3 of FMVSS No. 108, *Lamps, Reflective Devices, and Associated Equipment* (49 CFR 571.108).

VBC filed a noncompliance report dated November 15, 2022, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports*. VBC petitioned NHTSA on December 13, 2022, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance*.

This notice of receipt of VBC's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or another exercise

of judgment concerning the merits of the petition.

II. Vehicles Involved: Approximately 958 MY 2009–2023 Volvo 9700 buses, manufactured between February 1, 2008 and May 1, 2022, were reported by the manufacturer.

III. Rule Requirements: Paragraph S7.7.15.3 of FMVSS No. 108 includes the requirements relevant to this petition. Paragraph S7.7.15.3 of FMVSS No. 108 requires that light rays reach all portions of an imaginary plate of the same size at least 25 mm ahead of the actual plate measured perpendicular to the plane of the plate.

IV. Noncompliance: VBC explains that the noncompliance is that the subject vehicles are equipped with license plate lamps that do not reach all portions of the license plate when the license plate is placed 25 mm ahead of its normal position. Therefore, the subject vehicles do not comply with paragraph S7.7.15.3 of FMVSS No. 108.

V. Summary of VBC's Petition: The following views and arguments presented in this section, “V. Summary of VBC's Petition,” are the views and arguments provided by VBC. They have not been evaluated by the Agency and do not reflect the views of the Agency. VBC describes the subject noncompliance and contends that the noncompliance is inconsequential as it relates to motor vehicle safety.

VBC says that although the subject license plate lamps are noncompliant, when the license plate is installed in its normal position, it is fully illuminated by the lamps.¹

VBC states that it has corrected the subject noncompliance in vehicle production and production is currently in compliance with paragraph S7.7.15.3 of FMVSS No. 108. VBC notes that paragraph S7.7.15.3 of FMVSS No. 108 “refers to an imaginary plate in a testing position, and not a real license plate that requires physical testing with measurable test data.”

VBC contends that the subject noncompliance is inconsequential to motor vehicle safety because the noncompliant license plate lamps equipped on the subject vehicles fulfill its main purpose to ensure that law enforcement personnel and the public are able to identify vehicles in low-lighting conditions.

VBC explains that “except for vehicle testing purposes, the license plate is never installed in a position that differs from its original intended one.” Furthermore, VBC says no vehicles were delivered with a license plate in the testing position. Additionally, the

license plates are fixed in the original position and cannot be adjusted. Thus, VBC believes that the license plate equipped on the subject vehicles “will always be fully illuminated under normal vehicle operating conditions.”

VBC says that “test results demonstrate that this noncompliance is imperceptible to road users considering that the license plate is fully illuminated when normally installed, as demonstrated in Attachment 2 ‘VBC Engineering Report ER–684684’.”

VBC says that since 2008, over 900 subject vehicles have been functioning with the noncompliance at issue, and VBC has not received any customer complaints, field reports, or warranty claims related to the subject noncompliance. VBC adds that it is not aware of any accidents, injuries, or death related to the subject noncompliance.

VBC says that NHTSA has granted prior petitions in which a noncompliance involving the license plate lamps “is expected to be imperceptible, or nearly so, to vehicle occupants or approaching drivers.” VBC believes that the subject noncompliance is imperceptible to all road users, therefore, VBC contends that NHTSA should also grant VBC's petition.

VBC concludes by stating its belief that the subject noncompliance is inconsequential as it relates to motor vehicle safety and its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on this petition only applies to the subject vehicles that VBC no longer controlled at the time it determined that the noncompliance existed. However, any decision on this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after VBC notified them that the subject noncompliance existed.

¹ See Figure 3 and Figure 4 of VBC's petition.

(Authority: 49 U.S.C. 30118, 30120; delegations of authority at 49 CFR 1.95 and 501.8)

Otto G. Matheke III,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2024–10062 Filed 5–7–24; 8:45 am]

BILLING CODE 4910–59–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 applicable date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Bradley Smith, 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 Assistant Director for Compliance, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (ofac.treasury.gov).

Notice of OFAC Action(s)

On May 2, 2024, 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. AL-ZEIN, Mazen Hassan (Arabic: مازن حسان الزين) (a.k.a. EL ZEIN, Mazen Hassan; a.k.a. "AL-ZAYN, Mazin"; a.k.a. "EL ZEIN, Mazen"), Burj Daman Tower, Apartment 3406, Dubai International Financial Center, Dubai 99573, United Arab Emirates; Al Mustaqbal Street, Iris Bay Building, Apt. No. 2304, Business Bay, Dubai, United Arab Emirates; 51 Route des Valleees, Bis 3, Annemasse 74100, France; 46 Rue des Fontaines, Anthy Sur Lemans 74200, France; DOB 21 Jun 1974; POB Beirut, Lebanon; nationality Lebanon; Additional Sanctions Information - Subject to Secondary Sanctions Pursuant to the Hizballah Financial Sanctions Regulations; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; National ID No. 784197494718279 (Lebanon); Identification Number 178295160001 (United Kingdom) (individual) [SDGT] (Linked To: MOUKALLED, Hassan Ahmed).

Designated pursuant to section 1(a)(iii)(A) of Executive Order 13224 of September 23, 2001, "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism," 66 FR 49079, as amended by Executive Order 13886 of September 9, 2019, "Modernizing Sanctions To Combat Terrorism," 84 FR 48041 (E.O. 13224, as amended), for having acted or purported to act for or on behalf of, directly or indirectly, HASSAN AHMED MOUKALLED, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

2. MANSUR, Bashir Ibrahim (Arabic: مازن حسان الزين) (a.k.a. MANSOUR, Bashir Ibrahim), Baabda, Lebanon; Borj El Brajneeh, Lebanon; DOB 09 Feb 1980; POB Lebanon; nationality Lebanon; Additional Sanctions Information - Subject to Secondary Sanctions Pursuant to the Hizballah Financial Sanctions Regulations; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886 (individual) [SDGT] (Linked To: CTEX EXCHANGE).

Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, CTEX EXCHANGE, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

3. YOUSSEF, Adnan Mahmoud (a.k.a. YOUSSEF, Adnan; a.k.a. "YUSUF, 'Adnan"), Haret Hreik, Beirut, Lebanon; DOB 06 Jun 1956; POB Beirut, Lebanon; nationality Lebanon; Additional Sanctions Information - Subject to Secondary Sanctions Pursuant to the Hizballah Financial Sanctions Regulations; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886 (individual) [SDGT] (Linked To: MOUKALLED, Hassan Ahmed).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for having acted or purported to act for or on behalf of, directly or indirectly, HASSAN AHMED MOUKALLED, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

4. MUSHANTAF, Andriyah Samir (Arabic: اندريه سمير مشنت) (a.k.a. MISHANTAF, Andre Samir; a.k.a. MSHANTAF, Andre Samir; a.k.a. MSHANTAF, Andrea Samir; a.k.a. MUCHANTAF, Andreih Samir; a.k.a. MUSHANTAF, Andre Samir), Lebanon; DOB 11 Mar 1966; POB Lebanon; nationality Lebanon; Additional Sanctions Information - Subject to Secondary Sanctions Pursuant to the Hizballah Financial Sanctions Regulations; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; National ID No. 1694100 (Lebanon) (individual) [SDGT] (Linked To: CTEX EXCHANGE).

Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, CTEX EXCHANGE, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

5. MOUKALLED, Firas Hasan (Arabic: فراس حسن مقلد) (a.k.a. MOUKALLED, Firas; a.k.a. MQALLAD, Firas Hasan; a.k.a. MUQALLID, Firas Hasan), Lebanon; DOB 09 Oct 1990; POB Lebanon; nationality Lebanon; Additional Sanctions Information - Subject to Secondary Sanctions Pursuant to the Hizballah Financial Sanctions Regulations; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886 (individual) [SDGT] (Linked To: MOUKALLED, Hassan Ahmed).

Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, HASSAN AHMED MOUKALLED, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

Entities

1. TELEPORT COMPANY SAL (Arabic: شركة تليپورت ش.م.ل), Sami El Solh Street, Beirut, Lebanon; Additional Sanctions Information - Subject to Secondary Sanctions Pursuant to the Hizballah Financial Sanctions Regulations; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 15 Jan 2016; Organization Type: Non-specialized wholesale trade; Commercial Registry Number 1020711 (Lebanon) [SDGT] (Linked To: MUSHANTAF, Andriyah Samir; Linked To: MOUKALLED, Firas Hasan; Linked To: MOUKALLED, Rayyan Hassan).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by, directly or indirectly, RAYYAN HASSAN MOUKALLED, FIRAS HASAN MOUKALLED, and ANDRIYAH SAMIR MUSHANTAF, persons whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

2. THE CRYSTAL GROUP (a.k.a. THE CRYSTAL GROUP SAL), Beirut, Lebanon; Dubai, United Arab Emirates; Additional Sanctions Information - Subject to Secondary Sanctions Pursuant to the Hizballah Financial Sanctions Regulations; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 2003; Organization Type: Restaurants and mobile food service activities; Business Registration Number 1008937 (Lebanon) [SDGT] (Linked To: AL-ZEIN, Mazen Hassan).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by, directly or indirectly, MAZEN HASSAN AL-ZEIN, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

Dated: May 2, 2024.

Bradley T. Smith,

*Director, Office of Foreign Assets Control,
U.S. Department of the Treasury.*

[FR Doc. 2024-09971 Filed 5-7-24; 8:45 am]

BILLING CODE 4810-AL-C



FEDERAL REGISTER

Vol. 89

Wednesday,

No. 90

May 8, 2024

Part II

Environmental Protection Agency

40 CFR Parts 9 and 257

Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments; Final Rule

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Parts 9 and 257**

[EPA–HQ–OLEM–2020–0107; FRL–7814–04–OLEM]

RIN 2050–AH14

Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

SUMMARY: On April 17, 2015, the Environmental Protection Agency (EPA or the Agency) promulgated national minimum criteria for existing and new coal combustion residuals (CCR) landfills and existing and new CCR surface impoundments. On August 21, 2018, the United States Court of Appeals for the District of Columbia Circuit vacated the exemption for inactive surface impoundments at inactive facilities (legacy CCR surface impoundments) and remanded the issue back to EPA to take further action consistent with its opinion in *Utility Solid Waste Activities Group, et al. v. EPA*. This action responds to that order and establishes regulatory requirements for legacy CCR surface impoundments. EPA is also establishing requirements for CCR management units at active CCR facilities and at inactive CCR facilities with a legacy CCR surface impoundment. Finally, EPA is making several technical corrections to the existing regulations, such as correcting certain citations and harmonizing definitions.

DATES: This final rule is effective on November 4, 2024.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OLEM–2020–0107. All documents in the docket are listed on the <http://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: For questions concerning this proposal, contact Michelle Lloyd, Office of

Resource Conservation and Recovery, Materials Recovery and Waste Management Division, Environmental Protection Agency, 1200 Pennsylvania Avenue NW, MC: 5304T, Washington, DC 20460; telephone number: (202) 566–0560; email address: Lloyd.Michelle@epa.gov, or Taylor Holt, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division, Environmental Protection Agency, 1200 Pennsylvania Avenue NW, MC: 5304T, Washington, DC 20460; telephone number: (202) 566–1439; email address: Holt.Taylor@epa.gov. For more information on this rulemaking, please visit <https://www.epa.gov/coalash>.

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List of Acronyms

ACM Assessment of Corrective Measures
ANPRM Advance Notice of Proposed Rulemaking
ARAR applicable or relevant and appropriate requirements
ASD alternative source demonstration
CAA Clean Air Act
CBI Confidential Business Information
CBR closure by removal
CCR coal combustion residuals
CCRMU coal combustion residuals management unit
CERCLA Comprehensive Environmental Response, Compensation, and Liability Act
CIP closure in place
CFR Code of Federal Regulations
COALQUAL U.S. Geological Survey coal quality database
CWA Clean Water Act
DOE Department of Energy
EAP Emergency Action Plan
EIA Energy Information Administration
EIP Environmental Integrity Project
EJ environmental justice
ELG Effluent Limitation Guidelines
EPA Environmental Protection Agency
EPACMTP EPA Composite Model for Leachate Migration with Transformation Products
EPRI Electric Power Research Institute
FER Facility Evaluation Report
FERC Federal Energy Regulatory Commission
FGD flue gas desulfurization
FR Federal Register
GWMCA groundwater monitoring and corrective action
GWPS groundwater protection standard
HQ hazard quotient
HWA Hazardous and Solid Waste Amendments
ICR Information Collection Request
IRIS Integrated Risk Information System
LEAF Leaching Environmental Assessment Framework
MCL maximum contaminant level
MDE Maryland Department of the Environment
MNA monitored natural attenuation
MODFLOW-USG Modular Three-Dimension Finite-Difference Groundwater Flow Model
MSW Municipal Solid Waste
MW Megawatts
NAICS North American Industry Classification System
NERC North American Electric Reliability Corporation
NODA notice of data availability
NPDES National Pollution Discharge Elimination System
NPL National Priorities List
NTTAA National Technology Transfer and Advancement Act
OAFU Other Active Facilities
OLEM Office of Land and Emergency Management
OMB Office of Management and Budget
OSHA Occupational Safety and Health Administration

P.E. Professional Engineer
 PM particulate matter
 PRA Paperwork Reduction Act
 PRG preliminary remediation goal
 PUC Public Utility Commission
 QA/QC quality assurance/quality control
 RCRA Resource Conservation and Recovery Act
 RIA Regulatory Impact Analysis
 RME reasonable maximum exposure
 RTO Regional Transmission Organizations
 SMCL secondary maximum contaminant level
 SSI statistically significant increase
 SSL statistically significant level
 TDS total dissolved solids
 TSCA Toxic Substances Control Act
 TSDF Transportation Storage and Disposal Facility
 TVA Tennessee Valley Authority
 UMRA Unfunded Mandates Reform Act
 USGS U.S. Geological Survey
 USWAG Utility Solid Waste Activities Group
 WIIN Water Infrastructure Improvements for the Nation
 WQC water quality criteria

I. General Information

A. Does this action apply to me?

This rule applies to and may affect all CCR generated by electric utilities and independent power producers that fall within the North American Industry Classification System (NAICS) code 221112. The reference to NAICS code 221112 is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This discussion lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not described here could also be regulated. To determine whether your entity is regulated by this action, you should carefully examine the applicability criteria found in 40 CFR 257.50 of title 40 of the Code of Federal Regulations. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

B. What action is the Agency taking?

EPA is amending the regulations governing the disposal of CCR in landfills and surface impoundments, codified in subpart D of part 257 of Title 40 of the Code of Federal Regulations (CFR) (CCR regulations). Specifically, the Agency is establishing regulatory requirements for inactive CCR surface impoundments at inactive utilities (“legacy CCR surface impoundment” or “legacy impoundment”). This action is being taken in response to the August 21, 2018, opinion by the U.S. Court of Appeals for the District of Columbia Circuit in *Utility Solid Waste Activities*

Group v. EPA, 901 F.3d 414 (D.C. 2018) (“USWAG decision” or “USWAG”) that vacated and remanded the provision exempting legacy impoundments from the CCR regulations. This action includes adding a definition for legacy CCR surface impoundments and other terms relevant to this rulemaking. It also requires that legacy CCR surface impoundments comply with certain existing CCR regulations with tailored compliance deadlines.

While this action is responsive to the D.C. Circuit’s order, it is also driven by the record, which clearly demonstrates that regulating legacy CCR surface impoundments will have significant quantified and unquantified public health and environmental benefits. As EPA concluded in 2015, the risks posed by unlined CCR surface impoundments are substantial, and the risks from legacy impoundments are at least as significant. EPA’s 2014 Risk Assessment concluded that the cancer risks from unlined surface impoundments ranged from 3×10^{-4} for trivalent arsenic to 4×10^{-5} for pentavalent arsenic. Non-cancer risks from these same units also significantly exceeded EPA’s level of concern, with estimated Hazard Quotients (HQ) of two for thallium, three for lithium, four for molybdenum and eight for trivalent arsenic. In addition, as described in Unit III.A.1 of this preamble, information obtained since 2015 indicates that the risks for legacy CCR surface impoundments are likely to be greater than EPA originally estimated. Finally, based on the demographic composition and environmental conditions of communities within one and three miles of legacy CCR surface impoundments, this final rule will reduce existing disproportionate and adverse effects on economically vulnerable communities, as well as those that currently face environmental burdens. For example, in Illinois the population living within one mile of legacy CCR surface impoundment sites is over three times as likely compared to the State average to have less than a high school education (35.66% compared to 10.10%, see Regulatory Impact Analysis (RIA) exhibit ES.14), and that population already experiences higher than average exposures to particulate matter, ozone, diesel emissions, lifetime air toxics cancer risks, and proximity to traffic, Superfund sites, Risk Management Plan sites, and hazardous waste facilities (see RIA exhibit ES.15). Consistent with the directive in section 4004(a) to ensure that the statutory standard is met at all regulated sites, including the most vulnerable, this final

rule will help EPA further ensure that the communities and ecosystems closest to coal facilities are sufficiently protected from harm from groundwater contamination, surface water contamination, fugitive dust, floods and impoundment overflows, and threats to wildlife.

EPA is also establishing requirements to address the risks from currently exempt solid waste management that involves the direct placement of CCR on the land. EPA is extending a subset of the existing requirements in 40 CFR part 257, subpart D to CCR surface impoundments and landfills that closed prior to the effective date of the 2015 CCR Rule, inactive CCR landfills, and other areas where CCR is managed directly on the land. In this action, EPA refers to these as CCR management units, or CCRMU. The final rule expands the CCRMU requirements to a set of active facilities that were not regulated by the 2015 CCR rule because they had ceased disposing of CCR in their on-site disposal units, and they did not have an inactive surface impoundment. Accordingly, this rule applies to all CCRMU at active CCR facilities and inactive facilities with a legacy CCR surface impoundment.

EPA is also finalizing alternative closure provisions to allow a facility to complete the closure by removal in two stages: first, by completing all removal and decontamination procedures; and second, by completing all groundwater remediation in a separate post closure care period.

Finally, EPA is making a number of technical corrections to the existing regulations, such as correcting certain citations and harmonizing definitions.

EPA intends the provisions of the rule to be severable. In the event that any individual provision or part of the rule is invalidated, EPA intends that this would not render the entire rule invalid, and that any individual provisions that can continue to operate will be left in place. For example, EPA intends that the provisions governing each class of facilities—legacy CCR inactive surface impoundments, CCR management units, other active facility units, and regulated CCR landfills containing waste in contact with groundwater—to be independently severable from one another as each set of requirements operates independently from the other.

Likewise, the provisions regulating existing units at active facilities, including those units at non-fossil-fuel-fired facilities generating energy, are severable from the other substantive requirements—each provision may continue operating even if one of the others is invalidated. EPA also intends

that, within each set of provisions for legacy CCR surface impoundments and for CCR management units, the substantive requirements be severable from each other. For example, if any of the closure requirements were to be set aside (e.g., the requirement that CCRMU initiate closure within 48 months of publication), the groundwater monitoring and corrective action requirements can continue to fully and effectively operate. These requirements function independently from each other, address environmental concerns through different means, and are not dependent on the others; they are therefore severable from each other. Lastly, as set forth below, EPA has deferred the dates by when some units in some circumstances must comply with the substantive standards governing legacy CCR surface impoundments and CCR management units. If any of the deferrals were to be set aside, EPA intends that the substantive standards would remain in place because the rationale for and effectiveness of each set of substantive standards is not dependent on any of the deferrals.

For the reader's convenience, EPA has provided a background description of existing requirements in several places throughout this preamble.

C. What is the Agency's authority for taking this action?

EPA is publishing this notice under the authority of sections 1008(a), 2002(a), 3007, 4004, and 4005(a) and (d) of the Solid Waste Disposal Act of 1970, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA) and the Water Infrastructure Improvements for the Nation (WIIN) Act of 2016, 42 U.S.C. 6907(a), 6912(a), 6927, 6944, 6945(a) and (d).

RCRA section 1008(a) authorizes EPA to publish "suggested guidelines for solid waste management." 42 U.S.C. 6907(a). RCRA defines solid waste management as "the systematic administration of activities which provide for the collection, source separation, storage, transportation, transfer, processing, treatment, and disposal of solid waste." 42 U.S.C. 6903(28).

Pursuant to section 1008(a)(3), the guidelines are to include the minimum criteria to be used by the States to define the solid waste management practices that constitute the open dumping of solid waste or hazardous waste and are prohibited as "open dumping" under section 4005. Only those requirements promulgated under the authority of

section 1008(a)(3) are enforceable under section 7002 of RCRA.

RCRA section 4004(a) generally requires EPA to promulgate regulations containing criteria distinguishing "sanitary landfills," which may continue to operate, from "open dumps," which are prohibited. 42 U.S.C. 6944(a); *see id.* 6903(14), (26); 6945(a). The statute directs that, "at a minimum, the criteria are to ensure that units are classified as sanitary landfills only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid wastes at such facility." 42 U.S.C. 6944(a).

RCRA section 4005(a), entitled "Closing or upgrading of existing open dumps," prohibits any solid waste management practices or disposal of solid waste that does not comply with EPA regulations issued under RCRA section 1008(a) and 4004(a). 42 U.S.C. 6945(a). *See also* 42 U.S.C. 6903(14) (definition of "open dump"). This prohibition takes effect "upon promulgation" of any rules issued under section 1008(a)(3) and is enforceable either through a citizen suit brought pursuant to section 7002, or through an EPA enforcement action brought pursuant to section 4005(d)(4)(A). *See* 42 U.S.C. 6945(a), (d)(4)(A) (authorizing EPA to use the authority under RCRA section 3008(a) to enforce the open dumping prohibition for CCR). RCRA section 4005(a) also directs that open dumps (i.e., facilities out of compliance with EPA's criteria), must be closed or upgraded. *See* 42 U.S.C. 6945(a).

RCRA section 4005(d)(3) specifies that the regulations in 40 CFR part 257, subpart D "(or successor regulations promulgated pursuant to sections 6907(a)(3) and 6944(a) of this title), shall apply to each CCR unit" unless a permit issued by an approved State or by EPA is in effect. Similarly, section 4005(d)(6)¹ provides that:

a CCR unit shall be considered to be a sanitary landfill for purposes of this chapter, including subsection (a), only if the coal combustion residuals unit is operating in accordance with [a permit issued by EPA or an approved State] or the applicable criteria for coal combustion residuals units under part 257 of title 40, Code of Federal Regulations (or successor regulations promulgated pursuant to sections 6907(a)(3) and 6944(a) of this title).

1. Regulation of Solid Wastes Under RCRA Subtitle D

Solid wastes that are neither a listed nor characteristic hazardous waste are subject to the requirements of RCRA

subtitle D. Subtitle D of RCRA establishes a framework for Federal, State, and local government cooperation in controlling the management of nonhazardous solid waste. The Federal role is to establish the overall regulatory direction by providing minimum nationwide standards that will protect human health and the environment. States may, but are not required to, adopt these requirements into their State programs.

Under RCRA section 4005(a), upon promulgation of criteria under section 1008(a)(3), any solid waste management practice or disposal of solid waste that constitutes the "open dumping" of solid waste is prohibited. The Federal standards apply directly to the facility (are self-implementing) and facilities are directly responsible for ensuring that their operations comply with these requirements.

RCRA section 4005(d) establishes an additional regulatory structure, applicable exclusively to the solid waste management of CCR, that builds on the provisions in sections 1008(a)(3), 4004, and 4005(a), without restricting the scope of EPA's authority under those sections. *See*, 42 U.S.C. 6945 (d)(7). Under 4005(d), States may seek EPA approval of a State permitting program under which individualized facility permits would "operate in lieu of [EPA] regulation of coal combustion residuals units in the State." 42 U.S.C. 6945(d)(1)(A). EPA is also directed to "implement a permit program," which would operate in absence of an approved State program. 42 U.S.C. 6945(d)(2). However, the statute makes clear that facilities must continue to comply with the Federal regulations until a permit issued by either EPA or an approved State is in effect. 42 U.S.C. 6945(d)(3), (6).

RCRA sections 1008(a)(3) and 4004(a) delegate broad authority to EPA to establish regulations governing the management of solid waste. Under section 4004(a) EPA is charged with establishing requirements to ensure that facilities will be classified as sanitary landfills and not an open dump "only if there is no reasonable probability of adverse effects on health or the environment from the disposal of solid waste" at the facility. Or in other words, under section 4004(a) EPA is charged with issuing regulations to address all "reasonable probabilities of adverse effects" (i.e., all reasonably anticipated risks) to health and the environment from the disposal of solid waste. Section 1008(a)(3) expands EPA's authority to address the risks from any of the activities identified as "solid waste management" in RCRA section

¹ 42 U.S.C. 6945(d)(6).

1004(28). Specifically, EPA is authorized to establish requirements applicable to “storage, transportation, transfer, processing, treatment, and disposal of solid waste.” (42 U.S.C. 6907(a), 6903(28)). Under RCRA, EPA sets these requirements without taking cost into account as a factor. See *USWAG et al. v. EPA*, 901 F.3d at 448–49 (citing RCRA section 4004(a)).

The statute is clear that EPA is authorized to issue regulations to address the current risks from previous solid waste management activities. EPA explained at length the basis for this conclusion as part of the Agency’s rationale for regulating inactive impoundments. See, 80 FR 21344–21347. See also *USWAG*, 901 F.3d at 440. Among other provisions, the statutory definition of an “open dump” conclusively resolves the question. RCRA defines an “open dump” as “any facility or site where solid waste is disposed of” 42 U.S.C. 6903(14). As the D.C. Circuit explained,

Importantly, while the “is” retains its active present tense, the “disposal” takes the form of a past participle (“disposed”). In this way, the disposal itself can exist (it “is”), even if the act of disposal took place at some prior time Properly translated then, an open dump includes any facility (other than a sanitary landfill or hazardous waste disposal facility), where solid waste still “is deposited,” “is dumped,” “is spilled,” “is leaked,” or “is placed,” regardless of when it might have originally been dropped off. See 42 U.S.C. 6903(3), (14). In other words, the waste in inactive impoundments “is disposed of” at a site no longer receiving new waste in just the same way that it “is disposed of” at a site that is still operating.

901 F.3d at 440. See also *In re Consolidated Consol. Land Disposal Regulation Litig.*, 938 F.2d 1386, 1389 (D.C. Cir. 1991) (EPA’s reading of the term “disposal” in RCRA’s subtitle C, 42 U.S.C. 6924, to include “the continuing presence of waste” was reasonable); *USWAG*, 901 F.3d at 453–54 (Henderson, J., concurring) (same). By the same logic, these provisions would authorize EPA to regulate closed units that continue to pose risks to health or the environment, for example by requiring the owners or operators of such units to remediate any contamination from these units, or to take action to prevent such contamination.

The 2016 amendments further confirm EPA’s authority over these activities. In section 4005, Congress referenced the 2015 regulations in the statute, and expressly stated that the amendments in 4005(d) were not intended to limit or restrict the authority already provided under sections 1008(a)(3) and 4004(a). See, 42

U.S.C. 6945(d)(3), (6), (7). By incorporating the rule into the statute without modification, Congress has affirmed the Agency’s authority to impose the kind of requirements established in part 257 (e.g., corrective action to remediate groundwater contamination). Moreover, Congress made clear that EPA retains the authority to modify or expand these requirements as necessary to ensure that the standard in section 4004(a) will continue to be met. See, e.g., 42 U.S.C. 6945(d)(1)(A)(i), (3), (6) (referencing “or successor regulations promulgated pursuant to sections 6907(a)(3) and 6944(a) of this title”).

EPA interprets the standard in section 4004(a) to apply equally to criteria issued under sections 1008(a)(3) and 4004(a); namely that the criteria must ensure that a facility is to be classified as a sanitary landfill, and thus allowed to continue to operate, “only if there is no reasonable probability of adverse effects on health or the environment” from either the disposal or other solid waste management practices at the facility. Thus, under the combined authority conferred by sections 1008(a)(3) and 4004(a), a facility is an “open dump” if it engages in any activity involving the management of solid waste that does not meet the standard in section 4004(a); or in other words, any activity involved with the management of solid waste that presents a reasonable probability of causing adverse effects on health or the environment. EPA also interprets these provisions to authorize the establishment of criteria that define the manner in which facilities upgrade or close, consistent with the standard in section 4004(a), to ensure there will be no reasonable probability of adverse effects on health or the environment.

D. What are the incremental costs and benefits of this action?

As noted previously, EPA establishes the requirements under RCRA sections 1008(a)(3) and 4004(a) without taking cost into account. See, *USWAG*, 901 F.3d at 448–49. The following cost estimates are presented in the RIA and summarized in this preamble for compliance with OMB Circular A–4, E.O. 12866, and E.O. 14094. The requirements in this rule do not rely on these cost estimates.²

² Although EPA did not consider costs in developing this rule, if the Agency had considered costs, the final rule would not have been different. As discussed in greater detail later in this preamble and in the RIA, the monetized benefits are based on only a subset of adverse health effects from a single constituent. EPA monetized the benefit from two additional human health endpoints associated with

The RIA estimates that the annualized monetized costs of this action will be approximately \$214–\$240 million per year when discounting at 2%. Of this, \$123–\$135 million is attributable to the requirements for legacy CCR surface impoundments, which are subject to the D.C. Circuit’s order in *USWAG*, \$79–\$92 million is attributable to the requirements for CCRMU, an additional \$8–\$9 million is attributable to the requirements for CCRMU at Other Active Facilities (OAFUs) (a term used in the RIA) that are discussed in Unit III.C.2.e of the preamble, and \$4 million is attributable to requirements for landfills. The costs of this final rule are discussed further in the RIA and include the costs of unit closure, corrective action, fugitive dust controls, structural integrity inspections, and recordkeeping and reporting.

The RIA estimates that the annualized monetized benefits attributable to this action will be approximately \$53–\$80 million per year when discounting at 2%. Of this, \$43–\$57 million is attributable to the requirements for legacy CCR surface impoundments, \$9–\$21 million is attributable to the requirements for CCRMU, \$1–\$2 million is attributable to the requirements for CCRMU at “other active facilities,” or OAFUs. Requirements for landfills account for a de minimis amount of benefits.

In addition to monetized benefits, the RIA describes ten categories of non-monetized benefits. These include human health effects from lead exposure such as ADHD, cardiovascular mortality, and increased cancer risk. They also include ecosystem benefits from avoided exposure to the heavy metals in CCR effluent. The RIA describes several property-related benefits including increased property values near closed and remediated CCR units, and option values for remediated land. The RIA also contextualizes the final rule within EPA’s broader efforts to regulate air and surface water pollution from coal fired power plants.

Further information on the economic effects of this action can be found in Unit V of this preamble.

that single constituent in a sensitivity analysis and estimated an additional \$19 million per year when discounting at 2% from that single contaminant. The RIA also describes a number of important benefits that cannot currently be quantified or monetized due to data limitations or limitations in current methodologies. Based on these estimates EPA believes that after considering all unquantified and distributional effects, the public health and welfare gains that will result from the proposed alternative would justify the rule’s costs.

II. Background

A. 2015 CCR Rule

On April 17, 2015, EPA finalized national minimum criteria for the disposal of CCR as solid waste under Subtitle D of RCRA titled, “Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities” (80 FR 21302) (2015 CCR Rule). The 2015 CCR Rule, codified in 40 CFR part 257, subpart D, established regulations for existing and new CCR landfills, as well as existing and new CCR surface impoundments (including all lateral expansions of CCR units). The criteria consist of location restrictions, design and operating criteria, groundwater monitoring and corrective action requirements, closure and post-closure care requirements, recordkeeping, notification, and internet posting requirements.

The 2015 CCR Rule also imposed requirements on inactive surface impoundments at active facilities. A CCR surface impoundment is a natural topographic depression, man-made excavation, or diked area, which is designed to hold an accumulation of CCR and liquids, and the unit treats, stores, or disposes of CCR. The 2015 CCR Rule defined an “inactive CCR surface impoundment” as “a CCR surface impoundment that no longer receives CCR on or after October 19, 2015, and still contains both CCR and liquids on or after October 19, 2015.” 40 CFR 257.53. The rule defined “active facility or active electric utilities or independent power producers” as “any facility subject to the requirements of this subpart that is in operation on October 19, 2015. An electric utility or independent power producer is in operation if it is generating electricity that is provided to electric power transmission systems or to electric power distribution systems on or after October 19, 2015. An off-site disposal facility is in operation if it is accepting or managing CCR on or after October 19, 2015.” 40 CFR 257.53.

The 2015 CCR Rule did not impose any requirements on inactive facilities. EPA explained that this was consistent with past decisions under RCRA subtitle C. See, 80 FR 21344 (April 17, 2015). EPA further raised concerns that it would be difficult to identify the owners or other parties responsible for such facilities, as well as concerns that the present owner of the land on which an inactive facility was located might have no connection (other than present ownership of the land) with the prior disposal activities. *Id.* Consequently, EPA exempted those units at § 257.50(e).

B. 2018 USWAG Decision

The 2015 CCR Rule was challenged by several parties, including coalitions of regulated entities and environmental organizations (“Environmental Petitioners”). See *USWAG et al. v. EPA*, 901 F.3d 414 (D.C. Cir. 2018). Environmental Petitioners raised two challenges that are relevant to this final rule. First, they challenged the provision at § 257.101(a)(1) that allowed existing, unlined surface impoundments to continue to operate until they exceeded the groundwater protection standard. They contended that EPA failed to show how continued operation of unlined impoundments met RCRA’s baseline requirement that any solid waste disposal site pose “no reasonable probability of adverse effects on health or the environment.” 42 U.S.C. 6944(a). Second, Environmental Petitioners challenged the exemption at § 257.50(e) for inactive surface impoundments at inactive power plants (*i.e.*, “legacy ponds”). Environmental Petitioners argued that legacy ponds are at risk of unmonitored leaks and catastrophic structural failures.

On August 21, 2018, the U.S. Court of Appeals for the D.C. Circuit upheld most of the 2015 CCR Rule but decided in favor of Environmental Petitioners on these two claims. The Court held that EPA acted “arbitrarily and capriciously and contrary to RCRA” in failing to require the closure of unlined surface impoundments³ and in exempting inactive surface impoundments at inactive power plants from regulation. The Court vacated these provisions and remanded the matter back to the Agency for further action consistent with its opinion.

In overturning the exemption for legacy ponds, the Court evaluated the evidence in the rulemaking record and reached specific conclusions about the risks that legacy ponds pose based on the record for the 2015 CCR Rule. The Court pointed to evidence that legacy ponds are most likely to be unlined and unmonitored and that such units have been shown to be more likely to leak than units at utilities still in operation. 901 F.3d at 432. The Court also determined that legacy ponds:

... pose the same substantial threats to human health and the environment as the riskiest Coal Residuals disposal methods, compounded by diminished preventative and remediation oversight due to the absence of an onsite owner and daily monitoring. See 80 FR at 21343 through 21344 (finding that the

greatest disposal risks are “primarily driven by the older existing units, which are generally unlined”). Notably, this very Rule was prompted by a catastrophic legacy pond failure that resulted in a “massive” spill of 39,000 tons of coal ash and 27 million gallons of wastewater into North Carolina’s Dan River. . . .

[T]here is no gainsaying the dangers that unregulated legacy ponds present. The EPA itself acknowledges the vital importance of regulating inactive impoundments at active facilities. That is because, if not properly closed, those impoundments will “significant[ly]” threaten “human health and the environment through catastrophic failure” for many years to come. 75 FR at 35,177; see also 80 FR at 21,344 n. 40.

The risks posed by legacy ponds are at least as substantial as inactive impoundments at active facilities. See 80 FR at 21,343–21,344 (finding “no [] measurabl[e] differen[ce]” in risk of catastrophic events between active and inactive impoundments). And the threat is very real. Legacy ponds caused multiple human and environmental disasters in the years leading up to the Rule’s promulgation. See 75 FR at 35,147 (proposed rule discusses multiple serious incidents). For example, a pipe break at a legacy pond at the Widows Creek plant in Alabama caused 6.1 million gallons of toxic slurry to deluge local waterways. *Id.* Another legacy pond in Gambrills, Maryland caused the heavy metal contamination of local drinking water. *Id.* And the preamble to the Rule itself specifically points to the catastrophic spill at the Dan River legacy pond in North Carolina. 80 FR at 21,393–21,394.

Id. at 432–433. Relying on this evidence, the Court concluded there was no logical basis for distinguishing between the inactive impoundments at active facilities that were regulated and the legacy impoundments that were exempt. *Id.* at 434. Consequently, the Court vacated the provision of the 2015 CCR Rule (§ 257.50(e)) that specifically exempted inactive impoundments at inactive facilities from regulation and remanded the matter back to EPA for further action consistent with its opinion. Notwithstanding the vacatur of § 257.50(e), until EPA amended the regulations to effectuate the Court’s order, facilities were not legally obliged to take any action to comply with the Federal CCR regulations. This is because, as originally drafted, legacy CCR surface impoundments did not fall within the scope of the rule, as defined in § 257.50. The specific provision in § 257.50(e) exempting legacy impoundments merely identified the units that were not covered by § 257.50(b). Because the vacatur of § 257.50(e) did not amend § 257.50(b), legacy impoundments remained exempt.

³ After the Court’s ruling, the closure of unlined CCR surface impoundments was addressed in a separate regulatory action that was published on August 28, 2020 (85 FR 53516).

C. 2020 Part B Proposed Rule

In the March 3, 2020 proposed rule, Hazardous and Solid Waste Management System: Disposal of CCR; A Holistic Approach to Closure Part B: Alternate Demonstration for Unlined Surface Impoundments; Implementation of Closure (85 FR 12456), EPA proposed revisions to the 2015 CCR Rule, including: procedures to allow facilities to request approval to use an alternate liner for CCR surface impoundments; two alternative proposed options to allow the use of CCR during unit closure; an additional closure option for CCR units being closed by removal of CCR; and requirements for annual closure progress reports. On November 12, 2020, EPA finalized the procedures to allow facilities to request approval to use an alternate liner for CCR surface impoundments. 85 FR 72506. In this final rule, the Agency is taking final action on the proposed closure option for units being closed by removal of CCR, which action is discussed in Unit III.D of this preamble. EPA is still considering provisions from the proposed rule that are not addressed in this rule and may be addressed in a subsequent action.

D. 2020 Advance Notice of Proposed Rulemaking

On October 14, 2020, EPA published an Advance Notice of Proposed Rulemaking (ANPRM) (85 FR 65015). In that action, EPA requested information related to legacy CCR surface impoundments to inform a future rulemaking. The Agency requested input on its regulatory authority, input on a potential definition of a legacy CCR surface impoundment and specific information on the types of inactive surface impoundments at inactive facilities that might be considered legacy CCR surface impoundments. Specifically, EPA requested information on how many of these units exist, the current status of these units (*e.g.*, capped, dry, closed according to State requirements, still holding water), and the names, locations, and closure dates of former power plants that may have these units. Finally, the Agency took comment on which CCR regulations should apply to legacy CCR surface impoundments and on suggestions for compliance deadlines.

During the 60-day public comment period, the Agency received over 15,000 comments from environmental groups, four States, one Tribe, individual utilities, and industry trade associations. The topics raised in comments included a potential definition of a legacy CCR surface

impoundment, EPA's regulatory authority, the scope and applicability of the legacy impoundment rule, and regulatory requirements to propose. Moreover, the comments generally agreed that EPA must prescribe timeframes for coming into compliance with the regulations and they recommended timeframes that are shorter than compliance timeframes in the 2015 CCR Rule.

As noted in the ANPRM, EPA took comment on whether, in light of the Court's opinion in *USWAG*, the Agency could reconsider whether it has the authority to regulate inactive impoundments under RCRA subtitle D. 85 FR 65017–65018 (October 14, 2020). The general consensus from commenters on the ANPRM was that, because the Court resolved the question based on the plain meaning of the statute, EPA does not have the discretion to reinterpret its authority. In addition, no commenter identified a factual basis for not regulating legacy CCR surface impoundments that addressed the Court's concern about the risks these units pose. *Id.* at 65018. Consequently, EPA is not revisiting the question of whether it may regulate inactive or legacy CCR surface impoundments.

E. 2023 Proposed Rule and Comments

On May 18, 2023, EPA proposed revisions to the CCR regulations (88 FR 31982) (“the proposed rule” or “2023 proposed rule”). These revisions included establishing regulations specifying that legacy CCR surface impoundments are subject to 40 CFR part 257, subpart D and specifying that owners or operators of legacy CCR surface impoundments comply with all the appropriate requirements applicable to inactive CCR surface impoundments at active facilities. In addition, EPA proposed to establish requirements to address the risks from currently exempt solid waste management that involves the direct placement of CCR on the land. EPA proposed to extend a subset of the existing requirements in part 257, subpart D to CCRMU, which was proposed to include CCR surface impoundments and landfills that closed prior to the effective date of the 2015 CCR Rule, inactive CCR landfills, and other areas where CCR is managed directly on the land. This proposal would apply to all active CCR facilities and all inactive facilities with legacy CCR surface impoundments. Lastly, EPA proposed to make several technical corrections to the CCR regulations. These are: (1) To clarify the definitions of “feasible” and “technically feasible”; (2) To correct the CFR reference in the

definition of wetlands at § 257.61(a); (3) To correct a reference in the groundwater monitoring scope section; (4) To standardize the references to CCR websites throughout the CCR regulations; and (5) EPA requested comment on extending the period for document retention and posting.

The Agency received over 33,500 comments on the proposed rule, with over 600 unique comments. Commenters included individual electric utilities and independent power producers, national trade associations, State agencies, public interest and environmental groups, private citizens, and entities involved with the beneficial use of CCR. All public comments submitted in response to the proposal can be found in the docket for this action. Most commenters focused on the scope of the proposed rule, definitions, compliance deadlines, and EPA's statutory authority to regulate CCRMU. Most commenters also requested that EPA adopt additional requirements to address the risks from CCR units. EPA's responses to the comments on the proposed rule are addressed either in this preamble or in a response to comment document available in the docket to this final rule.

EPA conducted two public hearings on the proposed rule. EPA held an in-person public hearing in Chicago, Illinois on June 28, 2023. At this hearing there were 87 speakers and a total of 150 registered attendees. EPA also held a virtual public hearing on July 12, 2023, using an internet-based software platform. The platform allowed the public hearing participants to provide oral testimony using a microphone and speakers connected to their computers or using a phone. It provided the ability for any person to listen to the public hearing via their computer. At the virtual hearing, there were 93 speakers and a total of 353 registered attendees. Testimony at both public hearings focused generally on EPA's proposed amendments, and on the following topics: whether to further expand regulation to all CCR, regardless if it was onsite of a regulated facility; whether to regulate structural fill and other beneficial uses; enforcement of the CCR regulations; requests for more engagement with communities; and requests for EPA to amend other regulations to strengthen corrective action and limit the use of alternative source demonstrations (ASD). Finally, some commenters discussed site-specific concerns of facilities near their homes, or health effects witnessed in communities close to CCR sites, and general concerns about the health and environmental risks from CCR.

Transcripts for both public hearings are included in the docket for this action.

F. 2023 Notice of Data Availability

On November 14, 2023, EPA published a notice of data availability (NODA), to solicit comments on additional information and statistics developed in response to comments on the Agency's May 18, 2023 proposed rule. 88 FR 77941. Some of the information contains data or analysis obtained directly from comments submitted during the May 18, 2023 proposed rule's comment period, which might aid in the formulation of the final rule. EPA also solicited comments on a supplemental risk assessment EPA conducted in response to comments raised on the proposed rule. This risk assessment builds on the findings of the previous Human and Ecological Risk Assessment of Coal Combustion Residuals (2014 Risk Assessment)⁴ and better quantifies the specific risks that may result from placement of CCR in legacy CCR surface impoundments and CCRMU. EPA requested comment on all aspects of the assessment including the validity and propriety of relying on the new information, data, and analyses contained in the updated risk assessment to inform the final rule.

EPA also sought further information on legacy CCR surface impoundments and CCRMU, including information on the location, presence, condition, history, and risk associated with any of the potential legacy CCR surface impoundments or any of the potential CCRMU within the docket. EPA also requested any information regarding the presence of water, distance to surface water bodies, proximity to floodplains, unit size, CCR volume, depth to groundwater, date of CCR placement, closure status, any corrective action associated with the unit, and any groundwater monitoring data. EPA also requested comment on the accuracy of the information that was submitted regarding potential legacy CCR surface impoundments or potential CCRMU. Furthermore, EPA sought similar information on any other potential legacy CCR surface impoundments or potential CCRMU of which EPA may not be aware or for which we may have incomplete information.

EPA accepted public comment on the NODA until December 11, 2023. The Agency received over 70 comments on the NODA. Commenters included individual electric utilities and

independent power producers, national trade associations, State agencies, public interest and environmental groups, private citizens, and entities involved with the beneficial use of CCR. All public comments submitted in response to the NODA can be found in the docket for this action. The majority of commenters focused on the supplemental risk assessment; some focused on the request for additional information on the universe of legacy CCR surface impoundments and CCRMU. EPA's responses to comments received on the NODA are addressed either in an updated risk assessment (the 2024 Risk Assessment), this preamble, or in the response to comment document available in the docket to this final rule.

III. What final action is the Agency taking?

In response to the USWAG decision, EPA is finalizing a provision at § 257.50(e), specifying that legacy CCR surface impoundments are subject to 40 CFR part 257, subpart D. EPA is also requiring owners or operators of legacy CCR surface impoundments to comply with the following existing requirements in the CCR regulations: installation of a permanent marker, history of construction, hazard potential classification, structural stability and factors of safety assessments, emergency action plan (EAP), air criteria, inspections, groundwater monitoring and corrective action, closure and post-closure care, recordkeeping, and notification and CCR website requirements. EPA further is establishing new compliance deadlines for these newly applicable regulatory requirements to ensure the owners or operators of these units have time to come into compliance.

In addition to the revisions EPA proposed to address the USWAG decision, EPA is establishing requirements to address the risks from currently exempt solid waste management that involves the direct placement of CCR on the land. EPA is extending a subset of the existing requirements in 40 CFR part 257, subpart D to CCRMU, which are CCR surface impoundments and landfills that closed prior to the effective date of the 2015 CCR Rule, inactive CCR landfills, and other areas where CCR is managed directly on the land. These additional requirements apply to all active CCR facilities, all inactive facilities with legacy CCR surface impoundments subject to this final rule, and those active facilities (*i.e.*, facilities producing electricity for the grid as of October 19, 2015) that ceased placing

CCR in onsite CCR units prior to the effective date of the 2015 CCR Rule.

EPA is also finalizing alternative closure provisions to allow a facility to complete the closure by removal in two stages: first, by completing all removal and decontamination procedures; and second, by completing all groundwater remediation in a separate post closure care period.

Lastly, EPA is finalizing several technical corrections to the CCR regulations. These are: (1) to clarify the definitions of "feasible" and "technically feasible"; (2) to correct the CFR reference in the definition of wetlands at § 257.61(a); (3) to correct a reference in the groundwater monitoring scope section; (4) to standardize the references to CCR websites throughout the CCR regulations; and (5) to extend the period for document retention and posting.

A. Risks From Legacy CCR Surface Impoundments and CCR Management Units

1. Summary of May 2023 Proposal

The proposal largely relied on the model results from the 2014 Risk Assessment, as EPA considered the results were equally applicable to legacy CCR surface impoundments and CCRMU.⁵ This determination was based on the fact that many of these unregulated units are similarly constructed, manage the same types of ash, and are frequently located either at the same or nearby facilities as their regulated counterparts. In particular, some unregulated units are known to be located directly adjacent to or beneath currently regulated units.

The 2014 Risk Assessment concluded that the management practices that EPA believed were generally in use in 2014 at surface impoundments and landfills were likely to pose risks to human health through groundwater exposure within the range that EPA typically considers warrants regulation. For highly exposed individuals, the cancer risks from arsenic due to the operation of surface impoundments were as high as 2×10^{-4} , while noncancer risks were as high as an HQ of 5 for arsenic, 2 for lithium, and 2 for molybdenum. Cancer risks associated with the operation of landfills were estimated to be as high as 5×10^{-6} from the ingestion of arsenic-contaminated drinking water. In 2015, EPA relied on this risk assessment to support the regulation of both active CCR units and inactive CCR surface

⁴ U.S. EPA. 2014. "Human and Ecological Risk Assessment of Coal Combustion Residuals." RIN 2050-AE81. Office of Solid Waste and Emergency Response. Washington, DC. December.

⁵ U.S. EPA. 2014. "Human and Ecological Risk Assessment of Coal Combustion Residuals." RIN 2050-AE81. Office of Solid Waste and Emergency Response. Washington, DC. December.

impoundments at active facilities. The 2014 Risk Assessment reported risks for the units that were anticipated to be subject to the 2015 CCR Rule and therefore drew no conclusions about the older units excluded from the scope of that rule. Nevertheless, information available in the record supports the conclusion that these older units can pose risks at least as high as reported in the 2014 Risk Assessment.

EPA further proposed to find that the risks associated with legacy impoundments and CCRMU may be even higher than EPA modeled on a national scale in the 2014 Risk Assessment for active units. First, the proposal explained that these units have been present onsite for longer and had more time to leak. In addition, EPA explained that there are several management practices that have the potential to result in higher leakage, but that were previously modeled either less frequently for active units—based on a belief that the practices had declined over time—or not at all—due to data constraints on a national scale. These include: (1) The greater prevalence of unlined units; (2) The greater likelihood of co-management of CCR with coal refuse and other wastes in surface impoundments, making the overall waste pH far more acidic and (3) The potential for the units to be constructed below the water table or to have become inundated with groundwater after construction. The proposal estimated that the solid waste management practices associated with legacy impoundments and CCRMU could pose lifetime cancer risks from arsenic as high as 2×10^{-5} to 1×10^{-3} (i.e., 2 to 100 cases of cancer for every 100,000 individuals exposed), and non-cancer risks for cobalt as high as an HQ of 13, mercury up to an HQ of 13, lithium up to an HQ of 3, molybdenum up to an HQ of 4, and thallium up to an HQ of 2, depending on the specific management practice. Finally, EPA explained that each of these practices individually can pose greater risks than those previously modeled for the currently regulated universe of CCR units, and a combination of these practices could push risks even higher.

2. 2023 Draft Risk Assessment

A number of commenters claimed that the 2014 Risk Assessment did not adequately capture various factors associated with legacy CCR surface impoundments and CCRMU that the commenters believed will result in significantly different risks than those posed by currently regulated units. In response to these comments, EPA conducted a supplemental risk

assessment to determine the potential for some of these factors to affect national risks. This risk assessment built on the findings of the 2014 Risk Assessment and better quantified the specific risks that may result from placement of CCR in legacy CCR surface impoundments and CCRMU.

The 2023 draft supplemental assessment consisted of: (1) Additional modeling of inactive and closed CCR landfills and surface impoundments that was actually conducted in 2014 using the same methodology and data. These results were ultimately not included in the original 2014 Risk Assessment because the units were not regulated under the final 2015 rule, and (2) Some further model runs relying on some updated data. In addition, EPA modeled the placement of CCR in smaller quantities than would typically be found in a CCR surface impoundments or landfill (i.e., smaller CCRMU placements or CCRMU fills) to determine the potential for these smaller CCRMU placements to contaminate groundwater. Through this modeling, EPA identified potential for these fills to contaminate onsite groundwater. Model results indicated potential for exceedance of groundwater protection standards (GWPS) at the fill boundary under both high-end and moderate conditions. These results also showed potential for substantial spread of the resulting groundwater plume. Under high-end conditions, these plumes are large and persistent enough to sustain exposures for over a century or more at average risks of 2×10^{-5} or higher.

Finally, EPA assessed the potential for exposure to radiation from CCR remaining in the soil (subsurface). EPA found the amount of radon emitted by CCR is not distinguishable from background soil and so did not retain this pathway for further consideration. EPA also found greater potential for risk from gamma radiation as CCR comes to be located closer to the ground surface due to a reduction in shielding. An additional sensitivity analysis identified potential for further risk if CCR becomes mixed with surface soil. Accumulation of CCR can result in elevated cancer risk from incidental ingestion of arsenic and radium, in addition to direct exposure to gamma radiation from radium. For high-end waste concentrations, an eight percent mixture of CCR in surface soil was found to result in risk on the order of 1×10^{-4} .

The 2023 draft risk assessment was made available for public comment as part of a NODA released on November 14, 2023.

3. Response to Comments on the Proposal and the NODA

The following subsection provides a summary of comments received on either the proposed rule or NODA that are germane to the risk record for legacy impoundments and CCRMU. EPA considered these comments as it worked to finalize the supplemental risk assessment (“2024 Risk Assessment”). The Agency also received a number of general comments, which were either editorial in nature or expressed general support or disapproval for the risk assessment methodology, data, or results. However, these comments did not provide any specific technical recommendations or data that could otherwise be used to update the risk assessment. These general comments did not provide EPA with a basis to alter or otherwise re-evaluate the risk assessment in response.

a. Comments Related to Applicability of 2014 Risk Assessment

Comment: Several commenters generally affirmed the Agency’s risk basis for regulating historical and inactive disposal units. However, other commenters argued the Agency’s risk record is inadequate to support regulation of certain legacy impoundments or any CCRMU. Others contended that because the 2014 Risk Assessment supported regulation of active landfills and surface impoundments, it is not appropriate to apply that record to disposal units that previously ceased receipt of waste. In particular, commenters pointed to the current lack of ponded water and/or the presence of a cap and vegetative cover that would reduce infiltration through certain units. Some commenters noted that State programs may include requirements for unit design, monitoring, and closure that ensure a cover is present. Commenters stated these factors must be accounted for through an updated risk assessment.

EPA Response: Claims that the results of the 2014 Risk Assessment are applicable only to active units represent a fundamental misunderstanding of scope of the 2014 Risk Assessment. EPA did not only model units during operation. Instead, the risk assessment modeled the specific stage of the unit lifecycle anticipated to contribute the most to long-term risk. For surface impoundments this was during operation, but for landfills it was after closure. EPA modeled the leakage that occurred over this one lifecycle stage and tracked the subsequent migration through groundwater over time. The risks to downgradient receptors

resulting from the modeled leakage were used to represent risk over the entire unit lifecycle. Consideration of a single lifecycle stage was necessary because of model constraints and the high computational burden of tracking shifting configurations for every single unit.

Both landfills and surface impoundments progress through similar lifecycle stages from construction to closure. Thus, the fact that some historical and inactive units may no longer contain ponded water or may have installed a soil cover only places these units in a different stage of that lifecycle. That does not differentiate the long-term risks of those units from those previously modeled. In particular, existing groundwater contamination does not vanish once a unit ceases operation. As one State commenter noted, “[g]roundwater contamination is an important aspect to legacy impoundment closure and should not be overlooked simply because the impoundment does not contain liquid or CCR at the date of the final rule.”

By contrast, the 2014 Risk Assessment only modeled landfills after closure; in other words, EPA assumed that no leakage occurred prior to closure, while the landfill was operating. EPA only modeled landfills after closure because based on the assumption that this stage of the landfill lifecycle would have the greatest contribution to long-term risk for offsite receptors because the unit would be filled to capacity and the post closure stage represented the greater period of time over which leakage can occur. EPA modeled unlined units with a soil cap and vegetative cover equivalent to the surrounding native soils and found risks from arsenic as high as 2×10^{-5} for receptors up to a mile away. Even assuming some landfills have been closed in a manner more consistent with the existing CCR regulations (*i.e.*, with some kind of composite cover system), this is unlikely to change the overall conclusions of the risk assessment. This is because, regardless of the cover that is ultimately installed, higher leakage can occur throughout the active life of the unit when the landfill face is open and able to intercept more precipitation. This conclusion is reinforced by the fact that facility monitoring reports document that around 20% of currently active landfills have triggered corrective action. Additionally, EPA has seen no evidence to suggest that the closure of older units has been consistently more protective than EPA modeled in 2014. As discussed in Unit III.B.2.g.iii(a) of the preamble, as part of developing the 2015 CCR Rule, EPA reviewed State

statutes and regulations, with a more detailed focus on the 16 States responsible for approximately 74% of the CCR generated in 2009. See 80 FR 21324. The Agency’s review of State programs prior to 2015 found that oversight of these wastes and the overall protectiveness of particular programs varied widely. For example, EPA estimated that in 2015, approximately 20% of the net disposable CCR was entirely exempt from State regulatory oversight. Similarly, a 2006 joint Department of Energy (DOE) and EPA study reported that only 19% (three out of 19) of the surveyed surface impoundment permits included requirements addressing GWPS (*i.e.*, contaminant concentrations that cannot be exceeded) or closure/post-closure care. Furthermore, some of the photographs and descriptions of these older units provided by commenters indicate extensive growth of trees and other woody vegetation that can compromise the integrity of any cap present and increase the rate of infiltration into the unit. For these reasons, the 2014 Risk Assessment is equally representative of the national risks from historical and inactive landfills.

The 2014 Risk Assessment modeled all surface impoundments during the active stage of their lifecycle. This was based on the presumption that the highest rates of leakage would occur while wastewater is ponded above the ash, because this water creates a large and sustained hydraulic head that serves to drive leachate into the subsurface. Although the current configuration of historical and legacy impoundments may vary, all these units previously held ponded water during the active stage of their lifecycle. And, in the case of legacy impoundments, ponded water may still be present. As a result, the current configuration of the unit is immaterial to the releases that occurred during operation. For this reason, the modeling approach relied upon in the 2014 Risk Assessment is equally applicable to historical and legacy impoundments.

The 2014 Risk Assessment also accurately represents the potential risks that remains for units that were closed consistent with the 2015 CCR Rule. If the cover system is not adequately maintained after closure, degradation over time from human or animal activity, natural settling, freeze-thaw cycles, flooding and other extreme weather events, and other factors can result in greater leakage from the unit than designed. In some cases, groundwater monitoring may provide the only clear evidence the cap is not

performing as designed. Thus, the 2014 Risk Assessment accurately describes the risks that can result if these units are not adequately maintained and monitored in line with regulatory requirements.

Comment: Multiple commenters argued that historical and inactive disposal units will generally have a smaller footprint than those modeled in the 2014 Risk Assessment. For example, some commenters noted the average sizes of landfills and surface impoundments modeled in the 2014 Risk Assessment were around 120 acres and 50 acres, respectively, while the estimated average sizes of CCRMU and legacy impoundments in the proposed rule were both closer to 30 acres. Others cited to the sizes of individual units that at their facilities to contend that these units are much smaller than average. These commenters contended that a smaller footprint would result in a lower mass loading of groundwater and lower associated risk.

EPA Response: EPA disagrees that the referenced data indicate that older disposal units are significantly smaller in size than the units EPA modeled in 2014. The 2014 Risk Assessment relied on data submitted by facilities in the EPA Surveys to estimate an average active landfill size of around 120 acres from over 310 landfills and an average active impoundment size of around 50 acres from over 735 impoundments. The RIA summary referenced by commenters relies only on data that could be independently verified by data from posted facility reports and recent public comments. From the final list of 195 CCRMU and 194 legacy impoundments, EPA identified data for only one landfill with a size of 90 acres and 47 historical or legacy impoundments with an average size of 44 acres. Thus, when CCRMU are separately grouped as landfills and impoundments, the differences in size are not as substantial as indicated by commenters.

EPA also disagrees that any differences that do exist would result in substantially lower risks than previously modeled. As part of the 2014 Risk Assessment, EPA modeled 122 landfills and 163 impoundments that were excluded from the reported risk results because these units were determined to not be subject to that rule. These excluded units represent some combination of legacy impoundments, inactive landfills, and historical disposal units. The average sizes of these previously excluded units are 77 acres for the landfills and 28 acres for the impoundments. These sizes are approximately half the size of the units

identified in the 2014 Risk Assessment or more recent data collection efforts. However, as discussed in Section 3 of the 2024 Risk Assessment, the risks associated with these older units are substantially the same as those for currently regulated units. Therefore, there is no evidence that these differences in size have a meaningful impact on national risks, or that the results of the 2014 Risk Assessment are not equally applicable to legacy impoundments and CCRMU. While there may be individual disposal units at these sites that are smaller than average, the model results summarized in the 2024 Risk Assessment model include landfills as small as 2 acres and impoundments as small as 0.01 acres. Therefore, there is no indication based on the data provided that the overall distribution of unit sizes has not been adequately reflected in the national model.

Finally, EPA notes that individual unit size is not necessarily a reliable metric to draw conclusions about the overall risk from CCR disposal at electric utilities. The 2014 Risk Assessment modeled the risks from each landfill and impoundment separately because it was difficult to confirm the relative locations and orientations of different units with data from the EPA Surveys. However, the Agency is now aware of many sites where multiple units, both landfills and impoundments, are located immediately adjacent to one another. As a result, there is potential the 2014 Risk Assessment underestimated site risk to some degree by not evaluating the combined leakage over the full contributing area of these adjacent disposal units.

Comment: One commenter stated the 2014 Risk Assessment did not specifically characterize the risks from impoundments that do not contain fly ash. This commenter argued that historical and legacy impoundments are more likely to only contain bottom ash or boiler slag, as the process of capturing fly ash was not common prior to the 1970s. Therefore, this commenter concluded that the 2014 Risk Assessment does not adequately characterize the risks for these older units.

EPA Response: EPA disagrees that the 2014 Risk Assessment does not address the risks associated with these impoundments. The risk assessment incorporated porewater data from impoundments that contained only bottom ash, but EPA did not separately break out risks for this subset of units because the amount of data available was inconsistent across the set of modeled constituents. However,

available porewater data show the potential for certain constituents, such as molybdenum, to leach from bottom ash at levels as high as from fly ash.

Additionally, available monitoring reports for currently regulated units posted on facility websites document that these units have a similar potential to contaminate groundwater as units containing other types of CCR. Of the units designated as managing bottom ash, 32% of surface impoundments and 38% of landfills have triggered corrective action. Of the units designated as managing slag, 38% of surface impoundments have triggered corrective action. No landfills were identified as dedicated to slag. For comparison, 48% of remaining surface impoundments and 21% of remaining landfills have triggered corrective action. Therefore, there is no indication that these types of units are overall less likely to result in groundwater contamination.

Comment: One commenter claimed that a nationwide assessment should not be used to make determinations about the risks at individual sites or to support national requirements. This commenter stated that, unlike individual damage cases, the Agency's groundwater model does not adequately represent the specific conditions at each individual unit. However, this commenter provided no data to support their broad claims. One other commenter pointed to data they had identified to contend that the model does not reflect the specific environmental conditions at their facility.

EPA Response: The modeling conducted for both the 2014 and 2024 Risk Assessments utilized a probabilistic, site-based approach that combined site-specific data with more regional and national data sources. The model incorporated data about the specific location, dimensions, and liner status of individual disposal units where available. The aim of this approach is not to assign an exact risk to each individual unit, but to provide an overall accurate picture of the potential risks posed by these types of units on a national scale. Indeed, many of the findings from the 2014 Risk Assessment were supported by available damage cases. The commenters did not articulate why they believe the risks associated with individual units fall far outside the broader distribution of modeled units. But as acknowledged by the one commenter who did submit data, there is overlap between the range of conditions modeled and those they identified as present at their particular facility. EPA does acknowledge that there are some site conditions that the

2014 and 2024 Risk Assessments were not able to adequately model, such as waste below the water table. However, this is why the Agency separately relied on damage cases to identify additional constituents of potential concern for groundwater monitoring.

Comment: One commenter stated that EPA should not rely on the findings of the Environmental Integrity Project's report, "Poisonous Coverup: The Widespread Failure of the Power Industry to Clean Up Coal Ash Dumps" without independently validating the quality of analyses conducted for each site.

EPA Response: EPA recognizes that the method used in the cited report to identify potential exceedances of GWPS is not the same as the regulatory standard for triggering corrective action. For this and other reasons, the Agency does not rely on the report as a primary basis for the current rulemaking or to draw any conclusions about the monitoring status of any individual unit. Instead, EPA previously referenced the report as a supplementary source of information that further supports the findings of the 2014 Risk Assessment. Specifically, the fact that the constituents identified as risk drivers in the 2014 Risk Assessment are the same ones detected most frequently above GWPS indicates that the fate and transport modeling conducted by EPA was able to correctly identify the constituents most likely to be released and migrate at environmentally significant concentrations. While high background concentrations may be present at some of these sites, many have already triggered corrective action and the Agency believes that number will increase as more facilities come into compliance with the rule requirements. Because this report does not form a basis for the rule, it is not discussed further in the preamble to the rule or the 2024 Risk Assessment outside of responses to other comments that cite to the same or similar reports.

b. Comments Related to Draft 2023 Supplemental Risk Assessment Conceptual Model

Comment: Multiple commenters broadly argued that the draft 2023 risk assessment relied on data and assumptions that represent maximum values or otherwise reflect worst-case scenarios that could never occur, and therefore do not represent a "reasonable probability" of adverse impacts and so is not an appropriate basis for regulatory action.

EPA Response: EPA disagrees that the design of the risk assessment is inappropriately conservative. Consistent

with EPA's long-standing practice under RCRA (as well as other agency programs), an individual with *reasonable* maximum exposure (RME) provides the principal basis for evaluating potential human health risks. An RME scenario is intended to be conservative, while remaining within the range of possible high-end exposures.⁶ Specifically, "high end" has been defined as the part of the exposure distribution that falls above the 90th percentile, but below the 99.9th percentile.⁷ Reliance on this type of scenario is intended to protect sensitive populations. Selection of the data and assumptions incorporated in the 2024 Risk Assessment is in line with this objective. Further critiques about the potential for the specific data and assumptions to overestimate risk are addressed in subsequent responses.

Comment: Multiple commenters argued that it was inappropriate for EPA to consider future onsite residential exposures as a basis for evaluating the potential risks associated with onsite CCR disposal. One commenter claimed that the estimates of existing populations living near these facilities used in the 2024 Risk Assessment was both overestimated and inconsistent with estimates from the Agency's RIA. One commenter acknowledged that older units tend to be located closer to population centers. However, others argued that this proximity to existing populations or water bodies would not make them overall more likely to become residential in the future. One commenter stated that EPA should have surveyed the intended land use for facilities or otherwise directly assessed the likelihood of residential land use.

EPA Response: EPA disagrees that consideration of a population within a five-mile radius overstates the likelihood of residential development. Five miles away from a population center is a small distance for residential development to expand, even in the near future. Nevertheless, the Agency has updated the population estimates in the 2024 Risk Assessment to more closely align with reporting in the RIA and to include both one- and three-mile radii. EPA also disagrees that consideration of a future residential land use scenario is inappropriate or unrealistic. The substantial populations

already living near many facilities and the generally higher property value of land near water bodies are two indicators of the potential for land to be attractive for future residential land use. Facilities do not dictate the ultimate use of a property after the land has been sold for redevelopment. These types of facilities can include considerable tracts of land beyond that dedicated to waste disposal that may be considered for a range of different uses. EPA is currently aware of 22 examples in which former electric utilities have been proposed for residential development, 19 of which are known to have burned coal.⁸ Thus, there is evidence of community interest in residential land use at these types of facilities.

Although future residential use is considered as the RME scenario in the 2024 Risk Assessment, that does not mean it is the only scenario EPA considered or on which this final rule is based. Depending on their location, leakage of Appendix IV constituents from individual CCRMU fill may migrate off-site at levels of concern. In addition, even if the constituents from a single CCRMU do not migrate off-site, the modeling conducted in 2024 confirms that smaller CCRMU fills can meaningfully contribute to groundwater contamination across a facility. Concentrations from a single CCRMU can combine with contamination from other CCRMU, currently regulated CCR units, or legacy CCR surface impoundments that are also present on the same site. Although EPA did not model the aggregate or cumulative risk associated with these potential sources of co-located contamination, at a minimum, EPA expects that the presence of multiple sources of potential contamination at the same facility would increase the likelihood of a contaminant plume that could migrate off-site at levels of concern.

Nor is residential use the only scenario where exposures present concern. One commenter described donating property to a local government for recreational uses. Several other commenters described redeveloping sites as nature preserves. Even under these non-residential land uses, there is a reasonable potential for exposure (and consequently risk) to human and ecological receptors if the ash is subsequently disturbed. For example, as discussed in Section 6 the 2024 Risk Assessment, concentrations of certain contaminants may also pose risk to

wildlife if ash becomes intermingled with surface soil.

Comment: Commenters asserted that consideration of residential land use is inconsistent with various EPA guidance documents^{9 10 11} and Agency cleanup programs. These commenters argued such guidance instructs EPA to assume that facilities surrounded by operating industrial facilities will remain industrial unless there is clear evidence otherwise. These commenters further argued that guidance instructs EPA to account for institutional controls, such as State or local zoning laws, that would make residential development or resulting exposures at individual sites unlikely. Some commenters cited to specific State requirements they assert would prevent residential land use or prohibit future use of site groundwater as a source of drinking water. Others claimed that due diligence reviews would be adequate to identify and address any remaining sources of contamination before exposures could occur.

EPA Response: EPA disagrees that consideration of future residential land use at these facilities is inconsistent with applicable guidance and cleanup programs. First, the risk assessment was conducted to establish minimum national criteria rather than to clean up an individual site. To determine whether the section 4004(a) standard will be met at all sites nationwide, as the statute requires, the Agency needs to evaluate the risks associated with full range of reasonable scenarios. As discussed in the previous response, there are numerous examples in the record of instances in which these kinds of sites have been redeveloped for residential use.

Moreover, as the commenters have acknowledged, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and other cleanup programs only address contamination that has already occurred. In contrast, national standards for waste management developed under RCRA section 4004(a) are to prevent environmental releases

⁹ U.S. EPA. 1989. "Risk Assessment Guidance for Superfund Volume I Human Health Evaluation Manual (Part A)." EPA/540/1-89/002. Prepared by the Office of Emergency and Remedial Response, Washington, DC. December.

¹⁰ U.S. EPA. 1991. "Risk Assessment Guidance for Superfund Volume I Human Health Evaluation Manual (Part B, Development of Risk-based Preliminary Remediation Goals)." Publication 9285.7-01B. Prepared by the Office of Emergency and Remedial Response, Washington, DC. December.

¹¹ U.S. EPA. 1995. "Land Use in the CERCLA Remedy Selection Process." OSWER Directive No. 9355.7-04. Prepared by the Office of Solid Waste and Emergency Response. Washington, DC. May.

⁶ U.S. EPA. 1989. "Risk Assessment Guidance for Superfund Volume I—Part A, Human Health Evaluation Manual." EPA/540/1-89/002. Prepared by the Office of Emergency and Remedial Response, Washington, DC. December.

⁷ U.S. EPA. 2004. "An Examination of EPA Risk Assessment Principles and Practices." EPA/100/B-04/00. Prepared by the Office of the Science Advisor. Washington, DC. March.

⁸ Memorandum to the Docket: Compilation of News Articles on Future Land Uses for Electric Utilities.

before they occur. See, *USWAG*, 901 F.3d at 429–431. As EPA has previously explained, groundwater contamination is a concern, even if the aquifer is not currently used as a source of drinking water. Sources of drinking water are finite, and future users' interests must also be protected. See, 44 FR 53445–53448.

EPA further disagrees that the risk assessment failed to appropriately account for existing State and local requirements for institutional controls that would limit residential exposure. The purpose of a baseline risk assessment is to provide “. . . an analysis of the potential adverse health effects (current or future) caused by hazardous substance releases from a site in the absence of any actions to control or mitigate these releases (*i.e.*, under an assumption of no action).”¹² Thus, the intent of the risk assessment is to characterize the harm that could result if institutional and other controls are not implemented. This provides a consistent basis to understand the risks to be controlled and define appropriate national requirements such as a national requirement for deed restrictions at all sites at which CCRMU fills will remain in place. The Agency did not assume that all facilities will ultimately be used for residential purposes as a consequence of these factors in developing this final rule.

Furthermore, as several commenters have acknowledged, facilities have not historically been required to identify smaller placements of ash as a form of disposal and consequently have not maintained reliable records of where such placements are located. Indeed, most commenters have acknowledged that they are currently unable to identify all CCRMU at their existing facilities. These commenters do not explain how due diligence assessments would reliably identify such placements in the absence of such records, as such assessments typically rely on available site records to guide further investigation. Nor do commenters explain how existing State programs would reliably identify such placements or otherwise prevent exposures, when the facilities themselves cannot identify the presence of the ash on-site. This is reinforced by EPA's review of State programs, which found that the specific requirements, level of oversight over these wastes, and the overall protectiveness of individual programs varied widely among States. See, 80 FR

21324. As a result, EPA currently lacks a record to conclude that currently unidentified CCRMU fills located across a facility would be subject to the same institutional controls that are required for the disposal units the commenters reference. Given the current absence of national requirements, and that commenters have generally acknowledged that they have not reliably kept records of the existence of CCRMU, it is appropriate to evaluate the risks that can reasonably arise in the absence of institutional controls.

Comment: One commenter argued that EPA had already considered the practice of disposal below the water table because it had been discussed in previous risk assessments. Another commenter asserted the Agency's conceptual model assumed all legacy impoundments were in contact with the water table. Another commenter stated that EPA cannot use information about active units to make assumptions about which historical and inactive units at the same sites are in contact with the water table, due to differences in unit construction and location. By contrast, a number of other commenters agreed that because EPA cannot model the effects of waste below the water table, EPA had previously underestimated the risks associated with CCR units. Other commenters argued the conceptual model for surface impoundments did not adequately distinguish between the types of water that may be present in an impoundment. These commenters asserted that any residual water remaining after the unit has been initially drained would not exert the same hydraulic head within the unit that would drive leachate into the subsurface during unit operation, and so leakage would more closely resemble a landfill.

EPA Response: The conceptual models for landfills and surface impoundments in the 2014 and 2024 Risk Assessments did not evaluate contact with groundwater. Although these assessments both acknowledged that this could occur, the scenario could not be incorporated into groundwater fate and transport modeling as a result of data and model constraints. Because the 2014 and 2024 Risk Assessments did not directly model the effects of disposal below the water table, neither assessment incorporates any assumptions about the prevalence of this practice in the conceptual model. EPA has acknowledged that its inability to reliably model the effects of this practice means that its risk estimates on a national scale underestimate the risks associated with higher rates of leaching

and/or formation of strongly reducing conditions.

EPA acknowledges the rates of leakage from surface impoundments will generally decrease after ponded wastewater has been allowed to drain, reducing the overall hydraulic head across the unit. As such, discussion in the 2024 Risk Assessment has been updated to clarify the distinction between water ponded above the ash and porewater within an impoundment. However, any free liquids that remain within the unit can still result in higher leakage than would occur if the unit were fully dewatered. And the amount of “residual water remaining” can sometimes be substantial; in some cases, closed impoundments remain saturated by 20–54 feet of groundwater. See, *e.g.*, 88 FR 31982–31987, 55236.

In addition, regardless of the current configuration of an impoundment, it is appropriate for the conceptual models in the 2024 Risk Assessment to consider the stage of the unit lifecycle anticipated to contribute the most to long-term risk. For surface impoundments, this is when the units are in operation due to the presence of wastewater ponded above the ash. Subsequent draining of the unit does nothing to remediate any adverse impacts that occurred during operation. Furthermore, to the extent that impoundments leak at rates more similar to landfills after ponded wastewater has been drained, EPA notes the 2014 Risk Assessment previously modeled the risks from dry management in landfills and found the potential for unacceptable risk from these units. Therefore, continued leakage from drained units still has the potential to sustain releases.

Comment: One commenter affirmed that “EPA is likely correct in its observations and assumptions that CCRMU fills ‘will remain in place when ownership of the property changes,’ and that, ‘in the absence of land use restrictions, there is no guarantee [that] engineering controls will remain in place when the property is redeveloped.’” However, multiple commenters argued the conceptual model for CCRMU fills does not adequately account for the full diversity of CCRMU that may be present onsite. Various commenters stated that a conceptual model for fills does not adequately address specific types of placements, such as use in the construction or closure of CCR disposal units, storage in waste piles, construction of roadways and railroads, or spreading on roadways for snow and ice control. Another asserted that reliance on the similar conceptual models in the 2014 Risk Assessment to

¹² U.S. EPA. 1989. “Risk Assessment Guidance for Superfund Volume I Human Health Evaluation Manual (Part A).” EPA/540/1–89/002. Prepared by the Office of Emergency and Remedial Response, Washington, DC. December.

evaluate the disposal units and CCRMU fills is inappropriate because the CCRMU fills will tend to be smaller than the disposal units modeled in 2014.

EPA Response: EPA disagrees that the conceptual model for CCRMU fills does not adequately address the configurations of these units. The majority of the units described by commenters have a concentrated footprint, such as placement beneath a parking lot. Some of the specific alternate examples raised by commenters are either already regulated under the existing regulations (*e.g.*, waste piles) or are outside the scope of the current rulemaking. For others, there is little to no information available about the manner or frequency of such placements that could be used to characterize the units. Therefore, these types of placements are not considered as part of the conceptual model for CCRMU fills in the 2024 Risk Assessment.

The commenters do not explain how placement of CCR in a landfill or impoundment in service of construction or closure of that unit would be substantially different than the disposal scenarios previously modeled and found to pose risk. Finally, EPA has proposed and is finalizing the definition of CCRMU to exclude CCR used in roadbed and associated embankments.

There is little data that could be used to develop a conceptual model for diffuse placements, which may occur on a periodic basis. Nor do commenters provide any data on the manner or frequency of such placements. As a result, the 2024 Risk Assessment did not model these types of placements. This represents a source of uncertainty in the assessment. However, EPA notes that even small placements of CCR can contribute to broader leakage and have the potential to leak Appendix III constituents and influence nearby groundwater monitoring. Therefore, it is still necessary to identify where these types of onsite placements have occurred.

EPA also disagrees that applying a similar conceptual model for CCR landfills and CCRMU fills is inappropriate. Specifically, the conceptual model does not make any upfront assumptions regarding the sizes of these fills. As described in Section 4 of the 2024 Risk Assessment, EPA considered a range of potential sizes for these fills that were smaller than landfills reported in the EPA Surveys.

Comment: One commenter stated that it is inappropriate for the 2024 Risk Assessment to rely on similar data sources as the 2014 Risk Assessment to

characterize environmental parameters, claiming these data are outdated.

Another argued that the conceptual model does not adequately account for the presence of alternative liners, such as thick natural clay beneath the units.

EPA Response: First, EPA notes that the 2024 Risk Assessment does incorporate more recent weather data available from the most recent version of the Hydrologic Evaluation of Landfill Performance Model, updated in 2020. As explained in the 2014 Risk Assessment, EPA found the remaining data sources provide the most recent and representative data to characterize environmental conditions on a national basis. Commenters provide no explanation why these data should be considered outdated. For example, why the soil type present at a site would have changed substantially since 2014. EPA notes that to the extent that there is natural clay soil present in the vicinity of a facility, that would already be reflected through the environmental data.

c. Comments Related to Supplemental Risk Assessment Groundwater Model

Comment: Some commenters asserted that modeled leachate concentrations are unrealistically high. One commenter specifically argued that the LEAF data is unable to accurately reflect field leaching concentrations, citing two EPRI reports comparing LEAF and field leachate data both collected from the same units.^{13 14} They separately compared the leachate concentrations modeled in the risk assessment to field samples collected from around a number of different landfills. Based on this comparison, the commenter asserted that the high-end concentrations modeled in the risk assessment were substantially higher than measured in the field and so unrepresentative of actual leaching behavior. For these reasons, this commenter concluded that porewater data provide better representation of leaching in the field and so EPA should rely on that type of data to model leakage from CCRMU fills.

EPA Response: EPA disagrees that leachate concentrations modeled in the 2024 Risk Assessment are unrealistically high. EPA has previously demonstrated that the LEAF laboratory leaching tests are “effective for

estimating the field leaching behavior for a wide range of materials under both disposal and use conditions.”¹⁵ The two studies cited by commenters do not contradict these findings. Indeed, one of the cited reports concludes that LEAF Method 1313 measurements tended to only underestimate porewater concentrations of lithium and molybdenum and did not consistently overestimate or underestimate porewater concentrations of arsenic and thallium. These conclusions are consistent with previous Agency findings that LEAF Method 1313 measurements (1) can underestimate leakage of highly soluble constituents, such as lithium and molybdenum, if not adjusted to properly account for the sample liquid to solid ratio and (2) can over or underestimate leakage of redox sensitive contaminants, such as arsenic, if not further adjusted with geochemical speciation modeling. In response to these findings, the Agency has established general recommendations for how to address these issues.¹⁶ Modeling of highly soluble constituents in both the 2014 and 2024 Risk Assessment are consistent with these recommendations. Sufficient data are not yet available on the prevalence or magnitude of reducing conditions to allow EPA to adequately model the effects of these conditions on leaching behavior at a national scale. However, given that the 2024 Risk Assessment identified potential for extensive groundwater contamination with overall risks as high as 1×10^{-4} for the less mobile pentavalent speciation of arsenic, this uncertainty is unlikely to affect the conclusions of the risk assessment.

EPA also disagrees that the field data presented by commenters demonstrates that the modeled concentrations are unrealistic. As a general matter, these commenters did not make available the underlying data for the graphs presented or the reports from which the graphs were drawn. Therefore, it is not possible to fully evaluate these graphs, as EPA cannot determine how and where these data were collected, how many individual samples are represented, and how the data were compiled. Based on

¹⁵ U.S. EPA. 2014. “Leaching Test Relationships, Laboratory-to-Field Comparisons and Recommendations for Leaching Evaluation using the Leaching Environmental Assessment Framework.” EPA 600/R-14/061. EPA Office of Research and Development. Research Triangle Park, NC. October.

¹⁶ U.S. EPA. 2019. “Leaching Environmental Assessment Framework (LEAF) How-To Guide: Understanding the LEAF Approach and How and When to Use It.” SW-846 Update VII. Prepared by the EPA Office of Land and Emergency Management. Washington, DC. May.

¹³ EPRI. 2020. “Leaching, Geotechnical, and Hydrologic Characterization of Coal Combustion Products from a Closed Coal Ash Impoundment.” Palo Alto, CA. June.

¹⁴ EPRI. 2021. “Leaching, Geotechnical, and Hydrologic Characterization of Coal Combustion Products from an Active Coal Ash Management Unit.” Palo Alto, CA. February.

the limited description provided, it appears that the graphs summarize data on the average leachate concentrations collected from around different landfills. Thus, the cited median values would represent a median of the average measurements from each landfill. This type of summary does not provide a meaningful understanding of the leaching potential of CCR. For example, landfills can contain mixtures of different CCR types and other wastes, which may result in variable leaching profiles over the footprint of the unit. An average of measured leachate concentrations can mask regions of higher leaching potential over many acres. This potential for variable leaching is one reason why groundwater monitoring wells are required to be spaced along the entire downgradient boundary of these units. In contrast, CCRMU fills are smaller in size and more likely to be constructed with a single source of ash. Additionally, there is no indication of how long the waste has been present in these landfills prior to sampling. More soluble constituents can become depleted over time. For example, Modular Three-Dimension Finite-Difference Ground-Water Flow Model (MODFLOW) runs conducted for the 2024 Risk Assessment showed that molybdenum can deplete from the ash anywhere from several years to a few decades after leaching first began. Thus, these graphs could understate the full leaching potential of CCR.

Commenters also mischaracterize the results of the probabilistic analysis. The 90th percentile of all model inputs for leachate concentration is not the same as the 90th percentile of modeled risks. There are a number of other model parameters that will influence contaminant release and subsurface transport. As a result, the model runs with the highest initial leachate concentrations are not always the same as those with the highest downgradient concentrations. EPA reviewed a subset of model runs around the 90th percentile risk result reported in the 2024 Risk Assessment, representing 1% of all model runs at 1,000 feet from the waste boundary. This review found the median leachate concentration representative of these runs was closer to 0.31 mg/L for arsenic and 35 mg/L for molybdenum. There are multiple samples in the record of porewater or leaching tests with concentrations of the same order-of magnitude or higher than these concentrations. Therefore, EPA concludes that the methods used to generate model inputs do not result in unrealistically high leachate concentrations.

EPA maintains that LEAF leachate provides the most realistic estimate of long-term leaching potential from CCR placed in fills. There is little field leachate data for dry-managed CCR available in the record, as it can be difficult to collect representative samples from landfills. Additionally, field samples would reflect the specific waste mixtures and chemistry of these disposal units. Instead, LEAF provides data on the leaching behavior of individual CCR under a range of relevant environmental conditions. EPA did consider using impoundment porewater data to supplement the data on leaching of lithium because of the lack of LEAF data for this contaminant, and because lithium is a highly soluble, monovalent ion expected to be less influenced by specific impoundment chemistry. However, this constituent was not modeled in the 2024 Risk Assessment due to other data limitations. The uncertainties associated with exclusion of lithium are discussed in Section 6 of the 2024 Risk Assessment.

Comment: One commenter asserted that the distribution of leachate pH values used to represent CCRMU fills is unrepresentative. In particular, the commenter took issue with the prevalence at which acidic conditions were modeled within CCR fills. This commenter pointed to field data collected from CCR landfills to assert that leachate from fills would rarely be acidic.

EPA Response: EPA disagrees that the modeled leachate pH is unrepresentative of conditions at smaller CCRMU fills. Modeled leachate pH is based on the natural pH (or “own pH”) of the ash sample measured with LEAF. Thus, these data represent the properties of real ash samples. Landfills can contain a mixture of different CCR types and other related waste streams and so it is reasonable that the average pH of larger landfills may differ from that of individual CCR. At the same time, regions of individual landfills can be more acidic than average, which can be masked by consideration of only average values. The potential for such variations is part of the reason that placement of monitoring wells is required across the full downgradient boundary of these landfills. Smaller CCRMU fills are more likely to be constructed with a single ash type and so it is most appropriate to consider the pH of individual ash samples, rather than broader landfill conditions. The uncertainties associated with the modeling of pH are discussed in Section 6 of the 2024 Risk Assessment.

Comment: One commenter stated that use of a five-mile radius to draw environmental data for purposes of groundwater modeling is not adequately justified and inconsistent with both the 2014 Risk Assessment and Draft 2023 RIA.

EPA Response: EPA has reviewed and updated the sampling radius for environmental and population data. Based on this review, EPA established the sampling radius for environmental data at two kilometers (1.2 miles). This is consistent with the methodology applied in the 2014 Risk Assessment, which the Agency previously found adequately represented the environmental conditions near units for which a more precise location at the facility property could not be determined. EPA established the sampling radii for population data to be consistent with the rationale outlined in the 2024 RIA.

Comment: Multiple commenters criticized the Agency’s use of soil-water partitioning coefficients (*i.e.*, K_d values) to model contaminant sorption in the subsurface. These commenters argued that use of individual K_d values was inappropriate and unable to reflect the variability of subsurface transport conditions. They also stated that the K_d values used in the risk assessment for arsenic were biased low and likely to underestimate retention on soil. These commenters cited field measurements collected at various locations to assert that actual values for arsenic are likely to be higher. One commenter cited an alternative set of K_d values they had calculated to contend that actual values for arsenic would be orders-of-magnitude different than used in the risk assessment.

EPA Response: These commenters are incorrect; EPA did not rely only on individual K_d values for the risk assessment. As part of the 2014 Risk Assessment, EPA previously developed sorption isotherms for each modeled constituent, which represent the distribution of individual K_d values calculated and reflect the range of anticipated subsurface conditions and specific CCR waste characteristics. Each individual model run in the EPA Composite Model for Leachate Migration with Transformation Products (EPACMTP) samples from that distribution based on the key factors for that run (*e.g.*, leachate concentration, pH, ionic strength). No individual model run will precisely represent conditions at a particular site. Instead, the model runs collectively capture the variability of conditions that can occur across sites. Thus, EPA relies on the model runs in aggregate to draw

conclusions about the potential for risk nationwide.

EPA also disagrees that the specific Kd values used in MODFLOW are unrepresentative. The limited number of MODFLOW runs are intended to further characterize the subset of high-end scenarios modeled in EPACMTP. Thus, it is entirely reasonable that these model runs are those more likely to reflect scenarios where pentavalent arsenic is more mobile in the environment.

The field data shared by commenters for specific CERCLA sites or agricultural fields are not representative of conditions at CCR disposal units. As previously noted, the calculated sorption isotherms reflect the properties of CCR leachate, which can be vastly different from precipitation infiltrating through soil. In particular, both the high ionic strength and variable pH of this leachate are expected to result in different sorption behavior. EPA is also unable to fully review the Kd values calculated by commenters or compare them with Agency values because the commenters provided insufficient information regarding whether and how specific key environmental factors were considered. Nevertheless, EPA notes that the range of values presented by commenters falls within the full distribution of Kd values developed for arsenic in 2014. The full distribution of values is summarized in Appendix H of the 2014 Risk Assessment, and is the full range of values EPA sampled from to model groundwater transport in the 2024 Risk Assessment.

Comment: One commenter stated that any CCR material placed beneath the soil would become naturally compacted. Another commenter asserted that the pozzolanic nature of some ash would result in far lower hydraulic conductivity than EPA modeled.

EPA Response: In the absence of periodic inspections and a well-maintained cap, there is no guarantee that any ash placed in the ground will remain undisturbed by human or animal activity, natural settling or freeze-thaw cycles, flooding and other extreme weather events, or other unforeseen factors. Given that such disturbances can result in increased permeability, it was not possible to develop a fixed probabilistic distribution of conductivities. Instead, EPA modeled conductivity based on the dominant soil megatexture as described in Appendix B of the 2014 Risk Assessment. As such, the model assumes the ash has been subjected to a similar degree of compaction as the surrounding soil. EPA acknowledges that some fly ash is pozzolanic in nature. Yet, the commenter provided no information

that would indicate how common it is for this type of ash, which can be marketed for use in concrete, to be placed in CCRMU fills. EPA is also not aware of any information that could be used to represent the long-term conductivity of this ash when left in the field and exposed to the elements.

Comment: One commenter contended that EPA had not adequately demonstrated that consideration of more recent weather data drawn from the latest version of the Hydrologic Evaluation of Landfill Performance model would result in consistently higher infiltration rates than previously modeled in 2014 for CCR landfills.

EPA Response: The 2023 Draft Risk Assessment proposed that the higher rates of infiltration modeled for certain soil types with the new HELP data indicates the potential for higher leaching and risk to groundwater than previously modeled in 2014. However, because EPA found that the model results from the 2014 Risk Assessment are sufficient to support the current rulemaking, the Agency did not conduct the additional modeling that would be necessary to refine this draft analysis. As a result, EPA does not rely on this particular analysis to support the final rule and so it is not included in the 2024 Risk Assessment.

Comment: Several commenters stated that consideration of a limited subset of contaminants for groundwater modeling would result in an underestimation of risk. These commenters further assert that EPA further underestimated risk by not accounting for the effects of cumulative exposure to multiple contaminants.

EPA Response: EPA disagrees that the selection of constituents for groundwater modeling resulted in lower risks than would have otherwise been identified. The constituents selected for groundwater modeling were those found to be risk drivers for unlined surface impoundments in the 2014 Risk Assessment, as these are considered the most likely to also result in the greatest risks for unlined landfills and comparable management units. EPA notes that some of the additional constituents raised by commenters had been previously identified as risk drivers only for specific CCR types, such as flue gas desulfurization (FGD) wastes, which are considered far less likely to be used in CCRMU fills. The commenters presented no new information that could alter the previous model results and so there is no expectation that inclusion of these additional constituents would identify risks higher than those already modeled for the relevant CCR types. Some other

additional constituents raised by commenters lack health benchmarks within the Office of Land and Emergency Management (OLEM) hierarchy and so could not be quantitatively evaluated. See, 85 FR 72526. Uncertainties associated with the selection constituents for modeling is further discussed in Section 6 of the 2024 Risk Assessment.

Comment: Several commenters argued that a modeling horizon of up to 10,000 years was unrealistic. These commenters stated that such a long time frame is not consistent with identifying a reasonable probability of adverse effects because there is no reliable way to predict whether any receptors will exist that far in the future.

EPA Response: EPA ran the groundwater model until either the observed groundwater concentration at the receptor point reached a peak and then fell below a model-specified minimum concentration (1×10^{-16} mg/L), or the model had been run for a time period of 10,000 years. This is the same modeling horizon applied in the 2014 Risk Assessment. The text in the 2024 Risk Assessment has been updated to make it clear that the selection of a maximum 10,000-year time horizon does not mean that it typically took that long for contamination be identified or that all model simulations continue for the full 10,000 years. EPA also notes that the time to first exceedance of selected risk criteria is typically considerably less than the time to the greatest exceedance.

EPA acknowledges that future groundwater use patterns may shift over time as the number and location of receptors changes, and that it is unknown whether or how future shifts in receptor locations and other surface conditions might affect risk. However, EPA notes that all the contaminants associated with CCR are inorganic and so will remain present in the environment over the full modeling horizon. As such, a longer modeling horizon can provide useful information about the potential duration of groundwater contamination in the absence of regulation. EPA found that contaminant plumes modeled in MODFLOW did not fully dissipate for around 2,300 years for arsenic V and 100 years for molybdenum.

Comment: Multiple commenters argued that EPA was inconsistent with the 2014 Risk Assessment and overestimated risks for CCRMU fills by not evaluating the interception of groundwater by surface water.

EPA Response: EPA did not explicitly evaluate interception by surface water on groundwater fate and transport in the

2024 Risk Assessment. As acknowledged by commenters elsewhere, facilities have generally not maintained reliable records about the location or construction of all CCRMU fills. As a result, it is not possible for EPA to develop a representative, probabilistic distribution of the distance from these fills to downgradient water bodies or offsite receptors. However, given the diversity of reasons for such placements listed by commenters, there are few limitations as to where these fills might be located onsite. As a result, there is greater potential for these fills to be located further away from water bodies than disposal units, allowing for further contaminant spread prior to any interception. Therefore, the 2024 Risk Assessment evaluated the potential magnitude and extent of onsite groundwater contamination that could occur in the absence of interception. It is considered unlikely that further quantitative evaluation of interception would affect the conclusions of the 2024 Risk Assessment. The reductions in modeled risks attributed interception in the 2014 Risk Assessment were predominantly for median risks. However, the 2014 Risk Assessment still identified high-end risks to offsite receptors, and it was these risks that formed the basis for the 2015 CCR Rule. Thus, it is similarly unlikely that quantitative evaluation of surface water interception would affect the high-end risks reported in the 2024 Risk Assessment, especially because the current assessment considers onsite groundwater quality prior to discharge to a water body. Furthermore, as discussed in the 2024 Risk Assessment and in response to comments elsewhere, the fact that a contaminant plume that has migrated off-site is intercepted by surface water does not mean that there is no potential for risk or no need for further action to address the presence of groundwater contamination onsite.

Comment: Some commenters requested clarification on the prevalence of different types of liners modeled for the landfills and surface impoundments previously excluded from the 2014 Risk Assessment. Citing to data relied upon in the 2014 Risk Assessment, one commenter asserted that a majority of modeled landfills had some form of liner and that national regulations should be based on the risks for all units, rather than those that are unlined.

EPA Response: The handling of liner status for these units was described in Section 5 of the 2014 Risk Assessment. Of the units evaluated in the 2014 Risk Assessment, approximately 42% of landfills and 65% of surface

impoundments were modeled as having no engineered liner system. Of the previously excluded units summarized in the 2024 Risk Assessment, approximately 71% of landfills and 57% of surface impoundments were modeled as having no engineered liner system. EPA has updated the discussion of this issue in the 2024 Risk Assessment to better distinguish the specific liner status modeled for these different units. Differences in the national risks reported in 2014 and 2024 are largely attributed to the relative prevalence of engineered liners modeled for each. Modeled risks in both assessments are nearly the same for the subset of units with no engineered liner.

Far from being an isolated practice, a substantial fraction of the currently operating landfills across the country have no engineered liner. Although the 2014 Risk Assessment did model a majority of landfills as having some form of engineered liner, data that has become available since then indicates a greater proportion of operating units lack an engineered liner than EPA previously understood. Furthermore, the 2014 Risk Assessment modeled the performance of both clay and composite liners based on the assumption of good construction practices. However, it has become clear since then that some liner systems do not perform as modeled. For example, facility reporting shows that around 10% of composite and alternate-lined units have already entered into corrective action. Therefore, it is considered likely that national risks for both landfills and surface impoundments (including the inactive landfills and legacy impoundments subject to this final rule) are more similar to those unlined units than previously modeled.

Nevertheless, the 2014 and 2024 Risk Assessments, which provided much of the basis for this final rule, modeled the risks associated with both lined and unlined units. Under RCRA sections 1008(a)(3) and 4004(a), EPA establishes national criteria; because the criteria are national in scope EPA must evaluate the full range of conditions. In addition, EPA must establish requirements that will achieve the statutory standard at all sites subject to the criteria—including those that pose the greatest risk. Under these provisions, the criteria may authorize a CCR unit to continue operating “only if there is no reasonable probability of adverse effects on health and the environment from the disposal [or other solid waste management] of solid waste at such facility.” 42 U.S.C. 6903(a)(3), 6944(a). Given the requirement that the standard be met at each facility covered by the regulation,

it is not particularly surprising that the final requirements are driven by the higher end risks associated with unlined units—especially as the overwhelming majority of legacy impoundments and CCRMU are expected to lack the composite liner that would largely mitigate the risks of CCR units. But that does not mean that the national regulations are not based on the risks for all units.

Comment: One commenter argued that modeled groundwater concentrations and associated risk downgradient of smaller CCRMU fills are unrealistic because they are higher than previously modeled for landfills and surface impoundments. Other commenters contended that modeled groundwater concentrations were unrealistic, citing comparisons to monitoring data for all regulated units in a report by the Environmental Integrity Project (EIP)¹⁷ or for some smaller subset of units. These commenters calculated summary statistics from concentrations reported for site groundwater monitoring wells to assert that modeled concentrations were an order of magnitude higher or more than the concentrations that have occurred in the field.

EPA Response: The 2014 Risk Assessment modeled risks from landfills and surface impoundments to receptors located up to a mile away from these units. The 2024 Risk Assessment modeled the magnitude and extent of contamination extending from smaller CCRMU fills, including the likelihood of exceedance of GWPS at the waste boundary of the unit. It is entirely reasonable that concentrations and risk closer to the waste boundary are higher than EPA modeled in 2015 up to a mile away from a unit.

EPA disagrees that the modeled groundwater concentrations are contradicted by available monitoring data. First and foremost, EPA modeled the long-term potential for groundwater contamination that may occur in the absence of regulatory action. Thus, monitoring data from units of variable age and operational status do not represent a one-to-one comparison. Second, field monitoring data can diverge from model results as a result of improper well installation. As just one example, EPA is aware of multiple instances where monitoring wells are located far from the waste boundary, in some cases, hundreds of feet away. See, for example, 88 FR 55239. Third, EPA used EPACMTP to model

¹⁷ EIP. 2022. “Poisonous Coverup: The Widespread Failure of the Power Industry to Clean Up Coal Ash Dumps.”

concentrations along the centerline of the plume and to provide a best estimate of contaminant transport potential to inform further modeling with MODFLOW. Even if all wells in a network were properly installed and spaced, there is no guarantee that any individual well will intersect with the exact point of highest concentration; some wells may not intersect with the plume at all. Finally, the 90th percentile concentration modeled is not intended to correspond precisely to a 90th percentile of well concentrations. Instead, it reflects an RME scenario that is conservative, while remaining within the range of possible high-end exposures. The EIP dataset cited by commenters do show multiple instances of well concentrations at individual landfills of the same order of magnitude as modeled in the 2024 Risk Assessment or even higher. Further, in the case of arsenic, modeled GWPS exceedances between 26 and 19 for arsenic III and V are of a similar magnitude as the exceedance of 16 estimated by one commenter based on the EIP report. Therefore, EPA maintains that the magnitude of modeled groundwater concentrations is realistic.

Comment: Some commenters claimed that EPA had not justified modeling groundwater concentrations at fixed distances along the centerline of the plume or within the upper five feet of the aquifer and had not demonstrated how this approach compares with the 2014 Risk Assessment, which modeled concentrations within the top 30 feet of the aquifer.

EPA Response: The goal of modeling with EPACMTP was to identify the potential magnitude of GWPS exceedances at the waste boundary and potential for contaminant spread to support further modeling with MODFLOW. For both goals, a sampling along the centerline of the plume and to a depth of five feet was determined to be most relevant portion of the aquifer for consideration for the reasons documented in the 2024 Risk Assessment. Because different scenarios were modeled in the two risk assessments, a comparison with the results of 2014 Risk Assessment is not relevant here.

Comment: EPA received several comments regarding a graph from the 2023 Draft Risk Assessment, which summarized modeled risks from the 2014 Risk Assessment for unlined landfills as a function of unit size. Commenters stated that it demonstrated that risks consistently decline below a certain acreage and that smaller units do not warrant regulation because they pose less risk. One commenter stated

that the underlying model runs for the 2014 Risk Assessment were not made available alongside the graph and so its validity could not be confirmed.

EPA Response: One purpose of the referenced graph was to demonstrate that risks remain above levels of concern over a broad range of unit sizes modeled in the 2014 Risk Assessment. However, upon further review, EPA has determined that the graph incorrectly summarized model results for receptors of all age cohorts into one figure. This has the potential to bias the plotted risks low. However, filtering the model runs for only (1) unlined landfills, (2) where drinking wells are located closer than surface water bodies, and (3) where an adult was exposed results in a relatively small number of model runs. EPA is concerned that this number of runs is not sufficient to reflect national variability or support broader conclusions about risk. As such, EPA does not rely on this line of evidence to support the final rule and so it is not included in the 2024 Risk Assessment.

EPA cautions the data presented in the graph was for landfills and so use of this graph to draw conclusions about the risks from surface impoundments is not appropriate. EPA further cautions that it is not appropriate to use the referenced graph to identify a specific unit size below which landfill risks are not possible. The graph summarized the results of the 2014 Risk Assessment, which modeled risks to offsite receptors up to a mile away from the waste boundary. The risks identified based on these receptors provided a robust basis for the 2015 CCR Rule. Yet, this does not mean these are the only relevant risks. EPA's longstanding and consistent policy (across numerous regulatory programs) has been that groundwater contamination is a significant concern that merits regulatory action in its own right, whether or not the aquifer is currently used as a source of drinking water. The 2024 Risk Assessment identifies the potential for CCRMU fills to contaminate groundwater above levels of concern. Where CCR landfills and surface impoundments are located at the same sites even more extensive contamination can occur as a result of their larger size. As such, these disposal units warrant regulation to protect groundwater resources, regardless of their size.

Comment: One commenter questioned why MODFLOW—Unstructured Grid (USG) was used to model groundwater transport, stating that MODFLOW 6 is more commonly used. This commenter also inquired why the model was not run in steady-state mode. They further argued that insufficient information had

been provided to allow for evaluation of the design of MODFLOW model runs. Finally, the commenter identified a potential discrepancy in the reported model inputs for EPACMTP and MODFLOW.

EPA Response: MODFLOW—USG was selected for its ability to: (1) Simulate flow and transport in both the unsaturated and saturated zones without the need for additional modeling packages and (2) Simulate groundwater flow and transport sequentially without the need for reading cell by cell flow and transport. Steady state simulations were not used because they do not provide a time series representation of plume evolution. EPA has reviewed the model documentation to ensure that this and other relevant information raised by commenters was made clear in the 2024 Risk Assessment. However, EPA notes that this and much of the other specific information raised by commenters was previously described in the 2023 Draft Risk Assessment. EPA did not incorporate the full output files for all MODFLOW model runs because the file size would become prohibitively large to manage. The level of documentation of model inputs and outputs is consistent with that provided for EPACMTP. The identified discrepancy between EPACMTP and MODFLOW inputs were the result of a typo, which has been corrected.

Comment: One commenter stated that EPA had not provided sufficient evidence to support its conclusion that the location of legacy facilities that were not modeled in 2014 could result in somewhat higher risks for this subset of units compared to those previously modeled units.

EPA Response: EPA previously found that the locations of legacy facilities were clustered in the eastern half of the country. As a result, the rates of precipitation at these facilities will tend to be higher than modeled for the nation as a whole. Higher precipitation can result in greater vertical infiltration and subsequent leakage down to groundwater. The Agency has not conducted further sensitivity analyses to support this contention, as this argument is not central to the findings of either the risk assessment or the rulemaking. Instead, discussion in the 2024 Risk Assessment has been updated to clarify that the primary finding is that there is no indication based on geography that these additional units would be exposed to substantially different environmental conditions than EPA modeled in 2014.

Comment: Multiple industry commenters argued that modeled

arsenic risks do not warrant regulation because the associated concentrations often fall below the current maximum contaminant limit (MCL). One commenter noted that 70 percent of runs identified peak arsenic concentrations below the MCL at the unit boundary. In contrast, environmental advocacy groups stated that cancer risks within the OLEM risk range can occur at even lower levels. Another asserted it was inappropriate for EPA to identify risk based on modeled concentrations above GWPS because corrective action requires “a statistically significant level exceeding the groundwater protection standard.”

EPA Response: First, EPA notes that arsenic is only one of the contaminants modeled. Molybdenum was found to be above the associated GWPS on a more frequent basis. Indeed, EPA identified exceedances for this contaminant at both the 90th and 50th percentile results. EPA disagrees that risks identified below MCLs do not pose a concern. MCLs are not purely risk-based and can incorporate other considerations, such as the technical feasibility of reliably achieving even lower levels. As environmental commenters have pointed out, the arsenic MCL in particular represents a concentration that can fall outside the OLEM risk range. As such, these standards should be understood as values that corrective action must achieve and not levels that never warrant concern. Indeed, EPA established GWPS at the unit boundary with the intent to limit downgradient transport of contamination above this level and prevent the same magnitude of risk identified in the risk assessment.

EPA also disagrees that a statistically significant increase above GWPS is an appropriate standard for risk modeling. It is not clear, nor do commenters articulate, how such a statistical analysis would be conducted as part of the model. Thus, EPA believes this comment represents a general misunderstanding of both groundwater monitoring programs and probabilistic analysis. Statistical analysis is used in groundwater monitoring programs because factors, such as natural fluctuations in groundwater and uncertainty from sampling or laboratory analysis procedures, can introduce variability into the broader dataset. In this context, statistical analysis allows evaluation of the broader data and identification of an exceedance of GWPS with a specified level of certainty. However, numerical models are not subject to the same constraints. A model tracks the fate and transport of all contaminant mass from the point of

release to the point of exposure. Therefore, no additional steps required to confirm that an identified exceedance of GWPS resulted from leakage from the modeled unit.

Comment: Several commenters stated that the toxicity value used for arsenic underestimated risks from groundwater, citing draft values they assert would increase modeled arsenic risks by an order of magnitude or more.

EPA Response: The Agency’s current risk estimates are based on the same cancer slope factor of 1.5 mg/kg/d^{-1} for arsenic in EPA’s Integrated Risk Information System (IRIS). EPA is currently in the process of reviewing this slope factor and has released a draft toxicological review, which, if finalized without revision, would increase the individual risk estimates for arsenic by a factor of approximately 35. See, 88 FR 71360. However, the Agency has not yet finalized this updated IRIS reassessment, and EPA cannot base a final decision on a draft IRIS value that is subject to revision. Nor did EPA receive any other information during the development of this final rule that would help to resolve this uncertainty. The current IRIS values thus represent the best data available to the Agency until the IRIS reassessment is complete.

d. Comments Related to Supplemental Risk Assessment Soil Model

Comment: One commenter contended that radionuclides and non-radionuclides have different health endpoints and so it is not appropriate to treat the resulting risks as additive.

EPA Response: EPA disagrees that it is inappropriate to consider the cumulative risk from chemical and radiological contaminants. EPA policy is to treat the risk resulting from exposure to multiple carcinogens as additive.¹⁸ Agency policy is also to evaluate the risks from exposure to radionuclides in the same manner as chemical contaminants.¹⁹ Therefore, it is appropriate to evaluate the cumulative cancer risk from chemical and radiation contaminants. However, EPA notes that considering chemical and radiological risks separately would not alter the overall conclusions of the analysis, as each have demonstrated potential to individually result in risk exceeding EPA’s levels of concern.

¹⁸ U.S. EPA. 1989. “Risk Assessment Guidance for Superfund Volume I Human Health Evaluation Manual (Part A).” EPA/540/1–89/002. Prepared by the Office of Emergency and Remedial Response, Washington, DC. December.

¹⁹ U.S. EPA. 2014. “Radiation Risk Assessment at CERCLA Sites: Q&A.” OSWER 9285.6–20. Prepared by the Office of Land and Emergency Response. Washington, DC. June.

Uncertainties associated with cumulative risk is further discussed in Section 6 of the 2024 Risk Assessment.

Comment: EPA received comments that argued the U.S. Geological Survey coal quality (COALQUAL) database does not adequately account for several factors that may affect bulk content of the resulting ash, such as: CCR type, regional variability, coal rank, mining practices, coal preparation prior to combustion, and the presence of unburnt carbon remaining after combustion. Another commenter stated that because the risk assessment addresses historical disposal of CCR, sampling of the COALQUAL database should be updated to reflect production over time, rather than current production. Finally, one commenter argued that differences identified between activity calculated from COALQUAL data and measured elsewhere in the literature demonstrates that handling of COALQUAL data is likely to overestimate concentrations in the ash.

EPA Response: The Agency acknowledges that the bulk contaminant content of specific CCR samples can be influenced by a range of factors, such as the manner in which a coal sample is prepared and combusted. As detailed in Section 6 of the 2024 Risk Assessment, EPA considered the information provided by commenters on the potential for mining practices, residual unburnt carbon, and coal washing to affect estimated ash concentrations and concluded these factors are likely to have a minimal or inconsistent effect on overall distribution of concentrations. EPA did determine that concentrations of some contaminants are sensitive to differences in region and coal rank and so reviewed the Energy Information Administration (EIA) coal production reports referenced by commenters when updating the weighting of available samples.

For purposes of modeling groundwater exposure, EPA did not use the COALQUAL database to estimate the leachable content of CCR in the 2024 Risk Assessment. Previous reviews of EPACMTP summarized in the 2014 Risk Assessment did not identify leachable content as among the sensitive model parameters. Even at lower bulk concentrations, there is often sufficient soluble mass present to support sustained leaching. Instead, EPA represented leachable content using available LEAF data in a manner

consistent with the 2014 Risk Assessment and Agency guidance.²⁰

For purposes of modeling soil exposure, EPA retained use of the COALQUAL database in the 2024 Risk Assessment to calculate the bulk content of thorium and uranium of CCR. In this instance, use of COALQUAL provides information about the relative levels of each contaminant, which allowed for a more refined estimate of cumulative exposure that provides a more direct comparison with relevant benchmarks. As discussed in Section 6 of the 2024 Risk Assessment, EPA also considered available EIA data when updating the calculation of bulk content for these two contaminants and found that concentrations of both are less sensitive than other contaminants to regional geography. Therefore, further efforts to refine these calculations are considered unlikely to result in changes that would affect the overall conclusions of the evaluation.

The bulk contaminant content calculated from COALQUAL represents a mixture of fly ash and either bottom ash or boiler slag, collectively referred to in the 2024 Risk Assessment as the “whole ash.” Because fly ash is generated in the greatest volumes during coal combustion, the calculated bulk content primarily reflects this type of CCR. However, other available data sources indicate that the activity of fly ash and bottom ash are not substantially different. EPA has seen no indication that the activity of boiler slag would differ markedly from that of bottom ash. The whole ash does not include any CCR generated by scrubber systems and similar pollution control technologies. However, these CCR types are not considered relevant to the evaluation of CCRMU fills. EPA further discusses the uncertainties associated with these different types of CCR in Section 6 of the 2024 Risk Assessment.

Based on the comments received, EPA reviewed the available data on radioactivity drawn from the literature. This review led to the removal of several samples that were determined to be duplicative and removed all the data for one study because it was determined to not be representative of the broader ash generated at the facility. Altogether, the data removed represent a small fraction of the overall dataset. This review also identified some inaccuracies in how samples were described and averaged to avoid biasing the overall

dataset toward individual facilities that reported a greater number of samples. This had resulted in more samples being averaged together than was intended. The database presented as part of the 2024 Risk Assessment has been updated along with a summary of these updates. Following these corrections, the updated summary statistics for thorium align more closely with those calculated with COALQUAL. Therefore, there is general agreement between these two datasets. It is inevitable there will be some differences between datasets developed through different methodologies. In particular, any individual study may not reflect the full variability of coal produced over time. However, the magnitude of differences between activities drawn from COALQUAL and the broader literature are small on an absolute basis and consequently would not affect the overall conclusions of the risk assessment. Therefore, EPA concludes that COALQUAL can provide a reasonable estimate of both median and high-end ash activity.

Comment: One commenter critiqued multiple individual model inputs used in RESRAD as likely to overestimate potential for radon exposure. They also stated that the risk assessment should consider an additional scenario with RESRAD of CCR disposed at the ground surface to provide a consistent frame of reference to compare risk results obtained from RESRAD and the preliminary remediation goal (PRG) calculator. Other commenters separately commented that the assumed presence of some soil cover is inappropriate, referencing one CCRMU purported to have been placed with the intent to level out the ground surface and without any additional soil cover.

EPA Response: EPA has not established default parameters for modeling of radon fate and transport. Nor is there currently enough information available on a national scale to develop distributions that could be sampled probabilistically. Instead, EPA previously conducted a deterministic analysis for radon exposure by specifying high, moderate, and/or low values for model inputs to capture the range of potential exposure. EPA first modeled risk with all inputs set to moderate values to identify a baseline risk more representative of the central tendency. From this baseline, EPA adjusted each individual input to lower or higher values to better understand which inputs exert the greatest influence on modeled risks and support development of an RME scenario. However, EPA ultimately concluded that the rate of radon emanation from

CCR is not distinguishable from background soil and so the Agency did not develop this RME scenario or draw final conclusions about risk from radon exposure. For this same reason, EPA did not retain the quantitative evaluation of radon in the 2024 Risk Assessment.

Some CCRMU fills may currently be uncovered, but EPA was not able to confirm the status of the specific unit identified by the commenter based on the information provided. Nevertheless, EPA maintains it is unlikely that future residential construction would occur in the absence of some initial soil cover. It is generally anticipated residential construction sites will cover any exposed land with topsoil or turf to support uniform lawn growth. However, this does not guarantee this soil cover will be adequately maintained by residents into the future. As such, EPA agrees it is appropriate to evaluate a scenario of CCR without any soil cover to provide a bounding estimate of potential risk and a more direct link between the primary and sensitivity analyses. This updated scenario is discussed in Section 6 of the 2024 Risk Assessment.

Comment: Some commenters raised concerns about the sensitivity analysis conducted with the PRG calculator. One commenter asserted that the PRG calculator is intended for use with contaminated soils and is inappropriate for comparison against undiluted CCR. This commenter further argued that the sensitivity analysis conducted with the PRG calculator is overly generic and did not incorporate scenario-specific inputs, such as the potential for greater soil cover, shorter exposure duration, and ability of radon to emanate from CCR. Finally, this commenter stated that the degree of mixing of soil with CCR would not result in activities higher than either background or applicable or relevant and appropriate requirements (ARARs), concluding that the evaluation of radiation risk should consider contributions from background soils when presenting risk results. Another commenter stated that the ARAR was only exceeded around the 90th percentile concentrations and that regulation based on 90th percentile concentrations is not appropriate.

EPA Response: EPA disagrees that the PRG calculator is not applicable to the modeled scenario of CCR intermixed with soil. The commenters provide no rationale for this assertion beyond the fact that the PRG calculator nominally identifies soil as an environmental media of interest. This is reasonable as it would quickly become overwhelming to identify a comprehensive list of sludges, sediments, and other soil-like

²⁰ U.S. EPA. 2019. “Leaching Environmental Assessment Framework (LEAF) How-To Guide: Understanding the LEAF Approach and How and When to Use It.” SW-846 Update VII. Prepared by the EPA Office of Land and Emergency Management. Washington, DC. May.

materials that might be encountered at cleanup sites. EPA notes that the exposure assumptions incorporated into the PRG calculator are equally relevant for CCR intermixed with soil. CCR consist of small particulates that can be readily intermixed with the soil and result in exposures through the exact same routes, specifically incidental ingestion and direct exposure to gamma radiation.

EPA also disagrees that the analysis of exposure to CCR mixed with soil is overly simplistic. First, the presence of additional cover soil is already considered in the main analysis and is not relevant to the types of exposures explicitly considered in the sensitivity analysis. Second, because EPA concluded the rate of radon emanation from CCR and soil were not distinguishable, the sensitivity analysis explicitly does not incorporate risk from inhalation of radon gas. Only a relatively small fraction of the radon generated from fly and bottom ash is expected to escape into the ambient air and these losses can be counteracted by upward migration from deeper ash. Therefore, it is unlikely that further consideration of radon emanation would have substantial impacts on exposures through incidental ingestion or direct gamma exposure. Third, the model parameters used to characterize exposure to gamma radiation in the PRG calculation are generally the same as in RESRAD and other available models. Finally, exposure factors selected for use in the PRG calculator are consistent with Agency policy for characterizing an RME scenario and many of the remaining parameters are based on extensive modeling.^{21 22 23}

EPA generally only considers contributions from disposed wastes to risk when conducting national risk assessments under RCRA. Background concentrations may contribute to risk when present and can sometimes be higher than concentrations modeled in a risk assessment. Although constituent concentrations in undisturbed environmental media can be highly variable, they are often relatively low in concentration. As a result, consideration of these concentrations would generally

have no impact on the overall conclusions of a national risk assessment. Therefore, consideration of background concentrations is more appropriate on a site-specific basis when risk managers are determining the need for and scope of corrective action. EPA recognizes that a focus on background is more common for discussion of radioactivity, particularly when providing context for the associated risks to the broader public. However, as one point of reference, EPA has found that the median activities of fly and bottom ashes already fall close to the standard of 5 pCi/g radium-226+228 above background soil, which has been adopted as an ARAR for some cleanups under Superfund and State programs (*i.e.*, around 4.3 pCi/g higher).²⁴ Additionally, EPA has found that high-end radium-226+228 activity in CCR has the potential to be nearly 10 pCi/g higher than typical background soil. Thus, there is real potential for mixing of CCR with soil to further increase any risk already associated with background.

Commenters are correct that mixing small quantities of CCR with soil may not result in a surface soil activity above the ARAR. For high-end CCR activity, this would require a roughly equal mixture of soil and ash. However, risks are still possible at activities below the ARAR. The PRG calculator estimates that an increase of only 1.13 pCi/g of the thorium-232 decay chain or 1.45 pCi/g of the uranium-238 decay chain in surface soils could increase cancer risk for residential receptors by 1×10^{-4} . Such risks can result from relatively low mixtures of CCR and soil, which are possible if ash beneath the soil surface is disturbed. As a result, EPA has identified ARAR of 5 pCi/g above background as equally applicable to subsurface contamination that may be disturbed in the future and concluded “it would not generally be appropriate to allow backfilling with material with concentration higher than 5 pCi/g.” Uncertainties associated with background concentrations are further discussed in Section 6 of the 2024 Risk Assessment.

Comment: One industry commenter presented an analysis they had conducted comparing the concentrations of certain inorganic constituents in CCR to soil screening levels. The commenter contended this analysis demonstrated that “even daily

direct contact to trace elements in coal ash would not pose a significant risk to human health.”

EPA Response: EPA did not evaluate the potential soil risks for human health associated with many of the constituents considered in the cited analysis. The Agency believes that any risk from additional constituents would be mitigated by the rule requirements that address the risks identified for radionuclides. However, EPA notes that the cited analysis is not sufficient to demonstrate a lack of risk for these additional constituents on a national scale. The ash concentrations reported for some constituents are already near or above the health benchmarks, indicating some potential for risk. Further, the reported ash concentrations are based on samples from a limited number of geographically constrained facilities. As a result, the reported concentrations may not reflect the broader variability of potential concentrations from across the region or country. In particular, EPA notes there is evidence in the regulatory record of arsenic concentrations approaching an order of magnitude higher than considered in this analysis.

Comment: Several commenters argued that EPA underestimated risk by not considering other potential exposure pathways, specifically inhalation of loose CCR.

EPA Response: EPA selected direct exposure gamma radiation and incidental ingestion of soil as the pathways for evaluation because these represent the most direct routes of exposure to contamination in the soil. EPA agrees that inhalation is another pathway through which future receptors could be exposed if CCR becomes intermixed with surface soil. Quantitative evaluation of this pathway would require additional model inputs that could further increase the uncertainty of results on a national scale, such as the degree of vegetative cover and mean wind speed. However, EPA notes the default PRGs for inhalation of the uranium-238 decay chain in secular equilibrium is nearly three orders of magnitude higher than for external exposure to gamma radiation and two orders of magnitude higher than for incidental ingestion of soil. As a result, it is unlikely consideration of this pathway would substantially increase calculated risk. Therefore, this pathway does not represent a major source of uncertainty in the evaluation. EPA acknowledges that there may be other exposure pathways that could occur if CCR is mixed with surface soil. These are further discussed in Section 6 of the 2024 Risk Assessment.

²¹ Oak Ridge National Laboratory. 2014. “Area Correction Factors for Contaminated Soil for Use in Risk And Dose Assessment Models.” ORNL/TM–2013/00. Oak Ridge, TN. September.

²² Oak Ridge National Laboratory. 2014. “Gamma Shielding Factors for Soil Covered Contamination for Use in Risk and Dose Assessment Models.” ORNL/TM–2013/00. Oak Ridge, TN. September.

²³ Oak Ridge National Laboratory. 2020. “Bateman Equation Adaptation for Solving and Integrating Peak Activity into EPA ELCR and Dose Models.” ORNL/TM–2020/1780. Oak Ridge, TN. September.

²⁴ U.S. EPA. 1998. “Use of Soil Cleanup Criteria in 40 CFR part 192 as Remediation Goals for CERCLA Sites.” OSWER Directive 9200.4–25. Office of Emergency and Remedial Response and Office of Radiation and Indoor Air. Washington, DC. February.

e. Comments Related to Site Monitoring Data

Comment: Some commenters stated that, as part of any further risk assessment efforts, EPA should incorporate data that have been collected as part of the monitoring programs required by either the 2015 CCR Rule or prior State programs. Such data might include site hydrogeology from borings around the units and groundwater quality sampled from monitoring wells. These commenters claimed these data are more recent and more relevant to characterizing the actual nature and extent of contaminant release at individual sites.

EPA Response: There are multiple reasons why it is neither practical nor prudent to incorporate site-specific monitoring data into national fate and transport modeling. First, there are documented concerns about the quality and reliability of these data. For example, EPA has identified significant deficiencies in the monitoring networks at each facility for which the Agency has completed reviews under the Part A (85 FR 53516, August 28, 2020) and Part B (85 FR 72506, November 12, 2020) Rules. It is unlikely such deficiencies are isolated to this specific subset of facilities. Monitoring wells that are located too far apart, installed in the wrong aquifer, or otherwise inadequately installed would result in data that are incomplete or unrepresentative of relevant site conditions. Thus, use of these data would require thorough review prior to use. Much of the site characterization data are not required to be posted on facility websites and so would take substantial time to compile and review for the over 1,000 individual landfills and surface impoundments. Further, it is highly unlikely that any identified deficiencies could be remedied within a reasonable timeframe.

Second, the hydrogeologic data that have been collected in support of well installation can provide an incomplete or erroneous picture of site conditions for the purpose of fate and transport modeling. For example, at sites with lower conductivity soils, EPA has previously raised concerns that collection of hydrogeologic data with a focus on characterizing the predominant soil type can underestimate the prevalence of more localized deposits of higher conductivity soil and other discontinuities that can serve as preferential flow pathways to groundwater. See, 85 FR 72519. Therefore, the current approach to probabilistic characterization of soil and aquifer characteristics using more local

data sources is believed to provide the most reliable means to capture the potential variability of conditions across different facilities and represent contaminant fate and transport on a national scale. Furthermore, EPA notes that consideration of more site-specific data would not be expected to change the fact many units are known to be constructed on relatively permeable soils. As a result, further refinements on the hydrogeology modeled at each individual site is unlikely to alter overall model results, which show contaminants can escape from these units and spread considerable distances through groundwater.

Third, groundwater monitoring only provides a snapshot in time of groundwater concentrations at each well location. It is not obvious, nor do commenters articulate, how these data would be applied to model long-term unit leakage. Factors such as natural fluctuations in background groundwater concentrations make it difficult to apportion measured concentrations from individual sampling events into the specific contributions from background and unit leakage. That is why groundwater monitoring programs rely on statistical analysis of data across numerous sampling events to make a binary determination whether or not contaminant concentrations downgradient of a unit have increased above background and GWPS. Even if it were practical to utilize these monitoring data, groundwater samples do not provide broader information about the progression of leakage over time. Specifically, groundwater samples do not provide information on the magnitude of source leachate concentrations, how long the unit has been leaking, or any indication of the potential magnitude and extent of contamination in the future. EPA modeling previously showed that the magnitude and extent of a plume may not peak until decades or centuries after the unit first begins to leak. As a result, incorporation of groundwater monitoring samples into a model would require a number of additional assumptions about the site characteristics and conditions that could substantially increase the overall uncertainty of model results.

Finally, EPA is not aware of similar site-specific data available for the subset of smaller CCRMU intended for purposes other than disposal. As several commenters have acknowledged, facilities have not typically maintained reliable records of the locations of all these smaller units. Thus, any modeling of these units must, by necessity, draw on other datasets to characterize the

potential for environmental release and subsequent contaminant fate and transport.

f. Comments Related to Additional Risk Drivers

Comment: Multiple commenters asserted that risks higher than those modeled in the 2014 Risk Assessment are unlikely for landfills. One commenter stated that the previous risks modeled for unlined landfills are “only slightly above” the point of departure at 2×10^{-5} and so, even if most CCRMU landfills are unlined, it would not result in risks higher than this value.

EPA Response: The national risks reported in the 2014 Risk Assessment were based on the understanding of relative liner prevalence at the time of that assessment. However, it has since become clear that an even greater proportion of regulated units have no engineered liner and there is no evidence that CCRMU landfills are lined to any greater degree. Additionally, EPA notes that the 2014 Risk Assessment modeled both clay-lined and composite-lined units under the assumption of good construction practices that achieved the regulatory performance standard. However, it has become clear since then that some liner systems do not achieve this standard. For example, facility reporting shows that around 10% of regulated units with composite or alternate liners have already entered into corrective action. Therefore, even for those units that do have some form of engineered liner, there is potential for national risks to be higher than previously modeled. For all these reasons, national risks for both currently regulated and CCRMU landfills are only expected to be more similar to those previously modeled for unlined landfills. Furthermore, EPA has identified additional factors that have the potential to result in even higher risks than modeled, but that could not be fully quantified as part of either the 2014 or 2024 Risk Assessment. These include co-disposal with coal refuse and disposal in contact with the water table. The greater prevalence of unlined units makes it even more likely these additional factors will occur at unlined units. The combination of these factors has the potential to result in national risks even higher than previously modeled.

Comment: One commenter acknowledged that the 2014 Risk Assessment had demonstrated the potential for co-disposal with coal refuse to increase risk from surface impoundments. However, multiple others argued that the same assessment shows that neither co-disposal with coal

refuse nor extreme pH conditions increase risks for landfills. Specifically, commenters pointed to one sensitivity analysis summarized in Table 5–6 of the 2014 Risk Assessment that concluded modeled risks did not exceed the point of departure for any subset of the modeled pH conditions. One commenter argued the Agency's conclusions are not based on actual observations of CCR porewater and groundwater quality at sites where coal refuse is managed. This commenter stated that not all units that accepted coal refuse will contain enough to affect the broader chemistry of the unit and not all coal refuse will contain enough pyrite to influence pH. This commenter further argued that, where acidic conditions and higher leachate concentrations do occur, it will not necessarily result in higher downgradient groundwater concentrations due to other site-specific factors. To support this argument, the commenter summarized findings from multiple EPRI reports that analyzed field samples from around several landfills and surface impoundments believed to have accepted coal refuse.

Response: These commenters misrepresent the findings of the referenced sensitivity analysis. This analysis represents a parsing of groundwater model runs conducted in 2014 as a function of leachate pH. This analysis incorporates model results for a substantial number of lined units, which can mask the effects of leachate pH due to the low overall leakage rates from these units. As such, this sensitivity analysis does not support any conclusions about the impacts of pH on risks from unlined units. Further, very few model runs were conducted at highly acidic pH; the sensitivity analysis did not summarize any results for a pH lower than around 4. Thus, this analysis also does not support any conclusions about the risks associated with highly acidic conditions.

Available LEAF leachate data used to model landfills show that many constituents, including arsenic, can leach at highest concentrations near one or both extremes of the pH scale. The effects of these higher concentrations are reflected in the sensitivity analysis, with higher risks observed around a highly basic pH of 13. Therefore, this sensitivity analysis is consistent with the broader risk record and shows that extreme pH conditions can result in higher risk.

The commenters are also incorrect that the risk record is not based on observations of CCR porewater. EPA relied on empirical measurements of porewater to support modeling of

surface impoundments in 2014, which included samples co-disposed with coal refuse. As acknowledged by some commenters, these data supported identification of higher risks from these co-disposed wastes in impoundments. Corresponding pH data are not available for every porewater sample, but available data do show the potential for highly acidic pH around 1, roughly equivalent to stomach acid. The cited EPRI reports do not contradict the finding that co-disposal can affect CCR leaching behavior. As summarized by the commenter, these reports found that a third of units had impacts to unit pH and porewater chemistry. Individual units had potential or confirmed impacts on groundwater quality, causing at least one to trigger remedial measures by the facility. EPA further notes that these reports provide only a snapshot in time of the environmental impacts associated with disposal in this subset of disposal units. As a result, there remains potential for future releases beyond the waste boundary if these conditions persist.

Comment: Multiple commenters asserted that waste disposed below the water table would not result in higher risks from surface impoundments than previously modeled in the 2014 Risk Assessment. These commenters generally argued the hydraulic head present in an operating impoundment from ponded wastewater will result in greater leakage than groundwater flowing through a unit. One commenter presented a hypothetical comparison of the relative hydraulic flux from a unit due to ponded water, infiltrating precipitation, and contact with groundwater to argue that the presence of a ponded water would result in higher leakage. Others pointed to analyses from the 2014 Risk Assessment, which compared leakage from surface impoundments before and after dewatering, to argue that risks from impoundments remaining in groundwater would be lower. Others further argued that the lower hydraulic conductivity of some ash would limit flow through the impoundment and cause groundwater to preferentially flow around the unit.

Several commenters presented data from groundwater monitoring conducted at individual units to assert that risks are more likely to result from the hydraulic head in active impoundments than the intersection of waste with the water table. The presented data depict concentrations of boron, a highly soluble constituent that one commenter noted was selected for its “insensitivity to redox conditions.” These plots generally show

concentrations of boron to decrease over time after the impoundments were taken out of service, though that pattern was not universal. Some commenters went further, concluding that eliminating the hydraulic head in the unit would allow any prior groundwater contamination to naturally attenuate. Conversely, other commenters pointed to a documented case study where groundwater concentrations increased after ponded water was drained to contend that contact with the water table can result in higher releases.²⁵

EPA Response: A number of the commenters misconstrue the findings of the 2014 Risk Assessment, which did not include any assessment of the effects of CCR disposal within the water table. EPA was unable to quantitatively model the risks associated with this management practice because there was little data on how common the practice was or the extent to which it would affect groundwater chemistry. Instead, these commenters are referring to a comparison of the risks resulting from surface impoundments during operation and post-closure (*i.e.*, after free liquids had been eliminated consistent with § 257.102(d)(2)(i)) that was undertaken to understand if only modeling these units only during operation might underestimate peak risks. EPA only concluded that continued leakage after elimination of free liquids and closure would rarely result in higher peak risks. Thus, this assessment did not consider the effects of disposal below the water table or draw any conclusions about the risks associated with this practice.

When waste is managed above the water table, any leakage out of the unit must first infiltrate down through unsaturated subsurface soils and then mix with groundwater before it can flow beyond the waste boundary. As a result, downgradient groundwater concentrations can end up substantially lower than the original leachate concentration. In contrast, when waste is disposed below the water table, the entire volume of groundwater in contact with the CCR and all water infiltrating from above would become undiluted leachate. As the thickness of CCR below the water table increases, the volume of leachate generated can increase substantially based on the sheer size of these disposal units. There is no evidence the properties of CCR would reliably limit transport of this leachate away from the unit. Rather, the hydraulic gradient of the aquifer will continue to drive continued flow

²⁵ EPRI. 2001. “Evaluation and Modeling of Cap Alternative at Three Unlined Coal Ash Impoundments.”

through the unit. The hydraulic conductivity of different CCR overlaps with that of common aquifer materials. Even in instances where the average conductivity within a unit is lower than the surrounding aquifer, these units often contain different ash types and other wastes. This can lead to stratification within the unit that creates regions of higher conductivity and allows for greater flow. For all these reasons, there is potential for sustained leakage from units when waste is disposed below the water table. Whether or not the magnitude of this continued leakage is greater than from water ponded in an impoundment does not address the potential for such leakage to cause a release or sustain one that began when water was still ponded in the unit. Such comparisons also ignore that the waste would also be in contact with groundwater while the unit operates, greatly increasing the likelihood of groundwater mounding around the impoundment and increased contaminant transport in all directions.

It is not feasible to draw conclusions based on the small and curated sample of units presented by commenters. Various factors can complicate any interpretation of the presented graphs. First, boron is a highly soluble constituent that can washout at high concentrations into small amounts of water. Thus, the extent to which decreases in concentration over timeframes of a long as a decade or more simply represent the depletion of this highly soluble constituent from the ash is unclear. Second, unit geometry may not be uniform and consistently intersect with the groundwater table, resulting in more spatially isolated releases that cause higher concentrations in some wells and not others. Third, at sites with intermittent contact with groundwater, predefined sampling dates may not align with periods when contact with groundwater occurs. Therefore, it is not possible to draw meaningful conclusions, either at these sites or more broadly, based on the data provided. As pointed out by other commenters, there are also examples available where sustained contact with groundwater after a unit is drained resulted in increased groundwater concentrations of other Appendix III constituents.

The fact that downgradient concentrations have decreased at some impoundments after the unit was drained despite ongoing contact with groundwater does not prove such reductions will be sustained or further groundwater releases will not occur. As one EPRI report concluded, “the existence of saturated ash will greatly

reduce the effectiveness of any cap design when the facility is underlain by geologic materials with high hydraulic conductivity, because groundwater will continue to leach ash constituents.”²⁶ Thus, removal of ash from groundwater may be the only reliable means of source control for these units.

Comment: Several commenters agreed that use of porewater to represent leakage from impoundments is appropriate. However, these commenters also raised concerns that available porewater data collected during the active life of an impoundment may underestimate the risks associated with legacy impoundments because it may not accurately reflect leachate concentrations after the unit has ceased operation. As one example, they cited potential for reducing conditions to form through prolonged contact between waste and groundwater.

By contrast, one commenter asserted that elevated arsenic concentrations identified in the two journal articles EPA referenced in the proposal are only representative of that one site and that the majority of available impoundment porewater data have lower concentrations than reported in those articles.^{27 28} The commenter also noted the data presented in the journal articles were collected in support of an EPRI report, which found these concentrations had not translated to exceedances of GWPS in downgradient wells.²⁹ Based on this finding, the commenter concluded leachate concentrations alone are not a reliable indicator of which units will cause groundwater contamination due to variable site geochemistry and hydrogeology.

EPA Response: EPA agrees that porewater samples remain the best available data to represent leakage from operating surface impoundments. These field samples provide empirical data on leakage from various mixtures of CCR

and other wastes managed under consistently saturated conditions. EPA also acknowledges there can be uncertainties associated with field data submitted to the Agency, which might lead to an underestimation of concentrations in the field. One example is the potential for stronger reducing conditions to form after a unit has been closed as a result of less oxygenated water infiltrating through the unit. As acknowledged by commenters, however, there is not sufficient data to characterize the magnitude or extent of such conditions on a national basis. Therefore, the impact of this uncertainty is not known.

EPA disagrees that the arsenic concentrations identified in the referenced studies should be considered an isolated occurrence. These studies clearly demonstrate that: (1) Sustained contact with groundwater can result in stronger reducing conditions than dry management, (2) Reducing conditions can cause higher leaching of arsenic, and (3) LEAF methods can underestimate actual leaching from CCR under reducing conditions by as much as an order of magnitude. Given that disposal beneath the water table is a more common practice than previously understood, there exists the real potential for higher leachate concentrations in the field than previously modeled, particularly at landfills modeled with LEAF data.

EPA does agree that initial leachate concentrations are not the sole determining factor for contaminant fate and transport. As discussed in response to previous comments, this fact is reflected in Agency modeling. Individual model runs with the highest leachate concentrations are not always those with the highest risk. However, factors that will tend to push the overall distribution of leachate concentrations higher will also tend to push modeled nationwide risks higher because of the greater likelihood that higher leachate concentrations will occur at sites where these concentrations can more readily spread. Thus, the greater prevalence of units in contact with groundwater has the potential to result in higher risks on a national scale than previously modeled.

Finally, EPA notes that groundwater monitoring only represents a snapshot in time and does not necessarily provide any indication of the potential for future contamination. In the case of the studied unit, it is not known whether reducing conditions formed during or after operation. As such, there remains potential for future releases if the unit remains in contact with groundwater

²⁶ EPRI. 2001. “Evaluation and Modeling of Cap Alternative at Three Unlined Coal Ash Impoundments.”

²⁷ Wang, X., A.C. Garrabrants, Z. Chen, H.A. van der Sloot, K.G. Brown, Q. Qiu, R.C. Delapp, B. Hensel, and D.S. Kosson. 2022. “The Influence of Redox Conditions on Aqueous-Solid Partitioning of Arsenic and Selenium in a Closed Coal Ash Impoundment.” *Journal of Hazardous Materials*. 428:128255.

²⁸ Wang, X., H.A. van der Sloot, K.G. Brown, A.C. Garrabrants, Z. Chen, B. Hensel, and D.S. Kosson. 2022. “Application and Uncertainty of a Geochemical Speciation Model for Predicting Oxyanion Leaching from Coal Fly Ash under Different Controlling Mechanisms.” *Journal of Hazardous Materials*. 438:129518.

²⁹ EPRI. 2020. “Leaching, Geotechnical, and Hydrologic Characterization of Coal Combustion Products from a Closed Coal Ash Impoundment.”

and continues to leak such elevated arsenic concentrations.

g. Comments Related to Complete Exposure Pathways

Comment: Multiple commenters asserted that EPA must demonstrate the existence of a complete exposure pathway to justify regulatory action, which some defined as exposures that have already occurred. Specifically, commenters stated that “the presence of groundwater contamination alone does not constitute a risk” and “in many cases no one is drinking the water or contacting the CCR materials.” One commenter presented a summary of analyses that had been conducted across 27 sites, which concluded that groundwater risks do not exist at most sites because no drinking water wells are currently present. Another commenter asserted that the high-end risks identified in the 2014 Risk Assessment assumed that receptors were exposed immediately downgradient of the disposal units. This commenter went on to state that complete exposures would not occur at the many sites adjacent to water bodies because groundwater contamination would be intercepted by surface water first and that the 2014 Risk Assessment found no risks warranting regulation for surface water. Several other commenters also claimed that groundwater quality should be measured at the facility boundary because that would be more representative of a complete exposure pathway.

EPA Response: Section 4004(a) of RCRA requires EPA to establish requirements that will ensure no reasonable probability of adverse effects both to human health and the environment. See, 42 U.S.C. 6944(a). EPA therefore disagrees that only the presence of receptors within the impact sphere of a contaminating facility merits consideration. EPA’s longstanding and consistent policy (across numerous regulatory programs) has been that groundwater contamination is a significant concern that merits regulatory action in its own right, whether or not the aquifer is not currently used as a source of drinking water.

Once a potentially harmful constituent has leached from a disposal unit into groundwater, whether the constituent ultimately causes further damage by migrating into drinking water wells does not diminish the significance of the environmental damage caused to the groundwater under the site, even where it is only a potential future source of drinking water. As EPA explained in the

preamble to the original 1979 subtitle D criteria, EPA is concerned with groundwater contamination even if the aquifer is not currently used as a source of drinking water. Sources of drinking water are finite, and future users’ interests must also be protected. See, 44 FR 53445–53448. (“The Act and its legislative history clearly reflect Congressional intent that protection of groundwater is to be a prime concern of the criterion. . . . EPA believes that solid waste activities should not be allowed to contaminate underground drinking water sources to exceed established drinking water standards. Future users of the aquifer will not be protected unless such an approach is taken.”). See also, 80 FR 21453.

The commenters’ approach is also inconsistent with Agency guidance, which states that a “. . . pathway is complete if there is (1) a source or chemical release from a source, (2) an exposure point where contact can occur, and (3) an exposure route by which contact can occur.”³⁰ The guidance goes on to state that “. . . exposure assessments are concerned with current and future exposures.” Thus, a key consideration in evaluating risk is the potential for future exposure. If it were necessary to wait for exposures to occur as a prerequisite for action, an untold number of receptors could be subject to potential harm. Further, implementation of corrective action is not instantaneous and so this harm could persist for some time after receptor exposures are first identified. Commenters do not explain how such delayed action could be considered protective of human health and the environment, and so meet RCRA’s standard. See, *USWAG*, 901 F3d at 429–431.

Commenters also misrepresent the findings of the 2014 Risk Assessment regarding surface water interception. EPA modeled a distribution of distances for both groundwater wells and surface water bodies, accounting for interception whenever a water body was located closer than a well. Thus, reported high-end risks do not include any assumptions about the proximity of receptors to the units. Even if direct exposure to groundwater from use as a drinking water source is considered unlikely due to the potential for interception by nearby surface water, that does not justify no further action. EPA did identify the potential risks from individual disposal units to ecological receptors present in these

water bodies and human receptors who fish from those water bodies, as well as associated damage cases, which is why constituents, such as cadmium and mercury, were added to the Appendix IV list of constituents. Additionally, surface water bodies are large and highly interconnected systems that are likely to have multiple electric utilities, as well as any number of other industrial sources, located along their banks. If all these facilities were allowed to freely discharge to a water body solely because no individual release posed risk, the cumulative impacts can result in risk to surface water resources and nearby receptors. The 2015 CCR Rule addresses the potential for such risk by specifying corrective action must “remove from the environment as much of the contaminated material that was released from the CCR unit as is feasible.” 40 CFR 257.97(b)(3). Thus, dilution of a groundwater plume into surface water could not be considered a presumptive remedy. This requirement is consistent with guidance for OLEM programs that specify the need to prevent groundwater contamination above GWPS from contaminating other aquifers or environmental media.³¹

EPA also disagrees that a point of compliance at the facility boundary would provide a better estimate of actual risk than the waste boundary. Again, the commenter disregards that the contamination of the aquifer is an adverse effect on the environment, not simply a potential risk to subsequent receptors. Consequently, the regulations require facilities to address the contamination at the first available point, that is, when it first leaves the unit. There are several additional reasons that the waste boundary is the appropriate point of compliance. First, a point of compliance at the facility boundary would result in greater potential for current residences or water bodies immediately adjacent to the facility boundary to be exposed before the presence of contamination can be confirmed. Second, the facility boundary may be a significant distance away from the waste boundary, which would allow contamination to increase and spread for some time before triggering corrective action. The further contamination is allowed to increase and spread, the more difficult it may become to clean it up due to factors such as complex contaminant chemistry and site hydrogeology. This may render

³⁰ U.S. EPA. 1989. “Risk Assessment Guidance for Superfund Volume I: Human Health Evaluation Manual (Part A).” EPA/540/1–89/002. Prepared by the Office of Emergency and Remedial Response. Washington, DC. December.

³¹ U.S. EPA. 2009. “Summary of Key Existing EPA CERCLA Policies for Groundwater Restoration.” OSWER Directive 9283.1–33. Prepared by the Office of Solid Waste and Emergency Response. Washington, DC. June.

large volumes of groundwater unusable for drinking water or other purposes. Finally, EPA has previously documented numerous instances where, once the contaminant plume has migrated off-site and impacted private water wells, a utility has purchased these properties, thereby rendering the off-site contamination, “on-site,” further delaying corrective action. See, 80 FR 21456. For all these reasons, EPA considers the waste boundary to provide the most consistent and protective basis on which to establish evidence of a release.

4. 2024 Final Risk Assessment

EPA identified risks to groundwater from active CCR landfills and surface impoundments, as well as to inactive CCR surface impoundments at active utilities in the 2014 Risk Assessment, which are now regulated under the 2015 CCR Rule. The results of EPA’s further analyses in the final 2024 Supplemental Risk Analysis confirm that the findings on the risk from active units from the 2014 Risk Assessment are equally applicable to units that ceased receipt of waste prior to 2015 and either closed or became inactive. This final rule therefore relies upon the 2014 Risk Assessment, the additional data and analysis presented in the March 2023 proposal indicating that the legacy CCR surface impoundments and CCRMU would be expected to have risks even higher than previously modeled, and the 2024 Supplemental Risk Assessment. Each of these is discussed in turn below.

a. Summary of 2014 Risk Record

In the 2014 Risk Assessment EPA conducted a national-scale, probabilistic analysis that characterized potential risks to human and ecological receptors associated with leakage from CCR surface impoundments and landfills in operation at that time. A combination of models was used to predict fate and transport of contaminants through the environment, receptor exposures, and the resulting risks to human and ecological receptors. The specific exposure routes evaluated were: (1) Human inhalation of particulate matter blown from open management units, (2) Human ingestion of crops and livestock raised on nearby fields, (3) Human ingestion of groundwater used as a source of drinking water, (4) Human ingestion of fish caught from freshwater streams, and (5) Ecological contact with and ingestion of surface water and sediment. Site-specific data were used where available, supplemented by regional and national data to fill data gaps, to capture the variability of waste

management practices, environmental conditions, and receptor behavior. EPA reported risks for both highly exposed individuals and more moderately exposed individuals. Risks to highly exposed individuals represent a reasonable maximum estimate that members of the general population might be exposed to, which were calculated as the 90th percentiles of all probabilistic model results. Risks to moderately exposed individuals represent a more typical estimate that members of the general population might be exposed to, which were calculated as the 50th percentiles of all probabilistic model results.

Under RCRA, EPA typically relies on a risk range to determine the point at which regulation is appropriate. This policy was first developed in the context of determining whether to regulate (or “list”) wastes as hazardous under subtitle C of RCRA. See 80 FR 21449; 59 FR 66075–66077, December 22, 1994. However, over the years EPA has relied on this risk range more broadly to determine whether regulation is warranted under both subtitles C and D of RCRA. See 75 FR 35193 (“Although the statutory standards under subsections C and D differ, EPA has historically interpreted both statutory provisions to establish a comparable level of protection, corresponding to an acceptable risk level ranging between 1×10^{-4} and 1×10^{-6} .”).

Thus, to determine whether there is a reasonable probability of adverse effects on health or the environment from the disposal or other solid waste management of solid waste, EPA typically uses as an initial cancer risk “level of concern” a calculated risk level of 1×10^{-5} (one in one hundred thousand) or an HQ above 1.0 for any noncarcinogenic risks. See, 80 FR 21,449. For example, wastestreams or activities for which the calculated high end individual cancer-risk level is 1×10^{-5} or higher generally are considered candidates for regulation. Wastestreams or activities with risks calculated to be 1×10^{-4} (one in ten thousand) or higher generally will be considered to pose a reasonable probability of adverse effects on health or the environment and generally will be regulated. Wastestreams or activities for which these risks are calculated to be 1×10^{-6} (one in one million) or lower, and lower than 1.0 HQ or environmental risk quotients for any noncarcinogens, generally will be considered not to pose a reasonable probability of adverse effects on health or the environment, and generally will not be regulated. *Id.*

EPA first evaluated national-scale risks in the 2014 Risk Assessment,

which provides a snapshot in time of potential risks across the country. This was accomplished by weighting risks from individual management practices in proportion to the anticipated prevalence of those practices. National-scale risks provide important context as to whether risks are a systemic issue that warrant national regulations or are limited in scope and better addressed through more targeted actions. The Agency’s evaluation found that the management practices that EPA believed were generally in use in 2014 at surface impoundments and landfills were likely to pose risks to human health through groundwater exposure within the range that EPA typically considers warrants regulation. For highly exposed individuals, the cancer risks from arsenic due to the operation of surface impoundments were as high as 2×10^{-4} , while noncancer risks were as high as an HQ of 5 for arsenic, 2 for lithium, and 2 for molybdenum. Cancer risks associated with the operation of landfills were estimated to be as high as 5×10^{-6} from the ingestion of arsenic-contaminated drinking water. In contrast, all risks for moderately exposed individuals fell below EPA’s risk range. This was largely attributed to the fact that many facilities are located next to major water bodies and so contaminant plumes were frequently intercepted by these water bodies before they could reach private wells.

EPA next evaluated the risks associated with individual management practices at surface impoundments and landfills. This was accomplished by filtering the national-scale model runs to focus only on those that included the practice of interest and using the filtered set of runs to calculate risks associated with that specific practice. These individual risks provide important context about the range of contaminants and practices that could pose risk at individual sites. The Agency’s evaluation identified two specific management practices that could lead to risks higher than those identified in the national risk estimates.

The first practice EPA evaluated was the disposal of CCR in unlined and clay-lined units. Management in unlined surface impoundments resulted in cancer risks for arsenic up to 3×10^{-4} , as well as noncancer risks for lithium up to an HQ of 3, molybdenum up to an HQ of 4, and thallium up to an HQ of 2. Management in unlined landfills resulted in cancer risks for arsenic up to 2×10^{-5} . The larger increase in arsenic risks identified for unlined landfills above those for national-scale landfills (2×10^{-5} vs. 5×10^{-6}) compared to unlined and national-scale

impoundments (3×10^{-4} vs. 2×10^{-4}) is because a larger proportion of landfills nationwide were initially modeled as having a liner. Since promulgation of the 2015 CCR Rule, it has become clear that more units are unlined than originally estimated. Thus, it is anticipated that national-scale risks for landfills would actually be closer to those for unlined landfills (2×10^{-5}), rather than the lower nation-wide estimates reported in the 2014 Risk Assessment.

Although clay-lined units tended to have lower risks than unlined units, they still had potential to result in risks within the range that EPA considers for regulation under RCRA. Management in clay-lined impoundments with a liner thickness of three feet resulted in cancer risks for arsenic of up to 7×10^{-6} and noncancer risks for lithium up to an HQ of 2, while management in similarly unlined landfills resulted in cancer risks for arsenic up to the 1×10^{-5} . The larger increase in arsenic risks for unlined impoundments above those for clay-lined impoundments (1×10^{-5} vs. 7×10^{-6}) compared to unlined and clay-lined landfills (2×10^{-5} vs. 1×10^{-5}) is because the layer of low conductivity clay counteracts the hydraulic head in impoundments that would otherwise freely drive greater volumes of leachate into the subsurface.³² In contrast, leachate generation in both types of landfills is limited far more by the rate of precipitation. As a result, EPA further considered how reducing the modeled clay liner thickness of impoundments to the minimum allowable standard of two feet would affect arsenic risk and found it would increase to as high as 2×10^{-5} .

The second practice evaluated was the management of wastes with an extreme pH. In particular, empirical porewater data revealed that co-disposal of CCR with other wastes in surface impoundments had the potential to result in a highly acidic pH, cancer risks for arsenic up to 1×10^{-3} , and noncancer risks for cobalt and mercury up to an HQ of 13 and 5, respectively. Laboratory leaching test data also indicated that highly acidic and basic CCR wastes have the potential to leach similarly high arsenic concentrations, up to an order of magnitude higher than under more neutral conditions. Only a small number of previous landfill model runs considered acidic conditions based on the information available about conditions in active units; identified risks for these units were driven by

more basic conditions. Thus, to the extent that conditions at either extreme of the pH scale are more prevalent than previously estimated, it is likely that overall risks from disposal in both surface impoundments and landfills would be even higher than modeled.

EPA acknowledged in the 2014 Risk Assessment that there were some additional management practices that could result in higher risk at individual sites, but that could not be quantitatively modeled with the data available at the time. One specific example provided was of CCR disposal below the water table. EPA was unable to quantitatively model the associated risks as there was little data on how common this practice was or the extent to which it could affect groundwater chemistry. Because EPA could not quantitatively model these management practices (and because the Agency had no information to indicate that it was a current, widespread management practice), EPA noted only that, based on its review of damage cases, the damage from the placement of CCR in sand and gravel pits was almost always associated with CCR being placed in contact with water, which indicated that the placement of CCR in contact with water can lead to higher risks than from dry disposal. 80 FR 21352. EPA further explained that “in this situation, the sorption that occurs in the unsaturated zone of the risk assessment model does not occur in the field. This and other site-specific risk factors could lead to additional contamination beyond what was modeled nationwide.” 2014 Risk Assessment at pages 5–48. As a consequence, EPA specifically included sand and gravel pits that received CCR in the definition of CCR landfills covered by the regulations. 80 FR 21354.

The above model results from the 2014 Risk Assessment are equally applicable to legacy CCR surface impoundments and CCRMU. Many of these unregulated units are similarly constructed, manage the same types of ash, and are frequently located either at the same or nearby facilities as their regulated counterparts. In particular, some unregulated units are known to be located directly adjacent to or beneath currently regulated units. The fact that some of these unregulated units no longer contain water ponded above the ash surface or have installed some form of cover system does not meaningfully distinguish the long-term risks of these units from those previously modeled. This is because all landfills and surface impoundments progress through similar lifecycle stages. Progression toward closure does not remediate any releases that occurred during operation of the

unit. Furthermore, if a unit is not closed with an effective cover system or remains in contact with the groundwater table, the higher rates of leakage that can result could sustain releases long after the unit has ceased operation. It is expected that legacy impoundments and CCRMU have been present for longer than currently operating units and so would have had more time to leak. As a result, previous and ongoing releases from these units have the potential to be greater and to have migrated further than those from the currently regulated universe of units.

The risks associated with legacy impoundments and CCRMU may be even higher than EPA modeled on a national scale in the 2014 Risk Assessment. The 2014 Risk Assessment aimed to provide a static snapshot of waste management practices at that time based on the available data. As such, it did not reflect the greater prevalence of some practices at older closed and inactive units based on the understanding those practices had declined over time. Nor did it reflect some ongoing practices for which there was not enough data to characterize prevalence on a national scale. The Agency is now aware of several practices that are more common than were modeled in 2014 and have the potential to result in higher leakage. However, because the 2014 Risk Assessment identified baseline risks that warrant regulation, the national risk record does not depend on the greater prevalence of these practices to justify the need for regulation of closed and inactive units. Instead, the potential for even higher risk from these practices at individual units, which are discussed below, only reinforces the basis for regulation.

First, a greater number of units lack an adequate liner system than EPA previously understood. For example, in the 2014 Risk Assessment, EPA estimated that 65% of impoundments had no engineered liner (*i.e.*, do not meet the regulatory standard for either a clay or composite liner) based on surveys conducted by EPA between 2009 and 2010 (“EPA Surveys”).³³ It has since become clear that even fewer impoundments are actually lined. EPA’s review of available liner demonstration documents posted on facilities’ CCR websites indicates closer to 83% of impoundments have no engineered liner. Similar reporting is not available

³² The somewhat higher risks identified for clay-lined landfills compared to similarly lined impoundments are likely related to site-specific conditions, such as where in the country these units are located.

³³ U.S. EPA. 2014. “Human and Ecological Risk Assessment of Coal Combustion Residuals.” RIN 2050–AE81. Office of Solid Waste and Emergency Response. Washington, DC. December.

on the liner prevalence for older units. However, EPA is also not aware of any evidence that these older units have been lined at higher rates, particularly those constructed prior to the promulgation of minimum standards for disposal in RCRA subtitle D landfills in 1991. See, 40 CFR part 257, subpart A and part 258. Indeed, most coal-fired utilities in the United States were constructed before 1990.³⁴ Even when units do report having an engineered liner, they may not perform as well as previously modeled. The 2014 Risk Assessment modeled both clay and composite liners based on the presumption both would achieve regulatory performance standards. Yet, facility reports show that around 10% of landfills and surface impoundments with a composite liner have already entered into corrective action. Thus, many units previously modeled as lined are now believed to either have no engineered liner or to perform more like an unlined unit. For these reasons, EPA anticipates that national risks for both currently regulated units and those newly covered under this rulemaking will be closer to those previously modeled for unlined units. For landfills, this could increase national risks by up to an order of magnitude, as high as 2×10^{-5} for arsenic. That risk is twice the level that EPA typically considers for regulation and is the same level of risk as those associated with the clay-lined CCR surface impoundments that the D.C. Circuit required to close.

Second, a greater number of older units co-disposed CCR with the wastes generated from coal preparation activities, collectively referred to as “coal refuse.” These activities may have included coal handling by conveyor systems, coal washing for removing mineral matter, and coal “sizing” to reduce the average particle size of coal. Co-disposal with coal refuse can have a pronounced effect on the leaching behavior of CCR because of the potential for the refuse to make the overall waste pH far more acidic. Available Leaching Environmental Assessment Framework (LEAF) leaching data considered in the 2014 Risk Assessment show that multiple Appendix IV constituents are most soluble under extreme pH conditions and thus able to leak at higher rates. EPA found modeled risks are highest when CCR was disposed in surface impoundments with coal refuse. The modeled cancer risks for the co-

disposal of ash and coal refuse in surface impoundments ranged between 1×10^{-3} for trivalent arsenic to 4×10^{-4} for pentavalent arsenic. Non-cancer risks were similarly high, ranging between and an HQ of 13 for cobalt and HQ of 14 for pentavalent arsenic to 26 for trivalent arsenic, based on the ingestion of contaminated drinking water.

The practice of co-disposal with coal refuse has declined over time. A survey conducted by Electric Power Research Institute (EPRI) in 1995 showed 34% of unlined landfills and 68% of unlined surface impoundments actively managed CCR with coal refuse.³⁵ In contrast, EPA Surveys indicated that, by 2014 this management practice had declined to around 5% of active units. EPA’s 2014 national-scale modeling was based on the 5% reported in the EPA Surveys, and as a consequence, this practice had minimal influence on the overall nationwide risk estimates in the 2014 Risk Assessment. However, it is clear from the EPRI data that management of CCR with coal refuse used to be far more common prior to 1995. Of the 283 disposal units that were previously excluded from the 2014 Risk Assessment and that reported a start year in the EPA Surveys, around 91% had already begun operation by 1995. Therefore, the risks associated with these older disposal units are likely to be higher than the national scale risks reported in the 2014 Risk Assessment.

Finally, it has become apparent since promulgation of the 2015 CCR Rule that the practice of disposing of CCR below the water table is more common than EPA previously understood. EPA was aware of this practice in 2014 and raised it as an uncertainty in the risk assessment, but had little information about the frequency of this practice. EPA’s review of the location restriction demonstrations posted on facilities’ CCR websites found that approximately 31% of active CCR surface impoundments had waste below the water table. Similar statistics are not currently available for landfills, though it is clear from previously identified damage cases that this practice is not unique to impoundments. Nor is EPA aware of any evidence that would indicate older units are less likely on the whole to have been constructed within the water table. EPA was unable to model the effects of disposal in the water table in 2014 due to constraints on data availability and modeling capabilities.

Disposal beneath the water table, either continuously or intermittently, will result in conditions that mirror those previously found to drive risk from active surface impoundments. Specifically, saturation of disposed CCR provides a larger reservoir of leachate and the hydraulic gradient across the aquifer maintains a hydraulic head that serves to drive this leachate away from the unit. The implications for landfills are particularly significant, as the potential for greater contaminant transport from these units can result in higher risks to groundwater than previously modeled under dry conditions. Further, because these landfills leak directly to groundwater, there is potential for these risks to remain long after the unit has ceased operation. This is equally true for impoundments. Even if the hydraulic head within the aquifer is not as great as from ponded water, it can still sustain higher rates of leakage than if the unit were fully dewatered. As a result, removal of the saturated ash may be the only reliable means to control the source of contamination.

Since promulgation of the 2015 CCR Rule, EPA has identified evidence of another way in which disposal below the water table could result in greater risk. This disposal practice has the potential to alter groundwater chemistry in ways that increase either the solubility or mobility of some CCR contaminants. This is due to the residual, unburnt organic matter in CCR serving as a carbon source (*i.e.*, substrate, electron donor) for bacteria in the soil. Bacteria preferentially use any dissolved oxygen (O_2) for oxidation of organic matter (*i.e.*, electron transfer from the organic matter to oxygen) because this yields the greatest energy returns for the bacteria. With a sufficient source of biodegradable organic matter, bacterial consumption of oxygen can outpace replenishment of dissolved oxygen that occurs through diffusion from the atmosphere and infiltration of precipitation. Depletion of oxygen is more likely to occur in saturated soils because the constant presence of water allows biological activity to proceed unimpeded by periods of drying, the relatively slow flow rate of groundwater does not transport dissolved oxygen from the upgradient side of the unit fast enough to outpace consumption across the footprint of the unit, and sustained saturation of the soil limits oxygen exchange with the atmosphere. In the absence of oxygen, bacteria will instead use nitrate, manganese, iron, sulfate, and other compounds for reduction of organic matter (*i.e.*, electron transfer to

³⁴ United States Energy Information Administration. 2017. “Most Coal Plants in the United States were Built Before 1990.” Accessed online at: <https://www.eia.gov/todayinenergy/detail.php?id=30812>.

³⁵ EPRI. 1997. “Coal Combustion By-Products and Low-Volume Wastes Comanagement Survey.” Palo Alto, CA. June.

organic matter from other compounds). Such reducing conditions will not affect all constituents equally, serving to mobilize some and immobilize others. However, reducing conditions can mobilize arsenic, the primary source of risks identified in the 2014 Risk Assessment.

Research conducted since the 2014 Risk Assessment has better documented the potential effects of disposal below the water table on leakage from CCR units. Studies published in 2022 examined, among other things, the degree to which environmental conditions can differ within the same closed impoundment, both above and below the water table.^{36 37} Specifically, arsenic concentrations measured in the water intermingled with CCR beneath the water table were as high as 4,100 mg/L due to the presence of reducing conditions and a near neutral pH of 8. That concentration is substantially higher than 20 mg/L, measured from the same ash with LEAF Method 1313 at a similar pH, or 780 mg/L, which is the 90th percentile of all impoundment porewater measurements previously compiled by EPA. This indicates that the porewater and LEAF data relied on the 2014 Risk Assessment may significantly underestimate the magnitude of leakage from CCR units under reducing conditions.

The extent to which the porewater data EPA used to model surface impoundments in 2014 reflect strong reducing conditions is not known, as this information was not commonly reported. Such conditions might occur during operation as a result of sustained saturation or might evolve after an impoundment has been drained of ponded water and capped, thereby decreasing mixing of oxygen within the unit. However, it is known that the LEAF data used to model landfills does not reflect reducing conditions. All standardized leaching tests tend to reflect oxidizing conditions due to contact between the sample and the atmosphere during sample collection and laboratory analysis. As such, it has since been recognized that further analysis of leachate data with

geochemical speciation models may be warranted when field conditions diverge from those present in the laboratory setting (*e.g.*, reducing conditions).³⁸ Therefore, there is clear potential for significantly higher leachate concentrations than modeled if a landfill is in contact with groundwater.

b. 2024 Risk Assessment and Results

As noted above, a number of commenters argued the 2014 Risk Assessment does not adequately capture various factors associated with legacy impoundments and CCRMU that the commenters believe will result in significantly different risks than those posed by currently regulated units. In response, EPA prepared a supplemental risk assessment to determine the potential for some of these factors to affect national risks (“2023 Draft Risk Assessment”). EPA began by reviewing available information about the characteristics and locations of legacy impoundments and CCRMU to determine whether there was any potential for the risks from these units to be meaningfully different from currently regulated units. This included a review of groundwater model results previously excluded from the 2014 Risk Assessment because the units were ultimately not covered by the 2015 CCR Rule.

As part of this review, EPA grouped legacy impoundments and CCRMU disposal units into different categories based on unit type: (1) Historical and inactive landfills and (2) Historical and legacy impoundments. The 2024 Risk Assessment defines historical units as those that have steps taken toward closure, but that may or may not meet all the requirements of § 257.102(d). Additionally, EPA further considered the influence of unit size on risk and conducted additional modeling for the subset of CCRMU that is smallest in size, those used as fill or for similar purposes (hereafter “CCRMU fills”). Because facilities have not historically regarded such placement as disposal units or necessarily maintained associated records, EPA believes there is potential for exposures different than those previously considered for landfills and surface impoundments.

Specifically, EPA evaluated the potential for risk from onsite exposure to contaminated groundwater or CCR accumulations in the soil under a future residential land use scenario.

i. Problem Formulation

EPA first developed conceptual models to illustrate a generalized layout of legacy impoundments and CCRMU, the different pathways through which constituents may be released from CCR and migrate through the environment, and the risks to human health and the environment that could result. The conceptual models for landfills and impoundments were the same as used in the 2014 Risk Assessment/EPA determined that a second model was warranted for CCRMU because some smaller placements have not historically been regarded as disposal by facilities and so have not been reliably tracked or maintained over time. These smaller placements may be disturbed after land use changes, which can result in additional release pathways. Therefore, EPA prepared a second conceptual model for smaller units (*i.e.*, CCRMU fills). These conceptual models provide the basis for subsequent modeling efforts.

When CCR are placed on the ground for any purpose, they may leach metals and other inorganic contaminants to groundwater. Once mixed with groundwater, contamination may migrate downgradient to private wells where it is ingested by receptors who rely on groundwater as their primary source of drinking water. But a receptor does not need to be presently exposed for there to be a reasonable probability of adverse effects on health or the environment. EPA evaluated this exposure pathway in the 2014 Risk Assessment and identified a set of constituents most likely to pose risk to offsite receptors living up to a mile away. The 2024 assessment builds on those model results and identifies arsenic, lithium, molybdenum, and thallium as constituents that warranted further evaluation. These are the constituents found in the 2014 Risk Assessment to pose the greatest risk for unlined surface impoundments and have the greatest demonstrated potential to spread and pose risk on a national scale. These 2014 model results therefore also provide a reasonable screen to identify the most likely risk drivers for receptors living even closer to these types of units.

When CCR is placed in fills and left unmonitored, the ash can be disturbed in the future when land use changes. In the absence of records of the presence of CCR, and in the absence of inspection and maintenance, any engineering controls currently present that might serve to limit exposure cannot reasonably be assumed to remain in place in perpetuity. For this reason, EPA

³⁶ Wang, X., A.C. Garrabrants, Z. Chen, H.A. van der Sloot, K.G. Brown, Q. Qiu, R.C. Delapp, B. Hensel, and D.S. Kosson. 2022. “The Influence of Redox Conditions on Aqueous-Solid Partitioning of Arsenic and Selenium in a Closed Coal Ash Impoundment.” *Journal of Hazardous Materials*. 428:128255.

³⁷ Wang, X., H.A. van der Sloot, K.G. Brown, A.C. Garrabrants, Z. Chen, B. Hensel, and D.S. Kosson. 2022. “Application and Uncertainty of a Geochemical Speciation Model for Predicting Oxyanion Leaching from Coal Fly Ash under Different Controlling Mechanisms.” *Journal of Hazardous Materials*. 438:129518.

³⁸ U.S. EPA. 2019. “Leaching Environmental Assessment Framework (LEAF) How-To Guide: Understanding the LEAF Approach and How and When to Use It.” Office of Land and Emergency Management. Washington, DC. May.

considered the potential for additional exposure pathways that could occur under a future residential land use scenario. The 2014 Risk Assessment did not evaluate risks from direct placement of CCR in the soil. However, EPA previously identified radium as a constituent of concern in the 2015 CCR Rule and included two radioisotopes on the Appendix IV list for groundwater monitoring, radium-226 and radium-228. These radioisotopes are part of larger, naturally occurring decay chains that begin with uranium-238 and thorium-232, respectively. Even if some form of cover remains over the ash, future receptors who live on or around a fill may be exposed to radiation through direct exposure to gamma radiation or inhalation of radon gas. Therefore, EPA considered potential for exposure to the full decay chains of these radium isotopes as the primary risk driver for this pathway.

ii. Disposal Unit Groundwater Risk

All disposal units pass through the same lifecycle stages, ranging from initial construction to final closure. As a result, there is potential for historical and inactive disposal units to result in the same types of environmental releases as currently regulated units over the course of their lifecycle. The fact some historical and inactive units may have since drained ponded wastewater or installed some form of cover system does nothing to remediate any prior releases. EPA conducted a review of the available data on these historical and inactive units to understand whether the associated risks would be expected to differ from those previously modeled for regulated units.

The 2014 Risk Assessment modeled risks for a total of 122 landfills and 163 impoundments that were ultimately excluded from the final summary of national risks because it was determined that these units fell outside the scope of the 2015 CCR Rule. These units were excluded because they were anticipated to cease receipt of waste prior to the effective date of the rule. Therefore, model results for these previously excluded units directly address the historical and inactive units subject to the current rulemaking. EPA reviewed model results for these previously excluded units to better understand whether the associated risks were any different from those of currently regulated units. For highly exposed individuals, landfills were estimated to pose cancer risks as high as 7×10^{-6} from arsenic III, while surface impoundments were estimated to pose cancer risks as high as 8×10^{-5} from arsenic III and noncancer HQs as high

as 2 for arsenic III, 2 for lithium, and 1 for molybdenum.

Differences between these risks and those for currently regulated units are attributed primarily to differences in the prevalence of engineered liners modeled for the two sets of units. The previously excluded units were modeled as having no engineered liner at 71% of landfills and 57% of impoundments, compared to 42% of landfills and 65% of impoundments for currently regulated units. For unlined units, the arsenic III risk from previously excluded units was 1×10^{-5} for landfills and 2×10^{-4} for surface impoundments, while corresponding risk from regulated units were 2×10^{-5} for landfills and 3×10^{-4} for surface impoundments. Since all of this modeling was completed in 2014, it has been discovered through facility reporting that a greater percentage of regulated units has no engineered liner than EPA previously modeled. For example, in the 2014 Risk Assessment, EPA estimated that 65% of impoundments had no engineered liner based on the EPA Surveys.³⁹ It has since become clear that even fewer impoundments are actually lined. EPA's review of available liner demonstration documents posted on facilities' CCR websites indicates closer to 83% of have no engineered liner. EPA has seen no evidence that would indicate older historical and inactive units would be lined at any greater frequency. Thus, EPA concludes that the national risks for regulated and previously excluded units will fall closer to those modeled for unlined units.

EPA reviewed available data on facility location to understand whether environmental conditions (e.g., precipitation, soil type) at inactive and active facilities could be substantially different than previously modeled. Such conditions can affect the rate of leakage from a unit and subsequent transport of that leachate through the subsurface. This review found that around 80% of the active and inactive facilities that were not subject to the 2015 CCR Rule had already been modeled as part of the 2014 Risk Assessment and so are already reflected in the risk results for those previously excluded units. The remaining 20% of facilities are located an average distance of 26 miles from the nearest modeled facility. Therefore, EPA concludes that the 2014 Risk Assessment adequately captures the effects of facility location on national risk.

³⁹ U.S. EPA. 2014. "Human and Ecological Risk Assessment of Coal Combustion Residuals." RIN 2050-AE81. Office of Solid Waste and Emergency Response. Washington, DC. December.

Commenters stated that the smaller size of historical and inactive disposal units would result in lower volumes of leakage and could not sustain plumes of the same magnitude as from larger regulated units. EPA reviewed data from the EPA Surveys to determine whether the sizes of previously excluded units are substantially different than EPA modeled for currently regulated units. This comparison indicates that excluded units do tend to be somewhat smaller. The average size modeled for excluded units was 77 acres for landfills and 28 acres for impoundments. The average size modeled for regulated units was 107 acres for landfills and 47 acres for impoundments. Despite these differences, there remains a great deal of overlap in the range of sizes for both sets of units. Further, as described above, similar risks were identified for both sets of units. Thus, there is no indication that size differences of this magnitude have any notable effect on national risk. Nor is there any information available about the units not captured in the EPA Surveys that would indicate these remaining units are significantly smaller. Therefore, EPA concludes that the 2014 Risk Assessment adequately captures the effects of unit size on national risk.

iii. CCRMU Fill Groundwater Risk

EPA conducted national-scale modeling of CCRMU fills to understand the potential groundwater risks that could result from these smaller placements of CCR. The exposure route evaluated for was human ingestion of groundwater used as a source of drinking water. The evaluation incorporated many of the same data sources used in the 2014 Risk Assessment to characterize the variability of site conditions. Two models were used to evaluate contaminant fate and transport, EPACMTP and MODFLOW-USG. EPACMTP was run first at specified distances along the centerline of the plume to understand the potential for releases to occur and spread further downgradient. MODFLOW-USG was then run for a subset of the conditions to understand the broader magnitude and extent of these plumes.

Groundwater concentrations modeled with EPACMTP at the waste boundary were first compared to respective GWPS to understand the potential for fills to impact groundwater quality to an extent that would trigger corrective action at regulated landfills. The 90th percentile concentrations exceeded GWPS by factors of 26 for arsenic III, 19 for arsenic V, 156 for molybdenum, and 19 for thallium. The 50th percentile

concentrations exceeded GWPS by a factor of two for molybdenum. Based on these results, EPA finds that CCRMU fills can meaningfully contribute to groundwater contamination across a facility.

Groundwater concentrations modeled with EPACMTP at 500 and 1,000 feet away from the waste boundary were used calculate risks to individual RME receptors exposed to these concentrations. The 90th percentile concentration of each modeled constituent exceeded at least one risk benchmark at 1,000 feet. This indicates potential for leakage from fills to spread at environmentally significant concentrations. However, because these model runs represent concentrations at a fixed location, they do not provide broader information about the magnitude and extent of the plume. As a result, EPA does not rely primarily on these results to draw direct conclusions about overall risk. Instead, the Agency retained a subset of these model runs for both arsenic V and molybdenum from around the 90th percentile concentrations modeled at 1,000 ft. EPA selected pentavalent arsenic because it is the less mobile species and so provides a reasonable bounding on the high-end concentrations that can result for this contaminant. These runs were retained for further modeling with MODFLOW-USG to characterize the full magnitude and extent of each plume over time.

The MODFLOW-USG runs were designed with the same inputs as corresponding EPACMTP runs. Altogether, these model runs reflect a range of conditions that collectively resulted in high-end groundwater concentrations 1,000 feet from the fill. These corresponding placements of CCR range from around 3,500 to 70,000 tons placed over areas between 0.15 to 2.0 acres. EPA calculated the midpoint across these runs to define values representative of the 90th percentile model runs. For arsenic V, the model identified a peak risk of 1×10^{-4} averaged over 32 million gallons (Mgal) of groundwater and a peak volume of 147 Mgal with an average risk of 7×10^{-5} . The same leakage of arsenic V would result in a peak GWPS exceedance of three averaged over a plume volume of 1.2 Mgal and a peak plume volume of 8 Mgal with an average exceedance of 2 times GWPS. It would take around 2,300 years from the time of first exceedance for the plume to fully dissipate. For molybdenum, the peak exceedance of both risk benchmark and GWPS was 10 averaged over a plume volume of 27 Mgal and a peak plume volume of 80 Mgal with an

average exceedance of 4 times GWPS. It would take around 100 years from the time of first exceedance for the plume to fully dissipate. Plumes of these size and duration could readily sustain exposures for typical residential receptors that are anticipated to use around 80 gallons of water a day for all indoor household needs, resulting in less than 0.8 Mgal of use over 26 years of exposure.

iv. CCRMU Fill Soil Risk

EPA modeled of CCRMU fills to understand the potential risks that could result from CCR present in the soil. Exposure routes initially considered for evaluation were human inhalation of radon gas and direct exposure to gamma radiation emitted from the CCR. However, based on a preliminary review of available data, EPA determined that radon emanation from CCR (*i.e.*, fraction of radon able to escape into the surrounding air) is generally lower than from most soils. Despite the higher overall activity of CCR, the resulting radon emanation from the ash is not distinguishable from that of most surface soils. Therefore, EPA did not retain exposure to radon for further consideration.

Modeling of exposure to gamma radiation was conducted with the EPA PRG calculator. EPA evaluated the potential for direct exposure to gamma radiation from CCR under a soil cover ranging in thickness from 60 to 20 cm (2 to 0.66 feet). EPA compared the combined activity of the uranium-238 and thorium-232 decay chains in the CCR to the health benchmarks for each cover thickness to calculate the risks that could result from receptors living on or near the fill. Both 90th and 50th percentile activities have potential to result in cancer risks at or above 1×10^{-5} with a cover of 40 cm. The 90th percentile activity resulted in a cancer risk of 1×10^{-4} with a cover of 20 cm. This indicated the potential for even higher risk if the cover were to be disturbed and the CCR brought to the ground surface. However, evaluation of this scenario would require additional assumptions about the degree of mixing, which could be a major source of uncertainty on a national scale. Therefore, EPA retained this scenario for further consideration as part of a separate sensitivity analysis.

v. Uncertainty and Sensitivity Analyses

EPA reviewed the models used, as well as the data and assumptions input into the models, to better understand the potential sources of uncertainty inherent in the model results. The Agency qualitatively and, to the extent

possible, quantitatively analyzed these sources to understand the potential effects each may have on modeled risks. EPA also conducted further sensitivity analyses to understand how the modeled national risks vary in response to changes in sensitive parameters and to evaluate the potential for risks through exposure pathways that could not be fully modeled on a national scale.

The major source of uncertainty identified for the groundwater model is the potential for greater risk from multiple units located in close proximity. The EPA Surveys did not provide information on the relative location or orientation of different landfills and impoundments at any given facility and so the 2014 Risk Assessment modeled risks from each unit individually. However, the Agency is now aware of many instances where multiple units are located directly adjacent to one another, resulting in a larger total area over which leakage can occur. This could result in greater cumulative risk to offsite receptors than predicted based on contributions from each individual unit. Furthermore, there is potential for legacy impoundments and CCRMU (disposal units and fill) to confound groundwater monitoring programs when located upgradient of a regulated unit. Ongoing leakage from these unregulated units has the potential to skew the characterization of background groundwater quality. Under these circumstances, any leakage from a regulated unit would need to progress even further and faster to be distinguishable from that skewed background. This could delay or entirely prevent a regulated unit from entering into corrective action, resulting in risk to downgradient receptors.

EPA conducted a sensitivity analysis to determine whether there is a unit size below which adverse impacts to groundwater quality are unlikely and monitoring is not warranted. This analysis found exceedances of GWPS are possible for placements below 1,000 tons. Thus, such placements can meaningfully contribute to groundwater contamination at these facilities. It was not possible to identify a limit much lower than this tonnage because of the few model runs conducted at smaller amounts. Extrapolation beyond available model runs could introduce a great deal of uncertainty into any specific limit identified. The extent to which any identified limit could shift higher or lower in response to further modeling around these lowest tonnages is not known. Therefore, the Agency could not identify a lower limit based on the current modeling.

EPA conducted further sensitivity analyses to better characterize the risks to human health that may result from mixing of CCR with the soil. There is little data available to predict the likelihood of different degrees of mixing that could occur across the country. Instead, EPA considered the incremental contributions from CCR through increased mixing with soil to identify the point at which accumulation would raise concern. This analysis focused on radionuclides previously identified as potential risk drivers for soil, but also considered contributions from arsenic that may further contribute to cancer risk. The exposure pathways considered were incidental ingestion of the CCR and soil mixture and direct exposure to gamma radiation. For radionuclides, cancer risks above 1×10^{-4} are possible for residential receptors at mixing of more than 11% for 90th percentile activity and 21% for 50th percentile activity. For arsenic, cancer risks above 1×10^{-4} are possible at mixing of more than 33% for 90th percentile concentration, but would not occur at any degree of mixing for 50th percentile concentration. Both radionuclides and arsenic also occur naturally in soil; however, levels in CCR can be markedly higher than typical background levels. In particular, EPA has identified the potential for CCR to have a combined radium activity nearly 10 pCi/g above typical background soils. This is greater than the ARAR that has been applied at some cleanups for surface and subsurface soils under Superfund and State programs. As such, consideration of the incremental increase above background does not alter the overall results of this analysis. Therefore, EPA concludes that accumulation of CCR within the soil column can result in risks within the range that EPA considers or regulation.

EPA separately considered the potential for risk to ecological receptors that may result from mixing of CCR with the soil based on comments received that a future use for these facilities could be as a nature preserve. EPA calculated the incremental contributions from CCR as described above and compared the resulting concentrations to available ecological benchmarks. This analysis focused on constituents for which ecological soil screening levels are available. This comparison indicates that antimony, selenium, and vanadium are most likely to drive risk and require further evaluation at both high-end and median ash concentrations. In some cases, ecological benchmarks are lower than typical background soil levels. However, consideration of the

incremental increase above background does not alter overall results. Therefore, the potential for risk from accumulation of CCR within the soil column remains even if future residential land use is not anticipated.

vi. Final Conclusions

Based on the analyses summarized in the current risk assessment, EPA concludes that there is a reasonable probability of adverse effects on health and the environment due to leakage from legacy CCR surface impoundments and CCRMU. EPA's assessment estimates that the risks that leakage from these units would adversely impact groundwater quality and pose risk to future receptors fall within the range EPA typically considers warrants regulation under section 4004(a) (*i.e.*, cancer risks greater than 1×10^{-5} and non-cancer risks exceeding an HQ of 1). Older historical and inactive disposal units can pose risks to offsite receptors substantially the same as previously reported for currently regulated units. Smaller CCRMU fills can pose risk to onsite receptors and materially contribute to broader groundwater contamination across the facility. Depending on the location of these fills, they can also pose risk to offsite receptors. The risks identified for CCRMU fills are also believed to provide a bounding estimate on the risks posed by disposal units, as leakage from these larger units would generally be expected to result in more extensive releases than modeled for fills. Risks to human health from groundwater are anticipated to be driven by ingestion of arsenic, lithium, molybdenum, and/or thallium. Health effects associated with arsenic ingestion are an increase in the risk of cancer in the skin, liver, bladder, and lungs, as well as nausea, vomiting, abnormal heart rhythm, and damage to blood vessels. Health effects associated with ingestion of lithium are neurological and psychiatric effects, decreased thyroid function, renal effects, cardiovascular effects, skin eruptions, and gastrointestinal effects. Health effects associated with molybdenum ingestion are higher levels of uric acid in the blood, gout-like symptoms, and anemia. Health effects associated with thallium ingestion are hair loss, ocular effects, and behavioral changes.

EPA also concludes the unmonitored accumulation of CCR in surface and subsurface soils has the potential to result in risk to future human and ecological receptors in the range OLEM typically considers for regulation. Potential human health risks are driven by incidental ingestion of ash mixed

with the soil and direct exposure to gamma radiation from radium and its associated decay chains. Health effects attributed to radium exposure include increased risk of several types of cancer, particularly lung and bone cancer. Potential ecological risks are driven by exposure to antimony for mammals, selenium for plants and mammals, and vanadium for birds from ash mixed with the soil. Health effects attributed to these exposures are decreased reproduction, growth, or survival. EPA did not seek to identify a comprehensive list of other contaminants that might also contribute to risk as part of the current assessment; however, any further risk would be equally addressed by controls put in place to mitigate the identified soil risks.

B. Legacy CCR Surface Impoundment Requirements

The Agency is amending the CCR regulations in 40 CFR part 257, subpart D to require legacy CCR surface impoundments to comply with the same regulations that apply to inactive CCR impoundments at active facilities, except for the location restrictions (at §§ 257.60–257.64) and liner design criteria (at § 257.71). EPA is also establishing new requirements to address issues specific to legacy CCR surface impoundments. Finally, EPA is establishing new compliance deadlines for legacy CCR surface impoundments.

1. Definition of a “Legacy CCR Surface Impoundment”

EPA is finalizing the proposed definition of a “legacy CCR surface impoundment” without revision. A legacy CCR surface impoundment must meet three criteria: (1) The unit meets the definition of a CCR surface impoundment; (2) The unit contains both CCR and liquids on or after October 19, 2015; and (3) The unit is located at an inactive electric utility or independent power producer. An inactive impoundment must meet all three criteria to be a legacy CCR surface impoundment. This definition is codified in § 257.53.

EPA estimates there are 194 legacy CCR surface impoundments located at 85 facilities that will be subject to the requirements of this final rule.⁴⁰ This estimate also takes into account the information received in response to the Agency's lists of potential legacy CCR surface impoundments published in the dockets with the proposed rule and

⁴⁰ An updated list of potential legacy CCR surface impoundments can be found in the docket for this action. See document titled “Universe of Legacy CCR Surface Impoundments. April 2024.”

subsequent notice of data availability. This estimate is an increase from the 127 legacy CCR surface impoundments located at 59 facilities identified in the proposed rule. 88 FR 32028.

The sections below briefly explain what EPA proposed, summarize the public comments received, and provide the Agency's responses.⁴¹ The Agency addresses several aspects of the definition in the following order: (1) Date for determining applicability; (2) The requirement to contain both CCR and liquids; and (3) The requirement to be located at an inactive facility.

a. Legacy CCR Surface Impoundment—Date for Determining Applicability

EPA explained in the proposed rule that the 2015 CCR Rule exempted “inactive surface impoundments at an inactive facility” and codified definitions of an “inactive CCR surface impoundment” and an “active facility or active electric utility.” The Agency further stated that in developing a definition of a “legacy CCR surface impoundment” two separate components need to be addressed: (1) The definition of an “inactive CCR surface impoundment”; and (2) The definition of an “inactive facility or electric utility.” 88 FR 31989.

At proposal, the Agency relied on the existing definitions of an “inactive CCR surface impoundment” and “active facility or active electric utilities or independent power producers,” as well as the 2018 *USWAG* decision to inform the options discussed. Specifically, EPA explained that both terms establish applicability based in part on the effective date of the 2015 CCR Rule—a unit is an “inactive CCR surface impoundment” if it does not receive CCR on or after October 19, 2015, and still contains both CCR and liquids on or after October 19, 2015, and an “active facility or active electric utilities or independent power producers” is only active if it was in operation on or after October 19, 2015. 40 CFR 257.53.

The Agency proposed to define a legacy CCR surface impoundment, in part, as a surface impoundment that contained both CCR and liquids on or after October 19, 2015. EPA explained in the proposed rule, that using October 19, 2015 as the date to determine applicability was most consistent with the *USWAG* decision; first because legacy CCR surface impoundments would be regulated the same as the currently regulated inactive impoundments at active facilities.

Second, an October 19, 2015 applicability date would restore the status quo, as intended by court's decision to vacate the exemption. EPA also concluded that this was the most protective option. 88 FR 31990–31991. However, as an alternative, the Agency also solicited comment on defining a legacy impoundment as a unit that contains both CCR and liquids on or after the effective date of this final rule in 2024. 88 FR 31991–92.⁴²

Several commenters opposed the proposed applicability date of October 19, 2015, stating that the only legally defensible and workable approach is to establish an applicability date based on the effective date of this final rule. Some of these commenters argued that an applicability date of October 19, 2015, would constitute a retroactive rule, which they considered to be both legally impermissible and unreasonable. These commenters stated that establishing an applicability date based on the effective date of this final rule would honor the bedrock administrative principle that “rules should apply prospectively absent express statutory grant” consistent with *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208–09 (1988).

Other commenters stated that EPA was overreading the *USWAG* decision and inappropriately interpreting the court's decision. These commenters stated that the court did not specify how legacy impoundments should be regulated, or the appropriate applicability date and regulatory controls that should apply to the units but remanded those issues to EPA to address through rulemaking. These commenters further stated that the court's ruling was based on the administrative record for the 2015 CCR Rule, which they claimed is very different than the current record for the facilities that would be covered by the proposal. According to these commenters, the court was focused only on those legacy impoundments for which significant risks remained, which they characterized as exclusively CCR surface impoundments with a hydraulic head. These commenters argue that, by contrast, the proposal will also apply to CCR surface impoundments for which EPA has failed to demonstrate any significant level of risk, which they characterized as (1) CCR impoundments that contain “any amount of water,” but no hydraulic head; and (2) CCR

impoundments that are in the process of closing or have completed closure.

Several commenters similarly raised concern that the proposal ignores that there have been numerous changes since the court issued its decision in 2018. For example, some commenters stated that facilities have proactively worked with their States to close these impoundments and have invested substantial resources to close these units in compliance with existing regulatory requirements and thus these units should not be considered legacy impoundments. According to these commenters, the final rule should take into account the significant closure and corrective action work that has been undertaken since the 2015 CCR Rule was promulgated, rather than assuming the landscape has not changed over subsequent years.

In addition, a number of commenters noted that the proposed definition would capture numerous sites where former legacy CCR surface impoundments were closed by removal under then-applicable State regulations and where no CCR remains. These commenters raised concern that EPA lacks jurisdiction under RCRA to impose requirements at a site once all CCR has been removed. Many of these commenters further asserted that EPA should accept such closure as sufficient to protect the environment and not seek to impose an unnecessary set of requirements. Finally, some commenters explained that some of these sites have subsequently been restored and are now home to established natural ecosystems, and thus it would be counterproductive to require them to be disturbed.

By contrast, a number of commenters asserted that the record has not significantly changed since the court issued its opinion. These commenters stated that all legacy impoundments, including those that have been dewatered or completed closure, pose significant risks to human health and the environment that warrant regulation under RCRA. Citing the *USWAG* decision and EPA's findings from the 2015 CCR Rule and the proposal, these commenters stated that the risks associated with legacy impoundments are greater than currently regulated units because they are more likely than regulated ponds to be unlined, more likely not to have been designed by a professional engineer, and more likely to contain a mix of ash and coal refuse, all of which increase the potential for groundwater contamination. The commenters further noted that harm from contaminant releases from legacy ponds worsens as time passes, citing the

⁴¹ EPA's responses to public comments can be found either in this preamble or the Response to Comments document available in the docket.

⁴² EPA also published an ANPRM on October 14, 2020 (85 FR 65015). The Agency solicited input on a potential definition of a legacy CCR surface impoundment in the ANPRM and addressed comments to the ANPRM in the subsequent proposal. 88 FR 31989–91.

finding in EPA's 2014 Risk Assessment that peak contaminant releases from CCR surface impoundments will not occur until 70 years after waste placement.

These commenters also estimated that close to half a million people live within 1 mile of the 417 active and inactive coal-fired power plants in 44 States and Puerto Rico that have reported coal ash units. Using the Council on Environmental Quality's (CEQ) Climate and Economic Justice Screening Tool (CEJST), the commentor estimated that approximately half (213) of the facilities are located within a mile of a disadvantaged community, while over 70% of the facilities (297 of 417) are located near a community that has higher-than-State average levels of low-income populations or populations of color. These commenters also estimated that many of the communities living nearby may experience cumulative impacts from other threats. CEJST offers data at the census tract-level on PM_{2.5} exposure, diesel particulate matter, traffic proximity, abandoned mine land, formerly used defense sites, hazardous waste site proximity, Superfund site proximity, underground storage tanks and releases, wastewater discharge, and Risk Management Plan site proximity. According to the commentor, using CEJST, more than half of the 417 power plants with historic or active ash units (214) are within one mile of a census tract that experiences pollution from at least two of these additional sources to a degree higher than that of 75% of all census tracts in the United States.

The commenters also discussed several individual legacy impoundments with longstanding groundwater contamination, noting that for several plants, due to lack of Federal regulation and oversight, little or no action has been taken to remediate clearly documented contamination. Among those they highlighted were:

- At the Muskingum River Power Plant, where onsite groundwater has exceeded the primary EPA MCLs for barium and gross alpha as well as EPA secondary MCLs (SMCLs) for iron, sulfate, and Total Dissolved Solids. According to the commenter no remediation has occurred to date.
- At the retired Dynevig Vermilion Power Station in Oakwood, Illinois, 70-year-old unstable pits with more than 3 million tons of CCR are leaking CCR constituents into Illinois' only National Scenic River. The pits run along the river for a half-mile where kayaking and other recreational activities are common.
- At American Electric Power's retired Tanners Creek in Lawrenceburg,

Indiana, leaking ash pits at the plant are contaminating groundwater with high levels of boron within 500 feet of public drinking water wells and the Ohio River.

- At Georgia Power's retired Plant Arkwright, the unlined abandoned ash ponds have been leaking chemicals, such as boron, at levels above health standards into the groundwater and nearby Ocmulgee River for nearly 20 years, according to a peer-reviewed study.⁴³

According to these commenters, substantial risks to human health and the environment remain even where the impoundment has been dewatered or closed. In support of this conclusion, the commenters pointed to EPA's explanation in the proposal that even if impoundments have been at least partially dewatered or have undergone some type of closure, the current risks to human health and the environment can still be significant, due to contamination remaining at the site from releases that occurred while the unit was operating. Referencing data that legacy impoundments are, on average, 55 years old, the commenters also pointed to the proposal's explanation that the potential magnitude of releases from older units are greater than for currently regulated CCR units due to a number of factors, including (1) the likely absence of a liner in older impoundments; (2) the mixture of coal ash with coal refuse, which was a common disposal practice in older units; and (3) the older a CCR unit is, the longer it has had to leak and for hazardous constituents to migrate further from the unit. The commenters also discussed the results of a report, "Assessment of Legacy Surface Impoundments" by Gordon Johnson, M.Sc., P.Eng., which examined ten CCR surface impoundments at inactive facilities that were not on EPA's list of potential legacy ponds and do not appear to contain standing water, and concludes that all posed significant risks to health and the environment.

As a consequence, these commenters criticized EPA's proposed definition of a legacy impoundment as one that contains liquid on or after October 19, 2015. These commenters argue that this would exclude surface impoundments at inactive plants that pose a reasonable probability of adverse effects on health and environment, whether or not they contain liquid.

⁴³ J.S. Harkness et al., Evidence for Coal Ash Ponds Leaking in the Southeastern United States. *Environmental Science & Technology*, 50(12): 6583–6592 (2016).

Several commenters also supported EPA's proposal to regulate units at sites that are heavily vegetated or redeveloped on the surface with established natural ecosystems, stating that the possibility that conducting a proper closure might disrupt the current land use is outweighed by the fact that inadequately closed units pose ongoing threats to health and the environment. These commenters also supported coverage of legacy impoundments that had completed or were undergoing closure pursuant to State programs, citing EPA's review of State programs as part of the 2015 CCR Rule, which concluded that significant gaps remain in many State programs, and discussing specific examples of problematic State permits.

Some commenters also stated that the proposed applicability date of October 19, 2015, presents serious practical challenges to implementation because it requires facilities to look back more than eight years to determine the historical status of legacy impoundments. Commenters explained that this extended look-back period could prove to be an impossible task for sites where power plant operations ceased decades ago. Furthermore, the proposed applicability date illegally requires actions by facilities that are physically impossible. For example, operating records, construction and inspection reports, groundwater monitoring data, and employee testimonials may not exist for some facilities that ceased generating power decades ago. In addition, commenters pointed out that historic aerial photography will not inform whether liquids are present beneath the surface of the inactive impoundments. Finally, some commenters stated that EPA's proposed approach is particularly challenging to small public power utilities given their size, staffing levels, and record retention policies once a facility is closed.

After considering the comments and all of the information in the record, this final rule adopts the proposed date of October 19, 2015, for determining applicability for legacy CCR surface impoundments. This applicability date is justified for two independently sufficient reasons. First, it most effectively targets the risks to human health and environment posed by legacy impoundments. Second, it is consistent with the USWAG decision. Accordingly, this final rule specifies that an inactive impoundment at an inactive facility that contained both CCR and liquids on or after October 19, 2015, is a legacy CCR surface impoundment subject to the requirements of this final rule. The

definition of a legacy CCR surface impoundment is codified in § 257.53.

This option best addresses the risks legacy impoundments pose to human health and the environment. EPA's record for this rule, which includes the 2015 rulemaking record, supplemented by new information, establishes that that the environmental risks posed by legacy impoundments are greater than or similar to those posed by operating impoundments. EPA acknowledges that it is not bound by the 2015 rulemaking record that the court reviewed in *USWAG*—and, as just stated, in fact has supplemented that record with new information for this rulemaking. EPA further acknowledges that since the 2015 CCR Rule and the *USWAG* decision some units have closed or have begun to close in accordance with State permits, or on their own initiative in response to the D.C. Circuit's ruling. But EPA disagrees that the record shows that the risks to human health and the environment posed by the legacy impoundments regulated under this final rule are significantly or meaningfully lower than the risks the court found to be unacceptable in *USWAG*. In fact, as described in III.A.4 of this preamble, the record instead demonstrates that the totality of the risks is potentially greater than EPA estimated in 2014.

A subset of legacy impoundments is identical to those described in *USWAG*; the impoundments are structurally unstable and pose significant risk of contaminating groundwater because they are unlined, with a hydraulic head promotes the continual leaching of contaminants from the CCR and drives the resulting leachate into underlying soils and potentially into the underlying aquifer. No commenter disagreed that these legacy impoundments warrant regulation under part 257.

Another subset, on which many of the commenters largely focused, have been fully or partially dewatered, or have completed some form of closure. In response to the proposal, EPA received information that since October 19, 2015, 22 surface impoundments at inactive facilities have closed by removal or are in the process of closing by removal, and 10 surface impoundments have closed with waste in place, either with oversight from a State agency or on their own initiative in response to the *USWAG* decision. These commenters claimed that, as a consequence of dewatering their units, the units no longer pose any appreciable risk.

EPA agrees that once the water in the impoundment has been reduced the likelihood of structural failure will also have been reduced; and if the liquid and

or CCR have been entirely removed there will be no appreciable risk of structural failure. But these units nevertheless continue to present significant risk to human health and the environment as a consequence of existing—and in some cases, continuing—groundwater contamination. This contamination can exist even where CCR has been entirely removed from the disposal unit. First, in many cases facilities have only removed some of the free liquids in the impoundment; that is, have only partially dewatered. As described in Unit III.B.2.g of this preamble, many commenters claimed that under the existing closure regulations they are only required to eliminate free liquids to the extent necessary to support heavy machinery or other construction activities (*i.e.*, to the extent necessary to support the cover system), rather than to eliminate free liquids without qualification, as the regulation requires. Such units present essentially the same environmental and human health risks the *USWAG* court was concerned with. Second, to the extent a unit intersects with groundwater, free liquids will remain (because the groundwater is continually saturating the CCR), and the unit will continue to present significant risks, because the same conditions that promote the rapid leaching of contaminants in operating units are present, and will persist indefinitely. Finally, at many of these sites the existing contamination resulting from when the unlined impoundment was operating has not been addressed. Each of these are discussed further below.

Contrary to the commenters' claims, the partial dewatering they describe does not, as they claim, “eliminate” either the hydraulic head from a unit or the risk of groundwater contamination. Until the water (liquid) is fully removed, gravity will continue to exert downward pressure on the water in the saturated waste until it reaches equilibrium with the water table. Thus, although reducing the water in the unit also reduces hydraulic head, hydraulic head will be present as long as water remains in the unit.

Hydraulic head represents the energy to move a liquid. Liquid flows from locations of higher hydraulic head to locations of lower hydraulic head. A simple illustration of hydraulic head is the water percolating through (*i.e.*, exerting downward pressure on) coffee grounds into the cup below. As the water moves through the solids, particles of the solids combine with the water (create leachate) and drain downward. Even after the water is no longer visible above or among the coffee

grounds, liquids continue to drain into the cup below.

In a diked impoundment located above the water table, after the removal of free standing (or “ponded”) water, the CCR in the unit would still remain saturated with liquids (*i.e.*, the free liquid ⁴⁴ and/or porewater). Once the CCR material is saturated, some liquids may remain bound within the CCR due to retention forces. However, the remaining (free) liquids will drain in response to gravity and hydraulic head. Because the saturated waste is at a higher elevation than the normal water table, the free liquids within the saturated waste would continue to drain toward the normal water table (“exert downward pressure”) even if the unit no longer contained ponded water on top of the CCR. Until the water is eliminated from the CCR, gravity will continue to exert downward pressure on the water in the saturated waste, but at some point, gravity will be insufficient to overcome the retention forces in the CCR. Until that point, free liquids will continue to drain until they reach the water table. Continued contact with free liquids causes the metals and other constituents to leach out of the CCR, and the downward pressure of the hydraulic head drives the resulting leachate toward the bottom and sides of the unit. In an unlined unit, which the overwhelming majority of legacy impoundments are likely to be, any remaining free liquids saturating the CCR in the impoundment will eventually leak out of the unit into the surrounding soil and/or into the aquifer, along with any CCR constituents that have leached from the waste in the interim. As mentioned previously, it is important to note that after this draining occurs, some liquids will remain bound within the pore spaces of the CCR material and will not readily drain under ambient temperature and pressure. Consequently, these residual liquids are not free liquids. Because any remaining residual liquids (*e.g.*, bound porewater or potential leachate) will not continue to drain from the unit absent other forces, further releases of these residual liquids are not likely.

By contrast, when some portion of the unit has been constructed in or below the water table, even if the hydraulic head is reduced by the removal of free-standing or ponded water, hydraulic head remains present as long as groundwater flows through the unit

⁴⁴ Free liquids are any liquids that readily separate from the solid portion of a waste at ambient temperature and pressure. § 257.53. In the example described above, free liquids are the liquids that drain from the coffee into the cup below.

from higher groundwater elevations to lower groundwater elevations. And even where the CCR above the water table in such a unit has been partially or fully dewatered, the “conditions that promote rapid leaching of contaminants” still remain as a consequence of the continued saturation of CCR in the unit from groundwater infiltrating the unit.

As EPA explained in Unit III.A.2 of this preamble, a CCR landfill saturated with water during operation, either continuously or intermittently, would behave more like an operating CCR surface impoundment even though such a unit would not have the level of hydraulic head from ponded water present in an operating impoundment. The same is true of a dewatered legacy impoundment constructed in or below the water table. See also 88 FR 32011. The hydraulic head from the ponded water in an operating impoundment unit allows for continual leaching of contaminants from CCR and drives the resulting leachate into the underlying soils and potentially into the underlying aquifer. However, where any part of the unit is actually constructed below the water table, the conditions caused by the continuous saturation of the CCR by the groundwater flowing in and out of the unit allow the contaminants to continuously leach directly into the nearby ground and surface waters even without any downward pressure from hydraulic head pushing leachate out of the unit. *Id.*

The record shows that significant numbers of the currently regulated CCR surface impoundments were constructed such that the base of the unit intersects with groundwater,⁴⁵ and that many inactive, or even “closed,” impoundments continue to impound water below the water table (*i.e.*, contain liquids).

In any event, even if an impoundment has been completely dewatered, the current absence of impounded water does not remediate the releases that occurred during operation of the unit. In general, legacy impoundments are likely to have been present for longer than the currently operating units: For example, one commenter presented information to demonstrate that legacy impoundments are, on average, 55 years old; by comparison, EPA estimated in 2015 that most currently operating surface impoundments were between 20 and 40 years old. See 80 FR 21327. This is significant in two regards: (1) The

older the impoundment the greater the likelihood it is unlined; and (2) The more time the unlined unit would have to leak and for hazardous constituents to migrate further from the unit.

Consequently, previous and ongoing releases could potentially be greater and have migrated further from the unit than releases from the universe of currently regulated units. In this regard, it is notable that EPA estimated in its 2014 Risk Assessment that peak contaminant releases from CCR surface impoundments will not occur until 70 years after waste placement. This is further confirmed by the modeling originally conducted in 2014 for legacy impoundments.

Furthermore, as described in Unit III.A there are a number of additional reasons to believe that the potential magnitude of releases is even greater than EPA originally estimated in 2014. These include: (1) The likely absence of a liner at older impoundments; and (2) The greater likelihood that coal ash was managed with coal refuse, which was a common disposal practice in older units.

Finally, defining a legacy impoundment as one that contains both CCR and liquid on or after October 19, 2015, retains oversight of units that may have been dewatered but have not yet completed closure. In any unit without an effective cover system, precipitation can continue to freely migrate into the unit, and any leachate generated as a result would be a potential ongoing source of contamination, particularly where the unit is already leaking or in contact with groundwater. Further, significant risks can remain if a unit is not closed properly; for example, a closure that leaves that millions of tons of CCR saturated with groundwater and only a cover system to control downward infiltration of precipitation will not protect human health and the environment. And, as discussed in further detail in the next section, even at sites where the CCR has been completely removed from the impoundment it is possible that, in addition to the likely significant groundwater contamination present at the site, contaminated soil remains, which can serve as a source of further contamination. See, Unit III.B.1.b.ii.(a).

EPA acknowledges that some of these units may be closing pursuant to State laws that provide for a significant degree of State involvement and oversight, but that is not universally the case. As EPA concluded in 2015, there is a wide range of protectiveness in State programs. Clear deficiencies were present in some State regulatory programs, and questions remained with

respect to others. See, 80 FR 21326–21327, 21456 and Unit III.B.g.iii. EPA is aware that some State programs have been substantially revised since 2015, and some individual States provided additional information regarding their programs in their comments, but again this is not universal. For example, some commenters documented recent State approved closures that were deemed complete despite the absence of any groundwater monitoring to determine whether groundwater contamination remained at the site. The absence of a consistent, sufficiently protective approach among all State programs reinforces the need for a single, protective Federal standard.

EPA also continues to believe that an applicability date of October 19, 2015, is the most consistent with the *USWAG* decision. See, 88 FR 31991. The Court expressly found that EPA’s record for the 2015 CCR Rule demonstrated that legacy ponds “pose the same substantial threats to human health and the environment as the riskiest Coal Residuals disposal methods, compounded by diminished preventative and remediation oversight due to the absence of an on-site owner and daily monitoring.” 901 F.3d at 432. EPA agrees with this conclusion that legacy ponds “pose substantial risk to human health and the environment.” *Id.* Consistent with that determination, the final rule imposes essentially the same requirements on legacy CCR surface impoundments that currently apply to inactive impoundments at active facilities. In addition, as EPA explained in the proposed rule, D.C. Circuit’s decision setting aside the exemption for inactive impoundments meant that these impoundments were similarly situated to the impoundments regulated by the 2015 CCR Rule. EPA thus had an obligation to address the substantial environmental risks from those impoundments through regulation. By setting aside, rather than simply remanding the exemption back to the Agency for further explanation, the Court made clear that the existing record was sufficient for these units to be regulated.

Nor is EPA persuaded by the commenters’ remaining objections to the applicability date of October 19, 2015. EPA disagrees that reliance on the effective date of the 2015 CCR Rule would constitute a retroactive application of law. A regulation is impermissibly retroactive where, absent clear Congressional intent, the rule changes the past legal consequences of past conduct. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). This is generally referred to as primary

⁴⁵ EPA’s review of the location restrictions demonstrations posted on facilities’ CCR websites found that approximately 31% of operating impoundments have waste below the water table. There is no reason to believe that this percentage is not also representative of legacy impoundments.

retroactivity. See *Bergerco Canada, a Div. of Conagra, Ltd. v. U.S. Treasury Dep't, Off. of Foreign Assets Control*, 129 F.3d 189, 192 (D.C. Cir. 1997). Rules can also affect the legal rights flowing from past acts. See *Bergerco*, 129 F.3d at 192. This is referred to a secondary retroactivity. *Id.* Such effects are common, and permissible so long as they are not arbitrary or capricious. The D.C. Circuit in *Bergerco* noted that a rule may be arbitrary or capricious if it “makes worthless substantial past investment incurred in reliance upon the prior rule.” *Id.*

Here EPA is merely relying on a past fact to support the future application of regulations. And because EPA has established future compliance dates, no facility would be subject to penalties solely because one of its legacy CCR surface impoundments was out of compliance with the regulatory requirements prior to the effective date of this final rule. Thus, the rule is not primarily retroactive.

To the extent the rule has secondary retroactive effects in upsetting parties' expectations of regulation of legacy CCR surface impoundments and CCMRU, such effects are permissible. First, the D.C. Circuit considered and rejected this same argument in *Util. Solid Waste Activities Grp. v. Env't Prot. Agency*, 901 F.3d 414 (D.C. Cir. 2018). There, industry petitioners argued that EPA lacked statutory authority to regulated legacy CCR surface impoundments because such regulation would be retroactive. The D.C. Circuit held that “straightforward reading of the statute's language allows for the regulation of inactive sites.” *Id.* at 439. In short, as facilities “where solid waste is disposed of,” 42 U.S.C. 6903(14), inactive impoundments are “open dumps,” And no one denies that the EPA has authority to regulate (and to prohibit) “open dumps.” *Id.* at 441.

Moreover, as explained in detail below, EPA rationally explained why regulation was necessary and appropriate here notwithstanding facilities' reliance interests. EPA understands that facilities may have closed legacy impoundments and treated CCMRU in compliance with State law requirements, or otherwise made business decisions premised on the absence of Federal regulation. EPA has taken these reliance interests into account in developing the regulations here. As explained below, EPA surveyed State regulation of legacy impoundments and CCMRU and concluded that, on the whole, such regulations were not sufficiently protective, and did not meet RCRA's standard. Uniform, national regulation

was therefore necessary to ensure adequate protection of human health and the environment. To be sure, EPA recognizes that it is possible that some legacy impoundments, for example, may have been closed in a manner that is protective. But, due to the absence of adequate groundwater monitoring and other data, the adequacy of such closures cannot be verified. EPA has also accounted for other reliance interests, including renewable facilities' use of land containing CCRMU, in establishing compliance deadlines, and allowing for deferrals of additional closure measure where appropriate. EPA also notes that regulated entities have been on notice since the D.C. Circuit's 2018 decision in *USWAG* that Federal regulation of legacy CCR surface impoundments was forthcoming, 901 F.3d at 414.

A number of commenters also claimed that their units are heavily vegetated or developed and that reopening or other removal/remediation activities may disrupt the current use of the site. EPA acknowledges some old units may be heavily vegetated. However, no commenter submitted any data or analysis to demonstrate that, over the short or long term, removal or remediation activities would be more detrimental to health and the environment than either cleaning up the contaminated groundwater or taking measures to prevent the legacy CCR surface impoundment from contaminating groundwater.

Moreover, the fact that some impoundments have become heavily vegetated or redeveloped does not resolve the risks these unlined legacy CCR surface impoundments continue to pose. As discussed above, the risks associated with such units can be substantial. See Unit III.A of this preamble for more information. Consequently, the current record does not support an exemption for units that still contain both liquid and CCR even if the closure or remediation may disrupt the current use of the land.

As discussed in more detail in the subsequent section, EPA also disagrees that the removal of CCR from a disposal unit necessarily demonstrates that EPA lacks jurisdiction over the site. EPA's jurisdiction rests on the presence of solid waste that “is disposed of” at the site, not solely the presence of CCR. To the extent any CCR leachate or CCR constituents remain in the soil or in the aquifer at the site, solid waste remains at the site and EPA retains jurisdiction. However, as EPA stated in the proposal, the Agency agrees that it lacks jurisdiction over a site where the owner or operator can document that it meets

the standard for closure by removal in § 257.102(c). Accordingly, the final rule retains the provision specifying that any facility that documents that this standard has been met will not be subject to any further requirements. See Units III.B.2.b.iii and III.B.2.g of this preamble for further discussion.

The Agency disagrees that adopting an applicability date of October 19, 2015, requires actions that are physically impossible or that the implementation challenges cannot be addressed. The final rule does not require owners and operators to acquire historical operating records, construction and inspection reports, groundwater monitoring data, and employee testimonials where they no longer exist, or where they have never existed. EPA acknowledges that such information will not be available in some situations. Rather, EPA expects owners and operators of inactive impoundments at inactive facilities to develop a strategy to gather readily available and reliable information to determine whether the unit meets the definition of a legacy CCR surface impoundment. If, after making a good faith effort a facility is genuinely unable to obtain information to document that the impoundment contained both CCR and liquids on October 19, 2015, the unit would not be regulated as a legacy impoundment. See Unit III.B.2.b.i of the preamble for an explanation of the actions the Agency expects owners and operators to take to determine whether the inactive impoundment meets the definition of a legacy CCR surface impoundment.

Nevertheless, EPA agrees that the final rule should account for the significant closure work that has taken place at some legacy CCR surface impoundments between October 19, 2015, and the effective date of this final rule. For example, as noted, commenters provided several examples of closures that were completed prior to the effective date of this final rule. The final rule accounts for this not by exempting these units but by modifying the applicable requirements. A facility that can document that it has met the criteria in § 257.102(c) would be subject only to the requirement to document that they had met those standards. Similarly, a facility that completed closure with waste in place before the effective date of this final rule would only be subject to the closure performance standards in § 257.102(d), and the post-closure care requirements (*i.e.*, groundwater monitoring and corrective action, if necessary). In addition, a facility that completed closure under a regulatory authority's oversight and approval, such

as pursuant to a Federal or State cleanup order could be subject to even fewer requirements. Provided certain conditions have been met EPA is deferring a decision on the adequacy of such closures to a subsequent permitting authority to determine on an individual site-specific basis, whether the completed closure meets the Federal performance standards in § 257.102 or is equivalent to (*i.e.*, is as protective as) such a closure. In the interim, these units would be subject only to the requirements of a post closure care permit (*i.e.*, groundwater monitoring and corrective action, if necessary). See Unit III.B.2 of the preamble for further explanations of these provisions. As EPA stated in the proposal, units that contain liquid present different risks than those that do not, and the applicable requirements should differentiate among them accordingly on that basis. See 88 FR 31993. Consistent with that logic, while EPA agrees that legacy impoundments that were dewatered or closed prior to October 19, 2015 can still pose significant risks to human health and the environment, as discussed in the next section, the final rule retains the approach described in the proposal, and requires that an impoundment contain both liquid and CCR on or after October 19, 2015 to be regulated as a legacy impoundment.

b. Legacy CCR Surface Impoundment—Definition of an Inactive Impoundment—Contains Both Liquid and CCR

The final rule requires that to be considered a “legacy CCR surface impoundment” a CCR surface impoundment must have contained both CCR and liquids on or after October 19, 2015. In addition, the final rule further defines what it means to contain both CCR and liquid by reference to § 257.102(d)(2)(i). In this Unit of the preamble, the Agency briefly explains what was proposed, summarizes the public comments received, and provides EPA’s responses. EPA first discusses what it means for an impoundment to “contain liquids” followed by what it means to “contain CCR.”

i. What does it mean to contain liquid?

Consistent with the definition of an inactive CCR surface impoundment at active facilities under the existing regulations, EPA proposed in the May 2023 proposed rule that a legacy impoundment would be required to have contained liquids on or after October 19, 2015, in order to be subject to the requirements of this rule. In the proposed rule, EPA also responded to

comments previously raised in response to the ANPRM, alleging that the phrase “contains both CCR and liquids” was impermissibly vague. These commenters were concerned that the definition might not include those units whose bases are in contact with groundwater or that no longer have visible, standing water at the surface. EPA further responded to questions whether, based on the existing definition of an inactive CCR surface impoundment, the following would be considered a legacy CCR surface impoundment: (1) Where, prior to October 19, 2015, the facility has decanted the surface water, but, because the base of the impoundment intersects with the groundwater, water continues to flow through the impoundment and permeate the waste in the base of the unit; (2) Impoundments that contained both CCR and liquids in the past but are now closed; (3) Impoundments that contained CCR and liquids in the past but are in the process of closing on the effective date of the legacy rulemaking; and (4) Impoundments that once contained CCR and liquids but have been fully dewatered and are now maintained so as to not contain liquid.

EPA explained that the answers to these questions turn on the meaning of the terms “contain” and “liquids” in the definition of an inactive impoundment in § 257.53. Relying on dictionary definitions, EPA explained that the term “liquids” includes the free water, porewater, standing water, and groundwater in the unit, because once any are present in the unit, they have the same potential to create leachate, as well as to contribute to hydraulic head and drive flows propelled by hydraulic gradients. 88 FR 31992. EPA also explained that based on dictionary definitions an impoundment “contains” liquid if there is liquid in the impoundment, that is, it *has* water within it, even if water continues to leak from the unit. EPA also stated that as a factual matter, a surface impoundment that has only decanted the surface water would normally still contain liquid if the CCR was still saturated with water.

Accordingly, EPA explained that to the extent the unit still contains liquids on or after October 19, 2015, it is considered an inactive impoundment under the existing definition in § 257.53. EPA proposed that such units would also be considered legacy CCR surface impoundments, when located at inactive facilities. EPA also explained that under the proposal, such an impoundment would be considered a legacy CCR surface impoundment: (1) Even if it is considered “closed” under State law; (2) It is in the process of

closing on the effective date of this rule; or (3) The unit is only fully dewatered and can no longer impound liquid after October 19, 2015.

EPA further explained that to determine whether an impoundment has been dewatered, EPA relies on the existing requirements in § 257.102(d)(2)(i) (“Free liquids must be eliminated by removing liquid wastes or solidifying the remaining wastes and waste residues”). EPA explained that this provision requires a facility to eliminate both the standing liquid in the surface of the impoundment and the separable porewater in any sediment located in the base of the impoundment, regardless of the source of the standing water or porewater (*i.e.*, whether it was present in the impoundment due to surface water infiltration, intentionally added sluice water, or groundwater intrusion).

EPA also solicited comment on whether to adopt a regulatory definition of the term “liquids” to clarify that the term includes free water, porewater, standing water, and groundwater.

Finally, the Agency explained that under the existing regulations, an impoundment that did not contain liquids prior to October 19, 2015, whether because it was closed in accordance with existing State requirements or for other reasons, is not an inactive impoundment. Similarly, a unit that still contains both CCR and liquid after that date would still be considered an inactive unit even if it was closed in accordance with the requirements in effect at the time (*e.g.*, has a cover). Consistent with this definition, EPA proposed not to expand the definition of a legacy CCR surface impoundment to include units that no longer contained any liquid on October 19, 2015. 88 FR 31993.

(a) Pending Litigation Over EPA’s Regulatory Interpretations

A number of commenters claimed that the interpretation of “liquids” presented in the preamble was first announced in connection with proposed Part A determinations in January 2022, and is currently being litigated in the D.C. Circuit Court of Appeals in multiple cases combined under the name, *Electric Energy, Inc., et al. v. EPA, Case Nos. 22–1056 and 23–1035*.⁴⁶ These

⁴⁶ On January 11, 2022, EPA issued determinations on demonstrations submitted by facilities for extensions to the cease receipt of waste deadline per 40 CFR 257.103(f)(1) and 257.103(f)(2), which the Agency refers to as “Part A determinations” or “Part A”. The CCR Part A Final Rule (85 FR 53516, August 28, 2020), grants facilities the option to submit a demonstration to EPA for an extension to the deadline for unlined

commenters complained that EPA makes no mention of this litigation in the proposed rule, even as it claims that its interpretation is “sufficiently clear that a definition is not necessary.” According to these commenters, EPA must acknowledge (and make a good faith attempt to reconcile) the competing interpretations of key terms of art in the 2015 CCR Rule before extending them into this final rule. One commenter further stated that if EPA ultimately elects to adopt regulatory definitions of those terms, it should wait until the court rules so that the definitions are informed by and consistent with any such ruling.

EPA disagrees that it is necessary to wait until the court issues its decision in the pending litigation (*Electric Energy, Inc., et al. v. EPA, Case Nos. 22–1056 and 23–1035*). The central issue Petitioners raised in that case was exclusively procedural—whether EPA effectively amended the 2015 CCR Rule without going through notice and comment. Even if the D.C. Circuit addresses this procedural question, it would not resolve the substantive question EPA posed in the proposal, of whether the inclusion of a definition for the term “liquids” would provide further clarity.

Finally, EPA considers that it has more than met any obligation to “acknowledge (and make a good faith attempt to reconcile) the competing interpretations of key terms of art in the 2015 regulation,” in the proposal and again in this final rule. EPA has repeatedly explained its construction of the regulations in documents held out for public comment, including in the May 2023 proposal, and most recently, in the proposal to deny Alabama’s application for approval of its CCR permit program. See, e.g., 88 FR 31992–31993, 32025–32026, 55236–55238. EPA has also repeatedly responded to public comments, addressing each of the commenters’ alternative interpretations, and explaining in detail the reasons for the Agency’s disagreement. See, e.g., 88 FR 55237; U.S. EPA. Denial of Alternative Closure Deadline for General James M. Gavin Plant, Cheshire, Ohio. November 18, 2022. pp 14–42, Response to Comments on Proposed Denial (Docket ID No. EPA–HQ–OLEM–2021–0590). November 2022. EPA has again responded to the commenters’ alternative interpretations throughout this preamble and in the Response to Comments document in the docket. And even though EPA remains entirely

unconvinced by the commenters’ alternative interpretations, and without exception, considers that they are inconsistent with the plain language of the provisions at issue, EPA has responded to them by incorporating definitions of “liquids” and “infiltration” that reflect EPA’s existing construction of the regulations. Neither RCRA nor the APA requires anything further.

(b) Comments on the Definition of an “Inactive CCR Surface Impoundment” and the Meaning of “Contains Liquids”

All commenters agreed that, consistent with the existing definition of an inactive surface impoundment, any impoundment that “contains both liquids and CCR” at an inactive facility should be classified as a legacy CCR Surface impoundment. However, commenters disagreed on the correct interpretation of the phrase “contains. . . liquids.” Several commenters agreed with EPA’s explanation in the proposal that to the extent an impoundment still contains liquids on or after October 19, 2015, it is properly considered an inactive impoundment under the existing definition in § 257.53, even if (1) The unit had “closed” under State law; (2) The unit is in the process of closing on the effective date of this rule; or (3) After October 19, 2015 the unit is fully dewatered and can no longer impound liquid. These commenters also agreed that such units should also be considered legacy CCR surface impoundments when located at inactive facilities.

But other commenters objected to proposal’s construction of the regulation. These objections fell generally into two categories. First, a number of commenters argued that the discussion in the proposed rule reflected a “new” interpretation that expanded the meaning of the terms “CCR surface impoundment” and “inactive surface impoundment” by interpreting the phrase “contains liquids” to reach units that the commenters believe EPA never intended to cover in 2015. In support of this argument, these commenters objected to the statement in the proposal that free water, porewater, standing water, and groundwater are liquids under the existing regulation defining inactive CCR surface impoundments, arguing that this expands the existing definition of liquids to sources of water that the commenters assert “are not demonstrated to be contributing to hydraulic head creating the potential for impoundment failure and spread of contaminated water.” These

commenters further claimed that the existing definition of an “inactive impoundment” does not include: (1) Units “with any amount of water;” (2) Impoundments that closed prior to the effective date of the 2015 CCR Rule; and (3) “Dewatered” impoundments. These commenters contend therefore, that none of these units should be considered legacy CCR surface impoundments either. Second, a number of commenters raised concerns about the merits or wisdom of the approach. Many of these commenters also offered alternative definitions.

In addition, as discussed in the preceding section, a number of commenters objected to EPA’s proposal not to expand the definition of a legacy CCR surface impoundment to include units that no longer contained any liquid on October 19, 2015. These commenters argued that the proposed definition failed to address the full universe of surface impoundments at inactive plants that pose a reasonable probability of adverse effects on health and environment. In support of their contention, these commenters referenced EPA damage cases documenting harm to groundwater and/or surface water from impoundments that may not have contained liquid on or after 2015. The commenters also referenced a report, “Assessment of Legacy Surface Impoundments” by Gordon Johnson, M.Sc., P.Eng., that examines ten CCR surface impoundments at inactive facilities that were not on EPA’s list of potential legacy impoundments and do not appear to contain standing water. According to the commenter, the report shows that unacceptable levels of risk may still be present for historical impoundments that have been dewatered and/or capped.

(1) What is a “liquid”?

The May 2023 proposed rule explained that free water, porewater, standing water, and groundwater are liquids under the existing regulation. The source of the liquid does not impact its basic and fundamental designation as a liquid and its contribution to the risk posed by an impoundment. It therefore does not matter whether the liquid in the surface impoundment comes from the rain, waters the facility deliberately places in the unit, floodwaters from an adjacent river, or from groundwater—all are liquids, and once present in the unit, they have the same potential to create leachate (another type of liquid), and to contribute to hydraulic head and drive flows driven by hydraulic gradients. 88 FR 31992.

CCR surface impoundments to stop receiving waste. Facilities had until November 30, 2020 to submit demonstration to EPA for approval.

Several commenters agreed that the final rule should reflect EPA's existing interpretation that an impoundment containing any of the following types of liquid would be considered to contain liquid: free water, porewater, standing water, and groundwater without regard to their source.

However other commenters disagreed that under the existing regulations the term "liquids" includes free water, porewater, standing water, and groundwater in CCR units, and disagreed that EPA should adopt such a definition. Many of these commenters argued that EPA should not focus on "liquids" but on "free liquids," which they interpret to exclude groundwater. For example, one commenter asserted that "the term liquids, which is used in the definition of 'free liquids,' is not defined in the CCR Rule, and that the term 'free liquids' was never used in relation to groundwater." Another commenter objected that the existing regulations establish two separate definitions of free liquids and groundwater, which they claim do not reference each other or refer to overlapping concepts. The commenter further argued that free liquids are "liquids that readily separate from the solid portion of a waste under ambient temperature and pressure," but "groundwater" is "water below the land surface in a zone of saturation," and that these are different things from a technical perspective.

These commenters urged that regulating based on the presence of free liquids would be consistent with EPA's philosophy for regulating CCR surface impoundments because free liquids contribute to hydraulic head and hydraulic gradients regardless of their origin and impounded water must be removed from the impoundment to create a stable subgrade for the final cover system. Another commenter stated that this would be consistent with the 2015 CCR Rule, because even a unit closed under the existing regulatory criteria may contain some liquids after closure, so long as they are not free liquids.

The final rule continues to define "liquids" in accordance with its plain language meaning, consistent with the ordinary dictionary definition. Reliance on the ordinary meaning here is the default, as neither RCRA nor the existing part 257 regulations include a definition of the term "liquids." *FTC v. Tarriff*, 584 F.3d 1088, 1090 (D.C. Cir. 2009) (quoting *Williams v. Taylor*, 529 U.S. 420, 431 (2000)) ("It is fixed law that words of statutes or regulations must be given their 'ordinary, contemporary, common meaning.'").

This reflects EPA's existing construction of the current regulations. As discussed in greater detail in Unit III.B.1.b.i.(b)(4), the final rule incorporates this definition into § 257.53.

The dictionary definition encompasses all of the various types of liquid that may be present in a CCR unit, including water that was sluiced into the impoundment along with the CCR, precipitation, surface water, and groundwater that has migrated into the impoundment, which may be found as free liquids, free water or standing water ponded above the CCR or porewater intermingled with the CCR. These definitions are consistent with the surrounding regulatory text and structure of the regulation as a whole, as well as the wider context in which the terms are employed. As a consequence, the term functions effectively in all of the various contexts in which it is used in part 257. This is particularly true of the term "liquids," which plays a critical role in determining both whether a unit is subject to the regulations and in the performance standards that apply to impoundments closing with waste remaining on-site at § 257.102(d).

Further, reliance on this definition best achieves the statutory purpose of protecting human health and the environment. By accounting for all liquids, regardless of the source, the regulation ensures that the risks that legacy CCR surface impoundments pose will be addressed—both by focusing on the impoundments that pose the greatest risks and by ensuring that all sources of risk are addressed in closing an impoundment. As explained in the proposal, the source of the liquid does not determine its basic and fundamental properties. It therefore does not matter whether the liquid in the surface impoundment comes from the rain, waters the facility deliberately places in the unit, floodwaters from an adjacent river, or from groundwater. All liquids, once present in the impoundment have the same potential to become free liquids and promote contaminant leaching and contribute to structural instability or failure, by contributing to the creation of leachate (another type of liquid), and hydraulic head.

Contrary to the commenters' contentions there is no inconsistency between the regulatory definitions of groundwater and free liquids. By their terms the definitions of free liquids and groundwater are not mutually exclusive; rather, the term "free liquids" encompasses the term "groundwater." Nor is there any inconsistency in applying both of these terms in this context. First, the word "liquid," which

appears both in the existing definitions of an inactive CCR surface impoundment and free liquids, is broad enough that it can encompass groundwater, which has been defined in § 257.53 since 2015. Not all liquids are groundwaters, but all groundwater (water) is a liquid. And, where the water in the surface impoundment sits "below the land surface in a zone of saturation," the water in the unit meets the regulatory definition of groundwater. 40 CFR 257.53. Moreover, nothing in the definition of free liquids restricts the source of the liquid. It therefore does not matter whether the liquid in the surface impoundment comes from rain, waters that the facility deliberately places in the unit, floodwaters from an adjacent river, or from groundwater—all are liquids. The only test the regulation establishes for free liquids is whether the liquid readily separates from the solid portion of the wastes under ambient temperature and pressure. *Id.*

However, EPA generally agrees that regulating based on the presence of free liquids, albeit not based on the commenters' misinterpretation of the term, would be consistent with the existing regulations and the risks associated with CCR surface impoundments. As described in Unit III.A above, the risks are largely driven by the presence of free liquids in the unit, as these are the liquids that causes the metals and other constituents to leach out of the CCR, and that will eventually leak out of the unit into the surrounding soil and/or into the aquifer, along with any CCR constituents that have leached from the waste in the interim. Although some liquids will remain bound within the pore spaces of the CCR material and will not readily drain under ambient temperature and pressure, these residual liquids (*e.g.*, bound porewater or potential leachate) will not continue to drain from the unit, absent other forces, and exposure to these residual liquids is therefore not likely.

As discussed in the next section, EPA has adopted an approach based on whether free liquids are present in the impoundment.

(2) What does it mean to contain liquid?

The proposal explained that under the existing regulations, EPA determined whether an impoundment "contains liquids" by reference to a combination of the dictionary definition of "contains," and the dewatering standard in § 257.102(d)(2)(i). In essence, if liquids are present in an impoundment, the unit "contains liquid." However, EPA considers a unit that met the performance standard in

§ 257.102(d)(2)(i) to have been dewatered. Several commenters supported this proposal.

However, numerous other commenters raised concerns about relying on the plain language meaning of the phrase. For example, some commenters stated that all units contain some liquid, explaining that a landfill “contains” rain after a heavy rainfall event. Similarly, a commenter argued that that under EPA’s interpretation, a fully closed unit with ponded water on the cover resulting from precipitation or from fugitive dust control activities, and closed units with an engineered capability to impound water atop their covers would potentially be subject to the CCR regulations. The commenter stated that in all of these cases, the ponded water would seem to pose no risk.

Commenters also separately questioned whether EPA had real risk concerns from units that contained “any amount” of liquid. For example, one commenter asserted that EPA has not demonstrated that units with any amount of water, no matter how small an amount or without regard to whether the liquid is separable from the CCR will present sufficient risks to warrant regulation under RCRA section 4004(a). This commenter contended that EPA cannot rely on the 2014 Risk Assessment to support regulating such units because the assessment showed only that surface impoundments with a hydraulic head exceed that risk threshold. Several of these commenters recommended that EPA regulate based on whether the impoundment contains free liquids rather than liquids.

Another commenter raised concern that relying on the plain language meaning would present a number of technical challenges. These included how owners can determine whether a previously closed and dewatered surface impoundment at an active (or inactive) facility still contains “liquids.” The commenter explained that in some cases, State regulators confirmed that a site no longer had the capacity to impound water and therefore indicated that the site was no longer subject to the State’s dam safety and impoundment rules. The commenter also asked whether EPA would accept use of the paint filter test, the detection of water in piezometers, or some other method to determine whether sufficient separable porewater is present for an impoundment to be considered to “contain liquids.” The commenter also asked what kinds of samples would be required—individual or composite—as well as how many and at what locations, to determine if an

impoundment “contains liquids.” The commenter believed these questions need to be resolved in the numerous situations in which a formerly closed impoundment may contain some porewater as a result of periodic rainfall infiltration but is not in contact with the uppermost aquifer.

By contrast commenters generally supported reliance on § 257.102(d)(2)(i) to determine whether a unit contains liquid; although they disagreed over what that provision requires. Several commenters agreed with the proposal’s explanation of these existing closure requirements, stating that the discussion was fully consistent with EPA’s long-held position under the largely identical hazardous waste regulations, citing to EPA documents from 1982 and 1988.

But numerous other commenters argued that EPA had misinterpreted § 257.102(d)(2)(i), and consequently was proposing to regulate impoundments that the commenters believed had been dewatered, and therefore posed little risk. According to these commenters, § 257.102(d)(2)(i) does not require the elimination of all liquids, or even all free liquids, but only requires the removal of liquid wastes to the extent necessary to support the cover system. These commenters also contended that “the plain language of the 2015 CCR Rule does not require facilities to address groundwater as part of the closure performance standards under 40 CFR 257.102(d),” based in part on the claim that regulatory definition of free liquids does not encompass groundwater. These commenters urged EPA adopt the same approach to determining whether an impoundment contains liquid.

Several commenters also raised concern that the proposal failed to explain or provide clear guidance on how much water an impoundment must contain to be regulated as a legacy impoundment under the 2023 proposed rule. Many of these commenters requested EPA to clearly define a reasonable threshold associated with what it means to “contain liquids,” to aid the regulated community in determining when the performance standard has been met. One commenter noted that the Agency had attempted to fix this problem by relying on the closure standard in § 257.102(d)(2)(i), which requires the elimination of “free liquids,” but the commenter considered this approach to be insufficient because EPA had not articulated how to determine whether free liquids have been eliminated.

The final rule largely adopts the approach laid out in the proposal, relying on a combination of the plain

language meaning of the phrase and the performance standard in § 257.102(d)(2)(i) to determine whether an impoundment “contains liquid.” Under the ordinary meaning, an impoundment “contains liquid” if liquid is present in the impoundment, even if the impoundment does not prevent the liquid from migrating out of the impoundment. In other words, it “contains” water if it has water within it. See, *USWAG, supra* at 454 n. 23 (“The EPA’s regulatory definition of “impoundment” is consistent with the dictionary definition of the verb “impound,” which manifests continuing action,” citing *Impound*, Webster’s Third New International Dictionary 1136 (3d ed. 1993) (“[T]o confine or store (water)[.]”).

Accordingly, under the final rule, if liquids are present in the unit, it will be considered to contain liquids, unless the facility can demonstrate that free liquids have been eliminated. Simply put, if a facility can document that free liquids were permanently eliminated prior to October 19, 2015, the unit will not be considered a legacy impoundment.

Relying on § 257.102(d)(2)(i) in this context is reasonable and protective. Both the definition of an inactive CCR surface impoundment and the closure performance standard are designed to address the same issues (the presence or removal of liquid wastes) and are designed for the same purpose (to ensure the risks from the co-management of CCR and liquid are adequately addressed). Once the free liquids have been eliminated from the impoundment, any remaining liquids do not present a reasonable probability of contaminating the aquifer. Thus, EPA does not intend an operator to removal all moisture from an impoundment, but only the free liquids required under § 257.102(d)(2)(i), because of free liquids’ contribution to risk.

Contrary to some commenters’ claims, the existing text in § 257.102(d)(2)(i) requires a facility to eliminate both the standing liquid in the surface of the impoundment and all readily separable porewater in any sediment located in the base of the impoundment. Free liquids are currently defined at § 257.53 to mean “liquids that readily separate from the solid portion of a waste under ambient temperature and pressure.” This definition encompasses both standing liquids in the impoundment as well as any readily separable porewater (*i.e.*, porewater that readily separates under ambient temperature and pressure) in any sediment or CCR. As EPA explained in the proposal, the existing regulation does not differentiate between the sources of the liquid in the

impoundment (e.g., surface water infiltration, sluice water intentionally added, groundwater intrusion). This is further supported by the fact that the performance standard at § 257.102(d)(2)(i) was modeled on the regulations that apply to interim status hazardous waste surface impoundments, which are codified at § 265.228(a)(2)(i). EPA's guidance on these interim status regulations clarifies that these regulations require both the removal of standing liquids in the impoundment and sediment dewatering. See, "Closure of Hazardous Waste Surface Impoundments," publication number SW-873, September 1982. EPA previously discussed the subtitle C regulations at length beginning on page 29 in the Final Decision on Request For Extension of Closure Date Submitted by Gavin Power, LLC, 87 FR 72989 (November 15, 2022), as well as in the associated Response to Comments document located in the docket.⁴⁷ And the definition of liquid included in this final rule removes any misunderstanding.

The commenters are also mistaken that the existing regulation only requires the elimination of free liquids to the extent necessary to support the unit's final cover system. The provision does not state that the facility must "eliminate free liquids to the extent necessary to support the final cover system," or anything comparable. Given that § 257.102(d)(2)(ii) does specify that "waste must be stabilized sufficient to support the final cover system," the absence of any similar text in paragraph (d)(2)(i) is dispositive. Compare § 257.102(d)(2)(i) and (ii).

EPA disagrees that it is not taking into account whether the water in the unit poses risk. And for the same reasons EPA disagrees that it has failed to demonstrate that the units subject to regulation under this rule warrant regulation under RCRA section 4004(a).

Impoundments with free liquids do in fact pose significant risk for the reasons discussed above. In the proposal, EPA discussed two examples of units that still "contain liquids": (1) A unit constructed such that the CCR in the unit was continually saturated by water flowing freely through the unlined impoundment; and (2) Where the facility has removed only the standing water from the impoundment. As EPA explained, as a purely factual matter, a surface impoundment that has only

decanted the surface water would normally still contain free liquids if the waste in the unit was still saturated with water. Neither of these examples—which in actuality, likely represent the overwhelming majority of legacy impoundments subject to the final rule—have eliminated free liquids or involve trivial amounts of water. As explained in the preceding sections, such impoundments still contain hydraulic head and are otherwise essentially indistinguishable from the impoundments described in the 2015 CCR Rule preamble and modeled in the 2014 Risk Assessment. And as EPA explained in the proposal, these units retain the conditions that cause a heightened risk of contaminating the aquifer. That is true even if the unit is considered "closed" under State law, is in the process of closing, or at some subsequent point, the unit is fully dewatered and no longer contains liquid.

Moreover, as several commenters confirmed, it has apparently been a common practice to maintain CCR impoundments in a dewatered state. Even assuming these commenters meant that they had done more than merely remove the standing water, which seems unlikely given their comments on § 257.102(d)(2)(i), without an effective cover system many "dewatered" impoundments can nevertheless contain significant volumes of water simply as a consequence of the amount of precipitation that continually percolates through the unit. Based on an online USGS Rainfall Calculator Tool,⁴⁸ the example unit will receive a total of 27,154 gallons of water per acre during a single 1-inch rainfall event. Taking that a step further, a 50-acre impoundment in Atlanta, Georgia typically receives an average of 50 inches of rain a year, which equates, on a yearly average, to 67,885,000 gallons of water per year.⁴⁹ In the absence of any action taken to remove the water, over time it will continue to accumulate in the unit.

Thus, in many areas of the country (e.g., the Southeast), CCR surface impoundments without an effective cover system may contain free liquids and meet the definition of a legacy impoundment due to the amount of annual rainfall.⁵⁰ But this approach is

intended to also clarify that contrary to the commenters' contention, a unit whose periodic rainfall does not result in free liquids (e.g., is readily absorbed into the CCR) would not be regulated as a legacy CCR surface impoundment.

Finally, with respect to the small number of units that may have been completely dewatered after October 19, 2015, these units likely pose significant (and unacceptable) risks to human health and the environment that warrant regulation under RCRA section 4004(a), based solely on the expected presence of contamination that occurred while the impoundment was operating. See Unit III.A.2 of this preamble.

This approach also largely addresses commenters' request for a clear standard, and many of their technical concerns. For example, the clarification that EPA is concerned with the presence of readily separable porewater, (that is, free liquids), which can be easily verified by technical equipment such as piezometers, thus resolves the commenters' concern that that porewater may be difficult to measure as it is held in the interstices or pore spaces between particles of soil, sediment, and/or CCR material and may not flow readily or be easily quantified using field or laboratory methods. EPA has also developed a memorandum describing the current methods and tools that are available to determine whether free liquids have been eliminated, which is available in the docket for this rulemaking. EPA has provided a brief summary of the memorandum in the next four paragraphs below.

Many of the tools and methods to identify and eliminate free liquids are already widely used by industry to investigate and close surface impoundments. For example, tools currently used to identify free liquids include soil borings and cone penetrometers to map the stratigraphy of the CCR unit and characterize the geotechnical and hydraulic properties of the various CCR layers, as well as the installation of traditional piezometers, monitoring wells and vibrating wire piezometers to monitor pore pressures and water levels. Properly constructed

CCR surface impoundments, which may further increase the risk of these units contaminating their underlying aquifers. More frequent and more severe rainfall events may also increase the risk that legacy CCR impoundments flood, overtop, and experience structural failures leading to potentially catastrophic releases of CCR into the surrounding environment. Many legacy CCR surface impoundments are located in 100-year floodplains which suggests that they are particularly vulnerable to rainfall driven flooding. Unit V of this preamble and the RIA accompanying this final rule describe this scenario in more detail.

⁴⁷ The Final Decision and Response to Comments documents can be found in the docket for that action. See docket items EPA-HQ-OLEM-2021-0590-0100 and EPA-HQ-OLEM-2021-0590-0099, respectively.

⁴⁸ Found at <https://www.usgs.gov/tools/usgs-rainfall-calculator>. Found at <https://www.usgs.gov/tools/usgs-rainfall-calculator>.

⁴⁹ Based on 30-year average rainfall from National Weather Service data.

⁵⁰ The frequency and severity of future rainfall events may be amplified by the effects of climate change. On average this would result in more water percolating through, and accumulating in, legacy

wells and piezometers screened in the appropriate locations and depths have a prominent role in networks of instruments used to assess free liquids, as their design directly measures water levels under ambient conditions. Fundamentally, water levels in properly constructed and developed wells and piezometers are indicative of free liquids at that location. Conversely, networks of spatially discretized wells and piezometers can be used as part of a program to determine or confirm that free liquids no longer exist.

Similarly, tools and methods to eliminate free liquids within the CCR, such as rim ditches, underdrain systems, pumping wells, manifolded extraction wellpoints, etc., are also currently widely employed by industry. These elimination technologies can also provide diagnostic and confirmatory insights into the presence and nature of free liquids at a given CCR unit, e.g., rim ditches and open excavations enable direct observation of free liquids.

EPA recommends that a demonstration of whether free liquids are present rely on a holistic evaluation of all information collected from site-wide monitoring networks (e.g., piezometers and vibrating wire piezometers), as well as data collected from actual dewatering efforts. EPA further recommends that monitoring networks include points of sufficient density to independently verify dewatering performance determined from implementation of elimination technologies.

The memorandum also provides general guidance on considerations for developing successful site-specific strategies and approaches to identify, measure, monitor and eliminate free liquids. The elimination of free liquids relies on a well resolved understanding of the character and variability of the site-specific geology and hydrology, as well as the CCR materials themselves. Such information is frequently compiled into a Site Conceptual Model (CSM), and the memorandum also discusses some considerations related to the elements needed to construct a CSM if one does not already exist, or to augment a weak or poorly resolved CSM.

EPA has adopted this approach rather than the commenters' suggestion to define a legacy CCR surface impoundment as a CCR surface impoundment that "contains CCR and free liquids"—even though EPA expects the effect will be the same in almost all cases—because it represents the best balance of several competing considerations. First reliance on the broad dictionary definition is the most

protective because all liquids have the potential to become the free liquids that create leachate and contribute to hydraulic head. This approach also maintains consistency with the existing definition of an inactive CCR surface impoundment.

At the same time, EPA acknowledges that once the free liquids have been eliminated from the impoundment, any remaining liquids typically do not present a reasonable probability of contaminating the aquifer. EPA is also mindful of not establishing criteria that blur the lines between landfills and impoundments, EPA agrees with commenters that it would not be appropriate to designate a CCR landfill as a CCR surface impoundment based solely on periodic rainfall that is readily absorbed into the CCR and does not result in free liquids.

The regulation reflects this balance by placing the burden on the owner or operator to demonstrate that the standard in in § 257.102(d)(2)(i) has been met. In other words, the absence of free liquids is an affirmative defense, and therefore any uncertainty as to whether the standard in § 257.102(d)(2)(i) has been met is to be construed in favor of regulation because of the risks of environmental harm from free liquids in contact with CCR.

Although, consistent with the 2015 CCR Rule, EPA is not requiring facilities to post documentation to demonstrate that no legacy impoundment is present at the site, EPA recommends that facilities develop and retain records to support any determination that a particular unit meets this exception. Finally, as discussed in Unit III.B.2.b.i of this preamble, EPA has provided additional time to allow a facility to determine that it has eliminated free liquids as part of its applicability report.

(3) Whether the Proposal Reflected a "New" Interpretation

To support their claim that EPA had adopted new definitions of "liquid", "CCR surface impoundment" and "inactive CCR surface impoundment," a number of the commenters identified aspects of the 2015 CCR Rule or preamble that they believe to be inconsistent with the May 2023 proposed rule preamble. First, several of these commenters claimed that statements in the proposed rule are inconsistent with the requirement in the existing definition of a CCR surface impoundment that the unit must be "designed to hold an accumulation of CCR and liquids." 40 CFR 257.53. For example, some commenters stated that an impoundment that was dewatered and closed or is otherwise maintained

so as not to impound liquids is no longer "designed to hold an accumulation of CCR and liquids," and therefore, cannot be considered an inactive or legacy impoundment. Several commenters also claimed that the 2015 CCR Rule preamble, explained that the phrase, "designed to hold an accumulation of CCR and liquids," means *only* units that "contain a large amount of CCR managed with water, under a hydraulic head that promotes the rapid leaching of contaminants." According to these commenters, although a dewatered or closed impoundment may "contain liquid" as EPA defined it in the May 2023 proposal, no hydraulic head would be present. Or as one commenter stated, "The Proposed Rule definition of liquids was expanded to include sources of water that are not demonstrated to be contributing to hydraulic head, or creating the potential for impoundment failure and spread of contaminated water." These commenters argue that facilities had relied on this guidance in good faith, and that "simply citing the dictionary definitions of a 'liquid' and 'contains' eight years after the 2015 CCR Rule published and without context is not a sufficient rationale or appropriate."

Several of these same commenters raised concern that EPA was proposing to regulate units that do not present the same risks on which the original rule was based. These commenters stated that in 2015 EPA did not strictly interpret "liquids" as precipitation, porewater, or groundwater without considering the associated force of liquids on the unit's embankment. According to the commenters, the 2015 CCR Rule was based on—and the current rulemaking should continue to be concerned with only—"the risk of excessive hydraulic head and the potential for structural failure of embankments from impounded water." The commenters further stated that the maintenance of CCR impoundments in a dewatered state significantly reduces the risk of structural failure, reduces the contact time with larger quantities of CCR, and reduces constituent concentrations and overall risk of impact to groundwater.

Other commenters pointed to statements in the 2015 CCR Rule preamble that EPA did not intend the term "inactive impoundments" to include units that are closed, or to require closed units to reclose. Several of these commenters quoted the following discussion:

EPA did not propose to require "closed" surface impoundments to "reclose." Nor did

EPA intend, as the same commenters claim, that “literally hundreds of previously closed. . . surface impoundments—many of which were properly closed decades ago under state solid waste programs, have changed owners, and now have structures built on top of them—would be considered active CCR units.” Accordingly, the final rule does not impose any requirements on any CCR surface impoundments that have in fact “closed” before the rule’s effective date—*i.e.*, those that no longer contain water and can no longer impound liquid.

80 FR 21343.

Another commenter asserted that based on the proposal’s “strict interpretation,” all CCR landfills and all CCRMU would (inappropriately) be considered inactive or legacy CCR surface impoundments. As the commenter explained, a CCR landfill could contain liquids, especially after heavy rainfall, but as it was not designed to hold an accumulation of CCR and liquid it is not a CCR surface impoundment.

A number of commenters also argued that the interpretation in the proposal of “contains liquids” is inconsistent with the decision in 2015 to define sand and gravel pits as a CCR landfill. According to the commenters, if EPA intended inactive CCR surface impoundments to broadly encompass CCR in contact with groundwater, without hydraulic head, sand and gravel pits would have instead been added to the definition of CCR surface impoundment. The commenters base this on EPA’s statement in the proposed rule that “the damage from the placement of CCR in sand and gravel pits was almost always associated with CCR being placed in contact with water, which indicated that the placement of CCR in contact with water can lead to higher risks than from dry disposal.” See, 80 FR 32010.

Finally, a commenter raised concern that owners of inactive facilities that dewatered a CCR surface impoundment before October 19, 2015, but completed the removal of CCR at some time after October 19, 2015, could be subject to the CCR legacy rules because of what the commenter characterizes as the modification to the definitions of liquid and contains. This commenter also raised concern that some former coal-fired power plant properties were sold based on EPA’s prior guidance that dewatered surface impoundments were not regulated, and asked whether these non-utilities will be required to comply with the documentation requirements.

As discussed above, this final rule defines a legacy CCR surface impoundment as a CCR surface impoundment at an inactive facility that “contains both CCR and liquid,” as EPA

discussed that phrase in the proposal. EPA continues to believe that the appropriate construction of the phrase is to rely on its plain language meaning, consistent with the ordinary dictionary definitions those terms, in combination with the dewatering standard in § 257.102(d)(2)(i). EPA is also promulgating a definition of this term in this final rule. As discussed above, some commenters have asserted that this definition is “new.” EPA disagrees. Regardless, even if it were new, it is permissible for EPA to define the term here in this rulemaking—EPA is not bound to any prior definition, and fully explained its rationale for the definition herein. In addition, the definition of liquids is not in any way inconsistent with other definitions in § 257.53 or any other provisions from the 2015 CCR Rule.

EPA agrees that a legacy CCR surface impoundment must meet the existing definition of a CCR surface impoundment in § 257.53. That definition contains three criteria: (1) The unit must be “a natural topographic depression, manmade excavation or diked area;” (2) The unit must be “designed to hold an accumulation of CCR and liquid;” and (3) The unit “treats, stores or disposes of CCR.” 40 CFR 257.53. None of these require the presence of a particular amount of water or hydraulic head—or indeed any. Rather, the unit must be “designed”—that is, intended to—hold an accumulation of CCR and liquid. Although EPA expected that, based on its understanding of the utilities’ current management practices, water would be present as a consequence of the treatment, storage, or disposal occurring in the unit, nothing in the text of the definition requires it, let alone requires a minimum amount. The requirement that liquid actually be present in the unit appears in the definition of an “inactive surface impoundment” (or “legacy CCR surface impoundment”), which as discussed, requires that the unit “contains both CCR and liquids.” 40 CFR 257.53.

With this understanding, EPA disagrees with the commenter who asserted that based on the proposal’s “strict interpretation,” all CCR landfills and all CCRMU would be considered inactive or legacy CCR surface impoundments. The commenter explained that, for example, a CCR landfill could contain liquids, especially after heavy rainfall, and the commenter believed that the construction of the regulation outlined in the proposal would mean that this unit would be classified as a CCR surface impoundment even though the unit was

not “designed to hold an accumulation of both CCR and liquid.” EPA agrees that a unit that meets the definition of a CCR landfill would not become a CCR surface impoundment merely because it contained liquid; as the commenter noted, such a unit would not have been “designed to hold an accumulation of both CCR and liquid.” Ordinarily there should be clear indications that the unit was not intended or designed to function as an impoundment; for example, if the facility placed only dry CCR into a unit, or had designed or constructed the unit as a CCR landfill (*e.g.*, it was constructed or operated with a leachate collection and removal system that meets the requirements of § 257.70(d)). It was for this reason that EPA included sand and gravel pits within the definition of a CCR landfill; all of those instances involve the placement of exclusively dry CCR into the sand and gravel pits with no indication that they were designed to hold liquids.

For the same reason, EPA disagrees that an impoundment that has been dewatered and closed or is otherwise now maintained so as not to impound liquids should no longer be considered “designed to hold an accumulation of CCR and liquids,” and therefore, should not be considered an inactive or legacy impoundment. Just as a landfill would not suddenly become “designed to hold an accumulation of both CCR and liquids” based on the temporary presence of precipitation, removing liquids from a unit that was constructed as a surface impoundment and that operated as a surface impoundment by managing both CCR and liquids for decades, does not suddenly mean that the unit is no longer “designed to hold an accumulation of CCR and liquids.” Even assuming all free liquids had been removed from the unit, which as discussed below is unlikely, the subsequent removal of liquids as part of closing the unit does not change either the original design or use of the unit; the commenters do not intend to retrofit the unit for subsequent use as a landfill, but are merely in the process of complying with the requirements applicable to the closure of CCR surface impoundments. Nor does the subsequent dewatering change the present risks arising from the original design and long-term operation of the unit as an impoundment. To avoid any confusion on this point, EPA has deleted the phrase “which is” from the existing definition of a CCR surface impoundment.

EPA also disagrees that the proposed (and now final rule) expanded the existing definition of a CCR surface impoundment—either by regulating

different kinds of units as surface impoundments than are currently regulated as surface impoundments, or by regulating units that present substantially different kinds or level of risks. These commenters have misunderstood the 2015 CCR Rule and preamble.

EPA did not limit surface impoundments to units “containing a large amount of CCR managed with water, under a hydraulic head that promotes the rapid leaching of contaminants.” The definition of a CCR impoundment is discussed in the 2015 preamble at 80 FR 21357–21358. Reading the discussion as a whole, rather than the single sentence from the preamble that the commenters reference, clearly demonstrates that the 2015 CCR Rule was concerned with more than the risks associated with the force of impounded water on the embankment structure and included the risks of contamination when water travels from the impoundment to the surrounding are, and that EPA did not limit the CCR surface impoundments regulated under the 2015 CCR Rule to those that contain a particular amount of water or degree of hydraulic head.

It is clear from the complete discussion that what determines whether a unit is considered a CCR surface impoundment are the three criteria⁵¹ (discussed above) actually in § 257.53, rather than a finding that the particular unit “contain[s] a large amount of CCR managed with water, under a hydraulic head that promotes the rapid leaching of contaminants.”

In addition, the critical issue in crafting the definition was the quantity of CCR in the unit, not the quantity of water. Thus EPA explained that it was modifying the proposed definition to address concerns that it would capture ponds that contain only *de minimis* levels of CCR, because it agreed with commenters that the rule as proposed could inadvertently capture units that present significantly lower risks, such as process water or cooling water ponds that “although they will accumulate any trace amounts of CCR that are present, they will not contain the significant quantities that give rise to the risks modeled in EPA’s assessment.” 80 FR 21357. EPA then stated that by contrast, “units that are designed to hold an accumulation of CCR and in which treatment, storage, or disposal occurs

will contain substantial amounts of CCR and consequently are a potentially significant source of contaminants.” Id. (*Emphasis added*).

These points are best illustrated by the specific examples discussed in the preamble of the 2015 CCR Rule. First, in each example EPA explained whether the units would be considered CCR surface impoundments exclusively by reference to the criteria in the regulation. 80 FR 21357. Second, the units in each of the examples contained varying degrees of water and therefore hydraulic head. The final example was a diked area in which wet CCR is placed in order to remove the water for future transport to a CCR landfill or beneficial use. EPA explained that:

[t]he unit is accumulating CCR, while allowing for the evaporation or removal of liquid (no free liquids) to facilitate transport to a CCR landfill or for beneficial use. In this instance, the unit again meets all three definition criteria, it is a diked area (*i.e.*, there is an embankment), it is accumulating CCR for ultimate disposal or beneficial use; and it is removing any free liquids, (*i.e.*, treatment). As such, this unit would meet the definition of CCR surface impoundment.

80 FR 21357. The impoundment in this example contains far lower amounts of liquid than would be found in an operating impoundment because it is used to remove liquid from CCR. In essence such units would likely not contain significantly more liquid than the partially dewatered impoundments that the commenters now claim are exempt based on their supposed lack of a hydraulic head. 80 FR 21357–21358.

More to the point, the units that the commenters argue should be exempt do still contain a hydraulic head “that promotes the rapid leaching of contaminants” and the consequent increased risks of leachate contaminating groundwater.

Based on their comments on the closure performance standards, what these commenters mean by “dewatered” is merely the removal of: (1) Only the standing liquid or the free liquid visible at the surface of the impoundment; or (2) Free liquids in the CCR only to the depth needed to safely work with heavy machinery and to expedite the closure process. Properly characterized, this is merely partial dewatering. As previously discussed, because they are not removing free liquids beyond this depth, this eliminates neither the “liquid,” the hydraulic head in the unit, or the conditions that create the heightened risk of leachate contaminating ground or surface water. Although this will reduce the hydraulic head, until the water is eliminated, gravity will continue to exert downward

pressure on the saturated waste. Continued contact with free liquids will continue to cause metals and other constituents to leach from the CCR, and the downward pressure of the hydraulic head will continue to drive the leachate toward the bottom of the unit into the surrounding soil and/or into the aquifer, along with any CCR constituents that have leached from the waste.

It is clear from the 2015 preamble that the situation described by the commenters is not what EPA intended when it explained that the regulations did not apply to “closed” units. In the paragraphs preceding the commenters’ selective quotation, EPA defined inactive surface impoundments as “those that contain both CCR and water, but no longer receive additional wastes.” 80 FR 21343. EPA further explained that “By contrast, a ‘closed’ surface impoundment *would no longer contain water*, although it may continue to contain CCR (or other wastes), and would be capped or otherwise maintained.” Id. (*emphasis added*). See also, Id. (3d col) (“Accordingly, the final rule does not impose any requirements on any CCR surface impoundments that have in fact ‘closed’ before the rule’s effective date—*i.e.*, *those that no longer contain water and can no longer impound liquid.*”) (*emphasis added*). Note that EPA stated that a closed unit would not contain “water,” without qualification or limitation. Nowhere in this discussion (or the rest of the preamble) did EPA distinguish between water, free water, porewater, or groundwater, or expressly suggest that any of those might appropriately remain in the unit after closure.

EPA thus agrees that, as in the 2015 CCR Rule, “an impoundment that no longer contains liquid prior to October 19, 2015” would not be considered either an inactive impoundment or a legacy impoundment.⁵² EPA acknowledges that CCR surface impoundments that contained liquids prior to October 19, 2015, can still be associated with significant environmental and human health risks. As discussed in Unit III.A.1 of this preamble, many if not all of these impoundments lacked a composite liner system, and therefore likely leached contaminants into the soil and underlying aquifer during operation. Eliminating the liquid from the impoundment will not remediate these releases—which at some sites may be significant—although it may substantially reduce or eliminate a source of additional or continuing

⁵¹ The existing definition of a CCR surface impoundment contains three criteria: (1) The unit must be “a natural topographic depression, manmade excavation or diked area;” (2) The unit must be “designed to hold an accumulation of CCR and liquid;” and (3) The unit must “treat[, store[, or dispose] of CCR.” 40 CFR 257.53.

⁵² EPA also discusses its interpretation of “impound liquid” in Unit III.B.2.g of this preamble.

contamination. And to the extent the unit lacks an effective cover system, the unit may still be leaching contaminants, albeit at a reduced rate. Consequently, although such units would not be considered inactive or legacy impoundments, some will be regulated as a CCR management unit, as described in the next section.

However, the proposal by some commenters to regulate any impoundment that has ever contained CCR and liquids would represent a significant expansion of the regulations, in that it would essentially capture every CCR surface impoundment that ever operated in the United States. To illustrate the potential implications of such a revision: approximately 533 surface impoundments and 239 landfills are regulated under the 2015 Rule. EPA estimates that as a consequence of this final rule, an additional 194 (legacy) surface impoundments will be regulated. By contrast, as one commenter calculated, approximately 2,170 surface impoundments were operating in 1973 alone.⁵³ EPA, however, is not prepared at this juncture to expand the regulation so dramatically without first obtaining at least some basic information about the kinds of sites that would be regulated. Instead, EPA is proceeding to address the effects of past CCR management one step at a time, and is focusing here on a narrower universe of regulated units.

The Agency is not required to address every aspect of a problem immediately; courts have long recognized that it can be appropriate to address complex problems in stages. This final rule expands oversight to approximately 194 legacy CCR surface impoundments, and as discussed in Unit III.C, closes gaps in the existing regulations that currently fail to require facilities to remediate known contamination resulting from the operation of their CCR units. EPA expects to shortly publish a final permit rule and to begin issuing permits to bring facilities into full compliance. While the Agency works to address the risks from this current universe, EPA will also continue to collect information to better understand the full extent of the potential problem posed by the universe of abandoned sites that remain unregulated. In the interim, authority under RCRA section 7003 and CERCLA section 106 remains available to address any imminent and substantial threats to human health or the environment that

these unregulated sites may present. 42 U.S.C. 6873 and 9606.

EPA also agrees that as a consequence of the plain language meaning of the phrase “contains liquid,” the owners of inactive facilities that dewatered a CCR surface impoundment before October 19, 2015, but completed the removal of CCR at some time after October 19, 2015, would be subject to this final rule if only the standing water had been removed from the impoundment by this date. As EPA explained in the proposal, as a purely factual matter, a surface impoundment that has only removed visible surface water would normally still contain liquids if the waste lower in the unit was still saturated with water. However, this issue is also discussed further in the next section. Because the regulation applies exclusively to the current owners and operators, if such a facility had been sold to a non-utility, the new owner, rather than the previous owner, will be required to comply with the any applicable requirements.

(4) Adding a Definition to the Regulations

As noted previously, EPA solicited comments on whether adopting a definition of “liquids” into part 257 would provide greater clarity. The preamble discussed various possible definitions, including from Merriam-Webster and a technical definition. The proposal also explained that the term “liquids” encompasses all the various types of liquid that may be present in a CCR unit, including water that was sluiced into the impoundment along with the CCR, precipitation, surface water, and groundwater that has migrated into the impoundment due to the construction of the unit, which may be found as free water or standing water ponded above the CCR or porewater intermingled with the CCR. 88 FR 31992. Although there was widespread disagreement about what the definition should be, most commenters appeared to support including a definition in the regulations. Several commenters supported including a definition of “liquids” in the final rule to prevent future disputes over the meaning of the term. Some of these commenters stated that “given the clear, plain language of the CCR Rule’s closure provisions and EPA’s longstanding implementation of the regulations, codifying a regulatory definitions [sic] of the plain term ‘liquid(s)’ should be unnecessary.” However, the commenters also stated that “in light of industry’s apparent preference to litigate the reality that groundwater is liquid in favor of properly closing its leaking, unlined

ponds, EPA should codify its longstanding, plain meaning definitions of key terms in the hope of avoiding unnecessary and costly future litigation and ensuring timely, proper closure.”

By contrast several commenters opposed including a definition in the regulations, suggesting that EPA should instead continue to rely on how the commenters believed those terms have been used in the 2015 CCR Rule and historically applied in implementing RCRA requirements. Some of these commenters stated that EPA has not provided adequate notice to the public of a new regulatory definition of “liquids,” and claimed that EPA therefore could not adopt a regulatory definition of “liquids” in a final rule. Finally, a commenter opposed adding a definition of “liquids” to the regulations, arguing that it would not change the definition of “free liquids,” which the commenter believes is a distinct, technical regulatory term that does not encompass groundwater, or the performance standard in § 257.102(d)(2)(i), which, according to the commenter, only requires the removal of liquid wastes and stabilization of remaining wastes to support the cover system.

Several commenters recommended that in the absence of a statutory definition of “liquid(s)” and consistent with the CCR regulatory definition of “free liquids” and EPA’s longstanding implementation of the predecessor hazardous waste closure regulations, EPA should codify a definition of “liquid” based on the dictionary definitions as set forth in the Proposed Rule. They also suggested that the definition should make clear that the term encompasses free water, porewater, standing water, and groundwater without regard to their source.

Commenters also offered numerous alternatives. For example, several commenters offered technical definitions from various sources. One of those commenters raised concern that the technical definition discussed in the proposal had the potential to be confusing. According to this commenter, bulk particulate solids, such as fly ash, exhibit the physical properties of a liquid identified in the technical definition: specifically, dry fly ash flows when poured from container to container and conforms to the shape of a container—retaining its volume but not its shape. Instead, this commenter suggested that soil mechanics might provide useful information on which to base a definition.

As noted above, numerous commenters also suggested that EPA should focus on “free liquids” rather

⁵³ GenOn Comments at 5–6. Estimate based on the number of coal-fired generating units operating in 1973 according to the U.S. Energy Information Administration (1,839) and assuming 1.2 surface impoundments per plant, consistent with operations in 2010.

than “liquids.” Several of these commenters recommended that the final rule adopt the definition in 40 CFR 258.28(c)(1), which relies on the Paint Filter Liquids Test to determine whether liquids are present. The commenters recommended that the CCR and MSW landfill programs be consistent as both reside under RCRA subtitle D. However, one of these commenters also raised concern that it is unclear how far back in time this would reach and how EPA or the States would be expected to regulate inactive utilities that no longer exist but may have closed units that meet the definition. By contrast, other commenters raised concern about a definition that relied on the Paint Filter Liquids Test, stating that facilities had experienced difficulties implementing the test in the field.

Another commenter explained that focusing on porewater, rather than the separable porewater covered by the definition of free liquids would cause technical difficulties. According to this commenter, porewater may be difficult to measure as it is held in the interstices or pore spaces between particles of soil, sediment, and/or CCR material and may not flow readily or be easily quantified using field or laboratory methods. Consequently, the commenter believed that it would not be feasible to identify whether liquids inclusive of all porewater (whether separable or not) were present in an impoundment or landfill closed prior to October 19, 2015, or in other words, to demonstrate the absence of liquids eight years ago.

Similarly, one commenter stated that EPA should adopt a definition in the context of material in the “liquid state” such as free liquids and materials that behave as liquids and can be readily separated from the “solid” matrix and should not include those materials that are bound within the matrix and not readily separable. And another commenter recommended that EPA define a legacy impoundment based on the presence of free liquids and data to support that the free liquids have impacted groundwater.

EPA continues to strongly believe that the plain text of the regulation clearly communicates the Agency’s positions laid out above, and that in light of the dictionary definition a regulatory definition is not strictly necessary. However, in light of the different understanding of the regulations among commenters, EPA is incorporating the existing requirements into the definitions in § 257.53. Accordingly, the final rule includes a definition of “liquids” based on the definition from Merriam-Webster discussed in the proposal. The new definition, codified

at § 257.53, provides that “Liquids means any fluid (such as water) that has no independent shape but has a definite volume and does not expand indefinitely and that is only slightly compressible. This encompasses all of the various types of liquids that may be present in a CCR unit, including water that was sluiced into an impoundment along with CCR, precipitation, surface water, groundwater, and any other form of water that has migrated into the impoundment, which may be found as free water or standing water ponded above CCR or porewater intermingled with CCR.

In addition, the final rule includes in § 257.53 a definition of the phrase “contains both CCR and liquids,” consistent with the discussion above and in the proposal. The definition reflects both the dictionary definition of “contains” and EPA’s explanation that it relies upon the closure standard in § 257.102(d)(2)(i) to determine whether a unit contains liquids.

The definition states that “Contains both CCR and liquids means that both CCR and liquids are present in a CCR surface impoundment, except where the owner or operator demonstrates that the standard in § 257.102(d)(2)(i) has been met.”

These definitions reflect EPA’s construction of the existing regulations. In addition, codifying these definitions definitively confirms that an impoundment saturated by groundwater or continually inundated by surface water is an inactive or legacy impoundment. It also provides greater clarity that all kinds of liquid are relevant to determining whether an impoundment is subject to part 257 and has properly closed.

Consequently, EPA decided not to adopt either the technical definition of liquid discussed in the proposal or any of the suggested alternatives. EPA agreed that the technical definition in the proposal had the potential to be confusing given that fly ash can sometimes exhibit the physical properties of a liquid identified in the technical definition. While EPA also agrees that CCR is a porous material similar to soil, EPA did not adopt the commenter’s suggestion to rely on soil physics to craft an alternative. CCR is not a soil, and EPA is concerned more with the hydraulic characterization of CCR that involves other considerations in addition to soil physics.

EPA also chose not to adopt the definition in 40 CFR 258.28(c)(1), which relies on the Paint Filter Liquids Test, or to otherwise mandate reliance on the Paint Filter Liquids Test. First, a number of other commenters raised

technical concerns about relying on this test in this context. In addition, EPA would not generally recommend using the Paint Filter Liquids Test in this context. There can be physical effects from obtaining the sample that could affect the representativeness of the sample (vibration, heat from the drilling bit, etc.) and that can result in false negatives. Consequently, although it might provide relevant information to confirm the presence of water in a sample, EPA does not generally consider the results to be sufficiently reliable to confirm the absence of free liquids.

EPA disagrees that the public had insufficient notice of a potential definition. EPA explained the subjects and issues the agency would consider in reaching its decision, and provided examples of possible definitions. In general, to provide adequate notice an agency must “provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.” *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988). As demonstrated in the preceding section, numerous other entities were able to effectively provide comments, for example raising concerns about the definitions discussed in the preamble, and offering potential alternatives. No commenter has indicated what further information is necessary to be able to comment effectively on the issue.

EPA agrees that adopting these definitions will not change the performance standard in § 257.102(d)(2)(i), but for very different reasons than those proffered by the commenters. Incorporating these definitions into the part 257 regulations merely reaffirms the plain language meaning of the term “liquids,” which, as previously explained, is the status quo. But because the term “liquids” is used in the definition of “free liquids,” defining liquids to expressly encompass all of the various types that may be present in a CCR unit, including groundwater, removes any misunderstanding that such liquids cannot be considered to be free liquids when they otherwise meet the definition, that is, they readily separate from the solid portion of CCR at ambient temperature and pressure.

However, the commenters are correct that it will not address their misconstruction of § 257.102(d)(2)(i), which attempts to limit the requirement based on text that does not appear in the provision. Further discussion of § 257.102(d)(2)(i) can be found in Unit III.B.2.g.

In conclusion, under this final rule the surface impoundments discussed in the proposal would still be considered legacy impoundments, as all would still contain free liquids. Specifically this includes (1) Any impoundment where, on or after October 19, 2015, water flowed or continues to flow through the impoundment, permeating the waste in the unit, such as where the base of the impoundment intersects with the groundwater; (2) A surface impoundment where only the surface water has been decanted; here too the impoundment would normally still contain free liquids if the waste in the unit was still saturated with water; and (3) Any impoundment that still contains free liquids: (a) even if it is considered “closed” under State law; (b) it is in the process of closing on the effective date of this rule; or (c) the unit has been fully dewatered and can no longer impound liquid only after October 19, 2015 (*i.e.*, it contained free liquids on October 19, 2015).

ii. What does it mean to “contain” CCR?

In the proposal, EPA explained that under the existing regulation, an inactive CCR surface impoundment must contain CCR to be subject to the rule. 40 CFR 257.53. EPA further explained that it was not proposing to revise that aspect of the legacy impoundment definition. EPA proposed that, consequently, a legacy impoundment that had closed by removal in accordance with the performance standards in § 257.102(c) before October 19, 2015, would not be considered an inactive (and therefore not a legacy) CCR surface impoundment.

EPA also proposed that an impoundment at an inactive facility that was still in the process of closing by removal on October 19, 2015, would be considered a legacy CCR surface impoundment subject to the final rule requirements. EPA proposed that facilities with such a unit would be required to certify and post documentation that they have met the existing standard for closure by removal in § 257.102(c) on their CCR website (*i.e.*, “certification requirement”). However, if a facility could not demonstrate that the closed impoundment meets the existing performance standards in § 257.102(c), the unit would be considered a legacy impoundment subject to the rule. EPA further explained that because the impoundment contained liquid and CCR on October 19, 2015, it would meet the definition of a legacy CCR surface impoundment, and that EPA had no basis to exempt it, because EPA had no

factual basis to conclude that a legacy CCR surface impoundment that was in the process of closing posed no risk. However, EPA explained that depending on when the impoundment completed closure, some individual requirements may no longer be applicable to the legacy CCR surface impoundment (*i.e.*, when the compliance date in the final rule falls after the date closure is completed for the impoundment).

No commenter opposed the proposal to exclude impoundments that did not contain any CCR prior to the effective date of the 2015 CCR Rule, although several commenters believe that additional impoundments should also be excluded. For example, many commenters stated that EPA does not have jurisdiction under RCRA over impoundments from which all CCR was removed between October 19, 2015, and the effective date of this final rule. As one of these commenters explained:

As proposed, a closed unit would still be regulated under the final rule if all CCR has been removed but groundwater monitoring shows exceedances of the groundwater protection standard constituents listed in Appendix IV. RCRA’s juridical boundaries are exceeded under this interpretation. The USWAG decision explained that RCRA gives EPA the authority to regulate past disposal of CCR based on the continued presence of CCR. Once the CCR is removed, CCR is no longer disposed of, and EPA does not have the ability to regulate based on the previous existence of CCRs.

Commenters also provided examples of the type of facility they believe that EPA cannot regulate. For example, one commenter described a closure of three interconnected CCR surface impoundments associated with the Richard H Gorsuch Power Plant. According to the commenter,

the closure was permitted by the state of Ohio, along with a redesign of one of the impoundments to control stormwater runoff post-closure. The closure of these impoundments included dewatering and removal of all CCR materials to clean soil prior to filling with clean soil and grading. All CCR was transported to the associated off-site fly ash landfill. No groundwater monitoring was required, all the CCR was removed, and the site is adjacent to an existing RCRA corrective action (Union Carbide) with known groundwater impacts.

Some of these commenters further stated that EPA cannot rely on any residual contamination left in groundwater to support jurisdiction because EPA has made clear that groundwater (as well as other environmental media containing contaminants) is not a solid waste. Finally, some commenters asserted that EPA has no data showing that there is

a reasonable probability of adverse impact from historical CCR units that have been closed by removing the CCR, and as a consequence, EPA cannot regulate such units.

By contrast, a number of commenters requested that EPA clarify that its statement in the Proposed Rule that EPA “no longer has jurisdiction over a former unit that has closed by removal in accordance with § 257.102(c)” —is based on the complete absence of CCR, and requires not only removal of CCR from and decontamination of the unit but completing all groundwater cleanup and other remedial measures and then adequately documenting, with at least two years of post-removal or decontamination groundwater monitoring, that GWPS are reliably achieved by removal prior to the effective date of the final rule.

EPA disagrees that it lacks jurisdiction over a site at which the owner has removed CCR from the impoundment after October 19, 2015. Many of the commenters misunderstand the USWAG decision, as well as the legal structure applicable to these units.

First, the USWAG decision did not limit EPA’s authority to sites where CCR remains, but to sites where *solid waste* is present. See, *USWAG*, 901 F.3d at 440–441 (“Properly translated then, an open dump includes any facility (other than a sanitary landfill or hazardous waste disposal facility), where *solid waste* still “is deposited,” “is dumped,” “is spilled,” “is leaked,” or “is placed,” regardless of when it might have originally been dropped off.”) (emphasis added).

Second, in the example EPA presented in the proposal, even though the facility may have removed all CCR from the surface impoundment, solid waste still remains on site because groundwater monitoring continues to detect statistically significant levels of one or more Appendix IV constituents. These monitoring results demonstrate the continued presence of CCR leachate⁵⁴—which is a solid waste under the definition in 42 U.S.C. 6903(27)—in groundwater, and, potentially, in soil at the site. As discussed in greater detail below, this is sufficient to demonstrate that EPA retains jurisdiction over the site, under the plain language of the statutory definitions of solid waste and disposal.

EPA also considers that it has authority to regulate as part of this rule, sites similar to the one presented by the

⁵⁴ Leachate is produced when liquids, such as rainwater or groundwater, percolate through wastes stored in a disposal unit. The resulting fluid will contain suspended components drawn from the original waste.

commenter above. As discussed in more detail below, the rulemaking record supports a presumption that solid waste remains at the site, even assuming the facility had removed all CCR from the impoundment. The rulemaking record demonstrates the high likelihood that the impoundment will have leaked during its operation. As a consequence, at any site that closed without groundwater monitoring, such as the one described in the comment above, or that has not undertaken any remediation, there is every reason to believe that leachate (and, therefore, solid waste) will remain on site. In addition, the measures that facilities have described taking to remove all CCR from the impoundment would in fact leave CCR leachate remaining in soils at many sites.

(a) Definition of Solid Waste

EPA's jurisdiction over sites at which CCR leachate remains is clear from the plain language of the statutory definitions of solid waste and disposal.

Under the CCR regulations, the statutory definition of solid waste applies, rather than any of the various narrower subtitle C regulatory definitions in 40 CFR part 261. Section 257.53 specifically provides that "Terms not defined by this section have the meaning given by RCRA." Part 257 does not include a definition of "solid waste" or "waste," which therefore takes the broader statutory definition of the term. See also the § 257.53 definition of disposal, which references "solid waste as defined in section 1004 (27) of the Resource Conservation and Recovery Act."

The subtitle C regulations are equally clear that they do not apply to subtitle D wastes. See, e.g., 40 CFR 260.1(a) ("This part provides definitions of terms, general standards, and overview information applicable to parts 260 through 265 and 268 of this chapter."); § 261.1 (a) ("This part identifies those solid wastes which are subject to regulation as hazardous wastes under parts 262 through 265, 268, and parts 270, 271, and 124 of this chapter and which are subject to the notification requirements of section 3010 of RCRA.").

Under RCRA the term "solid waste" means:

any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded materials, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of title

33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C. 2011 *et seq.*].

42 U.S.C. 6903(27). The plain meaning of the word "discarded" in this definition is "disposed of," "thrown away," or "abandoned." See, e.g., *American Mining Congress v. U.S. EPA*, 824 F.2d 1177, 1184 (D.C. Cir. 1987) (citations omitted) ("AMC I"); *American Petroleum Institute v. EPA*, 906 F.2d 729, 740–741 (D.C. Cir. 1990) (per curiam). Such materials are "part of the waste disposal problem" that Congress enacted RCRA to address. *AMC I*, 824 F.2d at 1193. In other words, under the statute if something has been disposed of, as that term is defined in the statute, it is a solid waste.⁵⁵

Any CCR leachate left behind as soil and groundwater contamination after CCR removal would clearly constitute material that has been "abandoned" or "discarded" and is thus subject to regulation under subtitle D without further activity. EPA has long considered material that has spilled or leaked onto the soil and not been cleaned up to have been "abandoned" or "discarded." See, e.g., *Chemical Waste Management v. EPA*, 869 F.2d 1526, 1539 (D.C. Cir. 1989); *Connecticut Coastal Fishermen Ass'n v. Remington Arms Co.*, 989 F.2d 1305, (2d Cir 1993).

The conclusion that the CCR leachate contaminating soil and groundwater is a solid waste is also consistent with EPA's long-held interpretation (discussed at length in the 2015 CCR rule preamble) that leaking or passive migration of leachate constitutes the disposal of solid waste. 80 FR 21342–21347, quoting 43 FR 58954 ("This is an important issue, however, because some, and perhaps most, inactive facilities may still be 'disposing of waste' within the meaning of that term in Section 1004(3) of RCRA. . . . Many inactive facilities may well be leaking solid or hazardous waste into groundwater and thus be 'disposing' under RCRA."). See also, e.g., *In re Consolidated Land Disposal Litigation*, 938 F.2d 1386, 1388–1389 (D.C. Cir. 1991).

And even under the narrower regulatory definition of solid waste in subtitle C, EPA has long considered leachate (i.e., the leaked constituents) from previously disposed hazardous wastes to be a hazardous (and therefore, solid) waste. See, e.g., 40 CFR 261.3(c)(2)(i) ("any solid waste generated from the treatment, storage, or disposal of a hazardous waste, including

any . . . leachate . . . is a hazardous waste."). 45 FR 33096 (May 19, 1980) ("As a practical matter, this means that facilities which store, dispose of or treat hazardous waste must be considered hazardous waste management facilities for as long as they continue to contain hazardous waste and *that any wastes removed from such facilities—including spills, discharges or leaks—must be managed as hazardous wastes.*") (emphasis added). See, also, *Chemical Waste Management*, 869 F.2d at 1539.

Moreover, as discussed above, one factor the D.C. Circuit has considered in determining whether a substance is properly considered a waste is whether "the materials are 'part of the waste disposal problem' Congress intended to address in enacting RCRA." *AMC I*, quoting House Committee Report, H.R. Rep. No. 1491, 94th Cong., 2d Sess. at 2, U.S. Code Cong. & Admin. News 1976, p. 6240. If so, it falls under EPA's authority in RCRA to address. See, *American Mining Congress v. EPA*, 907 F.2d 1179, 1186–87 (D.C. Cir. 1990) (deferring to EPA's focus on potential environmental harm in determining whether material is discarded) (*AMC II*). The contamination from legacy impoundments (even when the CCR has been removed from the impoundment) remains a threat to human health and the environment that stemmed from discarded materials, and thus is "part of the waste disposal problem" RCRA was enacted to address.

As discussed in more detail in Unit III.A.3, EPA estimates that groundwater contamination at sites with legacy impoundments could pose lifetime cancer risks from arsenic as high as 2×10^{-5} to 1×10^{-5} (i.e., 2 to 100 cases of cancer for every 100,000 individuals exposed), depending on the specific management practices and site conditions. In addition, EPA estimated noncancer risks well in excess of an HQ of one for a wide variety of CCR constituents, depending on the management practices and site conditions; for example, the high-end of noncancer risks for lithium ranged between two to three; for molybdenum up to an HQ of four; thallium up to an HQ of two, and for cobalt and mercury up to an HQ of 13 and five, respectively. Moreover, in the absence of any groundwater remediation, there is no reason to believe that the removal of CCR from the impoundment mitigates these risks. Although the unit may no longer continue to contribute additional contamination, removal of the CCR does not address the release of and risk from the metals or other CCR constituents in any contaminant plume.

⁵⁵ As EPA explained in the 2015 preamble, "placement in a landfill or surface impoundment is prima facie evidence of discard." 80 FR 21348.

The leachate from a CCR surface impoundment or landfill is therefore unquestionably a solid waste under the broader statutory definition in 42 U.S.C. 6903(27). And to the extent the leachate remains in soil or groundwater, that is sufficient to support jurisdiction over that site, even though all CCR may have been removed from the disposal unit. The risks from the leachate-contaminated groundwater also clearly establish a reasonable probability of adverse impacts on health and the environment from legacy impoundments that have been closed by removing only the CCR.

EPA disagrees with the commenters who stated that the Agency should not presume that there have been impacts to groundwater from an area where the ash has been fully removed, absent specific evidence to the contrary. The record from both the 2015 CCR Rule and the current rulemaking supports a strong presumption that solid waste remains on-site at these facilities. As the D.C. Circuit noted, legacy impoundments have been shown to be even more likely to leak than units at utilities still in operation. 901 F.3d at 432.

Data collected as part of the 2015 rulemaking shows that the majority of the older operating (pre-1994) waste units lack liners; 63% and 24% of older surface impoundments have either no liners or clay liners, respectively. 80 FR 21326. Thus far, no commenter has identified a legacy impoundment with a composite liner.

Analysis of the information from the damage cases also demonstrates that unlined surface impoundments typically operate for 20 years before they begin to leak. *Id.* at 21326–21327. As discussed previously, commenters submitted data indicating that on average legacy impoundments are 55 years old. The following examples discussed in the 2015 CCR rule preamble further demonstrate the high probability that legacy impoundments will have leaked, and that in the absence of remediation measures leachate is highly likely.

In the wake of the 2008 TVA Kingston CCR spill, Illinois and North Carolina for the first time required utilities to install groundwater monitoring. Illinois required facilities to install groundwater monitoring downgradient from their surface impoundments. As a result, within only about two years, Illinois reported that seven facilities had detected instances of primary MCL exceedances, and five additional facilities had reported exceedances of secondary MCLs. The data for all 12 sites were gathered from onsite; it appears none of these facilities had been

required to monitor groundwater off-site, so whether the contamination had migrated off-site was unknown. Similarly, North Carolina required facilities to install additional down gradient wells. In January 2012, officials from the North Carolina Department of Environment and Natural Resources disclosed that elevated levels of metals were found in groundwater near surface impoundments at all the State's 14 coal-fired power plants. 80 FR 21455.

It is also highly unlikely that removal of CCR would also have removed all areas affected by releases at many (if not most) sites. In their comments, facilities have described relying on visual inspection or in some cases microscopic inspection of soil material to determine whether all CCR have been removed from the impoundment. In such cases, the practical depth limit of such investigations is generally just beneath (e.g., a foot or less) the visually observed maximum depth of CCR. However, it is not likely this practice would be sufficient at many legacy sites to remove all areas affected by releases of CCR leachate.

At a minimum, for units with bases above the groundwater, the soil column beneath the unit from the base of the unit to at least the depth of the lowest water levels recorded in the aquifer, would typically need to determine whether the zone of water table fluctuation constitutes a residual source and may be in need of corrective action. Concentrations of contaminants at this horizon could be significantly elevated. In a case where prior site assessment and groundwater monitoring activities have not resulted in a preexisting well network capable of making this determination it may be necessary to install additional wells or to assess groundwater.

Moreover, in a unit constructed with CCR below the ambient groundwater, after decades of groundwater infiltration through the waste, the leachate generated would be expected to show elevated levels of CCR constituents of concern. This chemically altered leachate can interact with unsaturated or partially saturated soils beneath the CCR and can react with aquifer solids beneath the unit to form intermediate chemical compounds, some of which may be bound to the aquifer matrix in solid phases. Also, depending on the amount of groundwater recharge and infiltration directed through the unit, some downwardly infiltrating leachate is likely to reach the saturated zone where additional chemical reactions occur. Depending on the degree of disequilibrium with the “ambient” conditions such reactions can be

significant and can also result in formation of mineral species that become temporarily immobilized at or beneath the water table as solid mineral phases by formation of mineral precipitates or simply adsorbed to the aquifer matrices by retardation processes. These intermediate transformation products may contain CCR constituents of concern as either major, minor or trace components of newly formed compounds. Depending on the aquifer chemistry, including redox state, pH, salinity, alkalinity, etc., some CCR constituents may remain mobile in groundwater and may continue to migrate downgradient of the unit. Consequently, in situations where the waste is below the water table, assessment efforts would generally need to penetrate a sufficient depth below the base of the waste or the lowest water levels in the aquifer, whichever is greater, to ensure that potential releases of leachate to the soil have been evaluated.

Consequently, based on the practices that facilities have stated that they use to confirm that they have removed all CCR from a site, both leachate contaminated soil and groundwater would frequently be expected to remain on site even after CCR may have been entirely removed from the impoundment. The totality of the information in the record thus supports a presumption that solid waste remains on-site. Demonstrating compliance with § 257.102(c) rebuts that presumption and documents that the site is no longer under RCRA's jurisdiction.

EPA also disagrees that reliance on the residual contamination left in groundwater to support jurisdiction is precluded by EPA's prior statements that contaminated media are not solid wastes. These commenters are referring to EPA statements made in connection with the “contained in” policy under the RCRA hazardous waste regulatory program. As an initial matter, the commenters have misunderstood the policy. The policy states only that with respect to contaminated soil or groundwater, the media itself—the soil or groundwater—is not a solid waste—even though it contains a hazardous waste. In other words, the contamination itself remains a solid waste, and therefore subject to EPA's jurisdiction. See, *Chemical Waste Management v. EPA*, 869 F.2d at 1539 (upholding EPA interpretation that hazardous waste restrictions continue to apply to waste “contained in soil or groundwater” as “consistent with the derived-from and mixture rules,” even though the rules by their terms do not apply to

contaminated soil or groundwater because they are not solid wastes).

In any event, as discussed above, none of the regulations in 40 CFR parts 260–268, or 270 apply, except to the extent EPA incorporated them into part 257, subpart D. This also means that any Agency interpretations or policies adopted under those regulations, no matter how long-standing, do not automatically apply to CCR, which are regulated under part 257, subpart D. Moreover, the policies and/or interpretations the commenters identify were developed based on the text of particular statutory or regulatory provisions under subtitle C, as well as the larger statutory context in which those particular statutory or regulatory requirements operate (for example, corrective action obligations at hazardous waste treatment, storage, and disposal facilities). RCRA subtitles C and subtitle D differ greatly. For example, only under subtitle C did Congress expressly prohibit land disposal of hazardous wastes that do not meet treatment standards established in EPA regulations. 42 U.S.C. 6924(d), (g), (h), (m). Similarly, there is no analog under subtitle D to section 6925(j), which imposes detailed requirements on hazardous waste surface impoundments. It would therefore be inappropriate to simply adopt a particular interpretation or policy developed under the particular provisions of the RCRA subtitle C hazardous waste regulatory program into the CCR program without evaluating whether the policy or interpretation is consistent the statutory language in subtitle D or would achieve Congress's purposes or direction. Note that EPA explains above how its approach is consistent with subtitle D and the congressional scheme.

Finally, it is important to note that EPA is not suggesting that the management of CCR leachate is now subject to the CCR regulations. EPA has jurisdiction over CCR leachate because the material is solid waste not because it is CCR. Under the existing regulations the definition of CCR does not include leachate. See, 40 CFR 257.53. EPA did not propose to amend this regulation and does not currently intend to do so.

(b) Exclusions

Several commenters suggested a number of other exemptions. For example, one commenter suggested that the final rule exclude legacy impoundments that only contain *de minimis* quantities of CCR. According to the commenter, EPA's risk analysis from the 2015 CCR Rule supports the conclusion that up to 75,000 tons of

CCR used as structural fill is generally safe. Therefore, the commenter recommended that inactive impoundments with 75,000 tons or less, be exempt from regulation. Other commenters urged EPA to clearly define what is meant by *de minimis* amounts of CCR in the context of legacy impoundments.

Other commenters requested that EPA exempt any legacy CCR surface impoundments that met State requirements for clean closure. These commenters argue that EPA cannot expect utilities who have closed legacy impoundments under State guidelines prior to this rulemaking to meet a standard that did not exist at the time of closure. These commenters also asserted that by regulating such units EPA is effectively disregarding a qualified State's regulatory authority to approve closure under the regulations and programs available to them at the time.

Other commenters suggested that EPA should allow facilities to certify that they had completed closure by removal in two additional situations. The first suggestion was to allow a facility to certify that it had complied with § 257.102(c) based solely on documentation that the facility had removed all ash by the effective date of the 2015 CCR Rule, unless EPA or the facility also had evidence (*e.g.*, from existing monitoring networks) of groundwater impacts that could impact human health or the environment. These commenters stated that EPA should not presume that there have been impacts to groundwater from an area where the ash has been fully removed years or even decades ago, absent specific evidence to the contrary. The second suggestion was that EPA exclude facilities that could certify and document that they have met the closure-in-place performance standards in § 257.102(d) by the effective date of this final rule. To support their proposal, the commenter noted that EPA has made it clear that the owner or operator of a CCR facility can close a CCR unit under either § 257.102 (c) or (d) and be in compliance with the Federal CCR regulations.

Finally, EPA received a number of comments on the kind of documentation that a facility needed to support a determination that it had closed a legacy impoundment by removal in accordance with the standards in § 257.102(c) prior to October 19, 2015. Some commenters requested that the final rule require facilities to post detailed documentation demonstrating compliance with § 257.102(c). Other commenters, however, objected to any documentation

requirements, asserting that it was inconsistent with EPA's treatment of similar facilities in 2015, who were not required to provide any compliance documentation of closure requirements. These commenters requested EPA to remove the requirements under § 257.100(f)(1)(ii) and allow owners to make the closure determination.

(c) Final Requirements

Consistent with the proposal, this final rule provides that an impoundment that contained CCR (and liquids) on or after October 19, 2015 is subject to this rule. This means that if a facility closed a legacy CCR surface impoundment by removal before October 19, 2015, that site is not subject to this final rule. However, the final rule does not require such facilities to demonstrate that these units were closed “in accordance with the performance standards in § 257.102(c).” Under § 257.102(c) closure is complete when all CCR has been removed from the CCR unit, any areas affected by releases from the CCR unit have been removed, and groundwater monitoring concentrations do not exceed the groundwater protection standard in § 257.95(h) for Appendix IV constituents. The proposed rule incorrectly stated that EPA was proposing to impose a documentation requirement on these facilities. That statement was made in error; EPA did not intend to propose such a requirement. EPA did not propose to require a facility to document that an impoundment did not contain liquids prior to October 19, 2015. Nor did the 2015 CCR Rule require any facilities to document that they were not subject to regulation. These facilities were never subject to the exemption for inactive impoundments at inactive facilities that was vacated in the *USWAG* decision and therefore should not be regulated as part of EPA's action to implement the Court's order. Accordingly—and consistent with the 2015 CCR Rule—if all CCR and liquids have been removed from the impoundment prior to October 19, 2015, nothing further is required.

Under the definition in the final rule, a facility that initiated closure by removal prior to October 19, 2015, but whose impoundment still contained CCR and liquids on or after October 19, 2015 is considered a legacy CCR surface impoundment and regulated under this final rule, even if the facility has removed all CCR prior to the effective date of this final rule. Depending on when the impoundment completes closure, some individual requirements may no longer be applicable to the legacy CCR surface impoundment (*e.g.*,

when the compliance date in the final rule falls after the date closure is completed for the impoundment); but as EPA explained in the proposal, the Agency has no basis for concluding that all legacy CCR surface impoundments that are still in the process of closing pose no risk.

The final rule retains the provision under which a facility with a CCR surface impoundment that contained CCR and liquids on October 19, 2015, but that completed closure by removal before the effective date of this rule, would only be required to post documentation on the facility's CCR website that it has met the standards in § 257.102(c) for that unit (*i.e.*, the certification of closure by removal for legacy CCR surface impoundments). To be eligible for the closure certification, the facility must document that it meets the criteria laid out in Unit III.B.2.b.iii. Namely, the facility must demonstrate that consistent with the existing standards, all CCR has been removed from the unit, any areas affected by releases from the CCR unit have been removed, and must have groundwater monitoring data demonstrating that the concentrations of each Appendix IV constituent do not exceed the relevant groundwater protection standard, which would be either the MCL or background concentration, for two consecutive sampling events.

If a facility certifies all of the legacy CCR surface impoundments on-site have met the requirements in § 257.102(c) for closure by removal before the effective date of this rule, the facility would not be subject to any further requirements under this final rule (*i.e.*, neither legacy CCR surface impoundment requirements or CCRMU requirements).

For similar reasons as explained above, EPA cannot accept the commenter's suggestion that EPA establish the same provision for facilities that closed a legacy impoundment prior to the effective date of this final rule in accordance with § 257.102(d) (closure when leaving CCR in place) and allow facilities to simply demonstrate that the closure meets the performance standards in § 257.102(d). The commenters appear to be requesting an exemption from post closure groundwater monitoring and corrective action requirements, but provided no factual basis for such an exemption. Nevertheless, as discussed in Unit III.B.2.g.iii of this preamble, if a facility can document that the closure of its unit meets the performance standards in § 257.102(d), all that would be required is compliance with the groundwater monitoring requirements in §§ 257.90–257.95, and any necessary corrective

action throughout the post-closure care period (in addition to recordkeeping and posting).

The documentation requirements, procedures, and compliance deadlines for these various options are discussed further in Unit III.B.2.g of this preamble.

EPA also disagrees with the commenter that 75,000 tons is a *de minimis* amount of CCR. The commenter has misunderstood EPA's findings in 2015; EPA did not conclude that quantities of CCR lower than 75,000 tons used as fill does not pose any risk to human health or the environment. Rather EPA concluded that, while the agency has sufficient information to document that unencapsulated uses can present a hazard, based on the rulemaking record EPA lacked the information necessary to demonstrate that unencapsulated uses in amounts lower than 12,400 tons are likely to present a risk. 80 FR 21352. In any event, as discussed in Unit III.A.4, recent EPA modeling demonstrates that far lower quantities of CCR (1,000 tons) can pose significant risks to human health and the environment.

In the 2015 CCR Rule, EPA provided guidance on which impoundments would not meet the definition of a CCR impoundment because they generally do not contain significant levels of CCR. 80 FR 21357. Specifically, EPA explained that CCR surface impoundments do not include units generally referred to as cooling water ponds, process water ponds, wastewater treatment ponds, storm water holding ponds, or aeration ponds. These units do not meet the definition of a CCR surface impoundment, that is, they are not designed to hold an accumulation of CCR and treatment storage or disposal of accumulated CCR does not occur in these units. Accordingly, EPA considers that such units would also not be legacy impoundments. EPA acknowledges that it mistakenly referred to one of these units as a CCR surface impoundment in the proposal, but that was an error.

c. Legacy CCR Surface Impoundment—Requirement To Be Located at an “Inactive Facility”

EPA proposed to define an “inactive facility” (or inactive electric utility or independent power producer) as one that ceased producing electricity prior to October 19, 2015, which is the effective date of the 2015 CCR Rule. EPA explained that this date is also the same date currently used in the regulation to define “active facility” under § 257.53, and that EPA originally used this date to define the exempted inactive units in the 2015 CCR Rule. The proposal further explained that use

of this date would mean that the same universe of units that were subject to the original exemption would be regulated and that this is consistent with the Court's vacatur, as vacatur is intended to restore the status quo ante, as though the vacated provision never existed. 88 FR 31994, 32034.

Commenters supported October 19, 2015, as the operative date to be used in the definition of an inactive facility because any other date would be inconsistent with the existing definition of an “active facility.” However, many commenters opposed the proposed substitution of the phrase “regardless of the fuel currently used to produce electricity” with “regardless of how electricity is currently being produced at the facility.” According to these commenters, the existing definition of “active facility” does not extend to facilities that do not use fuel, including, for example, facilities that produce solar power, because the plain language of § 257.50(c) makes clear that, to be active, a facility must use a fuel to produce electricity. These commenters cite two preamble statements in the 2015 CCR Rule to support their allegation. The first is the applicability section of 2015 CCR Rule, which only references the NAICS 221112 (Fossil Fuel Power Generation). These commenters speculate that if EPA had intended for the term “active facility” to extend to facilities that do not use fuel to produce electricity, EPA would have included other NAICS codes. The second statement appears in the executive summary and explains that the rule applies to:

Certain inactive CCR surface impoundments (*i.e.*, units not receiving CCR after the effective date of the rule) at active electric utilities or independent power producers' facilities, regardless of the fuel currently used at the facility to produce electricity (*e.g.*, coal, natural gas, oil), if the CCR unit still contains CCR and liquids.

80 FR 21303.

The commenters contended that EPA's proposal represents a significant change that will subject renewable generation to the CCR regulations (*e.g.*, a former coal-fired power plant that was retired, closed and dismantled well in advance of the 2015 CCR Rule that had new renewable generation built at the facility), creating strong disincentives to renewable repowering at those sites. These commenters further added that such a change in position requires EPA to take reliance interests into account. To address this, the commenters made two suggestions. The first was that EPA should establish an exemption from regulation for inactive facilities that

generate 50 megawatt (MW) or less to the grid (all from renewable energy). The 50 MW threshold is consistent with the small generating units subcategory under the Federal effluent limitations guidelines and standards (ELG) regulations.⁵⁶ In addition, the commenters believed that this would also account for sites that have utilized renewable energy (e.g., solar panels) for the primary purpose of powering the remaining infrastructure, but may potentially supply very limited amounts to the grid on occasion.

The second suggestion was that EPA confirm that this is a prospective change and provide a pathway for compliance for facilities that would be newly subject to the CCR Rule. According to those facilities relied in good faith on the explanatory statements in the 2015 CCR Rule preamble and the plain meaning of the term “fuel,” believed they were inactive facilities and did not have units subject to requirements of the CCR Rule, and accordingly should be allotted a separate new compliance timeframe.

EPA disagrees that the phrase “regardless of the fuel currently used to produce electricity” under § 257.50(c) indicates that EPA meant to limit the rule to facilities that combust fossil fuels. As EPA stated in the proposed rule, the definition of an active facility at § 257.53 does not include any limitation related to how the facility generates electricity. The clause, “regardless of the fuel currently used to produce electricity” in § 257.50(c) does not limit coverage only to facilities that use fuel to generate electricity. The plain language of the clause actually states the opposite; that coverage applies *without regard to the fuel used* to produce electricity. Or in other words, without regard to the type of fuel used or indeed whether any fuel is used to produce electricity.

EPA also disagrees that either of the cited preamble statements demonstrate a contrary intent. As the commenters themselves acknowledge, the discussion of affected entities expressly states that it “may not be exhaustive; other types of entities not listed could also be affected.” 80 FR 21302. In addition, EPA expressly stated that “[t]o determine whether your facility, company, business, organization, etc., is affected by this action, you should refer to the applicability criteria discussed in Unit VI.A of this document.” *Id.* Similarly, the parenthetical description “(e.g., coal, natural gas, oil)” uses the abbreviation e.g., which indicates that it is not comprehensive.

Consequently, EPA disagrees that facilities have any reliance interest in a less expansive definition. Generally, a reliance interest may be implicated if an agency issues a policy, a party takes an action based on that policy, and the agency subsequently changes its policy. *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020). Here, EPA never changed its position, and there can be no legitimate reliance on a non-existent past position.

Even if the regulatory amendment reflected a changed in policy, EPA issued a proposal and solicited comment from affected entities on the substance of the policy that would be in place in the final action. The commenters had an opportunity to provide EPA with information detailing their reliance interests, although they failed to do more than allege that they had reliance interests in remaining exempt. EPA has explained why, notwithstanding those interests, the agency believes that this is the better policy. No more is required. *DHS v. Regents of the Univ. of Cal.*, *supra* at 1913.

Nevertheless, EPA is sensitive to not creating disincentives to renewable repowering at those sites. In addition, EPA acknowledges that although commenters’ interpretation is not the best reading of the provision, it is a plausible one. Accordingly, EPA has adopted the commenters’ suggestion that the Agency provide a pathway to compliance for facilities that believed they were inactive facilities and did not have units subject to the requirements of the 2015 CCR Rule. This final rule provides that facilities producing electricity through renewables (*i.e.*, non-fuels) are subject to the same applicable compliance deadlines for these units. See § 257.100(a)(1).

EPA is rejecting the commenters’ suggestion that EPA exempt inactive facilities that generate 50 megawatt (MW) or less to the grid. This is because an exemption for small generating units based on current operations, such as renewable generation with a capacity of 50 MW or less, do not necessarily correlate to the current risks resulting from past coal-fired generation operations.

d. Innocent Owners

EPA proposed not to establish an “innocent owner” provision in the CCR regulations, in part because EPA had no factual basis to establish one. 88 FR 31994–95. The Agency received comments both opposing and supporting such a provision. Most commenters opposed the inclusion of an innocent owner provision in the final

rule. Some of these stated that there is no statutory basis for uniformly excluding existing owners and operators from any RCRA regulations applicable to legacy impoundments. According to these commenters, the concept of an “innocent owner” does not apply to legacy impoundments because only the owner of the regulated unit can fulfill obligations involving affirmative regulatory controls.

Other commenters stated that relevant parties may allocate liability among themselves through various agreements and arrangements. These commenters explained that liability should not be rigidly limited only to the current owner, that liability should honor existing agreements (e.g., purchase and sale agreement), and that it may be appropriate under some circumstances for shared responsibility between the current owner and the utility. Another commenter stated that each of the utilities and each transferee should remain responsible for rule compliance regardless of how responsibility is currently allocated.

Other commenters supported adoption of an innocent owner provision in the regulations. These commenters claimed that EPA is responsible for creating a new class of innocent owner when it changed the 2015 CCR regulations. Consequently, these commenters urged EPA to develop an innocent landowner provision that would allow both the utilities and developers to come to a mutual agreement as to who has the environmental and financial responsibility of these newly regulated units. Finally, another commenter suggested EPA take time to evaluate the different types of innocent property owners and then consider adding an innocent owner provision to the regulations.

EPA has not included an innocent owner provision in the final rule. EPA explained in the proposal that its analysis of inactive facilities found that most inactive facilities are owned by companies that are already regulated by the CCR regulations. The analysis presented in the proposed rule indicated that approximately 80% of potential legacy impoundments (*i.e.*, 126 of the 156 identified potential units) are owned by companies the Agency knows as already having units subject to the CCR regulations. 88 FR 31994. As a consequence, EPA proposed it had no factual basis to establish an innocent owner provision. 88 FR 31995. EPA has updated the ownership analysis based on an updated list of potential legacy impoundments. The revised analysis continues to indicate that most inactive

⁵⁶ 80 FR 67838 (November 3, 2015).

facilities are owned by companies that are already regulated by the CCR regulations. The 194 potential legacy impoundments identified in the final rule are associated with 52 different unique corporate parents. Of the 194 impoundments, 142 units (or 73%), are owned by 28 companies the Agency knows own facilities currently subject to the CCR regulations. The remaining 52 impoundments are owned by 24 different companies, with each company generally having just one location/site with legacy CCR surface impoundments (with two exceptions, that each own two sites).

EPA is also aware of a number of instances in which parties have allocated liability among themselves through various agreements and arrangements. EPA infers from this that an innocent landowner provision is not necessary to allow utilities and developers to come to a mutual agreement on how best to allocate environmental and financial responsibility. EPA has no interest in taking actions that could potentially inhibit or interfere with these private arrangements. For all these reasons EPA continues to believe that an innocent owner provision is not currently needed and has not included such a provision in the final rule.

2. Applicable Requirements for Legacy CCR Surface Impoundments and Compliance Deadlines

This Unit of the preamble first provides a general overview of how EPA determined the applicable requirements and compliance deadlines for legacy CCR surface impoundments. Then, EPA discusses each of the existing requirements for CCR surface impoundments and explains: (1) Why EPA is (or is not) applying them to legacy CCR surface impoundments; and (2) The rationale for the compliance deadline EPA is finalizing for each requirement.

a. General Overview

i. Applicable Requirements for Legacy CCR Surface Impoundments

EPA proposed to apply all of the existing requirements in 40 CFR part 257, subpart D that are currently applicable to inactive CCR surface impoundments to legacy CCR surface impoundments, except for the location restrictions at §§ 257.60 through 257.64, and the liner design criteria at § 257.71. EPA also proposed one revision to the existing groundwater monitoring requirements and three new requirements specific to legacy CCR surface impoundments: a reporting

requirement; a new security requirement to restrict public access to these sites; and a closure certification. As explained in the proposed rule, EPA proposed to exclude the location restrictions and the liner design criteria requirements because EPA believed they would not be necessary if EPA took final action on the proposed requirement that all legacy CCR surface impoundments initiate closure no later than 12 months after the effective date of the final rule. Furthermore, the proposed rule explained that the record for the 2015 CCR Rule demonstrated that “there is little difference between the potential risks of an active and inactive surface impoundment; both can leak into groundwater, and both are subject to structural failures that release the wastes into the environment, including catastrophic failures leading to massive releases that threaten both human health and the environment.” 80 FR 21343. As discussed in Unit II.B of this preamble, the D.C. Circuit came to the same conclusion, and on that basis, vacated the exemption for legacy CCR surface impoundments. See, *USWAG* at 901 F.3d at 434. Based on the record, EPA considered that it has limited discretion to establish requirements for legacy CCR surface impoundments that are significantly different than those currently applicable to inactive CCR impoundments. This is also consistent with how the *USWAG* court viewed the 2015 record. Accordingly, EPA proposed that in most cases the existing requirements in 40 CFR part 257, subpart D applicable to inactive CCR surface impoundments would apply to legacy CCR surface impoundments.

EPA received numerous comments on the proposed rule regarding the requirements applicable to legacy CCR surface impoundments. Several commenters generally supported the regulatory approach, although some suggested that legacy CCR surface impoundments be subject to all the existing CCR regulations, including the location restrictions at §§ 257.60 through 257.64 and the liner design criteria at § 257.71. Other commenters stated that the inspections at § 257.83 were only relevant for operating CCR units and therefore should not be applied to legacy CCR surface impoundments. A few commenters suggested EPA create additional requirements for legacy CCR surface impoundments such as zero discharge limits, new reporting requirements, financial assurance measures, and beneficial reuse restrictions. Other commenters suggested that EPA revise the existing requirements applicable to

inactive impoundments, including by adding requirements to the fugitive dust, closure, and post-closure care requirements; further revising the groundwater monitoring requirements to ban intrawell data comparisons; mandating closure by removal; and using a risk-based approach for corrective action and closure requirements.

EPA still considers that based on the record (as described in III.A of this preamble), EPA has limited discretion to establish requirements for legacy CCR surface impoundments that are significantly different than those currently applicable to inactive CCR impoundments. For that reason and those laid out in the preamble of the proposed rule, EPA did not adopt any of the new requirements, such as zero discharge limits, new reporting requirements, financial assurance measures, or new beneficial use restrictions suggested by commenters. The final rule contains only one additional revision of the existing requirements for inactive CCR surface impoundments beyond the four included in the proposed rule: the deferral to permitting of certain closure activities. The rationale for the final requirements is detailed in subsequent sections in this Unit.

For the reasons detailed in the proposed rule, except for certain legacy impoundments, EPA is finalizing the requirement for legacy CCR surface impoundments to comply with the existing regulations in 40 CFR part 257, subpart D applicable to inactive CCR surface impoundments except for the location restrictions at §§ 257.60 through 257.64, and the liner design criteria at § 257.71. EPA is also finalizing the revision to the existing groundwater monitoring requirements, combining detection and assessment monitoring for legacy CCR surface impoundments and the two new requirements specific to legacy CCR surface impoundments: the applicability documentation (§ 257.100(f)(1)(i)) and the site security requirement (§ 257.100(f)(3)(iii)).

The final rule also establishes a tailored subset of requirements applicable to legacy CCR surface impoundments that were closed prior to the effective date of this rule, including those impoundments whose closures qualify for deferral because they were conducted in accordance with substantially equivalent State or Federal requirements. See Unit III.B.2.g.iii.(b) of this preamble for further discussion of the deferral.

(a) Applicable Requirements for Legacy CCR Surface Impoundments Closed by Removal

EPA is finalizing a tailored subset requirements for legacy CCR surface impoundments that have completed closure by removal before the effective date of this final rule but are not able to complete the certification of closure by removal (see, Unit III.B.2.b.iii). For the reasons detailed in this Unit and in the following Units of the preamble (Units III.B.2.b–III.B.2.h), the owner or operator of such units must comply with the following requirements: the applicability report, installation of a permanent marker, all groundwater monitoring and corrective action (including combined detection monitoring and assessment monitoring), recordkeeping, notification, and website posting. In addition, if a CCRMU is discovered onsite during the course of complying with the Facility Evaluation Report (FER), the owner or operator of these units must develop a fugitive dust control plan (see Unit III.C.3).

While EPA acknowledges that these closed units are unlikely to have any ongoing activities that would create fugitive dust, EPA determined that requiring these units to comply with the fugitive dust requirement was appropriate because these units are subject to the CCRMU requirements and there is a reasonable likelihood that CCR fugitive dust would be generated as part of the actions required to comply with those requirements (e.g., field work to determine the presence or absence of CCRMU, CCRMU closure). As such, if a CCRMU is discovered onsite of a facility with a legacy CCR surface impoundment that has closed by removal, the owner or operator must complete a fugitive dust plan no later than six months after the FER is due (i.e., no later than 33 months after becoming subject to these requirements).

EPA determined that the site security requirements applicable to other legacy CCR surface impoundments would not be relevant for this subset of units as the CCR has been removed from the unit and the land may be being used for another purpose (e.g., nature preserve, agricultural land, redevelopment). However, EPA expects legacy CCR surface impoundments that closed by removal to protect the monitoring equipment and monitoring wells, similar to other legacy CCR surface impoundments.

EPA is also not requiring these units to comply with any other design criteria or operating criteria, aside from the installation of the permanent marker

and the fugitive dust requirements, as noted above. EPA has determined that the other design and operating criteria are not applicable to units that have closed by removal and therefore no longer contain CCR in the unit on the effective date of this final rule. For example, the requirement to prepare and maintain an EAP is not relevant when CCR is no longer present in the unit nor is the requirement to conduct weekly inspections of the legacy impoundment.

(b) Applicable Requirements for Legacy CCR Surface Impoundments That Closed With Waste in Place

EPA is finalizing a tailored subset of requirements for legacy CCR surface impoundments that, by the effective date of this final rule, have completed: (1) closure with waste in place or (2) a closure eligible for deferral to permitting as described in Unit III.2.g.iii(b). For the reasons detailed in this Unit and in the following sections (Units III.B.2.b–III.B.2.h), the owner or operator of such units must comply with the following requirements: applicability report, site security, installation of the permanent marker, history of construction, fugitive dust control plan, annual fugitive dust control report, all groundwater monitoring and corrective action (including combined detection monitoring and assessment monitoring), written post-closure care plan, post-closure care, recordkeeping, notification, and website posting. In addition, the final rule requires the facility to provide information on the completed closure of the legacy CCR surface impoundment, along with supporting documentation to demonstrate that the closure meets the performance standards in § 257.102(d) or the standards specified in § 257.101(g).

While EPA acknowledges that these closed units are unlikely to have any ongoing activity that would create fugitive dust, EPA determined that requiring these units to comply with the fugitive dust requirement was appropriate because these units are subject to the CCRMU requirements and there is a reasonable likelihood that CCR fugitive dust would be generated as part of the actions required to comply with those requirements (e.g., field work to determine the presence or absence of CCRMU, CCRMU closure). As such, if a CCRMU is discovered onsite of a facility with a legacy CCR surface impoundment that has closed by removal, the owner or operator must complete a fugitive dust plan no later than six months after the FER is due (i.e., no later than 33 months after

becoming subject to these requirements).

EPA is also finalizing the requirement for this subset of legacy CCR surface impoundments to comply with the site security requirements applicable to other legacy CCR surface impoundments. EPA determined that the site security requirements are needed to minimize the potential for the unauthorized entry of people or animals to disturb the final cover system, as these units are unlikely to be monitored. EPA also expects facilities that closed legacy CCR surface impoundments with waste in place to protect the monitoring equipment and monitoring wells, similar to other legacy CCR surface impoundments.

This final rule also requires the owners and operators of these units to complete the history of construction in accordance with § 257.73(c). The history of construction provides information regarding the original site conditions, as well as the unit's original design and construction, such as cross sections of the length and width of the CCR unit. It would also include information on subsequent revisions, such as the design and construction of any lateral expansions. This information is relevant to designing (and evaluating) the groundwater monitoring system, unit closures, and corrective actions. For example, the history of construction would normally include the elevations of the unit base and the CCR in the unit (i.e., the ground elevation contours within the footprint prior to unit construction); this information, in conjunction with the site characterization developed under § 257.90 to design the groundwater monitoring system can be used to determine whether the unit intersects with the groundwater (i.e., the unit's ability to sufficiently contain CCR and contaminants that may leach from CCR). This information remains relevant in evaluating closure, when addressing any contamination coming from the unit, and throughout the post-closure care period. Therefore, EPA is requiring this subset of legacy CCR surface impoundments to comply with the history of construction requirement.

EPA has determined that the other design and operating criteria (all those besides the permanent marker, site security, history of construction, and fugitive dust requirements) are not applicable to units that have completed closure in accordance with § 257.102(d) by the effective date of this final rule. For example, the requirement to prepare an inflow design flood control system plan is not relevant for units that have installed a final cover system, as post-

closure care requires a final cover system to be maintained and groundwater monitoring to continue. Additionally, periodic assessments, such as the hazard potential classification assessment and the structural stability assessments, are intended to address risks from unclosed unit and therefore, consistent with the requirements for units that have completed closure under the 2015 CCR Rule, are not applicable to units that have closed with waste in place.

ii. Compliance Deadlines for Legacy CCR Surface Impoundments

EPA proposed to establish new compliance dates for legacy CCR surface impoundments. The proposed rule explained that the 2015 CCR Rule compliance deadlines were based on the amount of time determined to be necessary to implement the requirements and the proposed compliance dates for legacy CCR surface impoundments were determined using the same approach. The proposed rule further explained that some factors considered in determining the 2015 CCR Rule compliance deadlines were not relevant for legacy CCR surface impoundments, such as the need to coordinate compliance deadlines with the then recently promulgated ELG rule. In addition, EPA anticipated most facilities would already be familiar with the existing regulations, and therefore the proposed requirements for legacy CCR surface impoundments, and fewer facilities and units would need to come into compliance, as compared to the 2015 CCR Rule. Consequently, EPA proposed generally expedited deadlines based on the expected shortest average amount of time needed to complete the necessary activities to meet the requirements. In the proposed rule, EPA requested comment on the proposed compliance deadlines and the feasibility to meet the proposed compliance timeframes for legacy CCR surface impoundments.

EPA received numerous comments regarding the proposed compliance deadlines. Several commenters expressed support for the proposed compliance deadlines for legacy CCR surface impoundments. Generally, these commenters stated that expedited compliance was appropriate due to the increased risk posed by these units, the likelihood that these units are actively contaminating groundwater, and the urgent need for corrective action to address that contamination for the protection of human health and the environment. Some of these commenters echoed the proposed rule, stating that owner's or operator's

familiarity with the existing requirements, along with the fact that these units are no longer in use and therefore would not need time to cease receipt of waste, further justified the expedited deadlines.

Many other commenters stated the proposed compliance deadlines were infeasible and should, at a minimum, allow as much time for compliance as the 2015 CCR Rule deadlines, although several commenters expressed that even the 2015 CCR Rule deadlines were inadequate, and that the insufficient timeframes were likely a factor in the gap between EPA's expectations and facilities' good faith efforts and utilization of best practices in developing groundwater monitoring networks, sampling and analysis plans, corrective action programs, and closure plans. Commenters pointed to several factors that they believed EPA did not fully incorporate into the proposed deadline calculations that make compliance with the proposed deadlines infeasible: the large number of CCR units (*i.e.*, existing CCR units, legacy CCR surface impoundments, CCRMU) competing for limited resources to meet overlapping compliance deadlines; the limited number of qualified contractors available to conduct necessary activities to reach the compliance deadlines; the nationwide labor shortage exacerbated by impacts from the COVID-19 pandemic; limited existing alternative disposal options; overlapping regulatory requirements (*e.g.*, State drilling permits, timing restrictions related to protected habitats, State CCR permits, Consent Decrees/Orders); seasonality impacts in different regions across the nation; and accessibility and completeness, or lack thereof, of historical documentation and information. One commenter provided specific information regarding typical delays experienced during the implementation of the 2015 CCR Rule caused by third-party availability and backlogs: two to four weeks for contractor mobilization; two to six weeks for site clearing; two to three weeks for surveys; three to 12 weeks for environmental drillers; and three to four weeks for laboratory analyses. These commenters also said EPA grossly underestimated the amount of time needed to hire a contractor, locate and review historical information, access a legacy CCR surface impoundment site, characterize and delineate a site, comply with the groundwater monitoring requirements, and conduct quality control or quality assurance on data and reports. Several of these

commenters expressed the belief that the proposed deadlines would result in unintentional non-compliance despite facilities' best efforts to comply due to the constraints listed above. Finally, a few commenters suggested EPA create alternative deadlines or mechanisms for extensions based on site-specific characteristics.

In response to comments, EPA reevaluated the compliance deadlines for legacy CCR surface impoundments. EPA reconsidered the impact of the following on the amount of time facilities needed to complete the activities involved in meeting the requirements: accessibility and abundance, or lack thereof, of historical documentation; seasonality; clearing restrictions and required local and State approvals to clear vegetation or drill wells; existing disposal options; impact of the national labor shortage and contractor and laboratory backlogs; and overlapping compliance deadlines for CCRMU, existing units (*i.e.*, groundwater monitoring, closure, and post-closure care), and legacy CCR surface impoundments. Overall, EPA found the information provided regarding the infeasibility of the proposed deadlines convincing. Specifically, EPA agrees that the shortage of qualified contractors and laboratory resources has persisted, if not increased, since the 2015 CCR Rule and that the increasing demand on these finite resources from new and existing CCR units, legacy CCR surface impoundments, and CCRMU complying with overlapping requirement deadlines will likely increase the time needed to come into compliance. EPA acknowledges that the proposed deadlines did not adequately account for those nationwide impacts of seasonality and extreme weather events; necessary coordination with outside parties (*e.g.*, State agencies, local governments); locating disposal capacity for those units closing by removal; the need to comply with overlapping regulatory requirements, such as State drilling permits or timing restrictions related to protected habitats; or necessary quality assurance and quality control in calculating the proposed deadlines. Therefore, as detailed in Units III.B.2.b through h, EPA extended the deadlines for legacy CCR surface impoundments to provide at least as much time facilities had to come into compliance with the 2015 CCR Rule. In some cases, EPA extended the deadlines for legacy CCR surface impoundments even further to mitigate factors mentioned by commenters that convinced EPA the 2015 compliance

deadlines would be infeasible for legacy impoundments. Overall, most of the comments EPA received supported deadlines that allowed at least as much time as EPA originally provided in the 2015 CCR Rule. While some units regulated by the 2015 CCR Rule were

able to come into compliance before the 2015 deadlines, the majority of units used all the time allowed by the 2015 CCR Rule.

Note that all deadlines herein are framed by reference to the effective date of the rule; the final rule will be effective six months after publication of

the final rule. Accordingly, facilities will have an additional six months beyond the deadlines to come into compliance. The Agency has included a document in the docket for this rule that summarizes the finalized compliance deadlines.⁵⁷

TABLE 1—FINAL COMPLIANCE TIME FRAMES FOR LEGACY CCR SURFACE IMPOUNDMENTS

40 CFR Part 257, Subpart D requirement	Description of requirement to be completed	Deadline (months after effective date of this final rule)	Date
Applicability Report (§ 257.100)	Complete applicability report	0	Friday, November 8, 2024.
Internet Posting (§ 257.107)	Establish CCR website	0	Friday, November 8, 2024.
Site Security (§ 257.100(f)(3)(iii)) ...	Implement site security measures	0	Friday, November 8, 2024.
Operating Criteria (§ 257.80)	Prepare fugitive dust control plan	0	Friday, November 8, 2024.
Operating Criteria (§ 257.80, 257.82, 257.83).	Initiate weekly inspections of the CCR unit.	0	Friday, November 8, 2024.
Operating Criteria (§ 257.80, 257.82, 257.83).	Initiate monthly monitoring of CCR unit instrumentation.	0	Friday, November 8, 2024.
Design Criteria (§ 257.73)	Install permanent marker	2	Wednesday, January 8, 2025.
Operating Criteria (§ 257.80, 257.82, 257.83).	Complete initial annual inspection of the CCR unit.	3	Monday, February, 10, 2025.
Operating Criteria (§ 257.80)	Complete initial annual fugitive dust report.	14	Thursday, January 8, 2026.
Design Criteria (§ 257.73)	Compile history of construction	15	Monday, February 9, 2026.
Design Criteria (§ 257.73)	Complete initial hazard potential classification assessment.	18	Friday, May 8, 2026.
Design Criteria (§ 257.73)	Complete initial structural stability assessment.	18	Friday, May 8, 2026.
Design Criteria (§ 257.73)	Complete initial safety factor assessment.	18	Friday, May 8, 2026.
Design Criteria (§ 257.73)	Prepare emergency action plan ...	18	Friday, May 8, 2026.
Operating Criteria (§ 257.82)	Complete initial inflow design flood control system plan.	18	Friday, May 8, 2026.
GWMCA (§§ 257.90–257.95)	Install the groundwater monitoring system, develop the groundwater sampling and analysis program, initiate the detection monitoring and assessment monitoring. Begin evaluating the groundwater monitoring data for SSIs over background levels and SSLs over GWPS.	30	Monday, May 10, 2027.
GWMCA (§ 257.90(e))	Complete initial annual GWMCA report.	January 31, 2027	January 31, 2027.
Closure (§§ 257.100–257.101)	Prepare written closure plan	36	Monday, November 8, 2027.
Post-Closure Care (§ 257.104)	Prepare written post-closure care plan.	36	Monday, November 8, 2027.
Closure and Post-Closure Care (§ 257.101).	Initiate closure	42	Monday, May 8, 2028.

b. New Requirements Specific to Legacy CCR Surface Impoundments

i. Applicability Report for Legacy CCR Surface Impoundments

EPA proposed to require the owner or operator of a legacy CCR surface impoundment to prepare an applicability report for any legacy CCR surface impoundment at that facility no later than the effective date of the final rule. This requirement would apply to all legacy CCR surface impoundments,

including incised impoundments and impoundments that do not meet the height and storage volume cutoffs specified in § 257.73(b). EPA proposed that this applicability report would include information to identify the unit, delineate the unit boundaries, include a figure of the facility and where the unit is located at the facility, the size of the unit, its proximity to surface water bodies, and the current site conditions. EPA also proposed that the applicability report include the facility address,

latitude and longitude, and contact information of the owner and/or operator of the legacy CCR surface impoundment with their business phone number and email address. EPA proposed that the report should document whether the legacy CCR surface impoundments are incised and whether the units meet the height and storage volume thresholds specified in § 257.73(b). EPA also proposed that the owner or operator of the legacy CCR surface impoundment notify the Agency

⁵⁷ A document “Final Rule Compliance Deadlines for Legacy CCR Surface Impoundments. April 2024.” is available in the docket for this action.

after a legacy impoundment is identified and the facility's CCR website is established, using the procedures currently in § 257.107(a) via the "contact us" form on EPA's CCR website. 88 FR 31998.

EPA received a few comments on the applicability report. Several commenters said the deadline to complete requirements of the applicability report could not be achieved. One commenter requested 24 months to complete the report. Another commenter presented several clarifying questions and said they could not estimate a compliance deadline without understanding these clarifications. This commenter asked if EPA will allow affected utilities to rely on information previously submitted to State regulatory authorities to satisfy the facility description requirements; what does EPA mean by the term "current site conditions" in the context of facility site descriptions; when EPA refers to providing a site identification number as previously provided to the State, is this intended only to apply in States that have achieved CCR Rule delegation, or in all States in which there is some level of State oversight over a legacy CCR surface impoundment; and if EPA can further determine what it considers to be "reasonably and readily available information" concerning history of construction. The commenter appreciates EPA's recognition that most of this information is likely "unknown or lost to time," but seeks additional guidance on the scope of investigation that should be conducted to meet the "reasonably and readily available" standard.

EPA believes that as part of the applicability report, an owner or operator of an inactive CCR facility can include information previously submitted to State regulatory authorities to describe the facility conditions. If, however, any changes have been made since the owner or operator last prepared that information or that information does not address all the issues inherent in an applicability determination, then updated or additional information should be included. The current site conditions should include, for example, when the facility operated, when it ceased generating electricity, the size of the facility property, a visual description of how the legacy impoundment looks on the effective date of the final rule (*e.g.*, ponded water, approximate size, vegetation, incised), a description of any nearby geological or hydrologic features (*i.e.*, rivers, lakes, streams, karst topography), and any other relevant information about the facility. The State

identification number can be for a previously issued solid waste, water, or other permit under State program, but does not have to be as part of an EPA-approved State CCR permit program.

EPA addressed the term "reasonably and readily available" at 80 FR 21380, "[t]herefore, in this rule, EPA is using the phrase 'to the extent available' and clarifying that the term requires the owner or operator to provide information on the history of construction only to the extent that such information is reasonably and readily available. EPA intends facilities to provide relevant design and construction information only if factual documentation exists. EPA does not expect owners or operators to generate new information or provide anecdotal or speculative information regarding the CCR surface impoundment's design and construction history."

Based on the comments about the infeasibility to complete the proposed requirements by the effective date of the final rule, EPA is not requiring that the applicability report include the size of the unit, its proximity to surface water bodies, or delineation of the unit boundaries. The size of the unit and delineation of the unit boundaries will be determined through the history of construction and groundwater monitoring requirements. Proximity to surface water bodies is not required by the 2015 CCR Rule, and EPA determined it is not feasible to determine the distance to surface water bodies before the unit boundaries are delineated, which would not be done by the effective date of the final rule. Therefore, EPA is not requiring proximity to surface water bodies to be completed in the applicability report.

Some commenters agreed with the proposed requirements on the applicability report and urged EPA to require additional information, including an EPA identification number, determination and public disclosure of whether legacy CCR surface impoundments contained both CCR and liquids, location and elevation of any 100-year floodplain within one mile, elevation and depth of CCR waste in the impoundment, proximity to public water supply wells or private water wells within two miles, proximity to wetlands, results of all environmental sampling, and owner/operator certification of the documentation. A commenter also said the applicability report should include a full investigation including the use of appropriate instrumentation to determine water levels, a report documenting the results certified by a qualified professional engineer, and the

publication of the report on a CCR website.

EPA considered these comments and decided not to require additional information since the recommended information would not be feasible to collect by the effective date of the final rule, especially given the limitations discussed in Unit III.B.2.a.i of this preamble. As stated previously, commenters discussed how delineating the unit boundaries and determining the exact location of the legacy CCR surface impoundment could not feasibly be completed by the deadline.

EPA is finalizing with revisions the proposed requirement for the owner or operator of a legacy CCR surface impoundment to prepare applicability reports for all legacy CCR surface impoundments at that facility no later than the effective date of the final rule. This requirement applies to all legacy CCR surface impoundments, including incised impoundments and impoundments that do not meet the height and storage volume cutoffs specified in § 257.73(b). This is codified in the regulatory text at § 257.100(f)(1)(i). The applicability report must include information to identify the unit, a figure of the facility and where the unit is located at the facility, and the current site conditions. The applicability documentation must also include the facility address, latitude and longitude, and contact information of the owner and/or operator of the legacy CCR surface impoundment with their phone number and email address. EPA is also finalizing the requirement that the owner or operator of the legacy CCR surface impoundment notify the Agency of the establishment of the facility's CCR website using the procedures currently in § 257.107(a) via the "contact us" form on EPA's CCR website.

Further, EPA is finalizing a requirement that a certification of the applicability report must be signed by the owner or operator or an authorized representative similar to the certification that is required at § 257.102(e) and § 257.102(f) for existing units undergoing closure. EPA proposed this requirement in § 257.75(c) for the FER and determined after reviewing the comments that a similar requirement should apply to the applicability report. This requirement is codified in the regulatory text at § 257.100(f)(1)(ii)(C).

For any legacy impoundments that have completed closure by removal or closure in place of the unit pursuant to a State permit or order that meets the requirements of § 257.101(g) prior to the effective date of this final rule, EPA is requiring the owner or operator to attach

such documentation to the applicability report required by § 257.100(f)(1) and post this documentation to its CCR website. This information will be evaluated by EPA permitting authorities at a future time to determine what further action, if any, is needed with the unit.

As discussed in Unit III.B.1.b.i.(b)(4) of this preamble, EPA is establishing a new definition of the phrase “contains both CCR and liquids” in the final rule. Under this definition CCR and liquids are present in a CCR surface impoundment except where the owner or operator has demonstrated that free liquids have been eliminated from the unit consistent with the performance standard in § 257.102(d)(2)(i). EPA recognizes that some owners and operators of inactive impoundments may not currently have records to demonstrate whether their inactive impoundment contained both CCR and liquids on or after October 19, 2015. In such cases, one option would be for the facility to conduct a field investigation to assess whether free liquids are currently present in the unit. To facilitate such investigations, the final rule establishes procedures to provide owners or operators with additional time to complete the legacy impoundment applicability report, should the owner or operator elect to conduct a field inspection to assess the unit for the presence or absence of free liquids. See § 257.100(f)(1)(v). To be clear, facilities are not required to conduct field testing to determine whether their unit is a legacy CCR surface impoundment. If records are available to allow the owner or operator to make that determination, this final rule does not require them to conduct field testing to confirm that information. However, to the extent facilities would prefer to rely on field investigations to supplement, or lieu of, a purely record-based investigation this final rule provides that option.

In order to obtain additional time to complete the legacy impoundment applicability report required under § 257.100(f)(1), an owner or operator must prepare an “applicability extension report” by the effective date of the final rule. The extension report consists of three parts. First, the extension report must include general identifying information about the potential legacy impoundment, including, the name associated with the unit, the identification number of the unit if one has been assigned by the State, and information about the location of the unit at the facility. This information is same as the first three

elements of the applicability report under § 257.100(f)(1)(i)(A) through (C).

Second, the extension report must include a statement by the owner or operator that available information does not provide a sufficient basis to determine that the inactive impoundment contained free liquids on or after October 19, 2015. Owners or operators that cannot make this statement are not eligible for this extension and must comply with the applicable requirements for legacy impoundments. For example, an owner or operator who knows that the unit currently contains liquids, or has aerial photographs from 2018 showing that the inactive impoundment contained standing or free water would not be eligible to make use of these extension provisions because the unit contained free liquids since October 19, 2015.

Finally, the extension report must contain a written field investigation workplan. The purpose of this plan is to describe the approach the owner or operator intends to follow to determine whether the inactive impoundment contains free liquids. The written field investigation workplan must contain the following elements:

- A detailed description of the approach to characterize the physical, topographic, geologic, hydrogeologic, and hydraulic properties of the CCR in the unit and native geologic materials beneath and surrounding the unit, and how those properties will be used to investigate for the presence of free liquids in the CCR unit.
- A detailed description of the methods and tools that will be employed to determine whether the inactive impoundment contains free liquids, the rationale for choosing these methods and tools, and how these methods and tools will be implemented, and at what level of spatial resolution at the CCR unit to identify and monitor the presence of free liquids.
- A detailed description of how groundwater elevations will be determined, and at what level of spatial resolution, in relation to the sides and bottom of the CCR unit and how any interaction of the groundwater table with the CCR unit will be evaluated, and at what level of spatial resolution.
- A plan for evaluating stormwater flow over the surface of the unit, stormwater drainage from the unit, and stormwater infiltration into the unit and how those processes may result in the formation of free liquids in the CCR unit. This plan must include a current topographic map showing surface water flow and any pertinent natural or man-made features present relevant to

stormwater drainage, infiltration and related processes.

- An estimated timeline to complete the workplan and make a determination if the CCR unit contains free liquids.
- A narrative discussion of how the results from implementing the workplan will determine whether the unit contains free liquids specified.
- A narrative discussion describing any anticipated problems that may be encountered during implementation of the workplan and what actions will be taken to resolve the problems, and anticipated timeframes necessary for such a contingency.

The final rule allows an owner to operator to obtain as many as three 6-month extensions (or 18 months from the effective date of the final rule) to complete the field investigation. Each six-month time extension must be supported by an updated extension report to justify the need for additional time. If the owner or operator needs either of the additional 6-month extensions, the subsequent extension report must be prepared no later than six months after completing the preceding extension report. Each prepared extension report must be placed in the facility's operating record as required § 257.105(k)(2) and posted to the owner or operator's CCR website.

Once the owner or operator determines that an inactive impoundment contains CCR and liquids the applicability report required by § 257.100(f)(1) must be completed within 14 days of the determination. EPA believes 14 days is a sufficient amount of time to complete the applicability report because the information will be known to owners or operators at this point. Following preparation of the applicability report, the inactive impoundment is subject to the requirements for legacy impoundments under § 257.100(f)(2) through (5), but with compliance deadlines adjusted by the length of the extension. These new timeframes are calculated on a unit-by-unit basis because the date the applicability report was prepared can vary by unit.

This following example illustrates how the new compliance timeframes are calculated for one of the design criteria for legacy impoundments. Section 257.100(f)(2)(i) requires that the permanent identification marker must be placed on or immediately adjacent to the legacy impoundment no later than 2 months after the effective date of the rule. If the owner or operator determines 10.5 months after the effective date of the rule that free liquids are present in the inactive impoundment, the owner or operator must prepare the legacy

impoundment applicability report with 14 days of that date. The new deadline for the owner or operator to install the permanent marker is 11 months after the original deadline (or in this case, 13 months from the effective date of the final rule (2+ 10.5 + 0.5 months)).

Finally, if the owner or operator determines that the unit does not contain liquids, the owner or operator must prepare a notification stating that the field investigation has concluded and that the owner or operator has determined that the inactive impoundment does not contain CCR and liquids. This notification informs the public, States and EPA that the unit is not a legacy CCR surface impoundment. The final rule also provides that if the owner or operator does not complete the field investigation work within the timeframes specified in § 257.100(f)(1)(iv)(B), the inactive impoundment shall be considered a legacy CCR surface impoundment and must comply with all applicable requirements under the new timeframes specified under § 257.100(f)(1)(iv)(E).

ii. Site Security for Legacy CCR Surface Impoundments

Active facilities generally have guards and fencing to control access to the facility, but inactive CCR facilities may not have such security controls in place at the facility. To minimize that risk, EPA proposed that owners or operators establish security controls to restrict access to legacy CCR surface impoundments. The proposed security requirements are written in terms of a performance standard, as opposed to a prescriptive set of technical standards, such as specific signage, barriers and fencing, or surveillance techniques. EPA chose this approach because it would allow the owner or operator to identify the most appropriate means of providing site security for the impoundment based on site-specific circumstances.

Commenters generally supported performance-based site security measures rather than having EPA prescribe specific technical standards. Some commenters agreed that such requirements are necessary because legacy CCR impoundments are located at inactive power plants, and unlike impoundments at operating power plants, they almost certainly lack the oversight and protection afforded by significant numbers of on-site personnel. These commenters stated that the integrity of impoundments and berms and the safety of nearby residents depend on robust security measures to ensure that people are not—whether

intentionally or unknowingly—entering the site and taking actions (such as all-terrain vehicle driving, dirt biking, or similar activities) that endanger the integrity of the impoundment or expose trespassers to health risks. Some commenters added that EPA should consider that some sites may not need security measures, for example, sites with closed legacy impoundments that closed under State programs, especially where CCR have been removed. EPA did not receive comments about the deadline to complete the site security requirements and is therefore finalizing as proposed.

EPA is adopting the proposed site security performance standard without revision from the proposal. Accordingly, the site security performance standard in the final rule requires the owner or operator to prevent the unknowing entry of people onto the legacy CCR surface impoundment and to minimize the potential for the unauthorized entry of people or livestock onto the impoundment. This is codified in the regulatory text in § 257.100(f)(3)(ii). The Agency generally modeled the requirements on the existing regulations that apply to interim status hazardous waste surface impoundments, which are codified at § 265.14(a). EPA recognizes that some facilities may already have facility-wide access controls in place, and in this case, the facility-wide controls would satisfy the requirement to limit public access to the legacy CCR surface impoundment. The Agency is finalizing the requirement for the facility to restrict access to the area containing the legacy CCR surface impoundment no later than the effective date of the final rule.

iii. Certification of Closure by Removal for Legacy CCR Surface Impoundments

EPA proposed that legacy CCR surface impoundments that completed closure by removal of CCR in accordance with the performance standards in § 257.102(c) after October 19, 2015, but before the effective date of the final rule would be subject to no further requirements under 40 CFR part 257, subpart D, provided the owner or operator completed certain actions.⁵⁸ 88 FR 31998 and proposed § 257.100(f)(1)(ii). Specifically, EPA proposed that the owner or operator would be required to post documentation on their CCR website showing that the legacy impoundment was closed in accordance with the

closure by removal standards in § 257.102(c). EPA further proposed to require that the closure certification be certified by a qualified P.E. Finally, EPA proposed to require that the certified demonstration be completed and placed in the operating record no later than the effective date of this final rule.

A number of commenters requested that EPA expand the certification to cover all State-approved closures by removal—including those in which all CCR was removed from the unit or site, but the State approved the closure without requiring any groundwater monitoring. The only factual basis these commenters offered to support their request was that EPA should rely on the State's determination that the closure was protective.

Other commenters raised concern that the information needed to support a certification may not be readily available, and as a consequence these units would be subject to all of the other requirements of the final rule, including groundwater monitoring, preparation of plans, filing of reports, and closure and post-closure activities. These commenters stated such an outcome is not necessary to protect human health and the environment.

Other commenters stated that the proposed closure certification under § 257.100(f)(1)(ii) was not sufficient to allow EPA, States, and the public to determine whether the facility has actually complied with the closure performance standards under § 257.102(c). These commenters requested that the final rule require owners/operators certifying closure by removal to specify, with supporting documentation all of the following:

- The nature and volume of CCR and all other materials in the unit prior to closure;
- All releases from the unit to the soil, surface water, groundwater, and atmosphere during the operation of the unit, during its inactive period(s), and prior to completion of closure activities;
- The nature and extent of all soil, groundwater, surface water, and other contamination associated with releases from the unit throughout its history, including active and inactive periods;
- The methods to be employed (in closure plans) and actually employed (in closure completeness certifications) to ensure complete removal of all CCR and other contaminated materials from the unit, including but not limited to post-removal sampling and analysis;
- Documentation that all CCR and other contaminated materials were in fact removed from the unit, including but not limited to post-removal sampling and analysis;

⁵⁸ These impoundments contained both CCR and liquids on or after October 19, 2015, and subsequently completed closure of the impoundment before the effective date of this final rule.

- The methods to be employed (in closure plans) and actually employed (in closure completeness certifications) to ensure complete decontamination of all areas affected by releases from the unit, including but not limited to post-decontamination sampling and analysis; and

- Documentation that all areas affected by releases from the unit were in fact decontaminated and that all groundwater affected by releases has achieved groundwater protection standards, including but not limited to a minimum of two years of post-removal/decontamination detection and assessment groundwater monitoring data collected pursuant to the CCR Rule's groundwater monitoring performance standards and analyzed pursuant to its sampling and analysis requirements, 40 CFR 257.91 and 257.93, to reliably demonstrate compliance with groundwater protection standards in order to certify the completion of closure in accordance with 40 CFR 257.102(c).

EPA is unable to adopt the commenters' suggestion to expand the certification to all State-approved closures by removal. Without any record of the factual and legal bases for the States' decisions, EPA cannot conclude that all State-approved closures by removal pose no reasonable probability of adverse effects on health or the environment, as it is required to do under RCRA section 4004(a). This is particularly true with respect to closures that were approved without any groundwater monitoring or other information to demonstrate that "groundwater . . . concentrations do not exceed the groundwater protection standard established pursuant to § 257.95(h)," 40 CFR 257.102(c). Given the high probability that these impoundments were unlined and leaked, the most likely conclusion is that contamination remains at the site. In the absence of any further information, it is not apparent how EPA could support approving such closures in a nationwide rulemaking. See also Unit III.B.2.g.iii of this preamble for further discussion of State programs.

EPA agrees that certifications under this paragraph need to include sufficient supporting data so that EPA, States, and the public can determine whether the facility has actually complied with the performance standards in § 257.102(c). However, EPA disagrees that all of the information the commenters suggest is necessary to achieve that goal. As described below, the final rule requires that a facility support its certification with information that would have been routinely developed as part of closing

the unit; either because the information is routinely required by State permit authorities or because the facility would have developed the information as part of the normal construction processes. Specifically, the final rule requires facilities to include the following supporting information with their certification:

- (1) The type and volume of CCR and all other materials in the unit prior to closure;

- (2) The methods used to verify complete removal of all CCR and other contaminated materials from the unit, including any post-removal sampling and analysis;

- (3) Documentation that all CCR and other contaminated materials were removed from the unit, including, the results of any post-removal sampling and analysis that was conducted;

- (4) The methods used to verify complete decontamination of all areas affected by releases from the unit, including but not limited to post-decontamination sampling and analysis; and

- (5) Documentation that all areas affected by releases from the unit were decontaminated and that all groundwater affected by releases has achieved groundwater protection standards.

The final rule identifies the minimum information needed to support a certification, but, for the most part does not substantially restrict the analyses or factual information that can be used. This is because these units closed before they were subject to the Federal CCR regulations, or knew that they would be subject to the regulations, and EPA expects it is unlikely that facilities would necessarily have the same documentation as a currently regulated entity. State requirements specifying the information and analyses necessary to obtain approvals or permits can vary significantly. However, the final rule specifies that the facility must have groundwater monitoring data demonstrating that the concentrations of each Appendix IV constituent do not exceed the relevant groundwater protection standard, which would be either the MCL or background concentration, for two consecutive sampling events, consistent with § 257.95(e). The final rule identifies the minimum information needed to support a certification, but does not substantially restrict the analyses or factual information that can be used. Because the facility was not subject to part 257 groundwater monitoring when the monitoring was conducted, the final rule does not require a facility to demonstrate that it had installed a

groundwater monitoring system that complied with all of the requirements in §§ 257.90 through 257.95. Nevertheless, the data supporting the certification must be scientifically valid and must credibly support a determination that the monitoring system would reliably detect any releases from the impoundment. Therefore, the final rule requires that owner or operator demonstrate that the groundwater monitoring system used to document the concentrations of Appendix IV constituents met a subset of the performance standards found in §§ 257.91(a) through (e), 257.93(a) through (d), and 257.93(i). Specifically, the facility needs to demonstrate that the groundwater monitoring system met the following criteria:

- (1) Accurately represented background water quality unaffected by a CCR unit;

- (2) Accurately represented the quality of water passing the waste boundary of the unit;

- (3) Was capable of detecting contamination in the uppermost aquifer;

- (4) Monitored all potential contaminant pathways;

- (5) Established groundwater background concentrations for Appendix IV constituents and compared samples to those background concentrations; and

- (6) Utilized wells that are (a) cased and maintained in a manner that protects the integrity of the monitoring well borehole, (b) screened or perforated and packed with gravel or sand, where necessary, to enable collection of groundwater samples, and (c) sealed between the borehole and the well casing to prevent contamination of the sample and groundwater.

Finally, the last sample used to demonstrate that no constituent in Appendix IV was detected in concentrations above the established groundwater protection standards must have been collected no earlier than one year prior to the initiation of closure.

If a facility can certify that all legacy CCR surface impoundments on-site met the standards in § 257.102(c) prior to the effective date of this rule, the facility would not be subject to any further requirements under this final rule (*i.e.*, neither legacy CCR surface impoundment requirements or CCRMU requirements). For these units, the certification of closure by removal would be due no later than the effective date of this final rule and must be placed in the facility operating record then posted on their public CCR website. See § 257.100(g).

EPA agrees that if a facility has actually met the performance standards

in § 257.102(c), there is no health or environmental benefit in requiring compliance with all of subpart D simply because the facility lacks the information to support the certification. Accordingly, the final rule provides an option that allows such a facility to obtain the information necessary to support a certification. If a facility has removed all CCR from a legacy CCR surface impoundment before the effective date of this final rule but never conducted groundwater monitoring (or had a groundwater monitoring system that does not meet the criteria laid out above), the facility would initially only be required to install a groundwater monitoring system and initiate groundwater monitoring in accordance with the requirements in §§ 257.90 through 257.95, as well as the recordkeeping, notification, and website posting requirements described in Units III.B.2.f and III.B.2.h. If the owner or operator of one of these units elects to pursue a closure certification, the owner or operator must prepare a notification of intent to certify closure by the effective date of this final rule and place it in the operating record, post it on their CCR website, and submit a notification to EPA or the State or Tribal Authority. The notification must state that the facility has removed all CCR from the unit and will be installing a groundwater monitoring system compliant with §§ 257.90 through 257.95 to determine whether there is contamination coming from the unit. If no SSL above the GWPS is detected for all Appendix IV constituent in at least the first two consecutive sampling events, consistent with the existing provisions of § 257.95(e), the facility could at that time complete the closure certification, and document compliance with § 257.102(c). EPA anticipates that the requirement to conduct two consecutive sampling events will result in one sample being taken during the dry season and one in the wet season and thus capture groundwater fluctuations. If the required sampling demonstrates no exceedances of Appendix IV constituents, the owner or operator of the unit must place the closure certification in the operating record, and submit a notification to the State or Tribal Authority, and post the certification documentation on their public CCR website. At that time, the facility would not be subject to any further requirements under this final rule (*i.e.*, neither legacy CCR surface impoundment requirements or CCRMU requirements). The deadline for the completion of the certification of closure by removal for these units is no

later than 42 months after the effective date of the final rule. This will provide the owner or operators of these units with the same amount of time as other legacy CCR surface impoundments to comply with the requirements to design and install a groundwater monitoring network, develop a sampling and analysis plan, collect eight baseline samples, and initiate combined detection and assessment monitoring (*i.e.*, 30 months after the effective date of the final rule) and an additional 12 months to perform at least two sampling rounds.

If, however, groundwater monitoring detects an SSL above the established GWPS of any Appendix IV constituent, the legacy CCR surface impoundment described above becomes subject to the corrective action requirements in §§ 257.96 through 257.98 and is no longer eligible to certify closure by removal under this provision. The owner or operator of the legacy impoundment must then prepare the applicability report no later than six months from the date of receiving the laboratory analysis documenting the SSL. No later than eight months from the date of receiving the laboratory analysis documenting the exceedance of the GWPS, the owner or operator must install the permanent marker. Furthermore, the facility must comply with the CCRMU requirements in Unit III.C. However, the compliance deadlines for the CCRMU requirements will be delayed by the number of months between the publication date of the rule and the date of receiving the laboratory analysis documenting the exceedance of the groundwater protection standard. For example, if a facility receives the laboratory analysis documenting an exceedance of the GWPS for any Appendix IV constituent 36 months after the effective date, the facility would add 42 months to all the CCRMU compliance deadlines. Additionally, if a CCRMU is discovered onsite, the owner or operator must prepare a fugitive dust plan no later than 6 months after the completion of the FER. For such units that are unable to certify, the final rule also includes a provision that allows a facility closing a unit by removal to complete any necessary corrective action during a post closure care period. Assuming the criteria in Unit III.B.2.g.iii are met, the facility can also elect to defer closure to permitting. However, given that the facility must comply with the groundwater monitoring and corrective actions under both options, EPA expects that most facilities will prefer to pursue

certifications. See Unit III.D of this preamble for further discussion.

c. Location Restrictions and Liner Design Criteria

Under the existing CCR regulations, existing CCR surface impoundments that cannot demonstrate compliance with the location restrictions for placement of CCR above the uppermost aquifer, in wetlands, within fault areas, in seismic impact zones, or in unstable areas (specified in §§ 257.60 through 257.64) must retrofit or close. The purpose of these requirements is to ensure that units located in particularly problematic areas cease operation. EPA explained in the proposed rule that because, by definition, legacy CCR surface impoundments are not operating, and because it appears that all legacy CCR surface impoundments are unlined and will therefore be required to close, EPA believed that requiring compliance with the location restrictions would be largely redundant.

Commenters largely supported not requiring location restrictions or liner demonstrations on the grounds that location restrictions and design criteria are not relevant to this class of units, as these requirements primarily seek to ensure active units operate safely. Other commenters believed that legacy CCR surface impoundments should not be exempted from liner and structural stability requirements out of concern that requiring compliance with one or more location restrictions would provide information that would be “critical” to designing unit closure and any necessary corrective action.

EPA disagrees that applying location restrictions and the liner design criteria to legacy CCR surface impoundments would be appropriate. First, as explained in the proposed rule, these criteria are more appropriate for operational units or units at active facilities. Second the consequence of failing to comply with the location restrictions and liner design criteria requirements is closure by a specific date. 40 CFR 257.101(a) through (b)(1). Because legacy CCR surface impoundments are not operational and will in any event be required to close, the consequence for failure to comply with location restrictions or the liner design criteria (*i.e.*, ceased receipt of waste and closure) is moot. Additionally, the commenter failed to identify any information necessary for conducting corrective action or closure uniquely gained by complying with the location restrictions or liner design criteria. Therefore, EPA continues to conclude that, as stated in the proposed rule, information useful for corrective

action or closure that would be obtained by complying with the location restrictions will be captured by compliance with the history of construction requirement, the closure plan, or in the development of the groundwater monitoring system.

EPA also continues to believe that the requirement to document whether the impoundment was constructed with a composite liner or alternative composite liner under § 257.71(a)(1) is not warranted for legacy CCR surface impoundments. The original purpose of this provision was to determine whether the unit was unlined, and consequently subject to closure. However, the available information indicates that legacy CCR surface impoundments were largely constructed well before composite liners systems were typically installed. Indeed, no commenter identified a legacy impoundment with a composite liner. For these reasons, EPA expects legacy CCR surface impoundment to be unlined and, therefore, the final rule requires all legacy CCR surface impoundments to close. As a consequence, requiring facilities to compile the information required by § 257.71(a)(1) would not provide useful information or otherwise be necessary. Therefore, EPA is not finalizing such requirement.

d. Design Criteria for Structural Integrity for Legacy CCR Surface Impoundments

EPA proposed that legacy CCR surface impoundments be subject only to the existing design criteria requirements in § 257.73, in order to help prevent damages associated with structural failures of CCR surface impoundments.

EPA received numerous comments on application of the design criteria requirements to legacy CCR surface impoundments. Most commenters on the design criteria specifically commented on the reporting/assessment requirements in § 257.73 (*i.e.*, history of construction, initial hazard potential classification, initial structural stability assessment, initial safety factor assessment). Some of these commenters supported the expedited deadline for the reports. However, most of these commenters echoed the concerns mentioned in Unit III.B.2.a.ii of this preamble, characterizing the proposed deadlines as infeasible, citing third-party availability, national labor shortage, seasonality, the need to conduct quality control and quality assurance, and the accessibility and completeness, or lack thereof, of historical documentation and data. These commenters stated that because legacy CCR surface impoundments are not operational and have not been

operational since before the 2015 CCR Rule took effect, it is highly unlikely that owners or operators will have the required historical documentation or data readily available and that, for most of these facilities, documentation is likely in storage or lost to time. Commenters have stated that more time is needed for owners or operators to do their due diligence in locating and reviewing the necessary data and information.

Furthermore, these commenters stated that due to the likely lack of historical information, additional analyses will more than likely be necessary to collect information essential to meeting the standards in the CCR rule for each report. Additionally, these commenters said that EPA was incorrect in characterizing these additional analyses as minor and capable of being performed within the proposed deadline (*i.e.*, three months from the effective date of the final rule) and that some of these analyses (*e.g.*, site visits, geotechnical investigations) could be impacted by both contractor availability and seasonality. Several commenters also pointed out that Professional Engineer (P.E.) certification or approval by the Participating State Director or EPA was required for these reports (*i.e.*, hazard potential classification assessments, structural stability assessments, and safety factor assessments). These commenters said that the proposed deadline did not provide adequate time to collect and review historical information, acquire any necessary new information (*i.e.*, perform additional analyses), and conduct sufficient quality control and quality assurance of said information to ensure the report would be certifiable by a P.E. or capable of being approved by a State Director, Tribal authority, or EPA. Commenters also highlighted that the information required by § 257.73 will also be important in complying with concurrent and subsequent requirements, such as the design of the groundwater monitoring network and the closure plan. These commenters stated that providing inadequate time to generate reports under § 257.73 that meet the standards set out in the rule has an adverse ripple effect on the inputs of other requirements, undermining the adequacy of those analyses and plans. Lastly, commenters stated the estimates in the proposed rule of the amount of time needed to complete actions necessary to achieve compliance (*e.g.*, hire a contractor; generate a report) were grossly underestimated, based on the

experiences of engineering firms, consultants, and owners or operators.

No commenters raised concern about requiring legacy impoundments to comply with the existing requirements in § 257.73. Therefore, EPA is finalizing the application of the structural integrity requirements in § 257.73 to legacy CCR surface impoundments.

As mentioned in Unit III.B.2.a.ii of this preamble, based on the information provided by commenters regarding the impacts of third-party availability, national labor shortage, seasonality, and accessibility and completeness of historical documentation, EPA has extended the deadlines for the design criteria located at § 257.73 as described below. This is at least as much time as facilities were granted to reach compliance in the 2015 CCR Rule deadlines. As detailed below in Units III.B.d.i through III.B.d.v, EPA calculates that this additional time as compared to the proposed deadlines mitigates the seasonality concerns associated with performing any necessary analyses involving field work; accommodates for the unavoidable delays caused by backlogs and shortages currently being faced by necessary third parties; provides owners or operators time to locate and compile the relevant historical documentation that was more readily available and accessible for facilities complying with the 2015 CCR Rule; and ensures a compliance deadline feasible for facility nationwide.

i. Installation of a Permanent Marker for Legacy CCR Surface Impoundments

EPA proposed that owners or operators of legacy CCR surface impoundments, except for “incised CCR surface impoundments” as defined in § 257.53, comply with § 257.73(a)(1), which requires the placement of a permanent identification marker, at least six feet high on or immediately adjacent to the CCR unit. EPA also proposed that placement of the permanent marker be completed by the effective date of the final rule.

Overall, commenters stated this deadline should align with the 2015 CCR Rule deadline (*i.e.*, two months from the effective date) to accommodate for site access issues, seasonality, and the time needed to hire necessary third parties to conduct the work. EPA acknowledges that the proposal had not accounted for the national labor shortage of contractors, or the need to factor in seasonality for site access and the installation of the permanent marker. Therefore, EPA agrees with the commenters that extending the deadline for the installation of the permanent marker to no later than two months from

the effective date of the final rule provides owners or operators of legacy CCR surface impoundments would provide the necessary time to comply with the requirement at § 257.73(a)(1) while still being protective of human health and the environment.

Therefore, EPA is finalizing the requirement to install the permanent marker no later than Wednesday, January 8, 2025, which is two months after the effective date of the final rule. This is codified in the regulatory text at § 257.100(f)(2)(i).

To complete the installation of the permanent marker, owners or operators must ensure the marker is at least six feet high and displays the name of the legacy CCR surface impoundment, the name of the owner or operator of the unit, and the identification number of the CCR unit, if one has been assigned by the State.

ii. History of Construction for the Legacy CCR Surface Impoundments

Consistent with the existing regulations, EPA proposed that owners or operators of legacy CCR surface impoundments that either have: (1) A height of five feet or more and a storage volume of 20 acre-feet or more; or (2) Have a height of 20 feet or more, would be required to comply with the existing requirements to compile the history of construction of the legacy CCR surface impoundment. In the proposed rule, EPA acknowledged that information regarding construction materials, expansions or contractions of units, operational history, and history of events may be difficult for owners or operators to obtain. Therefore, EPA proposed that owners or operators would only need to provide information on the history of construction to the extent that such information is reasonably and readily available. EPA proposed a deadline of no later than three months after the effective date for owners or operators to comply with this requirement.

Overall, commenters on the proposed rule stated the proposed deadline for the history of construction was infeasible for the reasons listed in Unit III.B.2.d of this preamble; namely the limited availability of contractors, exacerbated by the number of CCR units competing for the same resources; seasonality impacts on necessary analyses; and accessibility and completeness of historical information. Some of these commenters also highlighted the importance of the history of construction requirement as an input into the design of the groundwater monitoring system, closure decisions, and other design criteria assessments;

these commenters further emphasized the direct impacts of the quality of the history of construction on the quality of subsequent (*i.e.*, groundwater monitoring network design, closure plan) and interrelated requirements (*i.e.*, hazard potential classification, structural stability and safety factor assessments, inflow design flood control system plan, EAP). These commenters said that, although EPA acknowledged in the proposed rule that EPA would only require information that is reasonably and readily available, owners or operators would still likely need to conduct surveys and other analyses to ensure the report would meet the requirements in § 257.73(a)(2) and to provide sufficient information for the completion of subsequent and interrelated requirements. These commenters also stated that locating the necessary documentation to complete the history of construction would take considerable time and effort due to the age of the units, the inactivity of the facility, and the likelihood of records being located at currently unknown offsite locations. Furthermore, some of these commenters requested clarification of what EPA means by “reasonably and readily available.” Finally, commenters’ suggested deadlines for the completion of the history of construction requirement ranged from three to 30 months.

As stated in Unit III.B.2.d of this preamble, EPA has reviewed the information provided by commenters citing the shortages and backlogs of qualified contractors, increased strain on those contractors related to the number of CCR units complying with the CCR rule simultaneously, difficulty accessing and reviewing historical documentation, and needed time to perform quality control and quality assurance, and considers it to be persuasive. EPA also acknowledges that the history of construction report ties into several subsequent requirements, including the other design criteria assessments and plan, the groundwater monitoring and corrective action requirements, and the closure and post-closure care requirements and therefore, agrees that providing sufficient time for the completion of a thorough history of construction report is important for the protection of human health and the environment.

Furthermore, as stated in Unit III.B.2.a.ii, EPA extended most deadlines to allow for as much time to come into compliance as was granted in the 2015 CCR Rule. While EPA recognizes that when coming into compliance with the 2015 CCR Rule, owners and operators had to locate

historical documentation, based on information provided by commenters regarding the unknown whereabouts of the necessary records, the age and inactivity of these facilities, and the labor shortages, EPA expects it will be slightly more difficult to access and assess historical documentation for the older legacy CCR surface impoundments than it was for the units regulated by the 2015 CCR Rule. Because of the increased difficulty in locating and accessing records, the importance of the history of construction as an input into other requirements, and the high likelihood of additional analyses being needed, EPA is finalizing a deadline of no later than Monday, February 9, 2026, which is 15 months from the effective date. This deadline is an extension of three months longer than the 2015 CCR Rule deadline and is sufficient to accommodate the slight increase in difficulty in accessing legacy impoundment records. This is codified in the regulatory text at § 257.100(f)(2)(ii).

Finally, as explained in Unit III.B.2.b.i, EPA addressed the term “reasonably and readily available” at 80 FR 21380. When using this term, EPA intends facilities to provide relevant design and construction information only if factual documentation exists and does not expect owners or operators to generate new information or provide anecdotal or speculative information.

Compliance with the history of construction requirement at § 257.73(c) requires owners or operators of a CCR unit to compile a report that documents identifying characteristics of the unit, the history of how the CCR unit was used, specifics related to the unit’s design and construction, and the unit’s instrumentation. Once compiled, the report must be placed into the facility’s operating record as required by § 257.105(f)(9). If the information included in the history of construction report needs to be changed at any point in time, the owner or operator must update the history of construction report and place the updated report into the operating record. A comprehensive list of information required in the history of construction is in § 257.73(c)(1).

iii. Initial Hazard Potential Classification for Legacy CCR Surface Impoundments

EPA proposed that owners or operators of legacy CCR surface impoundments, except for incised CCR surface impoundments as defined in § 257.53, must complete the initial and periodic hazard potential classification assessments required under § 257.73(a)(2) without revision. EPA

proposed a deadline of no later than three months after the effective date for the completion of the initial hazard potential classification assessment.

No commenters raised concern about requiring legacy impoundments to comply with the existing requirements in § 257.73(a)(2). EPA is therefore finalizing this provision without revision. This is codified in the regulatory text at § 257.100(f)(2)(iii).

However, EPA received numerous comments on the proposed deadline. Overall, commenters on the proposed rule stated the proposed deadline for the initial hazard potential classification was infeasible for the reasons listed in Unit III.B.2.d of this preamble, namely the limited availability of contractors exacerbated by the number of CCR units competing for the same resources; seasonality impacts on necessary analyses; accessibility and completeness of historical information, and the need for quality assurance and quality control. As mentioned in Unit III.B.2.d.ii, a few commenters noted the interrelationship and overlapping activities (e.g., historical documentation review, site visit, geotechnical investigations, unit modeling) between the initial hazard potential classification and the history of construction, initial safety factor assessment, and the initial structural stability assessment. Specifically, commenters stated that the history of construction is done first and used to complete the initial hazard potential classification. Furthermore, commenters highlighted the direct dependence on the hazard potential classification for determining the design flood to use in inflow design flood control plan (§ 257.82(c)) and the trigger for the EAP requirement (§ 257.73(a)(3)). Commenters' suggested deadlines for the completion of the hazard potential classification requirement ranged from three to 24 months.

As explained in Units III.B.2.a.ii and III.B.2.d of this preamble, EPA acknowledges the need to extend the compliance deadline in consideration of the impacts of labor shortage, contractor backlogs, seasonality, accessibility and completeness of historical information, and the need for quality assurance and control. EPA further acknowledges the interrelationship of the design criteria reports and the direct dependence of the initial inflow design plan and EAP requirements on the completion of hazard potential classification. As explained in Unit III.B.2.d of this preamble, based on the information provided by commenters, EPA determined that extending the deadline for the initial hazard potential classification to allow for at least as

much time to come into compliance as was granted in the 2015 CCR Rule (*i.e.*, 18 months after the effective date) is necessary to ensure the compliance deadlines are nationally feasible. Because owners or operators will be locating and compiling historical documents and information as part of the history of construction requirement, EPA assumes that historical documentation necessary for the initial hazard potential classification assessment can be located and compiled concurrently. Additionally, EPA expects necessary historical information (e.g., engineering design drawings, geotechnical studies, dam hazard potential classification documents, stability assessments) and new analyses (e.g., surveys or geotechnical investigations) needed for the history of construction and the initial hazard potential classification to overlap to some degree. Therefore, EPA has determined that additional time beyond that granted to come into compliance with the 2015 CCR Rule is not needed for this requirement. As such, EPA is finalizing a deadline of no later than Friday, May 8, 2026, which is 18 months from the effective date of this final rule.

To comply with the hazard potential classification requirement at § 257.73(a)(2), owners or operators of legacy CCR surface impoundments must determine the hazard potential classification of the CCR unit and justify the determination in a report. The CCR unit can be classified as a low hazard potential CCR surface impoundment, a significant hazard potential CCR surface impoundment, or a high hazard potential CCR surface impoundment. The report must be certified by a P.E. stating the hazard potential classification was conducted in accordance with the CCR regulations. Subsequent periodic hazard potential classifications are required every five years after the completion of the previous hazard potential classification as described at § 257.73(f)(3).

iv. Initial Structural Stability Assessment and Initial Safety Factor Assessment for Legacy CCR Surface Impoundments

Consistent with the existing regulations and EPA's findings from the 2009–2014 Assessment Program as described in the proposed rule, EPA proposed that owners or operators of legacy CCR surface impoundments that meet the size thresholds in § 257.73(b) and (c), must conduct two types of technical assessments: (1) Structural stability assessments; and (2) Safety factor assessments. In the proposed rule,

EPA explained that these two assessments could be conducted concurrently and therefore, a deadline of no later than three months from the effective date of the final rule was proposed for both requirements.

No commenters raised concern about requiring legacy impoundments to comply with the existing requirements in § 257.73(b) and (c). EPA is therefore finalizing this provision without revision. This is codified in the regulatory text at § 257.100(f)(2)(iv).

However, EPA received numerous comments on the proposed deadline. Overall, commenters on the proposed rule stated the proposed deadlines for the initial structural stability and safety factor assessments were infeasible for the reasons outlined in Units III.B.2.a.ii and III.B.2.d of this preamble, namely, seasonality, third-party availability, national labor shortage, the need to conduct quality control and quality assurance, and the accessibility and completeness, or lack thereof, of historical documentation and data. As mentioned in Unit III.B.2.d.ii, a few commenters noted the interrelationship and overlapping activities (e.g., historical documentation review, site visit, geotechnical investigations, unit modeling) between the initial structural stability and safety factor assessments and the history of construction, initial hazard potential classification, and the inflow flood control system plan. Furthermore, commenters highlighted the need to have quality information within the structural stability and safety factor assessments to inform the EAP and to make sound closure decisions. Commenters' suggested deadlines for the completion of the initial structural stability assessment and the initial safety factor assessment ranged from six to 24 months.

As explained in Units III.B.2.a.ii and III.B.2.d, EPA acknowledges the need to extend the compliance deadline in consideration of the impacts of labor shortage, contractor backlogs, seasonality, accessibility and completeness of historical information, and the need for quality assurance and control. EPA further acknowledges the interrelationship of the design criteria reports and the value of using the structural stability and safety factor assessment to develop the EAP and the closure plan for the legacy CCR surface impoundment. As explained in Unit III.B.2.d of this preamble, based on the information provided by commenters, EPA determined that extending the deadline for the initial structural stability and safety factor assessments to allow for at least as much time to come into compliance as was granted in the

2015 CCR Rule is necessary to ensure the compliance deadlines are nationally feasible. Because owners or operators will be locating and compiling historical documents and information as part of developing the history of construction, EPA assumes that historical documentation necessary for the initial structural stability and safety factor assessments can be located and compiled concurrently. Additionally, the historical information (*e.g.*, engineering design drawings, operational records) and new analyses (*e.g.*, surveys, geotechnical investigations) needed for the history of construction, initial hazard potential classification, and the initial structural stability and safety factor assessments overlap to some degree. Therefore, EPA has determined that additional time beyond that granted to come into compliance with the 2015 CCR Rule is not needed for this requirement. As such, EPA is finalizing a deadline of no later than Friday, May 8, 2026, which is 18 months from the effective date of this final rule.

To comply with the structural stability assessment and safety factor assessment requirements at § 257.73(d) and § 257.73(e), owners or operators of legacy CCR surface impoundments must conduct initial and periodic structural stability and safety factor assessments. The structural stability assessment must document whether the design, construction, operation, and maintenance of the unit is consistent with recognized and generally accepted good engineering practices for the maximum volume of CCR and CCR wastewater capable of being contained within the unit. Accepted good engineering practices includes, but are not limited to, stable foundations and abutments, adequate slope protection, sufficiently compacted dikes, slope protections, spillways capable of managing flow during and following peak discharge events, structurally sound and operational hydraulic structures, and structurally sound downstream slopes capable of withstanding sudden drawdown of adjacent water bodies. See 40 CFR 257.73(d).

The safety factor assessment must document whether the calculated factors of safety for the legacy CCR surface impoundment achieves the minimum safety factor specified in §§ 257.73(e)(1)(i) through (iv) for the cross section of the embankment most susceptible to structural failure determined by loading conditions and other appropriate engineering considerations. See 40 CFR 257.73(e).

The periodic assessments are required every five years after the completion of the previous assessment described at § 257.73(f)(3). Each assessment must be certified by a P.E. stating that the assessment was conducted in accordance with the CCR regulations.

v. Preparation of an Emergency Action Plan for Legacy CCR Surface Impoundments

EPA proposed that the owners or operators of legacy CCR surface impoundments that have been identified as having either a high hazard potential or a significant hazard potential would be required to comply with the same requirement as existing CCR surface impoundments under § 257.73 to prepare and maintain a written EAP. An EAP is a document that identifies potential emergency conditions at a CCR surface impoundment and specifies actions to be followed to minimize loss of life and property damage.

No commenters raised concern about requiring legacy impoundments to comply with the existing requirements in § 257.73(a)(3). EPA is therefore finalizing this provision without revision. This is codified in the regulatory text at § 257.100(f)(2)(v).

However, EPA received numerous comments on the proposed deadline. Overall, most commenters on the proposed rule stated that at a minimum, EPA should allow as much time for legacy CCR surface impoundment to come into compliance as granted existing units the 2015 CCR Rule deadlines. Several commenters pointed out the direct reliance of the EAP on the hazard potential classification assessment and noted that the history of construction, safety factor assessment, and structural stability assessment provided critical information as well. These commenters noted that if the deadlines for any of those prerequisite requirements were extended beyond the proposed compliance deadline, the EAP deadline should be extended as well. Commenters' suggestions for the deadline for the completion of the EAP ranged from 11 to 18 months.

EPA acknowledges that the EAP relies on the hazard potential classification assessment and agrees with the commenters who stated that if the deadline for the hazard potential classification assessment was extended, the deadline for the development of the EAP should be extended to no earlier than the deadline for the initial hazard potential classification assessment. As stated in Unit III.B.2.d.iv, EPA is finalizing a deadline of no later than 18 months from the effective date of this

final rule for the initial hazard potential classification assessment. Furthermore, the deadlines for the initial safety factor and structural stability assessments are being finalized at no later than Friday, May 8, 2026, which is 18 months from the effective date of the final rule. This deadline also provides owners or operators the same amount of time for legacy CCR surface impoundments to comply with the requirements as was granted for existing units in the 2015 CCR Rule. Therefore, EPA is finalizing a deadline of no later than Friday, May 8, 2026, which is 18 months from the effective date of the final rule for legacy CCR surface impoundment to develop an EAP in accordance with § 257.73(a)(3).

As described above, an EAP specifies the actions to take during potential emergency conditions at a CCR surface impoundment. To prepare an EAP, the owner or operator must accurately and comprehensively identify potential failure modes and at-risk developments. See also 80 FR 21377–21379, April 17, 2015. To comply with the EAP requirement, the EAP must, at a minimum, define the events or circumstances involving the CCR unit that represent a safety emergency; describe the procedures that will be followed to detect a safety emergency in a timely manner; define responsible persons, each person's responsibilities, and notification procedures in the event of an emergency; provide contact information for emergency responders; include a map that delineates the downstream area that would be impacted by a CCR unit failure; a physical description of the CCR unit; and provisions for an annual face-to-face meeting between representatives of the owner or operator and the local emergency responders.

e. Operating Criteria for Legacy CCR Surface Impoundments

The operating criteria in §§ 257.80, 257.82, and 257.83 include air criteria for all CCR units, hydrologic and hydraulic capacity requirements for CCR surface impoundments, and periodic inspection requirements for CCR surface impoundments. These criteria address the potential risks from the day-to-day operations of CCR units and are established to prevent health and environmental impacts from CCR units. CCR surface impoundments are subject to hydrologic and hydraulic capacity requirements to ensure the unit can safely handle flood flows, which will help prevent uncontrolled overtopping of the unit or erosion of the materials used to construct the surface impoundment. The existing CCR

regulations also require periodic inspections of CCR units to identify any appearance of structural weakness or other conditions that are not consistent with recognized and generally accepted good engineering standards. EPA proposed that legacy CCR surface impoundments comply with these existing requirements without revision.

Several commenters recommended that EPA provide relief from these operating requirements for legacy impoundments that have closed prior to the effective date of this rule, since these operating requirements do not make sense for units that are no longer operating. These commenters also state that the proposed rule includes relief from many requirements for legacy impoundments that have closed by removal of CCR, but does not include similar flexibility for legacy impoundments that have closed in place. Commenters said requiring an owner or operator to meet operating requirements for units that no longer contain both CCR and liquids, and therefore do not pose the same operating risks as existing CCR units, is illogical. They contended these requirements are more applicable for legacy impoundments that continue to contain both CCR and liquids as of the effective date of this final rule. They further said EPA should therefore reconsider its position and account for prior closure activities and afford flexibility to those units that have undergone, or are undergoing, State-led closure activities.

EPA disagrees that applying the operating criteria to legacy CCR surface impoundments is inappropriate even if these units are no longer receiving waste. EPA believes that applying the fugitive dust requirements reduces the risk from airborne dust and requiring inspections and inflow design flood control plan for legacy impoundments that contain both CCR and liquids will reduce the risks from structural stability concerns. EPA further addresses legacy impoundments that closed by removal or closed with waste in place under a State or Federal authority in Unit III.B.2.g of this preamble. Accordingly, EPA is finalizing the requirement that legacy CCR surface impoundments comply with these existing operating criteria requirements in §§ 257.80, 257.82, and 257.83 without revision.

i. Fugitive Dust Control Plan for Legacy CCR Surface Impoundments

EPA proposed that owners or operators of legacy CCR surface impoundments must complete a fugitive dust control plan by the effective date of the final rule. The existing regulations require the owner or

operator of a CCR unit to adopt measures that will effectively minimize CCR from becoming airborne at the facility, including CCR fugitive dust originating from CCR units, roads, and other CCR management and material handling activities. 40 CFR 257.80(b). To meet this requirement, the owner or operator of the CCR unit must prepare and operate in accordance with a fugitive dust control plan. *Id.* See also 80 FR 21386–21388. EPA considers that fugitive dust controls are warranted because closure activities can produce significant quantities of dust.

EPA received few comments on the fugitive dust control plan. One commenter requested that EPA amend § 257.80 to include additional requirements to protect those who work or live near CCR facilities from the risks of fugitive dust. EPA disagrees that additional fugitive dust controls are needed as EPA has no data to prove that the existing requirements are inadequate.

EPA received some comments on the compliance deadline to complete the fugitive dust control plan. Overall, commenters supported the proposed deadline. However, a couple commenters requested more time. One commenter requested three additional months for all requirements due on the effective date, including the fugitive dust plan. This commenter provided no evidence or factual basis to support this suggested deadline. Another commenter requested a deadline of 30 months for all requirements with proposed deadlines of the effective date to allow owners or operators 24 months to determine if the unit is eligible for the closure certification and prepare the certification report and then an additional 6 months to comply with other requirements, such as the dust plan and creation of a CCR website, if the unit is not eligible for the closure certification. EPA finds the requests for a deadline extension for the fugitive dust control plan to be unfounded.

The primary activities associated with this requirement are hiring a contractor who is a qualified P.E., having the contractor develop a plan based on daily operations at the unit and site conditions, and certification of the plan by a P.E. Little to no field-based activities are required to complete the fugitive dust control plan. Furthermore, this provides the same amount of time that EPA provided in the 2015 CCR Rule for facilities to develop their fugitive dust control plans. Therefore, EPA is finalizing the requirement that owners or operators of legacy CCR surface impoundments must complete a fugitive dust control plan no later than Friday,

November 8, 2024, which is the effective date of this final rule. This is codified in the regulatory text at § 257.100(f)(3)(i).

ii. Initial Fugitive Dust Control Report for Legacy CCR Surface Impoundments

EPA proposed to require the initial annual fugitive dust report to be due 12 months after the effective date of the final rule. Consistent with the existing regulations, the report must document all actions taken to control CCR fugitive dust, a record of all citizen complaints, and a summary of any corrective measures taken in the previous year. As this report is primarily a summary of owner or operator activities related to fugitive dust control and does not require a P.E. certification, the report may be completed by the owner or operator without the need for a contractor. The owner or operator has completed the annual CCR fugitive dust control report when the plan has been placed in the facility's operating record.

EPA did not receive comments on the annual fugitive dust control report requirements. As described in Unit III.B.2.a.ii of this preamble, commenters requested that deadlines provide at least as much time as was granted for 2015 CCR Rule requirements. Therefore, EPA is extending the deadline from 12 months to 14 months to allow for a full year to be reported in the first report (12 months plus two months for report generation).

EPA is finalizing the requirement that the initial annual fugitive dust report be completed no later than Thursday, January 8, 2026, which is 14 months after the effective date of this final rule. This is codified in the regulatory text at § 257.100(f)(3)(vi).

iii. Weekly Inspections of the Legacy CCR Surface Impoundment and Monthly Monitoring of the CCR Unit's Instrumentation

EPA proposed that owners or operators of legacy CCR surface impoundments must initiate the inspection requirements set forth in § 257.83(a) no later than the effective date of the final rule. Under § 257.83(a), all CCR surface impoundments must be examined by a qualified person at least once every seven days for any appearance of actual or potential structural weakness or other conditions that are disrupting or that have the potential to disrupt the operation or safety of the CCR unit. The results of the inspection by a qualified person must be recorded in the facility's operating record. Weekly inspections are intended to detect, as early as practicable, signs of distress in a CCR surface

impoundment that may result in larger, more severe conditions. Inspections are also designed to identify potential issues with hydraulic structures that may affect the structural safety of the unit and impact its hydraulic and hydrologic capacity. Section 257.83(a) also requires the monitoring of all instrumentation supporting the operation of the CCR unit to be conducted by a qualified person no less than once per month. See also 80 FR 21394–21395.

One commenter opposed applying the inspection requirements to legacy CCR surface impoundment, stating these requirements are intended for operational units and therefore are inappropriate for units that no longer receive waste. EPA disagrees that applying the inspection requirements to legacy CCR surface impoundments is inappropriate even if these units are no longer receiving waste. EPA believes that applying the weekly inspection requirements to legacy CCR surface impoundments that contain both CCR and liquids reduces the risks associated with structural stability concerns. Furthermore, the commenter provided no factual basis for the exclusion of legacy CCR surface impoundments from these requirements. EPA did not get any comments specifically about this deadline, thus, EPA is finalizing without revision the requirement that owners or operators of legacy CCR surface impoundments initiate the inspection requirements set forth in § 257.83(a) no later than Friday, November 8, 2024, which is the effective date of the final rule. This is codified in the regulatory text at § 257.100(f)(3)(iii).

iv. Initial Annual Inspection for Legacy CCR Surface Impoundments

EPA proposed that owners or operators of legacy CCR surface impoundments must conduct the initial annual inspection no later than three months after the effective date of the final rule. Existing CCR surface impoundments exceeding the height and storage volume thresholds in § 257.73(b) and (c), are required to conduct annual inspections of the CCR unit throughout its operating life (§ 257.83(b)). These inspections are focused primarily on the structural stability of the unit and must ensure that the operation and maintenance of the unit is in accordance with recognized and generally accepted good engineering standards. Each inspection must be conducted and certified by a P.E. See also 80 FR 21395.

EPA received comments that said the inspections should be required for

legacy impoundments, in addition to the other operating criteria. However, one commenter opposed applying the inspection requirements to legacy CCR surface impoundment, stating these requirements are intended for operational units and therefore are inappropriate for units that no longer receive waste. EPA continues to conclude that the annual inspections required by § 257.83 are relevant for legacy CCR surface impoundments even if these units are no longer receiving waste. EPA believes that applying the annual inspection requirement to legacy CCR surface impoundments that contain both CCR and liquids reduces the risks associated with structural stability concerns. Furthermore, the commenter provided no factual basis for the exclusion of legacy CCR surface impoundments from these requirements.

Annual inspections include documentation review, a visual inspection of the CCR unit, and a visual inspection of any hydraulic structures underlying the base of the CCR unit or passing through the CCR unit's dike. Documentation reviewed as part of the annual inspection include operating records, previous structural stability assessments, and the results of previous weekly, monthly, and annual inspections and can overlap with reviews needed to complete the initial structural stability assessment.

EPA proposed that owners or operators of legacy CCR surface impoundments must conduct the initial annual inspection no later than three months after the effective date of the final rule. EPA proposed that owners or operators must prepare the initial inspection report for legacy CCR surface impoundments within the same time frame—no later than three months from the effective date of the final rule—as was required for existing CCR surface impoundments in the 2015 CCR Rule. The Agency believes this time frame to prepare the initial annual inspection is similarly appropriate for legacy CCR surface impoundments as for existing impoundments. As discussed in the preamble to the 2015 CCR Rule, the three-month time frame was based on EPA's experience with its CCR Assessment Program to evaluate the structural stability and safety of existing impoundments throughout the nation. Specifically, EPA found that three months would be adequate to complete the tasks supporting an annual inspection, including retaining the services of a P.E., reviewing relevant information in the facility's operating record, conducting the field inspection, and completing the inspection report.

See 80 FR 21395. EPA did not receive any comments objecting to this time frame.

EPA is finalizing the requirement without revision that owners or operators of legacy CCR surface impoundments must conduct the initial annual inspection no later than Monday, February 10, 2025, which is three months after the effective date of the final rule. This is codified in the regulatory text at § 257.100(f)(3)(iv).

v. Initial Inflow Design Flood Control System Plan for Legacy CCR Surface Impoundments

EPA proposed that owners or operators of legacy CCR surface impoundments must prepare the inflow design flood control system plan nine months after the effective date of the final rule. Owners or operators of all CCR surface impoundments are required to design, construct, operate, and maintain hydraulic and hydrologic capacity to adequately manage flow both into and from a CCR surface impoundment during and after the peak discharge resulting from the inflow design flood, which is based on the Hazard Potential Classification of the CCR surface impoundment (§ 257.82(a)). The regulation also requires the preparation of an initial inflow design flood control system plan (§ 257.82(c)). See also 80 FR 21390–21392.

EPA did not receive any comments about this requirement. However, overall, most commenters believed that compliance deadlines should not be accelerated to be shorter than required for active units. Commenters also believed that substantial data collection efforts might be required resulting in situations where it is not feasible to meet the proposed deadline. For example, there is an ongoing shortage of contractors (e.g., consultants, drillers, laboratories) to complete this work. EPA considered these comments and extended the deadline to 18 months in consideration of third-party availability and in order to match the 2015 CCR Rule.

EPA is finalizing the requirement that owners or operators of legacy CCR surface impoundments prepare the inflow design flood control system plan no later than Friday, May 8, 2026, which is 18 months after the effective date of the final rule. This is codified in the regulatory text at § 257.100(f)(3)(v).

f. Groundwater Monitoring and Corrective Action Criteria for Legacy CCR Surface Impoundments

EPA proposed to require legacy CCR surface impoundments to comply with the existing groundwater monitoring

and corrective action criteria in 40 CFR 257.90 through 257.98, with one revision, to require sampling and analysis of constituents listed in Appendix IV at the same time as those listed in Appendix III. As explained in the proposed rule at 88 FR 32003, §§ 257.90 through 257.95 require owners or operators of a CCR unit to install a system of monitoring wells, specify procedures for sampling these wells, and set forth methods for analyzing the groundwater data collected to detect hazardous constituents (e.g., toxic metals) and other monitoring parameters (e.g., pH, total dissolved solids) released from the units. If the groundwater monitoring required in § 257.95, demonstrates an exceedance of the groundwater protection standards for constituents identified in Appendix IV of part 257, corrective action is required as laid out in §§ 257.96 through 257.98. These requirements apply throughout the active life and post-closure care period of the CCR unit.

Several commenters expressed support for requiring legacy CCR surface impoundments to comply with these groundwater monitoring and corrective action requirements, stating CCR units can and have caused groundwater contamination. Some commenters suggested additional requirements be added to those in §§ 257.90 through 257.98, including a mandate to test groundwater quality outside the boundary of the facility and make those results public; a report documenting the unit's proximity to the closest surface water body and nearest private and public groundwater wells; a deadline for the completion of the selection of remedy required by § 257.97; and a prohibition against using intrawell groundwater data comparisons at legacy CCR surface impoundments. Other commenters stated that applying the existing corrective action requirements to historic sites, such as legacy CCR surface impoundments, is not appropriate and suggested that instead EPA incorporate site-specific risk-based corrective action into the CCR regulations.

EPA further proposed two deadlines for the groundwater monitoring requirements, as opposed to the single deadline in the 2015 CCR Rule. EPA received numerous comments on EPA's proposal to split the single deadline for groundwater monitoring requirements contained within the 2015 CCR Rule (24 months from the effective date of the final 2015 rule) into two separate deadlines (six months from the effective date of the final rule for the installation of the groundwater monitoring network

and development of the groundwater sampling and analysis plan and 24 months from the effective date of the final rule for the initiation of the combined detection and assessment monitoring). A few commenters expressed support of the two separate deadlines for groundwater monitoring requirements, stating it increased accountability and ensured owners or operators were not unnecessarily delaying the installation of the groundwater monitoring system. However, overall, commenters stated that the groundwater monitoring requirements should have a single deadline as the separate deadlines made compliance with the rule infeasible. Several commenters said the proposed split deadlines eliminated the flexibility necessary for compliance that was contained within the 2015 CCR Rule's single deadline. Those commenters went on to say the single deadline allowed facilities to accommodate for delays associated with factors outside their control, such as third-party availability, weather, and required permits or approvals, by making schedule adjustments necessary to achieve compliance (e.g., expedite the development of the sampling plan in the case of delays with the well installation). Other commenters said the proposed two deadlines were unnecessarily prescriptive. One commenter pointed out that the proposed rule contained no deliverables to verify compliance for the installation of wells or the development of the sampling and analysis plan.

As explained in the proposed rule, the existing groundwater monitoring and corrective action requirements are essentially the same requirements that have been applied to both hazardous waste and municipal solid waste disposal units for decades, and with the one exception discussed below, there is nothing about legacy CCR surface impoundments that makes them distinct enough to warrant separate requirements from those for other CCR surface impoundments. No commenter provided any factual basis for treating legacy impoundments differently than all the other units that currently comply with the same groundwater monitoring requirements, including other inactive CCR surface impoundments. For those commenters requesting that EPA adopt "risk-based corrective action" into the requirements, EPA notes that the commenters have provided no further explanation of what requirements in the existing regulations they wanted EPA to revise, what the revisions should accomplish, or why they are necessary

or appropriate. As a general matter EPA considers that the corrective action regulations in §§ 257.95 through 257.98 do currently require facilities to tailor remedies to address the risks to human health and the environment, based on the conditions at the site. It is unclear what more the commenters are seeking. Accordingly, EPA is finalizing the proposal that legacy CCR surface impoundments comply with the existing groundwater monitoring and corrective action requirements with one modification, combined detection and assessment monitoring.

However, EPA agrees that having a single deadline for groundwater monitoring requirements as opposed to two deadlines allows flexibility to complete tasks, such as installing groundwater wells and collecting independent samples, which is necessary for compliance with a nationwide rule. The activities involved in achieving compliance with the groundwater monitoring requirements (i.e., drilling wells, collecting samples, receiving lab results) are more susceptible to factors outside a facility's control, such as extreme weather events, shortages of qualified contractors, and permitting or approval delays, and therefore, warrant greater flexibility. Additionally, activities can be restricted dependent on the time of year and the location of the facility (e.g., due to seasonality, protected species, clearing restrictions). Because the groundwater monitoring requirements build upon each other, EPA must ensure that facilities nationwide are reasonably able to achieve regulatory compliance by the deadline. Utilizing a single deadline for the groundwater monitoring requirements allows facilities to make reasonable accommodations for regional factors in a way the proposed deadlines do not, while still maintaining the same level of protection for human health and the environment. Furthermore, EPA agrees that the proposed rule does not have a clear mechanism for facilities to prove compliance or for interested parties to verify compliance with the separate deadlines for the installation of the groundwater monitoring network and the development of the groundwater sampling and analysis plan. Finally, based on the information provided by commenters, specifically the information regarding the current labor shortages and backlogs experienced by third parties necessary to accomplish tasks involved in complying with the groundwater monitoring requirements (e.g., drillers for well installation, laboratories for sample analysis), time needed to obtain

necessary approvals (e.g., State permits to drill water wells or clear vegetation), and to accommodate for seasonality, EPA has calculated six months as the appropriate extension of the 2015 CCR Rule groundwater monitoring system deadlines. Therefore, EPA is finalizing a single deadline of no later than 30 months after the effective date of this final rule for the groundwater monitoring requirements found at §§ 257.90 through 257.95.

i. Design and Installation of the Groundwater Monitoring System for Legacy CCR Surface Impoundments

EPA proposed that owners or operators of legacy CCR surface impoundments install the groundwater monitoring system as required by § 257.91 no later than six months from the effective date of this final rule. EPA further proposed that existing monitoring wells can be used as a part of the legacy CCR surface impoundment groundwater monitoring systems provided the wells meet § 257.91. As explained in the proposed rule, based on the amount of time most facilities needed to complete or to collect baseline sampling, EPA calculated that facilities would be able to install the necessary monitoring wells within a single year.

As mentioned above, some commenters supported the expedited deadlines. However, most commenters stated the proposed deadline of six months from the effective date of the final rule for the design and installation of the groundwater monitoring network was infeasible and should be extended to no less than 24 months from the effective date to align with the 2015 rule deadline. As explained above, many of these commenters expressed the need for a single deadline for groundwater monitoring requirements. Furthermore, as described in Unit III.B.2.a.ii of this preamble, these commenters cited seasonality restrictions, the nationwide labor shortages, limited qualified contractor availability, the need for State approvals and permits, and the number of facilities competing for limited resources as reasons for why the proposed expedited deadline is infeasible. A few commenters noted that in recent decisions on Part A demonstrations, EPA cited deficiencies in the groundwater monitoring network as a basis for non-compliance. These commenters went on to state that the proposed deadline does not facilitate the establishment of a monitoring system that would meet the standards laid out in the CCR rule or the recent proposed decisions and thus, the proposed deadline creates de facto non-

compliance. One of these commenters elaborated by saying that the deadline does not allow facilities to acquire the permits that may be required to drill wells and precludes the observation of groundwater levels over time, which is needed to properly characterize groundwater flow. Other commenters stated meeting the proposed compliance deadline would prevent a facility from conducting proper site characterization, which is needed to inform well placement and depth and provide professional engineers sufficient information to certify the groundwater monitoring system. Lastly, commenters stated that contrary to EPA's assertion in the proposed rule that expediting the installation of the groundwater monitoring network is protective of human health and the environment, to meet the proposed deadline, facilities would likely be forced to design groundwater monitoring systems based on inadequate data resulting in unreliable groundwater monitoring data. Commenters provided estimates of time needed to comply with the design and installation of the groundwater monitoring system requirements ranging from 12 to 36 months.

As stated in Unit III.B.2.a.ii of this preamble, in response to comments EPA reevaluated the compliance deadline for the design and installation of the groundwater monitoring network and found the information provided regarding the general infeasibility of the proposed deadline compelling. Specifically, EPA agrees that more time is needed to account for limited third-party availability (e.g., contractor shortages and laboratory backlogs), seasonality and extreme weather events, procuring a contractor, complying with overlapping regulatory requirements, and coordinating with outside parties. EPA acknowledges the importance of proper site characterization as the foundation for designing a groundwater monitoring system and is convinced that although there may be some legacy CCR surface impoundments that have sufficient historical documentation for site characterization, many of these units may need to conduct more extensive site reconnaissance and field work to obtain the necessary information. Lastly, EPA recognizes that groundwater monitoring systems designed using inadequate data would be unable to properly monitor groundwater quality coming from the unit and therefore would not be protective of human health and the environment. Therefore, because EPA is convinced by information from the commenters that facilities would be

unable to conduct all the steps necessary to design and install a groundwater monitoring system capable of meeting the standards in § 257.91 by the proposed deadline, EPA has extended the deadline.

As stated in Unit III.B.2.f, based on information provided by commenters, EPA concluded that a single deadline should be used for the groundwater monitoring requirements. In the proposed rule, the latest proposed deadline for groundwater monitoring requirements was the deadline of 24 months from the effective date of this final rule for the initiation of the combined detection and assessment monitoring and the collection of the eight baseline samples. Based on information provided in response to comments on the proposed rule and as explained in Unit III.B.2.f, EPA calculated six months as the appropriate extension of the groundwater monitoring system deadlines. Therefore, EPA is finalizing a deadline for the completion of the design and installation of the groundwater monitoring system of no later than Monday, May 10, 2027, which is 30 months from the effective date of this final rule. This is codified in the regulatory text at § 257.100(f)(4)(i).

To complete the installation of the groundwater monitoring system, the owner or operator of a legacy CCR surface impoundment must ensure the monitoring system consists of sufficient number of wells both upgradient and downgradient of the CCR unit, installed at appropriate locations and depths, to yield groundwater samples from the uppermost aquifer that accurately represent the quality of background groundwater and groundwater passing the downgradient waste boundary of the CCR unit, monitoring all potential contaminant pathways. 40 CFR 257.91(a)(1) through (2). Because hydrogeologic conditions vary so widely from one site to another, the regulations do not prescribe the exact number, location, and depth of monitoring wells needed to achieve the general performance standard. Rather the regulation requires installation of a minimum of one upgradient and three downgradient wells, as well as any additional monitoring wells necessary to achieve the general performance standard of accurately representing the quality of the background groundwater and the groundwater passing. See, 80 FR 21399. The number and placement of the monitoring wells is critical to proper characterization of the groundwater. Thus, the specific number, spacing, and depth of the monitoring wells must be determined based on site-specific

information, including but not limited to the thorough characterization of aquifer thickness, groundwater flow rate, groundwater flow direction throughout seasonal and temporal fluctuations, the unit's geological setting, and the unit's hydrogeological setting.

The monitoring wells must be cased, constructed, operated, and maintained in a way that preserves the integrity of the monitoring well borehole, screened interval and other components so as to ensure the well performs to the design specifications throughout the life of the monitoring system. EPA expects owners or operators to ensure the groundwater monitoring wells are adequately protected from activities that may damage the wells or otherwise adversely impact their performance, such as accidental damage caused by livestock, vehicles, machinery, or other activities near the unit.

The owner or operator of the unit must ensure that the design, installation, development, and decommissioning of any aspect of the groundwater monitoring system is thoroughly documented and included in the operating record. Furthermore, the owner or operator must obtain a P.E. certification or approval from the Participating State Director or EPA stating the groundwater monitoring system meets the standards set out in § 257.91.

ii. Development of the Groundwater Sampling and Analysis Program for Legacy CCR Surface Impoundments

EPA proposed to require owners or operators of legacy CCR surface impoundments to comply with the existing groundwater sampling and analysis program requirements for CCR surface impoundments, including the selection of the statistical procedures that will be used for evaluating groundwater monitoring data. 40 CFR 257.93. EPA proposed a deadline of no later than six months after the effective date of the final rule for owners or operators to comply with this requirement.

One commenter suggested EPA prohibit use of intrawell groundwater data comparisons for legacy CCR surface impoundments. This commenter stated that intrawell comparisons are only appropriate when the background samples are collected before CCR was placed in the unit and therefore, since these units are likely already leaking, they would be ineligible for intrawell data comparisons. As stated in Unit III.B.2.f, the existing groundwater monitoring and corrective action requirements are essentially the same

requirements that have been applied to both hazardous waste and municipal solid waste disposal units for decades, and with the one exception discussed below, there is nothing about legacy CCR surface impoundments that makes them distinct enough to warrant separate or additional requirements. Furthermore, while EPA expects legacy CCR surface impoundments to largely be unlined and potentially leaking, the commenter did not provide any evidence that would support creating a prohibition against intrawell data comparisons. Therefore, EPA did not adopt a prohibition on intrawell data comparisons at legacy CCR surface impoundments. However, EPA acknowledges that since the 2015 CCR Rule went into effect, intrawell groundwater data comparisons have been misused to a large degree. No commenters raised concern about requiring legacy CCR surface impoundments to comply with the existing requirements in § 257.93. EPA is therefore finalizing this provision without revision. This is codified in the regulatory text at § 257.100(f)(4)(ii).

However, EPA received several comments on the proposed deadline for the development of the groundwater sampling and analysis plan. As mentioned in Unit III.B.2.a.ii, some commenters supported the expedited deadline. However, several other commenters pointed out that the sampling and analysis plan cannot be completed prior to the collection of the baseline samples, which had a proposed deadline of 24 months from the effective date. Many of these commenters went on to state that the proposed expedited deadline for the development of the sampling and analysis plan could result in too frequent sampling leading to non-independent, autocorrelated baseline samples for a large number of facilities, undermining the required statistical analysis. A few commenters further stated that EPA published decisions on Part A and Part B demonstrations citing lack of statistical independence in sampling as a basis for non-compliance, and failure for EPA to extend the deadline for the sampling and analysis plan to allow adequate time for facilities nationwide to gather independent samples would create de facto non-compliance.⁵⁹ Commenters also said

⁵⁹On January 25, 2023, EPA proposed determinations on six Part B applications for alternate liner demonstrations ("Part B"). All six proposals are proposed denials. The CCR Part B Final Rule (85 FR 72506, November 12, 2020), allowed a limited number of facilities to demonstrate to EPA or a Participating State Director that, based on groundwater data and the design of a particular surface impoundment, the unit has and

that the proposed deadlines do not account for the backlogs already experienced due to the existing CCR units using the small number of laboratories qualified to conduct the specialized analyses required by the rule, coupled with the national labor shortages. The commenters predicted the backlogs with laboratories will only increase with the regulation of legacy CCR surface impoundments and CCRMU, making the proposed deadlines even more infeasible. Finally, as mentioned in Unit III.B.2.f, commenters emphasized the need for one deadline for all groundwater monitoring requirements.

EPA agrees that a sampling and analysis plan cannot reasonably be completed before the collection of baseline samples. EPA also acknowledges the adverse impact of too frequent sampling on the validity of statistical analysis and the need to account for seasonal variability in groundwater flow, groundwater levels, and constituent concentrations. EPA further acknowledges that providing insufficient time for the collection of baseline samples or the development of the sampling and analysis plan would likely result in ineffective groundwater monitoring programs that may fail to alert facilities to groundwater contamination coming from CCR units. As explained in Unit III.B.2.a.ii and Unit III.B.2.f respectively, EPA recognizes the need for more time to accommodate third-party availability and a single deadline for the groundwater monitoring requirements. As stated in Unit III.B.2.f.i, for the reasons laid out above, EPA is finalizing a single deadline for the groundwater monitoring requirements of no later than Monday, May 10, 2027, which is 30 months from the effective date of this final rule.

The owner or operator must develop the groundwater sampling and analysis program that satisfies the requirements in § 257.93 and includes a list of monitoring wells to be sampled (*i.e.*, the monitoring network), the schedule for sampling, sampling procedures and techniques, sample preservation and shipping protocols, analytical procedures including an appropriate statistical method for analysis, and quality assurance and quality control methods. The sampling and analysis plan must include all analytes listed in Appendix III and Appendix IV. Recommendations and information on how to comply with many of the

will continue to ensure there is no reasonable probability of adverse effects to human health and the environment.

requirements for the groundwater sampling and analysis program (e.g., analytical procedures, QA/QC controls, sampling protocol) can be found in the following EPA guidance documents (e.g., *RCRA Groundwater Monitoring: Draft Technical Guidance*, 1992, EPA/530/R-93/001; *Low-Flow (Minimal Drawdown) Ground-Water Sampling Procedures*, 1996, EPA/540/S-95/504).

iii. Detection Monitoring Program and Assessment Monitoring Program Combined

EPA proposed to require sampling and analysis of constituents listed in Appendix IV at the same time as those listed in Appendix III. The proposed rule explained that this would expedite groundwater monitoring and initiation of corrective action by at least six months at sites where units have potentially been leaking for a time, as is likely the case at unlined legacy CCR surface impoundments. The proposed rule further explained that expediting Appendix IV constituent detection and any resulting corrective action is necessary for the protection of human health and the environment. EPA proposed no other revisions to the existing groundwater monitoring requirements in §§ 257.90 through 257.95.

EPA received few comments on its proposal to combine detection and assessment monitoring. One commenter pointed out the increased demand on laboratory services, facility staff and/or contractors, and P.E.s that would result from having all legacy CCR surface impoundments comply with both monitoring programs simultaneously. Another commenter stated that by combining detection and assessment monitoring and assuming groundwater contamination, EPA has rendered detection monitoring superfluous. Further, the commenter asserted that skipping detection monitoring entirely would lose critical data regarding whether there are statistically significant increases (SSI) in groundwater constituents specifically due to the unit being monitored. Another commenter said that the justification in proposed rule regarding phased groundwater monitoring being “best suited to situations where there is little likelihood of pre-existing contamination” conflicts with EPA’s position in the 2015 CCR Rule. According to the commenter, in the 2015 CCR Rule, the Agency was aware many CCR surface impoundments were decades old and potentially leaking; yet EPA still adopted a phased approach with detection monitoring to monitor indicators of potential groundwater

contamination and assessment monitoring to determine if releases of CCR constituents of concern did occur.

As explained in the proposed rule, the phased approach in the 2015 CCR Rule is best suited to situations where there is little likelihood of pre-existing contamination, such as at a new facility or unit. As EPA explained in 2015, detection monitoring was designed to provide an early warning that a unit might be contaminating the aquifer, by first monitoring for constituents that would rapidly move through the subsurface and thus provide early detection of a potential problem before significant releases of constituents of concern (i.e., those in Appendix IV) had occurred. See, 80 FR 21397. At a site without an old, unlined impoundment, or other evidence of pre-existing contamination, a graduated response to increasing evidence of leakage and potential contamination is easily justified, as it both allows facilities ample time to investigate the source of contamination as well as the environmental fate and transport characteristics of CCR constituents in groundwater, while still protecting human health and the environment. In essence, this approach rests on a presumption that the unit is not already leaking. At new sites, for example, there is no reason to expect that groundwater will have been contaminated above regulatory levels of concern prior to detection by the groundwater monitoring system.

But that presumption is largely inapposite for a universe consisting exclusively of historic unlined units, many of which have operated for decades. And at sites where leakage (and therefore, likely groundwater contamination) has been occurring for a sustained period, the need to protect human health and environment warrants the quick detection of constituents of concern and initiation of any necessary corrective action. Unlike this rule, the 2015 CCR Rule applied both to new facilities, which would be expected to have little likelihood of pre-existing contamination, and to currently operating facilities. Over the long term, EPA expected that there would eventually be a greater percentage of new units than existing units as the older units reached capacity and closed. In addition, as discussed in the proposal at 88 FR 32010 and in Unit III.A.2 of this preamble, it is clear from the data posted on facilities’ websites that EPA significantly underestimated the number of unlined units (both impoundments and landfills), and consequently, significantly underestimated the number of leaking

units and the extent of contamination at these sites. In light of these considerations, EPA’s decision in 2015 to adopt phased monitoring was reasonable.

By contrast, there is good reason to believe that many legacy CCR surface impoundments are currently contaminating groundwater, based on the record from the 2015 CCR Rule, the results of EPA’s recent modeling, and the large number of presently regulated CCR surface impoundments that have been found to be leaking, despite frequently inadequate groundwater monitoring networks. In sum, the totality of this record demonstrates that it is highly likely that the installation of groundwater monitoring at legacy impoundments will identify the presence of plumes of contaminated groundwater that have persisted or even expanded over many prior years despite a previous absence of groundwater data.

As a practical matter, EPA expects combining Appendix III and Appendix IV constituents into a unified sampling and analysis plan and approach will likely have only minor effects on schedules, as this change will not require additional field mobilizations or sampling events and will only require collection of a slightly larger number of sample containers at each monitoring well to allow for analysis for both Appendix III and IV constituents. As such, no additional shipments of samples to the analytical laboratory will be required. However, EPA acknowledges that combining Appendix III and Appendix IV constituents into a unified sampling and analysis plan may increase the total throughput burden on analytical laboratories and related services. Similarly, while combined monitoring may require additional evaluation (e.g., concentration and trend analysis of data concerning both Appendix III and Appendix IV constituents), this incremental increase is unlikely to significantly increase the overall reporting level of effort, as the number of reports will be essentially unchanged.

Nevertheless, as discussed in Units III.B.2.a.ii and III.B.2.f of this preamble, EPA acknowledges the commenters’ concerns regarding existing and projected labor shortages, backlogs, and third-party availability, and agrees this has the potential to affect facilities’ ability to comply with the proposed deadlines for groundwater monitoring requirements. EPA is therefore extending the deadline, as well as building in flexibility for facilities to accommodate for delays, by finalizing a single deadline for groundwater

monitoring requirements in lieu of the proposed split deadlines.

However, EPA disagrees that combining detection and assessment monitoring will render detection monitoring redundant, and that critical data would be lost, by sampling for Appendix IV constituents at the same time as Appendix III constituents (*i.e.*, by collecting more information). The commenters provided no further explanation of what information they thought would be lost, but under the combined monitoring, the facility would collect the same information on Appendix III constituents that is collected under the detection monitoring in § 257.94. Given that under the existing assessment monitoring provisions, facilities must simultaneously analyze samples for all parameters in Appendix III and for any Appendix IV constituent detected in the initial sampling, it is not apparent why the commenter believes that requiring simultaneous monitoring more broadly is appreciably different. 40 CFR 257.95(d)(1).

As stated in the previous paragraph, concurrent monitoring for Appendix III and Appendix IV constituents provides considerably more information and enables a more complete understanding of the geochemical nature, fate, and transport of any detected releases. Additionally, simultaneously collecting samples for Appendix III and Appendix IV constituents will still provide the basis for determining SSIs, should they exist, so no information will be lost. Contrary to the commenter's concern, additional information will be gained in an expedited manner (*e.g.*, the potential spatial and temporal correlation of Appendix III SSIs with exceedances of statistically significant levels (SSLs) for Appendix IV constituents). Furthermore, EPA disagrees that its explanation that phased groundwater monitoring is "best suited to situations where there is little likelihood of pre-existing contamination" fundamentally conflicts with EPA's decision to adopt phased monitoring in the 2015 CCR Rule. Unlike this final rule, the 2015 CCR Rule applied to both new facilities, which would be expected to have little likelihood of pre-existing contamination, and to existing facilities. Over the long-term, EPA expected that there would eventually be a greater percentage of new units than existing units as the older units reached capacity and closed. In addition, as discussed in the proposal at 88 FR 32010 and in Unit III.A.2 of this preamble, it is clear from the data posted on facilities' websites that in 2015 EPA significantly underestimated the number of unlined

units (both impoundments and landfills), and consequently, significantly underestimated the number of leaking units and the extent of contamination at these sites.

If an alternate source is causing an exceedance of an Appendix III constituent, it may also be the source of any SSL detected for any Appendix IV constituents; in such a case, a facility may simply prepare a single ASD that covers constituents from both appendices. The sole difference between phased monitoring and combined monitoring is if the alternate source is only responsible for the Appendix III constituent, but the unit actually is releasing one or more Appendix IV constituents. In such a case, under a phased approach detection of the Appendix IV constituent can be delayed or even remain undetected, because the facility would not trigger assessment monitoring absent an SSI from another Appendix III constituent. In such situations, combined monitoring can make the monitoring program more accurate; it is unclear why the commenter believes this is inappropriate.

To avoid unnecessary and potentially inappropriate delays, ASDs should only be considered in cases where there is a strong technical case for an alternate source, and technically weak or equivocal ASDs should be rejected as soon as is appropriate to minimize delays in corrective action implementation. Given the age of most inactive CCR facilities, the potential for plumes of groundwater contamination extending for significant distances downgradient of the unit boundaries where exceedances are first determined should be anticipated. Additional lateral and vertical delineation of groundwater exceedances should be conducted in conjunction with corrective action as needed.

Ultimately, the combined monitoring expedites the initiation of assessment monitoring which in turn, allows for more expeditious identification of statistically relevant exceedances of Appendix IV constituents. This will in turn expedite ASD development or corrective action, depending on the circumstances.

The phased approach in the 2015 CCR Rule provides for a graduated response to groundwater contamination as the evidence of contamination increases over time. This approach allows facilities ample time to investigate the source of contamination as well as the transport characteristics of CCR constituents in groundwater while, usually being protective of human health and the environment. However,

at sites where there is a strong likelihood that groundwater contamination has been occurring for a sustained period, the advantages provided by a protracted graduated response are outweighed by disadvantages of persistent or even increasing contamination that continues to move downgradient. At these sites, the need to protect human health and the environment necessitates the quick detection of the constituents of concern in Appendix IV to expedite any necessary corrective action. See, *USWAG* 901 F.3d at 427–30. In this case, as highlighted in Unit III.A, the record provides strong reason to conclude that many legacy CCR surface impoundments are contaminating groundwater, given the large number of currently regulated CCR surface impoundments that have been found to be leaking.

Therefore, EPA is finalizing this requirement as proposed to be completed no later than Monday, May 10, 2027, which is 30 months after the effective date of this final rule. This is codified in the regulatory text at § 257.100(f)(4)(iii)(B) and (C).

iv. Detection Monitoring Program and Assessment Monitoring Program—Deadline for Collection and Analyses of Eight Independent Samples for Legacy CCR Surface Impoundments

EPA proposed that no later than 24 months after the effective date of the final rule, owners or operators of legacy CCR surface impoundments initiate the detection monitoring program by completing sampling and analysis of a minimum of eight independent samples for each background and downgradient well, as required by § 257.94(b). The proposed rule explained that within 90 days after initiation of the detection monitoring program, owners or operators must identify any SSIs over background levels for the constituents listed in Appendix III, as required by § 257.94. To expedite the time to initiate any required corrective action, EPA also proposed that by this same deadline owners or operators initiate the assessment monitoring program by establishing groundwater protection standards and starting to evaluate the groundwater monitoring data for an SSL over GWPS for the constituents listed in Appendix IV as required by § 257.95.

No commenters raised concern about requiring legacy impoundments to comply with the existing requirements in § 257.94(b). Therefore, EPA is finalizing this requirement as proposed. This is codified in the regulatory text at § 257.100(f)(4)(iii)(A).

However, EPA received several comments on the proposed deadline for the collection of the eight baseline samples. As mentioned in Unit III.B.2.a.ii, some commenters supported the expedited deadline. However, several other commenters requested that the groundwater monitoring requirement deadlines be combined into a single deadline that provided at least as much time to come into compliance as was provided in the 2015 CCR Rule deadlines (*i.e.*, 24 months after the effective date of the final rule). As stated in Unit III.B.2.f, based on information provided by commenters, EPA concluded that a single deadline should be used for the groundwater monitoring requirements. In the proposed rule, the latest proposed deadline for groundwater monitoring requirements was the deadline of 24 months from the effective date of this final rule for the initiation of the combined detection and assessment monitoring and the collection of the eight baseline samples. Based on information provided in response to comments on the proposed rule and as explained in Units III.B.2.a.ii and III.B.2.f, EPA calculated six months as the appropriate extension of the groundwater monitoring system deadlines. Therefore, EPA is finalizing a deadline for the completion of sampling and analysis of a minimum of eight independent samples for each background and downgradient well of no later than Monday, May 10, 2027, which is 30 months from the effective date of this final rule.

v. Annual Groundwater Monitoring and Corrective Action Reports for Legacy CCR Surface Impoundments

EPA proposed to apply the existing requirements in § 257.90(e) to legacy CCR surface impoundments and that owners or operators of legacy CCR surface impoundments comply no later than January 31 of the year following the calendar year after a groundwater monitoring system has been established (and annually thereafter).

One commenter suggested that the initial groundwater monitoring and corrective action report be due no later than January 31 of the year following the collection of the eight baseline samples and the first semi-annual sampling event in order to allow facilities to provide all the documentation required by § 257.90(e). EPA disagrees that the information required by § 257.90(e) would not be available to a facility upon completion of the groundwater monitoring system, as the annual report serves as an update on the activities related to the groundwater monitoring program,

including the installation of groundwater monitoring wells. Additionally, when specific actions are not required by the CCR regulations (*e.g.*, a facility has not triggered corrective action), facilities are not penalized for not having any activities related to that action to discuss in the groundwater monitoring and corrective action annual report (*e.g.*, not describing progress in selecting a remedy when not in corrective action).

EPA is finalizing the requirement for owners or operators of legacy CCR surface impoundments to comply with the requirements in § 257.90(e) which mandate the preparation of an annual groundwater monitoring and corrective action report no later than January 31, 2027, and annually thereafter. This is codified in the regulatory text at § 257.100(f)(4)(iv).

The report documents the activities associated with the groundwater monitoring program and progress of any corrective action over the past year and must contain specific information identified in the regulations, including but not limited to maps; aerial images or diagrams showing the CCR unit and all upgradient (background) and downgradient wells; identification of any monitoring wells installed or decommissioned in the previous year; monitoring data collected under §§ 257.90 through 257.98; and a narrative discussion of any transition between monitoring programs (*i.e.*, detection and assessment monitoring). Annual reporting should ensure that groundwater level data collected over the reporting period is tabulated, presented, and analyzed to determine groundwater levels relative to any residual CCR left in place as well as to confirm or determine groundwater flow directions.

Upgradient and downgradient well locations and depths should be validated annually with respect to measured and mapped flow directions. Groundwater quality sampling data should be included in appendices and summarized and tabulated in the annual reports. If appropriate, exceedances (SSIs and SSLs) of Appendix III and IV constituents should be tabulated and highlighted. As mentioned in some comments, annual reports should identify the nearest downgradient surface water bodies as well as groundwater supply wells in the vicinity of the unit.

If the groundwater monitoring required in § 257.95, demonstrates an exceedance of the groundwater protection standards for constituents identified in Appendix IV of part 257, corrective action as laid out in §§ 257.96

through 257.98, should be initiated as soon as possible. It is critical that annual corrective action and monitoring reports provide the basis for selection and documentation of corrective actions as early as possible well as graduated data to document initiation of corrective action activities and graduated and ongoing steps and associated data collected over the course of each year to document remedial performance, modifications, and other changes or improvements.

In addition to documenting compliance, the annual report must be posted to the unit's public CCR website which allows the public to review the groundwater monitoring results. Therefore, it is critical that the annual reports contain the basic data that informs the positions and status reported in those documents, including but not limited to boring logs, monitoring well installation diagrams, water level data, field sampling data sheets for groundwater sample collection, laboratory analytical data including QA/QC data, data validation, and others. In summary, the annual groundwater monitoring and corrective action reports should not only contain the information required by the regulations but should be organized in such a way that: (1) Compliance with the CCR regulations is evident; (2) Data supporting compliance conclusions are easily located within the document; and (3) The public is readily able to review the groundwater monitoring data and related information. Lastly, the name of the document on the public CCR website should be such that it is clear what the file is and readily printed and downloaded by the public.

vi. Corrective Action Requirements for Legacy CCR Surface Impoundments

EPA proposed to require owners or operators of legacy CCR surface impoundments to comply with the existing corrective action criteria, as applicable in §§ 257.96 through 257.98. The proposed rule explained that conducting the sampling simultaneously would expedite groundwater monitoring and, where necessary, initiation of corrective action by at least six months at sites where units have potentially been leaking for a long period, as is likely the case at many unlined legacy CCR surface impoundments. The proposed rule further explained that expediting Appendix IV constituent detection, assessment and any subsequent corrective action would protect human health and the environment.

Under the existing regulations, if groundwater monitoring demonstrates

an exceedance of the groundwater protection standards for constituents identified in Appendix IV of part 257, corrective action is required, as laid out in §§ 257.96 through 257.98. These requirements apply throughout the active life and any post-closure care period of the CCR unit.

A commenter suggested EPA create a deadline for the completion of the selection of a remedy required by § 257.97 of 90 days after the completion of the assessment of corrective measures (ACM) with the ability to extend the deadline up to 180 days after the completion of the ACM. The commenter pointed to the failure of units regulated by the 2015 CCR Rule to select a remedy as soon as feasible after the completion of the ACM as required by the rule and the subsequent unnecessary delay in addressing contaminated groundwater. Other commenters stated that applying the existing groundwater monitoring and corrective action requirements to historic sites, such as legacy CCR surface impoundments, is not appropriate and suggested that instead EPA incorporate site-specific risk-based corrective action into the CCR regulations. One of these commenters further stated that the application of the existing CCR corrective action requirements conflict with EPA's decision-making frameworks in other programs such as RCRA and CERCLA due to lack of site-specific risk assessments to evaluate risk and drive corrective action decisions. This commenter suggested that EPA utilize site-specific, risk-based corrective action that is consistent with the guidance documents EPA has developed for RCRA and CERCLA programs.

EPA acknowledges the widespread non-compliance with the mandate to complete the selection of a remedy as soon as feasible after the completion of the ACM. However, EPA disagrees with the commenter's suggested deadline. The recommended deadline could actually have the effect of extending the deadline for the completion of the selection of a remedy beyond that in 2015 CCR Rule because "as soon as feasible" in many cases would likely be before 90 days after the completion of the ACM. Granting owners or operators more time to select a remedy would be less protective of human health and the environment. Regarding noncompliance with the CCR regulations, EPA has been and will continue to take action to address the non-compliance on a myriad of issues including to the failure of owner or operators to select a remedy as soon as feasible. EPA has announced that enforcing the CCR regulations is part of the ongoing set of National

Enforcement and Compliance Initiatives and expects that enforcement actions taken as part of the Initiative may address, where relevant and appropriate, the concern raised by the commenter.⁶⁰

EPA disagrees with the suggestion that the existing corrective action requirements, if triggered, are inappropriate at legacy CCR surface impoundments. As stated in Units III.B.2.a.i and III.B.2.f, the physical characteristics of legacy impoundments are not sufficiently different from currently regulated units to justify different requirements. For those commenters requesting that EPA adopt "risk-based corrective action" into the requirements, EPA notes that the commenters have provided no further explanation of what requirements in the existing regulations they wanted EPA to revise, what the revisions should accomplish, or why they are necessary or appropriate. As a general matter EPA considers that the corrective action regulations in §§ 257.95 through 257.98 do currently require facilities to tailor remedies to address the risks to human health and the environment, based on the conditions at the site. It is unclear what more the commenters are seeking. Furthermore, the commenter that stated that the existing corrective action regulations conflict with other EPA programs (*i.e.*, RCRA and CERCLA) failed to fully explain how the existing corrective action regulations conflict with EPA-published RCRA or CERCLA guidance documents or how they preclude corrective action decisions driven by site-specific risks. Accordingly, EPA is finalizing, without revision, its proposal that legacy CCR surface impoundments comply with the existing corrective action requirements at §§ 257.95 through 257.98.

As explained in the proposed rule at 88 FR 32003, §§ 257.90 through 257.95 require an owner or operator of a CCR unit to install a system of monitoring wells, specify procedures for sampling these wells, and set forth methods for analyzing the groundwater data collected to detect hazardous constituents (*e.g.*, toxic metals) and other monitoring parameters (*e.g.*, pH, total dissolved solids) released from the units (*i.e.*, all parameters listed in Appendices III and IV). If the groundwater monitoring required in § 257.95, demonstrates an exceedance of the groundwater protection standards

for constituents identified in Appendix IV of part 257, corrective action is required as laid out in §§ 257.96 through 257.98. These requirements apply throughout the active life and post-closure care period of the CCR unit.

When corrective action is required, it should be initiated as soon as possible. The corrective action program includes initiating an ACM to prevent further releases, to remediate any releases, and to restore affected areas to original conditions, as specified in § 257.96(a). After the ACM has been completed, the owner or operator must select a remedy that meets prescribed standards, including a requirement that the remedy attain the groundwater protection standards. See § 257.97(a) and (b). Finally, the corrective action program requires the owner or operator of the CCR unit to initiate remedial activities within 90 days of selecting a remedy. See § 257.98(a). The requirement to address releases under this requirement is identical to those requirements for any CCR unit undertaking groundwater corrective action with the additional requirement that implementation of corrective action begin during the active life of the unit.

EPA expects that when assessing corrective measures and selecting a remedy, the owner or operator of the unit will consider the impact of the corrective measures on the water quality and safety of the nearest surface water bodies and the nearest private and/or public groundwater wells.

With respect to completion of an ACM and remedy selection, § 257.96(a) requires an ACM be initiated within 90 days of determining an SSL has occurred, and then completed within another 90 days. An extension, not to exceed 60 days, may be warranted due to site-specific conditions or circumstances. This deadline to complete an ACM, 180 to 240 days after determining an SSL, was not proposed to be changed, so comments suggesting changes to these provisions are outside the scope of the rulemaking. Additionally, the commenters provided no reason why corrective measures could not be assessed and compared in an ACM and a remedy could not be selected. Prior to closure of a CCR unit, the facility has been required to characterize site conditions, including groundwater flow conditions and geology. The facility has knowledge of wastestreams and water volumes it discharges to a CCR surface impoundment. This information can be used to develop a groundwater model to predict groundwater flow conditions after wastestream disposal ceases and closure is initiated. EPA believes this

⁶⁰ EPA Enforcement Alert, National Enforcement and Compliance Initiative, Protecting Communities from Coal Ash Contamination. EPA Document #310F23002. December 2023. <https://www.epa.gov/system/files/documents/2023-12/ccr-enf-alert-2023.pdf>.

would provide sufficient characterization of post-closure conditions to assess and compare groundwater cleanup alternatives to complete an ACM. The commenters have provided no reasons or explanation why this would not be achievable.

Once the ACM is complete, a public meeting has been held, and community input has been considered, a remedy must be selected as soon as feasible. EPA agrees that a selected remedy may include closure by removal to comply with source control requirements, and that this would constitute commencing implementation of a remedy. However, the selected groundwater remediation portion of the remedy must also be implemented within a reasonable time, in accordance with the schedule established in the remedy selection report. 40 CFR 257.97(d). Implementation of the source control measure does not negate this requirement.

g. Closure and Post-Closure Care Criteria for Legacy CCR Surface Impoundments

EPA proposed to apply all of the existing closure and post-closure care requirements in §§ 257.101 through 257.104 to legacy CCR surface impoundments, except for the alternative closure requirements in § 257.103(f). The proposed rule explained that based on the data gathered since 2015 from the currently regulated CCR unit universe, the Agency considered it highly unlikely that any legacy CCR surface impoundment has a composite liner that meets the requirements of § 257.71 and therefore EPA expected legacy CCR surface impoundments to be unlined as defined by § 257.71(a)(3)(i). Consistent with the USWAG decision and the existing regulations in § 257.101(a) mandating that all unlined (including clay-lined) impoundments must close, EPA proposed to require that all legacy CCR surface impoundments initiate closure within 12 months of the effective date of this final rule. The proposed rule also explained that the alternative closure provisions in § 257.103(f) were not appropriate for legacy CCR surface impoundments as these units, by definition, are inactive impoundments at inactive facilities and could not therefore demonstrate the need to continue to use the disposal unit, which is a qualifying component of the alternative closure provisions.

EPA received numerous comments on its proposal to apply the existing the closure and post-closure care requirements §§ 257.100 through 257.104 to legacy CCR surface

impoundments. Overall, most commenters supported or did not contest EPA's proposal. Some of these commenters agreed that requiring legacy CCR surface impoundments to comply with the existing closure requirements is necessary for the long-term protection of human health and the environment. A few of these commenters also suggested that EPA prohibit legacy CCR surface impoundments from closing with CCR in place under § 257.102(d).

Many other commenters however objected to subjecting legacy impoundments to § 257.101(a), which requires CCR surface impoundments constructed without a composite liner to close. These commenters generally argued that a national requirement to close was not appropriate for legacy CCR surface impoundments and that EPA should instead determine whether closure is warranted at each site based on a finding that the individual unit at the particular site poses unacceptable risks. These commenters largely reiterated comments previously made in response to the ANPRM, without addressing EPA's responses in the proposal. For example, some asserted that their particular legacy impoundments are not contaminating groundwater and do not pose a risk to groundwater. One claimed that the proposal was based on the upper bound of risk pulled from a sensitivity analysis of a nationwide risk assessment based on aggregated data unrepresentative of any given facility, and therefore could not support a finding that any particular site poses "actual risks." This commenter also asserted that a nationwide risk assessment should not be used to impose a "one-size-fits-all" closure requirement or universal performance standards for closure, because it could drive closure methods that are not necessary to ensure protection of human health and the environment. Other commenters repeated their claims that the closure of legacy CCR surface impoundments would itself present greater risks than leaving the disposal unit in its existing state. For example, one commenter asserted that closing legacy impoundments could raise environmental justice issues associated with increased traffic and (consequently) decreased air quality; could risk potentially destabilizing the unit and disturbing native species and animal habitats; and would increase air emissions, water consumption, and waste generation.

These commenters asserted that a "risk-based" closure or corrective action program was better suited "to address the unique nature and unknown risk of

legacy CCR surface impoundments." For example, one commenter suggested that the risks associated with legacy CCR surface impoundments can be better managed through corrective action implemented under a permit program, which the commenter believed would make the mandate to close these units unnecessary. The commenter explained that although closure can be useful as source control in remediating contamination, as long as the exposure pathways are appropriately addressed through corrective action, nearby receptors will not be impacted by the risks, and the RCRA subtitle D protectiveness standard would be met without closing the impoundment. Similarly, another commenter argued that mandating closure for all legacy impoundments is inconsistent with other RCRA and CERCLA or State cleanup programs, which, the commenter asserts generally use site-specific risk assessments to determine whether closure is warranted. The commenter suggested that instead, the final rule should rely on the upcoming implementation of EPA's Federal permitting rule pursuant to the WIIN Act and allow a regulated entity to conduct a site-specific risk assessment to evaluate whether the historical CCR disposal areas pose "actual risks" and allow closure and corrective actions to be tailored to site-specific conditions and risks.

Other commenters raised concern that some legacy impoundments are now located beneath infrastructure such as pipelines or transmission lines that cannot be disturbed without disrupting operations, active CCR units, or buildings. These commenters explained that requiring closure of these impoundments could adversely impact grid reliability, business operations, or other necessary public services (e.g., military infrastructure) and suggested that EPA exempt these units or at least extend the closure time frames to allow for closure of the impoundment when the other unit or structure is closed or decommissioned.⁶¹

⁶¹ EPA also received comments suggesting that it examine the cumulative impact of several recently or soon-to-be finalized power sector and vehicle rules. EPA performed suggested sensitivity analysis which demonstrated 1) the cumulative impact is not expected to adversely impact resource adequacy, and 2) that, considering the power sector rules together, the cumulative effect of these rules in terms of reduction in coal steam electric generating capacity is less than the sum of each of these rules individually for 2035. The affected universe of units with significant mitigation responsibilities among the EPA rules is overlapping, not purely additive, as it largely reflects the same segment of the grid's generation portfolio. See *Resource Adequacy Analysis: Vehicle Rules*, 111 EGU rule, ELG, and MATS Technical

Several commenters expressed support for the proposed 12-month deadline to initiate closure, stating that the shorter deadlines are necessary to address the increased risk from legacy CCR surface impoundments and likelihood these units are and have been contaminating groundwater. Many other commenters characterized the proposed deadline as infeasible for the reasons mentioned in Unit III.B.2.a.ii, including seasonality, need to comply with overlapping regulatory requirements, labor shortages, and the strain on the limited resources necessary to achieve compliance (e.g., contractors, laboratories, P.E.s) caused by the number of CCR units coming into compliance at the same time. Commenters also stated that compliance with the closure requirements should not be required until after the groundwater monitoring system was installed and baseline samples collected so that closure could be informed by the groundwater monitoring data. These commenters pointed to recent EPA Part A and Part B decisions as evidence of the gap between EPA's expectations and the closure and post-closure plans developed using good faith efforts by owners or operators and best practices; these commenters further stated that the proposed deadline precludes the incorporation of groundwater monitoring data in developing closure plans and is likely a contributing factor to the gap between EPA's expectation and closure and post-closure care plans submitted by owners or operators of currently regulated units. One commenter also claimed that legacy CCR surface impoundments are potentially still being used to manage non-CCR wastestreams, and that EPA consequently needed to create a mechanism for facilities to seek extensions similar to those that had been made available under § 257.103(f). Commenters' suggestions for alternative deadlines to initiate closure ranged from 24 to 34 months, or at least after the collection of the baseline groundwater monitoring samples required by § 257.94.

MEMO for more information. Also see *IPM Sensitivities MEMO*. The grid analysis did not include the proposed or final version of this rulemaking, because this CCR rule primarily addresses only disposal units that have not received CCR since before 2015, that is the disposal units are not part of ongoing operations at any facility, and consequently this rule is not expected to impact the generation of electricity. In addition, EPA continues to believe this final rule will not generally impact current utility operations, particularly due to the revisions made in the final rule to address commenters concerns, as discussed in the preamble to the final rule (e.g., extended deadlines for CCRMU located under critical infrastructure).

EPA continues to believe that applying the closure and post-closure requirements in §§ 257.101 through 257.104 to legacy CCR surface impoundments is appropriate and necessary to protect human health and the environment. Based on the record compiled for the 2015 CCR Rule, EPA concluded that "there is little difference between the potential risks of an active and inactive surface impoundment; both can leak into groundwater, and both are subject to structural failures that release the wastes into the environment, including catastrophic failures leading to massive releases that threaten both human health and the environment." 80 FR 21343. As discussed in Unit III.B of this preamble, the D.C. Circuit concurred, and on that basis, vacated the exemption for legacy CCR surface impoundments. See, *USWAG* at 901 F.3d at 434. EPA received no information during this rulemaking that would support a conclusion that legacy CCR surface impoundments present fewer risks than other inactive CCR surface impoundments. Indeed, as discussed in Unit III.A, more recent information continues to indicate that legacy CCR surface impoundments are more likely to contaminate groundwater and at higher levels, even in cases where the unit no longer presents structural stability concerns. Based on this record and on the specificity of the D.C. Circuit's findings in *USWAG*, EPA considers that it has limited discretion to establish requirements for legacy CCR surface impoundments that are significantly different than those currently applicable to inactive CCR surface impoundments. Accordingly, EPA in most cases instances has required legacy CCR surface impoundments to comply with the existing closure and post-closure requirements in 40 CFR part 257, subpart D, that are currently applicable to inactive CCR surface impoundments. This final rule also adopts the provisions that were originally proposed on March 3, 2020, that allow a facility closing by removal to complete required groundwater remediation during a post-closure care period, discussed in Unit III.D of this preamble.

However, in response to comments, EPA included one additional provision to account for the inception of Federal permitting. A key feature of a permit program is that, through a subsequent public process, a regulatory authority can adjudicate legal and factual issues based on the specific facts of an individual site, that would be more complex and challenging to resolve in a national rule. EPA has relied on this

feature to resolve one of the more complex legal and factual issues raised in this rulemaking by deferring it to the subsequent permitting process: how to address situations where the impoundment contained CCR and liquids on October 19, 2015, but prior to the effective date of this final rule, a facility closed its legacy CCR surface impoundment in accordance with standards established by a regulatory authority that are different than the performance standards in § 257.102, but that are likely to provide equivalent protection of human health and environment. Provided certain criteria are met, EPA is deferring the requirement for the closed unit to comply with § 257.102 until a permit authority can evaluate the adequacy of the previously completed closure, and determine during permitting whether (as well as what) additional measures are necessary to ensure that the closure is as protective as § 257.102. The criteria EPA is employing are designed to ensure that the regulatory authority overseeing the closure applied standards that were substantially equivalent to the otherwise-applicable CCR rules in terms of evaluating and mitigating the risks. In such cases, EPA would therefore have reliable evidence that the risks have likely been adequately mitigated and therefore, these are unlikely to pose a reasonable probability of adverse effects pending later permitting. The final rule also includes procedures for the closure equivalency determination modeled on similar determinations made for hazardous waste interim status units under § 270.1.

EPA is currently transitioning from the exclusively rule-based program to a Federal permitting program. Although every unit in operation, closure, or corrective action will ultimately receive a permit, and EPA expects to shortly begin issuing permits, it will be several years before permits are issued for every unit. This means that, at least in the near term, most facilities will continue to operate under the current self-implementing regime, similar to units under the subtitle C hazardous waste program that initially operated under interim status prior to obtaining a permit. While this necessarily limits the degree to which this final regulation can rely on the permitting process, this is an example of a situation that is better resolved through a combination of a national rulemaking and the individualized decision making provided through permitting rather than exclusively through a national rulemaking. EPA agrees that there are

examples of units closed under alternative criteria that appear to be equally as protective as the part 257 closure requirements. If EPA were to require all previously closed units to document compliance with § 257.102 immediately, several units that have likely already met the protectiveness standards would be swept in unnecessarily. Unfortunately, it is not feasible to evaluate these individual closures as part of this national rulemaking; these units are all subject to different requirements, and commenters have provided insufficient information on each individual unit for the Agency to conclude that they are in fact as protective as a closure conducted in accordance with § 257.102. If EPA were still limited to issuing minimum national criteria through rulemaking, it would be reasonable to craft a regulation that would regulate over broadly in order to ensure that the final rule achieves the statutory standard at each facility subject to the regulation. See 42 U.S.C. 6944(a) (“no reasonable probability of adverse effects on health or the environment . . . at such facility”). As EPA explained in 2015, to establish criteria under this provision, EPA must demonstrate, through factual evidence available in the rulemaking record, that the final rule will achieve the statutory standard at all sites subject to the standards based exclusively on the final rule provisions. This means that the regulations must account for and be protective of all sites, including those that are highly vulnerable. But now that Congress has granted the agency broader authority, it is reasonable in this case, where EPA can craft criteria to identify closures that may be protective and thus warrant a closer evaluation, to rely on that broader authority.

Under this provision, EPA is not exempting a facility from the requirement to demonstrate that a unit closure meets the performance standards in § 257.102, or from agency oversight, but only delaying application of the requirement until the Agency can resolve the outstanding legal and factual issues. EPA is also deferring only the requirement that a closed unit achieve compliance with the closure performance standards. To mitigate any potential risks, all other applicable requirements, including the requirements for groundwater monitoring and corrective action would continue to apply to these units. Further EPA’s existing authorities to respond to urgent threats to human health or the environment also remain available,

should the need arise. See, e.g., 42 U.S.C. 6973.

i. Requirement for Legacy CCR Surface Impoundments To Close

The final rule continues to require legacy CCR surface impoundments to close. As EPA explained in the proposal, the *USWAG* decision has effectively resolved this issue. No commenter submitted any evidence to demonstrate that the risks associated with these units are any lower than they were in 2018 when the Court decided that closure of all unlined and clay-lined impoundments was required by RCRA section 4004(a) or that the risks posed by legacy CCR surface impoundments are any lower than those at the currently regulated inactive impoundments at active facilities. If anything, more recent information indicates that a greater number of legacy CCR surface impoundments are more likely to have leaked even higher levels of contaminants than the operating impoundments modeled in 2014. See Unit III.A.

No commenter has identified any legacy CCR surface impoundment with a composite liner that meets the requirements of § 257.71. Based on the data gathered since 2015 from the currently regulated CCR unit universe, the Agency considers it highly unlikely that any legacy CCR surface impoundment has such a liner. EPA analyzed the list of inactive CCR facilities compiled based on comments received in response to the ANPRM and this rulemaking and knows that almost all these facilities were opened prior to 1990 (one facility opened in 1996) before composite liner systems were typically installed. Unless legacy CCR surface impoundments are very different than impoundments at active facilities, EPA expects all units of this age to be unlined as defined by § 257.71.

The D.C. Circuit has also already rejected arguments that EPA can avoid requiring CCR surface impoundments to close based on claims that “all impoundments aren’t leaking.”

The EPA and Industry Intervenor assert that the composite lining required for new units is not needed for existing units because most unlined impoundments do not leak, and an unlined impoundment that is not leaking is not dangerous. Industry Intervenor emphasize that the record suggests that “almost two-thirds of unlined impoundments do not leak,” and they assert that “appropriate controls on impoundments that do leak” suffice to meet RCRA’s “no reasonable probability” standard. The EPA underscores that it made no finding of any “reasonable probability that each and every unlined impoundment will, in fact, result in adverse effects on health and the

environment.” It insists that RCRA’s “no reasonable probability” standard is met by the Rule’s provisions for “extensive monitoring of groundwater to detect constituent leaking,” *id.* at 83, and “immediate action to stop that leak,” “redress that leak,” and to close the site as soon as a harmful leak is detected.

USWAG, *supra* at 427. The Court summarily rejected these arguments.

It is inadequate under RCRA for the EPA to conclude that a major category of impoundments that the agency’s own data show are prone to leak pose “no reasonable probability of adverse effects on health or the environment,” 42 U.S.C. § 6944(a), simply because they do not already leak.

Id. This holding largely rests on a legal conclusion of what RCRA section 4004(a) requires, which Congress did not alter when it amended the statute in the WIIN Act.

The Court similarly rejected arguments that reliance on the part 257 corrective action provisions to clean up releases can effectively substitute for a national requirement to close impoundments, or that corrective action alone is sufficient to meet the RCRA section 4004(a) standard. As the Court explained, that argument focuses on the wrong risks and addresses only half of the statutory standard. The contamination of a potential source of drinking water is itself an adverse effect on the environment, and the statutory requirement to ensure there will be no reasonable probability of adverse effects on health or the environment requires the Agency to take measures based on the risks to prevent this harm from occurring in the first place. It is not enough to remediate the contamination before it reaches an off-site receptor.

In defending the Rule here, the EPA looks at too narrow a subset of risk information and applies the wrong legal test.

The Final Rule’s approach of relying on leak detection followed by closure is arbitrary and contrary to RCRA. This approach does not address the identified health and environmental harms documented in the record, as RCRA requires.

RCRA requires the EPA to set minimum criteria for sanitary landfills that prevent harm to either “health or the environment.” The EPA’s criteria for unlined surface impoundments, limited as they are to groundwater monitoring for contaminant levels keyed to human health, only partially address the first half of the statutory requirement.

But here, too, the EPA has failed to show how unstaunched leakage while a response is pending comports with the ‘no reasonable probability’ standard.

Id. at 429–430, 431 (emphasis added). None of this has changed. Nor has any commenter identified any unique

characteristic of legacy impoundments that makes any of the Court's analysis irrelevant or inapplicable. Although some commenters continue to claim that their units are heavily vegetated or developed and that reopening or other removal/remediation activities may disrupt current use of the land, no commenter submitted any data or analysis to demonstrate that removal or remediation activities would be more detrimental to health and the environment than not cleaning up the contaminated groundwater in the aquifer or taking measures to prevent the legacy CCR surface impoundment from continuing to contaminate the aquifer. Moreover, the fact that some impoundments have become heavily vegetated or redeveloped does not mitigate the risks these unlined legacy CCR surface impoundments continue to pose.

The same is true for those commenters alleging that the closure of legacy CCR surface impoundments would itself present greater risks than leaving the disposal unit in its existing state; none presented any data or analysis, stating instead that possible effects were self-evident. However, EPA notes that most of these comments appear to have been premised on the assumption that closure by removal would be required. As discussed in the next section, EPA is not prohibiting legacy CCR surface impoundments from closing with waste in place, provided all of the performance standards in § 257.102(d) have been met.

EPA also cannot, as the commenters suggest, proceed exclusively on the basis of site-specific assessments and forego a nationwide risk assessment, national closure requirement, or universal performance standards for closure. When Congress amended the statute in 2016, it added a permitting component but retained without revision the requirements in RCRA sections 1008(a)(3) and 4004(a) that EPA establish minimum national standards ("criteria") by regulation. The statute relies on these criteria in several provisions, including as the standard EPA must use to evaluate State programs, to issue permits, and to determine whether a CCR unit is a sanitary landfill or an open dump. See, 42 U.S.C. 6945(d)(1)(B), (d)(1)(D), (d)(3), (d)(6). The D.C. Circuit has also effectively confirmed the continued necessity of national criteria; if the Court believed that the WIIN Act obviated the need to comply with RCRA section 4004(a) it would have granted EPA's request for an abeyance or dismissed the case as moot. That it did neither demonstrates that the Court

believed that its opinion would remain relevant. See, *USWAG*, 901 F3d at 436–437 (denying EPA's request for voluntary remand because "this claim involves a question—the scope of EPA's statutory authority—that is intertwined with any exercise of agency discretion going forward.")

Accordingly, the final rule requires all legacy CCR impoundments to close.

ii. Deferral for Legacy CCR Surface Impoundments Under Critical Infrastructure

As noted above, several commenters stated that some inactive facilities have been redeveloped and that the CCR surface impoundments are now located beneath critical infrastructure. These commenters claimed that requiring closure of units beneath infrastructure could adversely impact grid reliability, business operations, or other necessary public services and suggested EPA create exemptions or extensions for these units. For example, one commenter stated that closure of units located under other structures is not feasible as EPA has proposed. The commenter further explained that:

the issue is applicable and even more pronounced with respect to legacy impoundments. By definition legacy CCR surface impoundments are located at inactive sites that in some instances have been partially or completely redeveloped. As a result, former legacy units at this stage may be completely inaccessible due to vegetation, new infrastructure like pipelines or transmission lines that cannot be disturbed without disrupting operations, active CCR units, buildings, or other obstacles to access. If EPA proceeds to issue the proposal EPA must address such accessibility issues.

Other commenters supported the decision not to propose an exemption from the closure requirements for legacy CCR surface impoundments beneath redevelopments or infrastructure, based on the risks that these sites can present, and provided specific examples of such sites. Two of the examples related to a situation in which active CCR disposal units were built on top of former CCR surface impoundments (*i.e.*, overfills). In one instance, the commenter described a site where an unlined CCR surface impoundment had been closed by partially draining the impoundment and constructing a new CCR landfill (98.9 acres), two stormwater ponds and a leachate pond (10.8 acres), and a materials handling area (4.4 acres) on top of the former impoundment. According to the commenter, the facility claimed that the closed impoundment rather than any of the active CCR units, was responsible for SSIs detected in its groundwater monitoring. The

commenter referenced documents on the facility's CCR website which explained that:

Although it has not received sluice water since 2008, the CCR in the former Main Pond continues to receive, store, and discharge water, primarily groundwater entering the CCR through the sides of the filled valley. Groundwater flow into the CCR in the former Main Pond drains downward and outward to the east through the toe drain system under the dam.

The commenters explained that overfills can increase groundwater contamination from the underlying unit by reducing the hydraulic gradient and increasing the waste and water contact time. They stated that this has been documented by both an EPRI study and groundwater monitoring at a specific overfill that showed steady to gradually increasing concentrations of CCR related constituents in the landfill monitoring wells, rather than the predicted decline in concentrations of CCR-related constituents from the closure of the underlying surface impoundment.

As an initial matter, under both the existing definitions and the definitions in the final rule a legacy CCR surface impoundment could not be located below an active CCR unit. A legacy impoundment is located at an inactive facility, and the presence of an active CCR unit means that the facility is active, not inactive. See, §§ 257.50(b), 257.53 (definition of active facility). This means that in the example described by the commenter the surface impoundment underneath the active landfill is an inactive CCR surface impoundment at an active facility, and would be considered a "regulated unit" subject to the existing requirements in part 257, rather than this final rule.

In any event, EPA disagrees that its proposal did not adequately account for the circumstance in which a legacy CCR surface impoundment may be challenging to access, such as where the impoundment is located beneath infrastructure or buildings. In contrast to the comments received with respect to CCRMU, no commenter provided a concrete example in which closure of a legacy CCR surface impoundment would interfere with critical infrastructure. The overwhelming majority of commenters provided concrete examples of concerns with respect to CCRMU and then concluded that EPA needed to address the issue equally for legacy CCR surface impoundments. The most concrete example of potential interference with critical infrastructure is the reference to "new infrastructure like pipelines or transmission lines that cannot be disturbed without disrupting

operations” quoted above. But even in that case the commenter provided no explanation of the factual basis for the conclusion that over the five to 15 years the existing regulations provide to complete closure the facility could not schedule the outages necessary to move pipelines or transmission lines, and conduct the closure in stages as necessary to accommodate scheduling any necessary outages.⁶² In addition, as discussed in the next Unit of the preamble, EPA has extended the deadline to initiate closure to 48 months from promulgation. The amount of time provided by these deadlines is more than adequate to account for any accessibility issues. Further, EPA has been regulating utilities under multiple environmental statutes for decades and reliability issues are often raised when regulations are promulgated, but EPA is unaware of situations where those reliability concerns have been realized in the form of electric blackouts caused by compliance with Federal environmental standards. In this case, in the unlikely event closure of a legacy CCR surface impoundment cannot occur within the regulatory timeframe without creating a demonstrated reliability concern, the Agency will work with the facility, the relevant RTO, and other relevant Federal agencies to ensure proper closure occurs without causing the power to go out.

Finally, as noted above EPA received a substantial number of comments requesting the agency not require facilities to “re-close” any unit that had already completed closure. This final rule does not mandate that any previously closed unit automatically re-close. But, as described in the next section, the final rule does require all legacy CCR surface impoundments to meet the performance standards in § 257.102, although as discussed above, some may not be required to do so until permitting. EPA does not consider this to be equivalent to a requirement to “re-close” as, depending on the site conditions, facilities may be able to implement engineering measures, such as the installation of slurry walls to prevent groundwater infiltration, to address any deficits without removing

the cover system or entirely re-closing the whole impoundment.

iii. Requirement To Comply With Performance Standards in § 257.102

As discussed above, consistent with USWAG and the proposed rule, this final rule requires that the closure of legacy CCR surface impoundments meet the performance standards in either § 257.102(c) or (d). Under this final rule, all closures initiated after the effective date of this rule, as well as those that were not completed prior to the effective date of this rule, will need to comply with these requirements.

And in general, the same is true with respect to closures that were completed prior to the effective date of this rule. As discussed previously, a facility that can certify that its prior closure meets the performance standards in § 257.102(c) only needs to post the documentation that it meets the standard. Similarly, if a facility can demonstrate that the closed unit meets the requirements under § 257.102(d), EPA will consider them to be closed and the only requirements that will be applicable are those that apply to closed units under post-closure care—such as groundwater monitoring, and if necessary, corrective action. EPA never intended to require facilities that otherwise met the closure standards to go through the process again and re-close the unit. In addition, where the facility was subject to standards that are different than the Federal CCR closure standards (*e.g.*, if the closure were conducted as part of a CERCLA cleanup or State order) but are otherwise equivalent in terms of mitigating the risks, the requirement to meet the § 257.102 standards will be deferred to permitting, where a closure equivalency determination will be made.

In response to EPA’s proposal that all legacy CCR surface impoundments comply with § 257.102, many commenters again reiterated their request that EPA exempt any unit that has either completed closure or is in the process of closing pursuant to State law (*e.g.*, solid waste permit, consent orders or decrees). Commenters also requested EPA to exempt any site that had closed as part of a cleanup conducted pursuant to another Federal requirement, such as CERCLA or RCRA subtitle C. These commenters stated that EPA had failed to demonstrate that these units posed any risk as a consequence of the lack of ponded water, and that “re-closure” of these previously closed units is consequently unnecessary and overly burdensome.

By contrast, several commenters supported EPA’s proposal to require all

legacy CCR surface impoundments to comply with the performance standards in § 257.102, even if the closure was previously approved by a State regulatory agency. These commenters pointed to EPA’s conclusions in 2015 that significant gaps remain in many State programs; that some programs provide minimal or no regulatory oversight of CCR units; and that most CCR surface impoundments were permitted exclusively under NPDES or other surface water pollution prevention programs. See, 80 FR 21324–21325. The commenters also included recent examples of closures approved by various State agencies that were not consistent with the Federal closure standards including: (1) Ohio’s approval of the closure of an unlined CCR surface impoundment at the Gavin Plant, which EPA subsequently estimated could be sitting in groundwater as high as 64 feet deep in some locations post closure and that as much as 8.2 million cubic yards (or as much as 40% of the CCR in the Fly Ash Reservoir) could still be saturated—and would remain so indefinitely; (2) Alabama’s issuance of several permits authorizing several facilities to close unlined CCR surface impoundments with large quantities of free liquids and saturated CCR remaining in the closed units; and (3) Kentucky’s permit authorizing the closure of an unlined CCR surface impoundment by partially draining the impoundment and constructing a new CCR landfill (98.9 acres), two stormwater ponds and a leachate pond (10.8 acres), and a materials handling area (4.4 acres) on top of the impoundment. The CCR in the underlying closed impoundment continues to receive, store, and discharge water, primarily groundwater entering the CCR through the sides of the filled valley, drains downward and outward to the east through the toe drain system under the dam.

Finally, several commenters requested that EPA prohibit legacy CCR surface impoundments from closing in place under § 257.102(d).

EPA disagrees that legacy CCR surface impoundments should be prohibited from closing with waste in place in accordance with § 257.102(d). The commenters did not demonstrate that legacy impoundments could never meet the performance standards in § 257.102(d) or identify unique characteristics or risks of legacy impoundments that would not be adequately addressed by compliance with those provisions. Both clean closure and closure with waste in place can be equally protective, provided that all of the requisite performance

⁶² Electric generating facilities are required to schedule and agree upon boiler shutdown periods with their Regional Transmission Organization (RTO) to ensure grid reliability. Most plants have regular boiler shutdowns on an annual basis with a more substantial one every few years. Since regular boiler shutdowns are already scheduled, the facility can plan the closure construction around the already scheduled outage; however, the outage may need to be extended depending on the work. The RTOs require various lead times of consultation or notice prior to any retirements, outages, or extended periods of non-operation.

standards in § 257.102 are met. The final rule therefore requires legacy impoundments to comply with the same requirements applicable to other inactive impoundments, that is, to close in accordance with either § 257.102(c) or (d).

If all of the performance standards for clean closure and the performance standards for closure with waste in place can be met, an owner or operator may determine which alternative is appropriate for their particular unit. The regulations do not require an owner or operator to use one closure option over the other in such situations. However, the facility must meet all the performance standards for the option it has selected, and if it cannot meet all of the performance standards for one option, then it must meet all of the performance standards for the other option. 40 CFR 257.102(a) (specifying that “[c]losure of a CCR landfill, CCR surface impoundments . . . [m]ust be completed either by leaving the CCR in place and installing a final cover system or through removal of the CCR and decontamination of the CCR unit, as described in paragraphs (b) through (j) of this section.”). For example, if the facility is unable to meet the performance standards for closure with waste in place for a particular unit (or portion of a unit), it must close the unit by removal (or that portion). Whether any particular unit or facility can meet the performance standards is a fact and site-specific determination that will ultimately depend on a number of factual and engineering considerations, such as the hydrogeology of the site, the engineering of the unit, and the kinds of engineering measures available.

As discussed in the preceding section, this final rule does not require previously closed legacy CCR surface impoundments to automatically “re-close.” Rather, consistent with the proposal, facilities will be required to ensure that all closed legacy CCR surface impoundments meet the performance standards in § 257.102(c) or (d). To the extent any deficit can be remedied by supplementary engineering methods, that would be all that is required.

(a) Closure of Legacy CCR Surface Impoundments Under State Law

EPA continues to disagree that it would be appropriate to exempt any legacy CCR surface impoundment that has completed closure or is currently in the process of closing pursuant to State requirements. As EPA repeatedly explained in the proposal, Congress established a specific process that would authorize State requirements to

operate in lieu of the Federal CCR regulations, and it would be inappropriate for EPA to substitute its own process to achieve the same ends. Under the Congressionally mandated process, a State must obtain EPA approval, in whole or in part, of its CCR permit program, pursuant to RCRA section 4005(d). 42 U.S.C. 6945(d). Those provisions expressly identify the standard EPA must use to evaluate a State program including, where applicable, alternative technical criteria that differ from the Federal CCR regulations, along with requirements for EPA to review approved programs and, if necessary, to withdraw approval. Finally, the statute expressly provides that in the absence of a permit issued under an approved State program, the Federal criteria apply to all CCR units. 42 U.S.C. 6945(d)(6). These provisions reflect Congress’ considered judgment of the appropriate legal structure and relationship between State and Federal requirements, and it is not appropriate for EPA to effectively establish its own alternative.

In any event, EPA lacks the record necessary to support a broad exemption for all closures under any State requirement. As discussed in more detail below, the information currently available does not demonstrate that all closures conducted under State authority “ensure there is no reasonable probability of adverse effects on health or the environment.” 42 U.S.C. 6944(a).

First, commenters’ arguments appear to be premised largely on the existence of a State solid waste program with the attributes of the municipal solid waste landfill requirements adopted and approved well after those dates. But as some commenters acknowledged, many legacy impoundments closed well before any State had developed such regulations—e.g., during 1970s–1990s.⁶³ EPA has no evidence demonstrating the protectiveness of State requirements during this period. However, the results of the joint U.S. Department of Energy (DOE) and EPA study completed in 2006, “Coal Combustion Waste Management at Landfills and Surface Impoundments, 1994–2004,” are not encouraging. Only 19% (three out of 19) of the surveyed surface impoundment permits included requirements addressing groundwater protection standards (*i.e.*, contaminant concentrations that cannot be exceeded) or closure/post-closure care. The EPA/DOE report also concluded that

approximately 30% of the net disposable CCR generated was potentially exempt from all State solid waste permitting requirements (EPA/DOE Report at pp 45–46). For example, at the time of the report, Alabama did not regulate CCR disposal under any State waste authority and did not have a dam safety program. Finally, the report found that a number of States only regulated surface impoundments under Clean Water Act authorities, and consequently primarily addressed the risks from effluent discharges to navigable waters, but did not require liners or groundwater monitoring.

As part of developing the 2015 CCR Rule, EPA independently reviewed State statutes and regulations, with a more detailed focus on the 16 States responsible for approximately 74% of the CCR generated in 2009. See 80 FR 21324. This review identified some programs that provided minimal or no regulatory oversight of CCR units. For example, Arizona, New Mexico, and Utah had no regulations applicable to CCR units or entirely exempted CCR from State regulations governing solid waste. Similarly, Mississippi, Montana, and Texas (the largest coal-ash producer) exempted the on-site disposal of CCR (as “nonhazardous industrial solid waste”) from some or all key requirements, such as permits or groundwater monitoring. Such exemptions covered most of the disposal of CCR within the State, as the majority of utilities dispose of their CCR on-site. Other States, such as Florida, Indiana, Ohio and Pennsylvania, exempted CCR landfills or “monofills” from many requirements. For example, Indiana regulations considered surface impoundments that are dredged at least annually to be “storage units” that are exempt from solid waste regulations, including from corrective action requirements. Many of these States were among the leading generators of CCR wastes at the time. In total, EPA estimated that in 2015, approximately 20% of the net disposable CCR was entirely exempt from State regulatory oversight.

However, EPA concluded in 2015 that most States regulated the management of CCR to varying degrees, although the particular requirements varied significantly. Most CCR surface impoundments were permitted exclusively under NPDES or other surface water pollution prevention programs. In these States, requirements to protect groundwater, such as liners or groundwater monitoring systems, were frequently less robust than the corresponding requirements applicable to CCR landfills.

⁶³ As discussed previously, if an impoundment contained CCR and liquids on or after October 19, 2015, it is considered a legacy impoundment under these regulations even if the unit is considered to have been closed under state law.

EPA did not specifically evaluate State closure requirements in 2015. However, EPA's findings with respect to groundwater monitoring requirements suggests that it is unlikely States considered the extent to which a surface impoundment would remain saturated by groundwater after closure. In 2015 EPA had only limited anecdotal evidence on the status of groundwater monitoring in six States, including four States that are among the leading CCR generators. After the Kingston TVA spill in December of 2008, groundwater monitoring wells were installed at 12 of Illinois's existing surface impoundments, almost doubling the number of monitored surface impoundments in the State. However, 55 additional surface impoundments, both active and inactive, still lacked groundwater monitoring systems. In Ohio, 44 CCR units, out of a total of 57 CCR units in the State (42 surface impoundments and 15 landfills) still lacked groundwater monitoring in 2015, even though all the surface impoundments were permitted decades ago under Ohio's NPDES program. Ohio acknowledged in their comments that the extent of groundwater risks in the State was poorly documented, as 40 out of 44 unlined CCR units did not have a groundwater monitoring system. Some State programs also authorized a buffer zone or a "zone of discharge," which allows the facility to defer remediation of groundwater contamination for some period of time, usually until the contaminant plume has migrated to the facility site boundary. Florida, Illinois, North Dakota, and Tennessee were among the States with such a regulatory provision.

EPA acknowledges that some States have substantially revised their programs since 2015, but this is not universal. In addition, although a few States provided further information that was not available to EPA in 2015 about their programs in response to the proposal, most did not. For the most part, commenters offered general assertions that State regulatory authorities have considered the site-specific conditions and determined that the closure or closure plan meets the necessary requirements for addressing risk, and that EPA should not second guess these decisions, but provided little, if any, evidence that would support a wholesale exemption for any closure conducted in accordance with State requirements.

At the same time, as discussed above, several commenters provided examples of recent (post-2015) State-authorized closures that are significantly less protective than § 257.102. For example,

at least two States responsible for a significant percentage of the CCR generated annually, Ohio and Kentucky, recently (*i.e.*, after 2015) allowed facilities to close their impoundments by removing the CCR from the impoundment, but did not require groundwater monitoring to determine whether groundwater contamination remained at the site. Under the CCR regulations, closure by removal is only considered complete with documentation that all Appendix IV constituent concentrations are below the GWPS in two consecutive groundwater monitoring sampling events.

More to the point, as EPA explained in the proposal, the record clearly shows that significant numbers of CCR surface impoundments were constructed with at least some portion of the unit actually in the aquifer beneath it, or otherwise consistently saturated by groundwater or surface water migrating into the unlined impoundment. Many of these units were closed without addressing the liquids that continued to saturate the CCR, and the free liquids that remained or the fact that the unit continues to impound water—in some cases with full approval from the State. This is especially likely for closures that occurred prior to 2015. As noted previously, a 2006 DOE/EPA report concluded that only 19% of the surveyed surface impoundment permits included requirements addressing groundwater protection standards (*i.e.*, contaminant concentrations that cannot be exceeded) or closure/post-closure care, and approximately 30% of the net disposable CCR generated was potentially exempt. The risks associated with such closures can be substantial, as discussed in Unit III.A of this preamble. Ultimately, under the Federal CCR regulations what determines whether a unit meets the definition of an inactive CCR impoundment or a closed CCR impoundment—and what determines whether the unit continues to present a reasonable probability of adverse effects on health and the environment—are the conditions that remain and the resulting risks, rather than whether a facility or even a State regulatory authority has labeled the unit as "closed."

For all of these reasons, EPA cannot exempt: (1) All units that have closed consistent with State requirements, or (2) All units that have started closure or have had a closure plan approved under State requirements prior to the effective date of the final rule.

(b) Deferral of Certain Completed Closures to Permitting

A few commenters provided examples of closure that they believed were

substantially equivalent to closures in accordance with § 257.102, because they involved substantial regulatory oversight, a site-specific risk assessment, and general consistency between the programs on the standards to be applied. These included closures under CERCLA and an approved State's RCRA subtitle C program. According to these commenters, it is a near certainty that there will be slight differences in the way the closure activities were designed or conducted when compared to § 257.102, but because the closure activities accomplish the same environmental goals and meet the same ultimate performance standards with respect to avoiding groundwater impacts, there is little to be gained by duplicative closure activities under the Federal CCR regulations. Another commenter provided a copy of a Consent Order entered in State court governing the closure of CCR surface impoundments at seven sites across the State. The commenter also provided copies of several human health and ecological risk assessments that were conducted to support the State's approval of the closures, along with various third-party reports. The commenter concluded that based on this factual record, it is unnecessary to subject these units to the existing closure criteria for CCR surface impoundments in §§ 257.101 and 257.102.

EPA agrees that closures conducted as part of a CERCLA or RCRA subtitle C response action would normally be expected to be consistent with the performance standards in § 257.102; the CCR closure regulations were based on the closure regulations for hazardous waste facilities, and the CCR regulations would normally be considered ARARs under CERCLA for any closure of a CCR facility after 2015. Consequently, these facilities may ultimately be able to support a certification of compliance with § 257.102. But, as the commenters noted, there can be slight variations in how the standards are applied, and a facility may consequently not be confident that it can support a certification.

Nor are these the only closures that may be substantially equivalent. As the commenters' examples demonstrate, State requirements, even where different, can result in closures that are equally as protective as those conducted in accordance with Federal requirements.

However, as the commenters noted it is a near certainty that there will be differences in the way the closure activities were designed or conducted when compared to § 257.102. EPA does

not believe that it can craft an exemption that could encompass all these potential variations. Nor does EPA believe that it could develop criteria that are sufficiently precise that regulated entities could determine whether alternative requirements ultimately accomplish the same environmental goals and meet the same ultimate performance standards as the Federal requirements. But EPA has detailed criteria to identify whether a closure is potentially as protective as those conducted in accordance with § 257.102, and which therefore warrant a closer evaluation; closures that meet these criteria will be deferred until a permitting authority can evaluate the adequacy of the closure.

The closures described above all share certain features such as the risks at the site have been fully evaluated by a regulatory authority and carefully addressed with oversight by a regulatory authority. Even though the specific requirements may differ from § 257.102, there is nevertheless reason to believe that the closure will be protective, at least in the interim until a permitting authority can evaluate the adequacy of the closure to the CCR closure requirements. Based on these considerations, EPA is limiting this deferral to closures where the facility can document that it meets specific conditions. First, the deferral is limited to circumstances in which a regulatory authority played an active role in overseeing and approving the closure activities. EPA considers a “regulatory authority” to include a State or Federal permit, an administrative order, or consent order issued after 2015 under CERCLA or by an EPA-approved RCRA State program. The permitting or other authority must have required groundwater monitoring to ensure there was no contamination coming from the unit that is not addressed by corrective action.

Second, to support deferral of evaluation of a prior closure of a legacy CCR surface impoundment as substantially equivalent, the facility with a surface impoundment that closed with waste in place must document that free liquids have been eliminated, consistent with the standard in § 257.102(d)(2)(i). This requirement directly addresses the reason that EPA has concluded that many previously completed closures do not meet the standard in RCRA section 4004(a).

Third, a facility must document that it had installed a groundwater monitoring system and performed groundwater monitoring that meets a subset of the performance standards found in § 257.91(a). Specifically, the

facility must demonstrate that the groundwater monitoring system was capable of: (1) Accurately representing background water quality; (2) Accurately representing the quality of water passing the waste boundary; and (3) Detecting contamination in the uppermost aquifer. Finally, the groundwater monitoring system must have monitored all potential contaminant pathways. These are the same subset of standards that apply to a facility certifying that its closure by removal completed prior to the effective date of this final rule meets the performance standards in § 257.102(c).

Fourth, a facility would need to demonstrate that a site-specific risk assessment was conducted or approved by the regulatory authority prior to (or as part of) approving the closure, and that the closure and any necessary corrective action has been overseen by the regulatory authority, pursuant to an enforceable requirement.

These criteria are generally consistent with the criteria a commenter suggested to identify closures under other authorities that would be equivalent to those conducted in accordance with § 257.102. These included that the facility had installed a groundwater monitoring system and performed groundwater monitoring and analysis in accordance with §§ 257.90 through 257.95 and was conducting any necessary remediation in accordance with §§ 257.96 through 257.98, pursuant to an enforceable requirement. Although the commenter proposed these to serve as a basis for an exemption, EPA considers they are equally relevant to identifying decisions that can be deferred for future evaluation.

Fifth, the facility would be required to prepare and include documentation in the applicability report and operating record, demonstrating that it has met these criteria and is eligible for deferral. This would include all relevant specifics such as State permit, order, data, groundwater monitoring results, etc. This must be certified by the owner/operator or an authorized representative using the same language in § 257.102(e).

When it comes time for the permit authority to evaluate the closure, EPA intends to rely on the permit application process as the primary mechanism to collect the information to allow a determination to be made as to whether a legacy CCR surface impoundment that closed under these alternative standards did so in compliance with the requirements of § 257.102. The permit application process is a well-established system for reviewing the types of groundwater, soil and other sampling and analytical data that will typically be

required in determining the “equivalency” of alternative closures.

When the permit application is called in, the facility must provide sufficient information, including data on contaminant levels in groundwater, to demonstrate that the applicable § 257.102 standards have been met. EPA or a Participating State Director will review the information to determine whether the “equivalency” of the closure has been successfully demonstrated. If EPA determines that the closure has met the appropriate part 257 closure standard, EPA will issue a permit. If EPA or a Participating State Director determines that the closure does not meet the part 257 standards, the owner or operator will be required to submit a permit application containing all the applicable information for an operating permit, and EPA or a Participating State Director will issue a permit that contains the specific requirements necessary for the closed unit to achieve compliance with § 257.102.

iv. Closure Compliance Deadlines for Legacy CCR Surface Impoundments

(a) Initiation of Closure for Legacy CCR Surface Impoundments

EPA proposed that legacy CCR surface impoundments be subject to the existing requirement to initiate closure that are applicable to other unlined CCR surface impoundments because, as discussed in the proposed rule and in Unit III.B.2.c of this preamble, the current record indicates that legacy CCR surface impoundments are largely, if not entirely, unlined. Specifically, EPA proposed that owners or operators of legacy CCR surface impoundments initiate closure no later than 12 months after the effective date of the final rule because EPA anticipated 12 months being sufficient time for owners or operators to identify and delineate the legacy CCR surface impoundment, determine relevant engineering information (e.g., structural stability), characterize the site’s hydrogeology and other characteristics, and determine whether any of the uppermost aquifer has been contaminated. As explained in the proposed rule, EPA acknowledged that most of this information would be obtained through compliance with the proposed groundwater monitoring and corrective action requirements.

In the proposed rule, EPA solicited comment on whether the regulations should provide owners and operators the option to retrofit a legacy CCR surface impoundment in accordance with the retrofit requirements in § 257.102(k) as an alternative to

requiring the closure of a legacy CCR surface impoundment.

As stated in Unit III.B.2.g, generally commenters on the proposed rule supported requiring legacy CCR surface impoundments to close in accordance with the existing requirements. However, some commenters disagreed that closure was appropriate for certain legacy CCR surface impoundments, including those units underneath infrastructure needed to support current activities, those that had completed or currently undergoing closure, and those units that have been demonstrated not to pose unacceptable risk.

Most commenters stated that the proposed deadline for the initiation of closure was infeasible due to the factors listed in Units III.B.2.a.ii and III.B.2.g of this preamble (e.g., labor shortages, seasonality, limited contractor availability, overlapping regulatory requirements) and should be extended in consideration of those factors as well as to allow for the incorporation of the groundwater monitoring data.

No commenters provided feedback on whether the regulations should allow owners and operators to retrofit a legacy CCR surface impoundment.

For the reasons explained in the proposed rule as well as Unit III.B.2.g, EPA continues to conclude that the closure requirements in the existing rule are generally appropriate for legacy CCR surface impoundments. However, as explained in Unit III.B.2.g, EPA recognizes that in specific situations, mandatory closure of a legacy CCR surface impoundment by the deadline may cause more harm than benefits to human health and the environment. Based on information provided by the commenters and experience with the implementation of the 2015 CCR Rule (i.e., regulation of inactive CCR surface impoundments), EPA finds that these situations are limited to those in which the legacy CCR surface impoundment has completed closure under a State authority and those in which the unit is beneath infrastructure necessary for current activities.

For additional closure requirements of a legacy CCR surface impoundment, the decision to require reclosure will be deferred until a permitting authority is authorized to issue CCR permits to the facility, at which point, the permitting authority will be able to look at site-specific factors and evidence to decide if reclosure is necessary to protect human health and the environment. EPA concludes that this approach will mitigate adverse impacts to local communities and the environment, including environmental justice concerns that may result from activities

associated with reclosing a facility that is not contaminating groundwater or posing other risk to human health and the environment, such as increased traffic, increased greenhouse gas emissions, habitat loss, loss of native vegetation, water consumption, and additional waste generation.

When the legacy CCR surface impoundment is beneath infrastructure vital to the continuation of activities, such as beneath a substation, the initiation of closure will be deferred until the infrastructure is no longer needed or the closure of the facility, whichever is sooner. This approach protects human health and the environment while appropriately accounting for the need for operational continuity and reliability.

As explained in Unit III.B.2.g, EPA acknowledges the benefit of allowing owners or operators the time needed to incorporate groundwater monitoring data into the closure plan. Additionally, as stated in the proposed rule, EPA acknowledges the importance of using information gained by compliance with the groundwater monitoring and corrective action requirements to inform closure decisions and therefore the initiation of closure. For the reasons explained in Unit III.B.2.f, EPA is extending the deadline for the groundwater monitoring and corrective action requirements to a single deadline of no later than 30 months from the effective date of the final rule. As such, the initiation of closure is being extended as well. To ensure owners or operators have enough groundwater monitoring data to draw conclusions about seasonality impacts on groundwater levels and flow and the source of any potential groundwater contamination in the area, EPA is finalizing a deadline of no later than Monday, May 8, 2028, which is 42 months from the effective date of the final rule. This is codified in the regulatory text at § 257.101(e)(1).

EPA is finalizing the application of the existing requirements to initiate closure to legacy CCR surface impoundments as proposed except for those that fall under the deferral of closure described above (i.e., units closed under State authority, units beneath critical infrastructure).

As stated in § 257.102(e), closure has been initiated once any steps necessary to implement the closure plan as described by Unit III.B.2.g.ii of this preamble have been taken, including submitting an application for any necessary State or agency permits or permit modifications and taking steps to comply with standards of any State or

other agency that are a prerequisite to completing closure of a CCR unit.

(b) Preparation of a Written Closure Plan for Legacy CCR Surface Impoundments

EPA proposed that owners or operators of legacy CCR surface impoundments comply with the existing requirements of § 257.102(b) requiring the preparation of a written closure plan no later than 12 months after the effective date of the final rule.

As mentioned above, overall commenters on the proposed rule agreed that closure requirements, including the written closure plan, would generally be appropriate for legacy CCR surface impoundments. One commenter suggested additional requirements for the content of the closure plan including the elevation of the base of the unit, groundwater information, and descriptions of compliance with § 257.102 will be achieved (e.g., how free liquids would be eliminated, how waste will be stabilized, measures to minimize the need for further maintenance of the CCR unit). A few commenters supported the proposed deadline but as summarized in Units III.B.2.a.ii and III.B.2.g of this preamble, other commenters stated the proposed deadline was infeasible and inappropriate. One commenter suggested the deadline for the closure plan be extended to be concurrent with the initiation of closure. Commenters suggestions for the deadline for the completion of the closure plan ranged from 12 (the 2015 CCR Rule deadline) to 32 months, or after the collection of the eight baseline groundwater samples.

EPA disagrees with the commenter that additional requirements regarding the content of the closure plan are necessary. The information the commenter requested be included in the closure plan is 1) already required to be in the closure plan pursuant to §§ 257.102(b) or 2) readily available in other required reports (e.g., the annual groundwater monitoring and corrective action reports). Furthermore, the commenter failed to fully explain how compliance with § 257.102(b) does not provide the information needed to determine if compliance with the closure performance standards will be met.

Regarding the deadline, as stated above, EPA concludes that the deadline for the closure plan should be extended from the proposed deadline to allow for owners or operators to incorporate information about groundwater quality, groundwater flows, seasonality impacts, and the migration of contaminants (if any) into the plan. Therefore, EPA is finalizing a deadline of no later than

Monday, November 8, 2027, which is 36 months after the effective date. This is codified in the regulatory text at § 257.100(f)(5)(i).

Based on comments on the proposed rule and experience from the 2015 CCR Rule, EPA expects the incorporation of this information into the closure plan will allow facilities to select a closure method that most appropriately addresses issues like waste that is in contact with groundwater, groundwater contamination, and long-term structural stability concerns. Closure plans that adequately address these issues will result in more compliant closure plans and therefore, be more protective of human health and the environment.

The closure plan describes the steps necessary to close a CCR unit at any point during the active life of the unit based on recognized and generally accepted good engineering practices. 40 CFR 257.102(b)(1). The plan must set out whether the closure of the CCR unit will be accomplished by leaving CCR in place or through closure by removal and include a written narrative describing how the unit will be closed in accordance with the section, or in other words, how the closure will meet all the performance standards in the regulations. 40 CFR 257.102(b)(1)(i). The written closure plan must also provide a schedule for completing all activities necessary to satisfy the closure criteria of the rule. See also 80 FR 21410–21425.

If the CCR is left in place, the closure plan must include a description of the final cover system and how the final cover system will achieve the regulatory performance standards. If the base of the impoundment intersects with groundwater, the closure plan would need to discuss the engineering measures taken to ensure that the groundwater had been removed from the unit prior to the start of installing the final cover system, as required by § 257.102(d)(2)(i). The closure plan would also need to describe how the facility plans to meet the requirements in § 257.102(d)(1) to “control, minimize or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste and releases of CCR, leachate, or contaminated run-off to the ground or surface waters.” This could include, for example, the installation of engineering controls that would address the post-closure infiltration of liquids into the waste from all directions, as well as any post-closure releases to the groundwater from the sides and bottom of the unit.

(c) Preparation of a Written Post-Closure Care Plan for Legacy CCR Surface Impoundments

EPA proposed that owners or operators of legacy CCR surface impoundments would be required to comply with the existing requirement in § 257.104(d) regarding the preparation of a written post-closure no later than 12 months after the effective date of the final rule.

The comments EPA received on the proposed rule regarding the post-closure plan requirement are described in Units III.B.2.g and III.B.2.g.i and can be summarized as requests for an extension of the post-closure care deadline to allow for a more feasible deadline and the incorporation of groundwater monitoring data. For the reasons stated in Units III.B.2.g and III.B.2.g.i, EPA is finalizing a deadline of no later than Monday, November 8, 2027, which is 36 months from the effective date of the final rule to comply with the post-closure care requirement in § 257.104(d). This is codified in the regulatory text at § 257.100(f)(5)(ii).

Section 257.104(d) requires that an owner or operator of a CCR unit prepare a written post-closure plan. The contents of the P.E.-certified plan are stated in the rule at § 257.104(d)(1)(i) through (iii) and can be summarized as a description of the monitoring and maintenance activities required for the unit, the frequency that these activities will be performed, information for the point-of-contact during the post-closure care period, and planned uses of the property.

(d) Deadline To Complete Closure for Legacy CCR Surface Impoundments

EPA proposed that owners or operators of legacy CCR surface impoundment comply with the existing closure completion time frames in § 257.102(f).

As stated in Unit III.B.2.g of this preamble, some commenters on the proposed rule supported the proposed deadline, however, overall commenters supported applying the existing closure completion time frames as long as the proposed deadline for the initiation of closure was extended. For the reasons described throughout this section, EPA has extended the deadline for the initiation of closure. EPA expects the extension to the deadlines for the closure plan and initiation of closure, as well as the options to defer closure requirements for legacy CCR surface impoundments that have completed closure under a regulatory authority (see Unit III.B.2.g.iii.b), to address the concerns commenters expressed with

the infeasibility or inappropriateness of the deadline to complete closure. Therefore, EPA is finalizing the deadline for the completion of closure of legacy CCR surface impoundments as proposed.

Section 257.102(f) generally requires an owner or operator of existing and new CCR surface impoundments to complete closure activities within five years from initiating closure. However, the regulations also establish conditions, including documentation requirements, under which owners or operators can demonstrate and receive two-year extensions of the deadline. For CCR surface impoundments of 40 acres or less, the deadline can only be extended by one two-year extension. For CCR surface impoundments larger than 40 acres, the deadline can be extended in increments of two years for no more than five times.

(e) Post-Closure Care for Legacy CCR Surface Impoundments

EPA proposed to apply the existing post-closure care requirements at § 257.104 to legacy CCR surface impoundments without revision. These criteria are essential to ensuring the long-term safety of legacy CCR surface impoundments.

No commenters raised specific concern about requiring legacy impoundments to comply with the existing requirements in § 257.104. EPA is therefore finalizing this provision without revision.

The existing post-closure care criteria require the monitoring and maintenance of units that have closed with CCR in place for at least 30 years after closure has been completed. 40 CFR 257.104. During this post-closure period, the facility would be required to continue groundwater monitoring and corrective action, where necessary.

h. Recordkeeping, Notification, and Internet Posting Criteria for Legacy CCR Surface Impoundments

EPA proposed that owners or operators of legacy CCR surface impoundments be subject to the existing recordkeeping, notification, and website reporting requirements in the CCR regulations found at §§ 257.105 through 257.107. For reasons specified in the 2015 CCR Rule, the CCR regulations require the owner or operator of a new or existing CCR unit to record specific information in the facility's operating record, maintain files of all required information (e.g., demonstrations, plans, notifications, reports) that supports implementation and compliance with the rule, notify State Director and Tribal authorities, and maintain a public CCR

website that hosts this information. 80 FR 21427.

A commenter on the proposed rule supported applying recordkeeping, notification, and internet posting requirements to legacy CCR surface impoundments but stated that the existing requirements were ineffective at ensuring compliance with the CCR regulations or allowing for meaningful public awareness or participation. The commenter suggested that EPA create mechanisms within the rule to ensure the public has the opportunity to participate in the decision-making processes at regulated CCR units; standardize reporting to make the report more easily understood by the public; establish organizational requirements for the CCR websites; require public notice and engagement when notifying the State Director and/or appropriate Tribal authority as required by the CCR rule; extend the period of time the files required by the CCR rule must be maintained in the operating record; and require owners or operators to certify compliance documentation for the CCR units. This commenter also suggested EPA clarify what records owners or operators are required to retain and to publish.

EPA agrees with the commenter on the importance of meaningful public participation. The current regulations allow for public participation by requiring owner or operators to hold a public meeting as part of the assessment of corrective measures in § 257.96, creating a mechanism for the public to file dust complaints in § 257.80(b), and the “contact us” form or specific email address on facilities’ public CCR websites for questions or issues from the public as required by § 257.107(a). EPA does not have evidence to support the claim by the commenter that these opportunities for public participation are ineffective. Furthermore, EPA does not find other decision-making points in the rule appropriate for mandatory public meetings although facilities are encouraged to engage with the public and to both solicit and incorporate public input into decisions, such as closure methods, as able and appropriate.

With respect to the commenter’s suggestions that EPA require the owners or operators of CCR units to certify compliance documentation and create standardized reporting and website layout requirements, as explained in the proposed rule, EPA does not have evidence that legacy CCR surface impoundments are sufficiently different than currently regulated facilities to necessitate substantially different requirements. The commenter provided

no factual basis to support the suggestion that requiring owner or operator certifications would improve compliance with the regulations beyond the certifications currently required by professional engineers. When justifying the request for standardized reporting and website layout requirements, the commenter failed to explain how compliance with the public website posting requirements in § 257.107, including the requirement to ensure all information is “clearly identifiable and must be able to be immediately printed and downloaded by anyone accessing the site” is inadequate or a hindrance to the public accessing the required information. Therefore, EPA does not believe additional notification, certification, or public engagement requirements for legacy CCR surface impoundments would be appropriate.

EPA agrees with the commenter on the need to extend the period of time files required by the CCR rule must be maintained on the facilities’ public websites and in the operating records. As described in Unit III.D.5, EPA is extending how long files must be maintained in the operating record and on the public website. While EPA believes the regulations at §§ 257.105 and 257.107 clearly lay out what records must be retained and published, EPA has included in Unit III.D.5 a table that details what records are required to be maintained in the operating record and on the public website as well as the corresponding retention periods.

EPA is finalizing the requirement that owners or operators of legacy CCR surface impoundments comply with recordkeeping, notification, and internet posting requirements at §§ 257.105 through 257.107. Owners or operators must document implementation and compliance with the rule and must place these files into the facility’s operating record. Each required file must be maintained in the operating record for the entirety of the retention period specified in § 257.105 following submittal of the file into the operating record. Each file must also indicate the date the file was placed in the operating record. Files are required to be submitted into the operating record at the time the documentation becomes available or by the compliance deadline specified in the CCR regulations. Section 257.105 contains a comprehensive listing of each recordkeeping requirement and corresponding record retention periods.

Furthermore, the owner or operator of a legacy CCR surface impoundment must maintain a CCR website titled, “CCR Rule Compliance Data and Information” that hosts the compliance

information so that it may be viewed by the public. Unless provided otherwise in the rule (see, Unit III.E.5), information posted to the publicly accessible internet site must be available for a period of no less than five years from the initial posting date for each submission. Posting of information must be completed no later than 30 days from the submittal of the information to the operating record. Owners or operators of legacy CCR surface impoundments have 30 days from the effective date of this rule to establish a CCR website and post the required applicable information.

C. CCR Management Unit Requirements

EPA is establishing requirements to address the risks from previously unregulated solid waste management of CCR that involves the direct placement of CCR on the land at CCR facilities. Information obtained since 2015 demonstrates that these exempt solid waste management practices are currently contaminating groundwater at many sites, and at others, have the potential to pose risks commensurate with the risks associated with currently regulated activities.

The closure of CCRMU of 1,000 tons or greater also provides significant risk mitigation. As laid out in Unit III.A of this preamble, CCRMU at both active facilities and inactive facilities with legacy impoundments pose risks to human health and the environment that are at least as significant as the risks presented by legacy CCR surface impoundments and the units currently regulated under the 2015 CCR Rule. In particular, for highly exposed individuals off site, landfill CCRMU were estimated to pose cancer risks as high as 7×10^{-6} from arsenic III, while surface impoundment CCRMU were estimated to pose cancer risks as high as 8×10^{-5} from arsenic III and noncancer HQs as high as 2 for arsenic III, two for lithium, and one for molybdenum. Differences in national risks between currently regulated units and these older units are attributed largely to the proportion of units that were modeled at the time as lined. However, the risks associated with these older units may be even higher than EPA modeled in the 2014 Risk Assessment for active units. These units have been present onsite longer and had more time to leak. In addition, there are several management practices that have the potential to result in higher leakage, but that were previously modeled either less frequently for active units—based on a belief that the practices had declined over time—or not at all—due to data constraints on a national scale. These include: (1) The greater prevalence of

unlined units; (2) The greater likelihood of co-management of CCR with coal refuse and other wastes in surface impoundments, making the overall waste pH far more acidic and (3) The potential for the units to be constructed below the water table or to have become inundated with groundwater after the time of construction. As discussed in Unit III.A, each of these practices individually have the potential to result in nationwide risks higher than previously reported on a national basis for the currently operating universe of CCR units. For example, unlined landfill CCRMU were estimated to pose cancer risks as high as 1×10^{-5} from arsenic III, while unlined surface impoundment CCRMU were estimated to pose cancer risks ranging from 2×10^{-4} from arsenic III and noncancer HQs as high as 5 for arsenic III, 3 for lithium, 2 for molybdenum, and 1 for thallium. A combination of these practices could push risks even higher than modeled.

Based on these data, EPA is finalizing the addition of a new category of CCR units that would be subject to a set of requirements tailored to the characteristics of such units and the risks that they present. This new category of CCR units, called “CCR management units” or CCRMU, consists of CCR surface impoundments and landfills that were closed prior to the effective date of the 2015 CCR Rule, and inactive CCR landfills, which include inactive CCR piles. Under this final rule, CCR management units are subject to the regulations when they are located at: (1) A facility currently regulated under the 2015 CCR Rule; (2) Inactive facilities with a legacy CCR surface impoundment; and (3) Facilities that, on or after October 19, 2015, produced electricity for the grid but were not regulated under the 2015 CCR Rule because they had ceased placement of CCR in onsite CCR units and did not have an inactive CCR surface impoundment (the inclusion of these facilities are discussed in Unit III.C.2.f). EPA refers to the facilities in the above three categories in this preamble as “covered CCR facilities.”

Owners or operators of any of covered CCR facilities are required to conduct a facility evaluation to identify and delineate any CCRMU containing one ton (or more) at the facility and document the findings in two reports. In addition, owners or operators of a covered CCR facility are required to ensure that all identified CCRMU containing 1,000 tons or more comply with the existing requirements in 40 CFR part 257, subpart D for groundwater monitoring, corrective action (where

necessary), and in certain cases, closure, and post-closure care requirements. These issues are discussed in more detail in this Unit of the preamble.

EPA estimates that there are 179 CCRMU at 92 active facilities and 16 CCRMU at 12 inactive facilities that will be subject to the requirements of this final rule.⁶⁴ These areas include inactive CCR landfills, closed CCR landfills, closed CCR surface impoundments, and other solid waste management areas of CCR. EPA also identified 20 CCRMU at eight other active facilities. This estimate of CCRMU is an increase from the 134 CCRMU located at 82 facilities identified in the proposed rule. 88 FR 32028.

1. Damage Cases

EPA has a long history of considering damage cases in its regulatory decisions under RCRA. RCRA specifically directs EPA, when making a Regulatory Determination for CCR, to consider “documented cases in which danger to human health and the environment from surface run-off or leachate has been proved,” demonstrating that such information is to carry great weight in decisions of whether and how to regulate such wastes. 42 U.S.C. 6982(n)(4). See also 42 U.S.C. 6982(n)(3). In addition, damage cases are among the criteria EPA must consider under its regulations for determining whether to list a waste as a “hazardous waste.” See 40 CFR 261.11(a)(3)(ix). EPA also relied on damage cases to develop the specific requirements for CCR in part 257, subpart D. See, 80 FR 21452–21459.

Damage cases generally provide direct evidence of both the extent and nature of the potential risks to human health and the environment that have resulted from actual waste management practice. For example, in the 2015 CCR Rule, EPA relied on damage cases to identify actual management practices that resulted in harm above and beyond that already identified through modeling. Based on the damage cases, EPA identified several additional constituents (antimony, barium, beryllium, chromium, selenium, and lead) that were added to the Appendix IV list for groundwater monitoring.

For CCRMU, EPA proposed to rely on ten potential damage cases to further support the results of the modeling and 2014 Risk Assessment, and to better understand the characteristics of the sites and units, as well as the

management practices, in order to develop appropriate requirements. EPA reviewed information received in response to the ANPRM as well as the documents posted on facilities’ CCR websites for compliance with CCR regulations. See, 88 FR 32012. Specifically, EPA reviewed groundwater monitoring reports, assessment of corrective measures reports, corrective measures progress reports, remedy selection reports, history of construction reports, closure plans and reports, and fugitive dust control plans for facilities with CCR websites from 2018, 2019, 2020, and 2021. Through review of the groundwater monitoring and corrective action reports, EPA found many instances where the owners or operators of CCR facilities claimed that the detection of an SSI or SSL in concentrations of Appendix III or IV constituents in groundwater came from a CCRMU rather than the monitored regulated CCR unit.

Whenever a facility determines that there is an SSI over background levels for one or more of the constituents in Appendix III at a monitoring well at the downgradient waste boundary, the existing CCR regulations allow the facility an opportunity to complete an ASD showing that a source other than the unit (*i.e.*, an alternative source) was the cause of the SSI. 40 CFR 257.94(e)(2). The existing CCR regulations provide a similar opportunity whenever assessment monitoring results indicate that an SSL exceeding the GWPS has been detected at a downgradient well for any of the Appendix IV constituents. 40 CFR 257.95(g)(3). If a successful ASD for an SSL is not completed within 90 days, corrective action must be initiated.

In reviewing groundwater monitoring and corrective action reports EPA found that 42 ASDs or ACMs concluded that a Federally unregulated CCR source was responsible for the SSI or SSL. The proposed rule included ten examples (*i.e.*, damage cases) where owners or operators of CCR facilities claimed that an SSI or SSL is attributable to a CCR source rather than the Federally regulated CCR unit.

In addition to reviewing the groundwater monitoring and corrective action reports, EPA reviewed the history of construction reports, closure plans and reports, and fugitive dust control plans for facilities with CCR websites from 2018, 2019, 2020, and 2021. These documents contained either site maps, which identified currently regulated units, and in some cases, inactive or closed units at the facility, or narrative discussions of the site history, which included identification of where CCR

⁶⁴ An updated list of known potential CCRMU can be found in the docket for this action. See document titled “Universe of CCR Management Units. April 2024.”

were previously disposed or managed at the facility.

EPA received numerous comments about the damage cases provided in the proposed rule. Some commenters provided information to demonstrate that many of EPA's listed damage cases did not meet EPA's criteria for a damage case to be considered "a proven damage case," that had been developed for purposes of the Bevill Regulatory Determinations described in 65 FR 32214, 32224 (May 22, 2000). One commenter mischaracterized these criteria as "EPA's criteria for identifying damage cases in RCRA rulemakings," and claimed that groundwater exceedances are not sufficient to prove that there is any risk to human health. The commenter stated that "exceedances [must be] measured in ground water at a sufficient distance from the waste management unit to indicate that hazardous constituents had migrated to the extent that they could cause human health concerns" citing the 2000 Regulatory Determination (65 FR 32224, May 22, 2000), and the 2010 proposed CCR Rule (75 FR 35131, June 21, 2010). The commenter asserted that without such information, none of the cases can be used to justify EPA's proposed regulation of CCR management units.

Another commenter argued that "the damage cases are not representative of all CCRMUs, and, consequently, cannot legitimately be relied upon to develop national standards and requirements for all CCRMUs." The commenter claims that a report generated by Gradient documents "many examples of CCRMUs that are not causing any GWPS exceedances, are not associated with any undue risk, and are being effectively regulated under state purview." Additionally, the commenter claims that the "damage cases cited by US EPA do not demonstrate that CCRMUs are currently impacting groundwater quality and causing an unacceptable risk because EPA has not addressed whether the groundwater impacts that they have attributed to CCRMUs result from the current condition of each CCRMU or its historical operating condition." The commenter concludes that because EPA has provided no evidence to determine whether the impacts are being caused by the current condition of each CCRMU (potentially closed, inactive, and/or dewatered), EPA's conclusions that the damage cases provide evidence of potential risks associated with CCRMU is misguided and unsupported.

One commenter also took issue with EPA's inclusion of "only" ten "hand-picked" damage cases to justify

regulation of CCRMU. The commenter complained that "EPA's damage cases are not based on information collected by EPA, but rather are based on information compiled by advocacy groups using data collected from CCR websites, [and t]here is no indication EPA has conducted its own data collection, or verified the data that was collected." The commenter went on to say,

Much of the data refers to alternative source analyses conducted for regulated CCR units, suggesting that the discussed 'CCRMU' may be the source of groundwater contamination; however, EPA makes no statements regarding whether, and conducts no analysis to determine whether, it agrees with those analyses. This is highlighted by the carefulness of EPA's declaration that its review of the third-party compiled information identified 42 areas "potentially contaminating groundwater." . Potential groundwater impacts does not rise to the RCRA protectiveness level of "reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility.

Finally, one commenter complained that of the 134 areas EPA identified where the management of CCR remain exempt, less than one third were found to potentially have groundwater impacts, yet EPA seeks to regulate the entire universe of 134 areas and more. According to this commenter, even assuming the potential groundwater impacts are real, they are not necessarily an indication that the CCR management practice creates a reasonable probability of an adverse effect on human health or the environment, as the commenter believes there are several other factors, such as the nature and extent of the CCR management practice, whether a hydraulic head is present, the hydraulic conductivity of surrounding soils, and the proximity of the material to water and the likelihood of contact with water, that must be considered before concluding a CCR management practice creates a reasonable probability of an adverse effect.

EPA disagrees that it is inappropriate to characterize the cited SSIs and SSLs as damage cases. As explained in the 2015 CCR Rule preamble, EPA has a long history of considering damage cases in its regulatory decisions under RCRA. 80 FR 21452. The statute specifically directs EPA to consider "documented cases in which danger to human health and the environment from surface runoff or leachate has been proved," in reaching its Regulatory Determination for these wastes, demonstrating that such information is to carry great weight in determining whether to regulate these wastes. 42 U.S.C. 6982(n)(4). Damage cases, even if

only potential damage cases, are also relevant under the third Bevill factor: "potential danger, if any, to human health and the environment from the disposal and reuse of such materials." 42 U.S.C. 6982(n)(4). In addition, damage cases are among the criteria EPA must consider under its regulations for determining whether to list a waste as a "hazardous waste." See 40 CFR 261.11(a)(3)(ix). Damage cases generally provide extremely potent evidence in hazardous waste listings.

As with the 2015 CCR Rule, EPA considers that both proven and potential damage cases provide information directly relevant to this rulemaking. Damage cases—whether proven or potential—provide evidence of both the extent and nature of the potential risks to human health and the environment. The primary difference between a proven and a potential damage case is whether the contamination has migrated off-site of the facility. But the mere fact that groundwater contamination has not yet migrated off-site does not change the fact that a potentially harmful constituent has leached from the unit into groundwater. Whether the constituent ultimately causes further damage by migrating into drinking water wells does not diminish the significance of the environmental damage caused to the groundwater under the site, even where it is only a future source of drinking water. As explained in the original 1979 subtitle D criteria, EPA is concerned with groundwater contamination even if the aquifer is not currently used as a source of drinking water. Sources of drinking water are finite, and future users' interests must also be protected. (See 44 FR 53445–53448.) ("The Act and its legislative history clearly reflect Congressional intent that protection of groundwater is to be a prime concern of the criterion. . . . EPA believes that solid waste activities should not be allowed to contaminate underground drinking water sources to exceed established drinking water standards. Future users of the aquifer will not be protected unless such an approach is taken."). EPA is therefore presenting its findings with regard to damage cases because this information further supports the results of EPA's 2014 and 2024 Risk Assessments, which together provide the factual bases for the actions taken in this final rule.

EPA also disagrees with the arguments that attempt to minimize the significance of the damage case record. EPA is relying on the damage cases to evaluate the extent and nature of the risks associated with particular CCR management practices. Facts

demonstrating the consequences from particular activities therefore remain relevant, particularly (although not solely) where the management practices continue to occur. In other words, what matters in this regard are facts that provide information on the reasons that unit leaked, the particular contaminants that were present, the levels of those contaminants, and the nature of any impacts caused by that contamination. This is entirely consistent with RCRA section 8002(n), which requires EPA to evaluate the “potential danger, if any, to human health and the environment from the disposal and reuse of such materials” in addition to “documented” damage cases. 42 U.S.C. 6982(n)(3)–(4).

EPA further disagrees that only the presence of receptors within the impact sphere of a contaminating facility merits consideration of a particular damage case. EPA’s longstanding and consistent policy across numerous regulatory programs has been that groundwater contamination is a significant concern that merits regulatory action in its own right, whether or not the aquifer is currently used as a source of drinking water. Sources of drinking water are finite, and future users’ interests must also be protected. The absence of current receptors is therefore also not an appropriate basis on which to discount damage cases. And for all the reasons discussed above, EPA also disagrees that only exceedances of health-based standards of contaminants that have migrated off-site (*i.e.*, only proven damage cases) should be accounted for as part of this rulemaking.

EPA further disagrees with commenters’ assertions about the sources of information that EPA included in the proposed rule and that EPA is relying upon in this final rule. In the proposal EPA discussed information that the Agency obtained from comments submitted in response to the ANPRM, and from other sources provided by environmental groups. However, EPA conducted an independent review of information posted on facility websites, including groundwater monitoring reports, assessment of corrective measures reports, corrective measures progress reports, remedy selection reports, history of construction reports, closure plans and reports, and fugitive dust control plans for facilities with CCR websites from 2018, 2019, 2020, and 2021 to develop the record for the proposed rule. 88 FR 32012–32013.

Several commenters disagreed with EPA’s characterization in the proposed rule of certain sites as damage cases because the units have now been closed or the contamination has been

remediated (or is in the process of being remediated) under State oversight. For example, one commenter noted that they are “aware of situations where over the years CCR was intermittently dispersed within fill to facilitate facility expansions (commonly referred to as “made land”), which was a common practice along heavily industrialized shores of the Great Lakes.” The commenter further stated that, the “Phases I and II of the Landfill at NIPSCO’s R.M. Schahfer Generating Station, is an example of how the Proposed Rule mischaracterizes the risk associated with CCRMU.” According to the commenter Phases I and II have been closed in a manner that is protective of groundwater, and the data demonstrates that the groundwater plume resulting from Phases I and II is stable, with concentrations of constituents declining.

Another commenter similarly objected to EPA’s inclusion of Reid Gardner as an example of CCRMU with identified SSIs. The commenter said EPA mistakenly assumed the historical ponds under the regulated units may be a cause of SSIs. They said these historical ponds were excavated and removed prior to 2015 so these units cannot be deemed to be a CCRMU. As a result, they said EPA’s characterization of Reid Gardner as a damage case is inaccurate and inappropriate and should be removed from the final rule. In addition, they disagreed with EPA’s reliance on “standard GWPS” equivalent to MCLs, stating that by doing so, EPA fails to consider site-specific factors such as pre-existing groundwater contamination, natural variation in groundwater, and the site conceptual model, as well as EPA guidance for statistical analysis. Finally, the commenter said that corrective actions at Reid Gardner are comprehensively regulated under the State, which governs the performance and/or completion of Environmental Contaminant characterization, the screening and selection of Corrective Action, and the implementation and long-term Operation and Maintenance of [NDEP] approved Corrective Action concerning Pollution Conditions at the Site (Nevada Division of Environmental Protection Administrative Order on Consent Reid Gardner Generating Station, I.4, page 2). According to the commenter, interim corrective actions completed under the Administrative Order have already resulted in the removal of over 2.5 million cubic yards of CCR and associated materials from the site.

The same commenter also disagreed with EPA’s inclusion of Huntington as an example of a CCRMU with identified SSLs. They said EPA’s statement that the plant’s remedy selection report “does not appear to address releases from the Old Landfill,” is incorrect, as the selected remedy—a groundwater capture system—has been placed to capture groundwater from both the regulated landfill and the Old Landfill. In addition, the commenter said the Old Landfill is subject to separate State oversight and corrective action, including elimination of infiltration, capping of closed sections and capture of any seepage. As a result, they disagreed with EPA’s characterization of Huntington as a damage case and stated it should be removed from the final rule.

One commenter claimed that the damage case example concerning East Kentucky Power Cooperative’s Cooper Station does not support the conclusion EPA draws from it. Specifically, EPA’s proposal refers to a former surface impoundment below the current landfill at the facility, but, as the proposal recognizes, the facility conducted an ASD that did not identify the former impoundment as an alternate source of groundwater impact and the unit therefore remains in detection monitoring, with no conclusion having been drawn. As such, the commenter said, “EPA is relying on an ASD which did not identify the impoundment as an alternative source to justify more stringent regulation of CCRMU with respect to groundwater impacts that have not been found to have resulted from the unit.” EPA agrees that this facility should not be included in the final list of damage case examples based on this comment.

Other commenters provided information about EPA’s Damage Case Compendiums developed for the 2015 CCR Rule to show some of those include potential CCRMU. They also provided additional damage cases and lists of potential CCRMU for EPA to include in the record.

Except as noted above, EPA disagrees that the damage cases are not representative of CCRMU, even if the units are regulated under State programs. The data from these units shows these CCRMU are contributing to groundwater contamination, irrespective of any prior State oversight.

EPA also continues to believe that, as EPA explained in the 2015 CCR Rule, cases where contamination has been remediated remain relevant to this rulemaking. EPA is relying on the damage cases to evaluate the extent and nature of the risks associated with particular CCR management practices.

Facts demonstrating the consequences from particular activities therefore remain relevant, particularly (although not solely) where the management practices continue to occur. In other words, what matters in this regard are facts that provide information on the reasons that unit leaked, the particular contaminants that were present, the levels of those contaminants, and the nature of any impacts caused by that contamination. None of these facts are affected by whether the damage is ultimately mitigated or remedied. This is entirely consistent with RCRA section 8002(n), which requires EPA to evaluate the “potential danger, if any, to human health and the environment from the disposal and reuse of such materials” in addition to “documented” damage cases. 42 U.S.C. 6982(n)(3)–(4). Accordingly, the fact that any contamination has subsequently been remediated is not a basis for disregarding a damage case. See 80 FR 21455.

In summary, EPA continues to believe the damage cases provide extremely valuable evidence that is directly relevant to the question of whether and how to regulate CCR. For example, the damage cases provide “real world” evidence against which to compare EPA’s risk modeling estimates, such as evidence regarding the frequency with which particular constituents leach into groundwater. 80 FR 21326. They also provide direct evidence regarding specific waste management practices at electric utilities, along with the potential consequences of those practices. Accordingly, EPA has sufficient confidence in the veracity of the collected information to rely on it in making decisions in this rule. EPA expects that additional damage cases will be discovered in response to the installation of the groundwater monitoring systems required by the final rule.

a. Examples of CCRMU With Identified SSLs

Under the existing CCR regulations, when a facility determines there is an SSL for one or more Appendix IV constituents and completes a successful ASD showing that a source other than the regulated unit is the cause of the SSL(s), the facility is not required to initiate corrective action for that particular constituent. Through reviewing the ASD posted on facility websites, EPA identified several areas at active facilities where CCR is managed outside of a regulated unit and is identified as a source of one or more Appendix IV SSL(s). The following facilities are examples of situations in

which such areas have been identified as the source of an SSL and therefore support EPA’s determination that such areas warrant regulation under RCRA section 4004(a).

James H Campbell Power Plant, West Olive, Michigan

The JH Campbell Power Plant, owned and operated by Consumers Energy Company, is located within a mile of Lake Michigan. The facility has five regulated CCR units, including three CCR surface impoundments (Pond A, Bottom Ash Ponds 1–2, and Bottom Ash Pond 3) and two CCR landfills. The “wet ash ponds area” is approximately 267 acres and is bounded by perimeter dikes with a system of internal dikes separating the individual ash ponds. In addition to the five regulated CCR units, there are at least seven other unregulated, unlined “closed” impoundments⁶⁵ that ceased placement of waste prior to October 19, 2015, do not have an engineered cap nor vegetative cap, and have a closure plan that was approved by the State. Based on the groundwater monitoring report reviews, there were SSLs over background at many wells at all units and some had an SSL for arsenic and selenium. At Pond A, which closed with waste in place in 2019, there are SSLs for boron and sulfate, and SSLs were identified for arsenic (13 µg/L [MCL of 10 µg/L]) and selenium⁶⁶ (143 µg/L [MCL of 50 µg/L]) for which an assessment of corrective measures was completed, and the selected remedy is source removal and final cover as the primary corrective action. In the 2021 Annual Groundwater Monitoring and Corrective Action Report posted in January 2022, Consumers Energy concluded there was an ASD for Pond A and said, “Increases in Appendix III constituents (e.g. boron) and direct exceedances of the selenium GWPS in JHC–MW–15011, JHC–MW–15010, JHC–MW–15009, and JHC–MW–15008R that have not yet resulted in a statistically significant exceedance suggest a detectable influence from the immediately adjacent, upgradient, closed, pre-existing CCR units on-site. The closed, preexisting units are not regulated under the RCRA CCR Rule, but remedial action is being taken under

⁶⁵ These “closed” impoundments (Pond B, Pond C, Pond D, Pond F, Pond G (G1 and G2), Pond H, and Pond K) are listed in a figure on page 12 of the 2021 Annual Groundwater Monitoring and Corrective Action Report, JH Campbell Power Plant Pond A, January 2022, Prepared for Consumer’s Energy.

⁶⁶ JH Campbell Semiannual Progress Report—Selection of Remedy, Ponds 1–2 North and 1–2 South, and Pond A, July 30, 2022. Pages 3–4.

Consent Agreement WMRPD No. 115–01–2018. A [remedial action plan] for these units was submitted to [Michigan’s Department of Environment, Great Lakes, and Energy] on September 30, 2021.” During the 2021 groundwater monitoring period for Bottom Ash Ponds 1–2, which closed by removal in 2018, SSLs were identified for boron, calcium, chloride, pH, sulfate, and total dissolved solids (TDS); also, one SSL was identified for arsenic (38 µg/L [MCL of 10 µg/L]).⁶⁷ An assessment of corrective measures has been completed for the CCR unit and the primary selected remedy is source removal and final cover. Consumers Energy also said in the 2022 semiannual progress report that the facility is reevaluating the groundwater “monitoring system for [Bottom Ash] Ponds 1–2 to more accurately account for the influence from the closed, pre-existing units.”

New Castle Generating Station, Pennsylvania

GenOn Power Midwest LP (GenOn) operates the New Castle Generating Station located in West Pittsburg, Pennsylvania. The New Castle Generating Station has two CCR units subject to the regulations—an impoundment (North Bottom Ash Pond) and a landfill (New Castle Plant Ash Landfill). Each of these CCR units has relevance to this proposal due to other unregulated disposal units located adjacent to the regulated CCR units.

The North Bottom Ash Pond was used for the management of bottom ash until 2016 when the facility transitioned from coal to natural gas. After the transition to natural gas, GenOn initiated closure of the North Bottom Ash Pond by removing all waste from the impoundment. Closure of the impoundment was certified in 2019.⁶⁸ Groundwater monitoring associated with the impoundment while the unit was operating detected arsenic at SSL above the GWPS in all downgradient monitoring wells.⁶⁹ In accordance with the procedures in the regulations for CCR units in 40 CFR 257.94(e)(2), GenOn determined that an alternative source was responsible for these SSLs of arsenic. Specifically, the ASD found that a 120-acre unlined CCR surface impoundment located immediately adjacent to the North Bottom Ash Pond

⁶⁷ Annual Groundwater Monitoring and Corrective Action Report, JH Campbell Power Plant Ponds 1–2 North and 1–2 South, January 2022, Prepared for Consumers Energy. Page 23.

⁶⁸ CCR Compliance, Closure Certification Report, Closure by Removal, New Castle North Bottom Ash Pond. June 2019.

⁶⁹ *Id.* At 5.

was responsible for the arsenic concentrations in the downgradient monitoring wells.⁷⁰ According to the 2019 Annual Report prepared by GenOn, there were SSLs for arsenic (0.087 mg/L [MCL of 10 µg/L]) in the downgradient monitoring wells.⁷¹ Consequently, because the SSLs of arsenic were attributed to another source (*i.e.*, a former unlined CCR surface impoundment), GenOn concluded it was not required to remediate the arsenic contamination under the Federal CCR regulations.

GenOn also determined that there were SSIs above background levels for multiple analytes at the New Castle Plant Ash Landfill (Ash Landfill), which is the other regulated CCR unit at the New Castle Generating Station. In its most recent annual groundwater monitoring report in 2022, GenOn reported SSIs for boron, calcium, fluoride, sulfate, and total dissolved solids.⁷² GenOn determined that an alternative source was responsible for these analyte increases, specifically pointing to an “underlying historic ash impoundment and other closed stages of the landfill.”⁷³ Prior to development of the 60-acre Ash Landfill, CCR was disposed in an impoundment from approximately 1939 to 1978.⁷⁴ After the impoundment was dewatered in 1978, dry CCR was disposed in this area in several stages of CCR placement up until the time Ash Landfill began operation. Since 2018, GenOn has attributed SSIs for boron, calcium, fluoride, sulfate, and TDS to this historic disposal of CCR.

Huntington Power Plant, Utah

The Huntington Power Plant in Huntington, Utah is owned and operated by PacifiCorp and has one regulated unit, the Huntington CCR Landfill. While conducting the required groundwater monitoring for the Huntington CCR Landfill, there were SSLs for chromium, cobalt, lithium, molybdenum, selenium, fluoride, and arsenic, so the owner or operator conducted assessment of corrective measures. There is also a former combustion waste landfill called the Old Landfill, which is located northwest of the regulated Huntington CCR

Landfill. The ACM report⁷⁵ assumes the SSLs are the result of groundwater interactions with both the Huntington CCR Landfill and the Old Landfill. Both landfills have stormwater run-on from the area surrounding the landfill. This run-on is routed around the landfills via diversion ditches and run-off from the landfills itself is collected and retained in a sediment basin north of the Huntington CCR Landfill. The facility is implementing a remedy to address releases only from the regulated CCR Huntington Landfill, but the remedy selection report⁷⁶ does not appear to address releases from the Old Landfill.

J.B. Sims, Grand Haven, Michigan

The J.B. Sims Generating Station, owned and operated by Grand Haven Board of Light and Power, is located on Harbor Island, north of Grand Haven, Michigan. Harbor Island is bound to the north, east, and west by the Grand River and to the south by the South Channel, tributaries of Lake Michigan. The facility has two Federally regulated CCR units (Unit 1 & 2 and Unit 3), both of which are inactive, unlined surface impoundments. Unit 1 & 2 is approximately 1.2 acres and includes areas where, prior to October 19, 2015, CCR was placed in unlined impoundments and used as fill in low-lying areas of adjacent wetlands. Unit 3 is approximately 0.5 acres and was built on top of historically placed CCR. The boundary of Unit 1 & 2 was updated in an agreement with EPA and the State in January 2021,⁷⁷ to include an area that received CCR prior to 1978. Therefore, the groundwater monitoring network and closure plan are currently being updated to reflect the new boundary and better address contamination from historical CCR across the units.⁷⁸ Additionally, in March 2022, the State issued an enforcement notice⁷⁹ to J.B. Sims citing inadequate groundwater

monitoring and failure to address all areas where CCR were managed (*e.g.*, stored, placed) prior to disposal during the unit's operation. As such, the facility is considering expanding Unit 3's groundwater monitoring network. The units are often partially flooded, and groundwater elevations and flow direction are influenced by precipitation and water levels in the Grand River and the South Channel.

Based on groundwater monitoring report reviews, both units have had SSIs and SSLs since groundwater monitoring was initiated in 2017. During 2021, both Unit 1 & 2 and Unit 3 had SSIs for all Appendix III constituents and SSLs for arsenic (98 µg/L [MCL is 10 µg/L]), chromium (270 µg/L [MCL is 100 µg/L]), cobalt (22 µg/L [GWPS is 6 µg/L]), fluoride (13 mg/L [MCL is 4 mg/L]), and lithium (2800 µg/L [site-specific GWPS is 59 µg/L]).⁸⁰ In December 2020, J.B. Sims submitted an ASD for Unit 3's 2019 SSLs for chromium, cobalt, fluoride, lead, and lithium, pointing to the historic fill across the island as the source of the SSLs.⁸¹ Furthermore, the Fourth Quarterly 2021 Monitoring Report suggested the continued SSIs and SSLs at Unit 3 were due to historical CCR fill beneath the unit, historical fill outside of Unit 1 & 2, and waste historically placed across the site.⁸² However, until the groundwater monitoring networks are finalized, the extent of groundwater contamination and the source of all contamination cannot be determined. The assessment of corrective measures for both units began in February 2019 and is ongoing, pending finalization of the groundwater monitoring networks. Based on groundwater monitoring reports, EPA has found that due to the fluctuations in groundwater elevations in response to precipitation and nearby surface water levels, portions of the facility, including Unit 1 & 2, can be inundated or partially in contact with groundwater.

⁷⁵ Corrective Measures Assessment CCR Landfill—Huntington Power Plant Huntington, Utah. May 2019.

⁷⁶ Remedy Selection Report CCR Landfill—Huntington Power Plant, Huntington, Utah. August 2020.

⁷⁷ The meeting between Grand Haven Board of Light and Power, the State, and EPA during which the new boundaries for Unit 1 & 2 were agreed to is discussed on page 3 (PDF page 10) of the 2021 Annual Groundwater Monitoring & Corrective Action Report by Golder Associates. January 28, 2022.

⁷⁸ Letter to Grand Haven Board of Light and Power—Update To The October 14, 2019 J.B. Sims Generating Station Inactive Units ½ Impoundment And Unit 3 Closure Plan—Interim Conditions For Closure. October 22, 2021.

⁷⁹ The State of Michigan, Department of Environment, Great Lakes, and Energy (EGLE) issued an enforcement notice via email March 22, 2022, to Grand Haven Board of Light and Power, J.B. Sims.

⁸⁰ SSL concentrations can be found in Appendix B (PDF page 512) of the 2021 Groundwater Monitoring & Corrective Action Report prepared by Golder Associates on behalf of Grand Haven.

⁸¹ 2020 Alternate Source Demonstration J.B. Sims Generating Station—Unit 3 Impoundments Submitted to: Grand Haven Board of Light and Power Submitted by Golder Associates Inc. December 28, 2020.

⁸² Technical Memorandum to Michigan Department of Environment, Great Lakes, and Energy—Unit 3 Impoundments Alternate Source Demonstration Response Grand Haven Board Of Light And Power—JB Sims Power Generating Station. February 12, 2020.

⁸³ Memorandum to Michigan Department of Environment, Great Lakes, and Energy—Fourth Quarter 2021 Monitoring Report, Former JB Sims Generating Station, Unit 3 A&B Impoundments—Response to Comments. March 8, 2022.

⁷⁰ *Id.*

⁷¹ CCR Compliance, Groundwater Monitoring and Corrective Action Annual Report, New Castle North Ash Pond and Ash Landfill. January 2020.

⁷² CCR Compliance, Groundwater Monitoring and Corrective Action Annual Report, New Castle Ash Landfill. December 2022.

⁷³ *Id.* At 3.

⁷⁴ New Castle Plant Ash Landfill—Annual CCR Unit Inspection Report. January 16, 2018.

b. Examples of CCRMU With Identified SSIs

Under the existing CCR regulations, when a facility determines there is an SSI for one or more Appendix III constituents and completes a successful ASD showing that a source other than the regulated unit is the cause of the SSI(s), the facility is not required to initiate assessment monitoring for that particular constituent. 40 CFR 257.94(e). Through ASD reviews, EPA identified several areas at active facilities where CCR was managed outside of a regulated unit and was identified as a source of one or more Appendix III SSI(s). As such, any groundwater contamination from these potential CCRMU have not been investigated under the existing Federal CCR regulations. The following facilities are examples of situations in which potential CCRMU have been identified as the source of an SSI and demonstrate the need to regulate CCRMU.

Reid Gardner Generating Station, Moapa Valley, Nevada

Reid Gardner Generating Station (Reid Gardner), owned and operated by NV Energy, is located adjacent to the Muddy River and the Moapa Band of Paiutes reservation, approximately 45 miles northeast of Las Vegas. Reid Gardner has seven regulated CCR units: four unlined inactive surface impoundments (Pond 4B-1, Pond 4B-2, Pond 4B-3, and Pond E-1), two active unlined surface impoundments (Pond M-5 and Pond M-7), and one partially lined landfill (Mesa Landfill). The inactive surface impoundments covered 47 acres and were closed by removal in 2017.⁸⁴ The inactive surface impoundments were constructed in 2003 (Pond E-1) and 2006 (Pond 4B-1, Pond 4B-2, and Pond 4B-3) to replace four of the eleven historical unlined evaporation ponds located at the facility that made up the evaporation pond complex (Pond 4A, Pond 4B-1, Pond 4B-2, Pond 4B-3, Pond 4C-1, Pond 4C-2, Pond D, Pond E-1, Pond E-2, Pond F, and Pond G).⁸⁵ The evaporation pond complex was built within the Muddy River floodplain and used from approximately 1974 until approximately 2002 to evaporate CCR and other process wastewaters from the facility. The two active surface impoundments (Ponds M-5 and M-7) were constructed in 2010 approximately 0.75 miles south

of the historical evaporation ponds and cover 28 acres. Mesa Landfill was constructed and operational prior to the 2015 CCR Rule and has a surface area of roughly 252 acres.

Based on groundwater monitoring report reviews, the inactive surface impoundments had no Appendix III SSIs above their established background concentrations during the detection monitoring event in 2019.^{86 87 88 89 90 91} However, the inactive surface impoundments did have Appendix IV constituent concentrations above the standard GWPS, including arsenic (2.52 mg/L [MCL is 0.01 mg/L]), cadmium (0.0072 mg/L [MCL is 0.005 mg/L]), cobalt (242 µg/L [standard GWPS is 6 µg/L]), fluoride (35.4 mg/L [MCL is 4.0 mg/L]), lithium (27,300 µg/L [standard GWPS is 40 µg/L]), molybdenum (6,390 µg/L [standard GWPS is 100 µg/L]), selenium (0.204 mg/L [MCL is 0.05 mg/L]), thallium (0.026 mg/L [MCL is 0.002 mg/L]), and radium 226 & 228 combined (8.02 pCi/L [MCL is 5 pCi/L]). Ponds M-5 and M-7 and the Mesa Landfill have had SSIs for fluoride every year of detection monitoring for which ASDs have been performed pointing to natural variation in groundwater quality.^{92 93 94 95 96 97} ASDs were also

performed for SSIs at Mesa Landfill for pH (2019 and 2021) and turbidity (2020 and 2021) that attributed the SSIs to natural variation in groundwater quality. Therefore, since ASDs have been performed for all SSIs and the active units, Reid Gardner has not moved from detection monitoring to assessment monitoring. The facility also claims the historical, co-located evaporation ponds are the source of groundwater contamination in the area and not the CCR-regulated units. Specifically, in the closure certification for the inactive surface impoundments, the facility points to documentation as far back as the 1980s that describe seepage from Pond D, the historical Pond E-1 and E-2, Pond F, and Pond G and leakage at an estimated rate of 50 acre-feet/year from Ponds 4C-1 and 4C-2 and historical Ponds 4B-1, 4B-2, and 4B-3.

Seminole Electric Cooperative, Florida

Seminole Electric Cooperative (Seminole) operates the Seminole Generating Station located in Palatka, Florida. For CCR that is not beneficially used, CCR is disposed at the facility in a landfill (Increment One Landfill), which is subject to the CCR regulations. This CCR landfill is a double-lined landfill with a leachate collection system and, because part of the Increment One Landfill overlaps with the side-slope of a former, Federally unregulated landfill, the liner system also includes a high-density polyethylene geomembrane where the two units interface.⁹⁸ Seminole determined there were SSIs above background levels for multiple analytes in one or more monitoring wells at the downgradient waste boundary in 2018, including SSIs for boron, calcium, chloride, sulfate, and TDS. Seminole determined that one or more alternative sources were responsible for these analyte increases. These sources include

Report and Alternate Source Demonstration. January 31, 2020.

⁹⁵ Reid Gardner Generating Station Mesa Landfill Coal Combustion Residual 2020 Annual Groundwater Monitoring and Corrective Action Report and Alternate Source Demonstration. January 31, 2021.

⁹⁶ Reid Gardner Generating Station Mesa Landfill Coal Combustion Residual 2021 Annual Groundwater Monitoring and Corrective Action Report and Alternate Source Demonstration. January 28, 2022.

⁹⁷ Alternate Source Demonstration and Addendum to the Coal Combustion Residual 2017 Annual Groundwater Monitoring and Corrective Action Report Reid Gardner Generating Station Mesa Landfill. Prepared for NV Energy. April 13, 2018

⁹⁸ Seminole Generating Station Increment One Landfill Annual Groundwater Monitoring and Corrective Action Report. January 31, 2019.

⁸⁴ Reid Gardner Generating Station Inactive Coal Combustion Residual Surface Impoundments Ponds 4B-1, 4B-2, 4B-3, and E-1 Closure Certification, April 2019.

⁸⁵ Construction History, Pond E1, Reid Gardner Generating Station. April 11, 2018.

⁸⁶ Reid Gardner Generating Station Inactive CCR Surface Impoundment E-1. Coal Combustion Residual 209 Annual Groundwater Monitoring and Corrective Action Report. July 31, 2019.

⁸⁷ Reid Gardner Generating Station Inactive CCR Surface Impoundments 4B-1, 4B-2, and 4B-3. Coal Combustion Residual 2019 Annual Groundwater Monitoring and Corrective Action Report. Revision 1. May 14, 2020.

⁸⁸ Reid Gardner Generating Station Mesa Impoundments M5 and M7 Coal Combustion Residual 2019 Annual Groundwater Monitoring and Corrective Action Report and Alternate Source Demonstration. January 31, 2020.

⁸⁹ Reid Gardner Generating Station Mesa Impoundments M5 and M7 Coal Combustion Residual 2020 Annual Groundwater Monitoring and Corrective Action Report and Alternate Source Demonstration. January 29, 2021.

⁹⁰ Reid Gardner Generating Station Mesa Impoundments M5 and M7 Coal Combustion Residual 2021 Annual Groundwater Monitoring and Corrective Action Report and Alternate Source Demonstration. January 28, 2022.

⁹¹ Alternate Source Demonstration and Addendum to the Coal Combustion Residual 2017 Annual Groundwater Monitoring and Corrective Action Report Reid Gardner Generating Station Mesa CCR Surface Impoundments (Ponds M5 and M7). Prepared for NV Energy. April 13, 2018.

⁹² Reid Gardner Generating Station Mesa Landfill Coal Combustion Residual 2018 Annual Groundwater Monitoring and Corrective Action Report and Alternate Source Demonstration. January 31, 2019.

⁹³ Reid Gardner Generating Station Mesa Impoundments M5 and M7 Coal Combustion Residual 2018 Annual Groundwater Monitoring and Corrective Action Report and Alternate Source Demonstration. January 31, 2019.

⁹⁴ Reid Gardner Generating Station Mesa Landfill Coal Combustion Residual 2019 Annual Groundwater Monitoring and Corrective Action

former test cells (*i.e.*, areas where CCR was placed in the 1980s for purposes of construction evaluations that are now located beneath the Increment One Landfill), a former CCR landfill adjacent to the Increment One Landfill, and several process water ponds next to the Increment One Landfill.⁹⁹ Since 2018, Seminole has attributed SSIs for these analytes to these alternative sources and therefore, has not moved from detection monitoring to assessment monitoring.

R.M. Schahfer Generating Station,
Indiana

The R.M. Schahfer Generating Station, owned and operated by Northern Indiana Public Service Company, LLC (NIPSCO), has several CCR units subject to the regulations, including several CCR impoundments and a CCR landfill consisting of multiple cells or phases of operation (“Landfill”). The Landfill is of particular relevance to this proposal because it includes three cells subject to Federal CCR regulations (Phases V through VII) and four landfill cells that are not (Phases I through IV). In the course of conducting the required groundwater monitoring for the regulated cells of the Landfill, in January 2018, NIPSCO determined that there were SSIs above background levels for all seven analytes in Appendix III at one or more monitoring wells at the downgradient waste boundary of the regulated CCR units. This included SSIs for boron, calcium, chloride, fluoride, pH, sulfate, and TDS.¹⁰⁰ Through procedures laid out in the regulations for regulated CCR units in 40 CFR 257.94(e)(2), NIPSCO determined that these groundwater SSI impacts were not due to a release from the regulated CCR landfill cells, but instead were attributable to another source. Specifically, NIPSCO has concluded that “a release from the non-regulated, unlined portions of the landfill, Phases 1 and II, is the source of the identified SSIs.”¹⁰¹ Subsequent groundwater monitoring of the regulated Landfill cells since 2018 continues to identify SSIs and NIPSCO continues to attribute

those impacts to releases from the unregulated Phase I and II cells.¹⁰²

Landfill Phase I is a 20-acre unlined cell that received CCR (flue gas desulfurization materials and fly ash) between 1984 and 1991 and subsequently closed with a final cover system in 1999. Phase II of the Landfill is an unlined 42-acre cell where flue gas desulfurization materials and fly ash were disposed between 1991 to 1998. The Phase II cell was closed with a final cover system in 1998. CCR landfills such as the Phase I and II cells are not regulated by the existing regulations because the cells have not received CCR on or after October 19, 2015. As a result, NIPSCO has not been required under the existing Federal CCR regulations to investigate further and remediate as necessary groundwater impacts from the unlined Phase I and II cells.

Waukegan Generating Station, Illinois

An example of CCR used as fill on-site is Midwest Generation’s Waukegan Generating Station in Waukegan, Illinois. There are two CCR surface impoundments named the East Ash Pond and West Ash Pond, which were used interchangeably during the facility’s operational history and have a multi-unit groundwater monitoring system. The East Ash Pond has a surface area of 9.8 acres with a storage capacity of 184,000 cubic yards. The West Ash Pond has a surface area of 10 acres with a storage capacity of 223,000 cubic yards. According to the 2018 Annual Groundwater Monitoring and Corrective Action Report, there was detection of SSIs over background for Appendix III constituents, including pH and sulfate.¹⁰³ An ASD was completed that claimed other potential historic sources were the cause of the SSIs. In the 2019 Annual Groundwater Monitoring and Corrective Action Report, an ASD for Appendix III constituents identified calcium and TDS with the same claim that other potential historic sources were the cause of the SSIs.¹⁰⁴ The ASDs discuss that the downgradient monitoring wells were installed within the berms for the surface impoundments that consisted of a “mixture of fill and beneficially reused coal combustion by-product”.¹⁰⁵ ¹⁰⁶ The 2018 ASD also

notes that a upgradient well, MW–05 which is not a part of the CCR groundwater monitoring network, has substantially higher sulfate and boron concentrations than the downgradient wells suggesting an upgradient source. Furthermore, the 2019 ASD mentions that the fluctuating TDS concentrations at downgradient well MW–16 are correlated to fluctuations in TDS at MW–05 further suggesting an upgradient source. While these ASDs suggest that the sources may be CCR within the berms and a upgradient source they do not analyze these potential sources to verify the claims. EPA did verify that the boring logs for groundwater monitoring wells MW–01 through MW–05 and MW–16 show they were installed within 11 to 20 feet of CCR in the berms surrounding the surface impoundments.¹⁰⁷ In addition, construction drawings in the history of construction show “existing fill” or CCR was used in the construction of the surface impoundment access ramps and underneath the surface impoundments liners.¹⁰⁸ The facility continued to use the ASDs for SSIs in 2020 and 2021, therefore, the surface impoundments remain in detection monitoring.

White Bluff Steam Electric Station,
Arkansas

The White Bluff Steam Electric Station in Redfield, Arkansas is owned or operated by Entergy and has three CCR units: two CCR surface impoundments (A Recycle Pond/South Pond and B Recycle Pond/North Pond); and one CCR landfill (Existing CCR Landfill Cells 1–4). CCR previously was disposed in a 20-acre ravine,¹⁰⁹ which was closed and covered in accordance with the original facility State-issued permit. The active landfill was then built on top of, and adjacent to, the unlined, closed landfill. In 2018, the facility conducted intrawell monitoring of the groundwater at the facility and SSIs for pH, calcium, TDS, and boron were detected. An ASD was completed and determined that the sources of the SSIs were: (1) Releases from portions of the Coal Ash Disposal Landfill (CADL) closed before the effective date of the CCR Rule (October 19, 2015); (2) Surface water that has come into contact with on-site CCR and has migrated into the subsurface; and/or (3) Natural variation

⁹⁹ *Id.* at 20.

¹⁰⁰ 2018 Annual Groundwater Monitoring and Corrective Action Report—Landfill Phase V and Phase VI, NIPSCO R.M. Schahfer Generating Station. January 31, 2019.

¹⁰¹ Northern Indiana Public Service Company, R.M. Schahfer Generating Station, Wheatfield, Indiana, Schahfer Landfill Phase V and Phase VI, Alternative Source Demonstration. April 13, 2018. Begins on PDF page 20 of the 2018 Annual Groundwater Monitoring and Corrective Action Report—Landfill Phase V and Phase VI. April 13, 2018.

¹⁰² 2021 Annual Groundwater Monitoring and Corrective Action Report, Landfill Phase V, Phase VI, and Phase VII, NIPSCO LLC R.M. Schahfer Generating Station. January 31, 2022.

¹⁰³ 2018 Waukegan Generating Station Annual GWMCA Report, Appendix B, PDF pg. 100. January 2019.

¹⁰⁴ 2019 Waukegan Generating Station Annual GWMCA Report, Appendix B, PDF pg. 100. January 2020.

¹⁰⁵ 2020 Waukegan Generating Station Annual GWMCA Report. January 2021.

¹⁰⁶ 2021 Waukegan Generating Station Annual GWMCA Report. January 2022.

¹⁰⁷ Waukegan boring well logs.

¹⁰⁸ October 2016, Waukegan Generating Station History of Construction.

¹⁰⁹ Entergy Arkansas, LLC White Bluff Steam Electric Station Landfill Cells 1–4 2021 Annual Groundwater Monitoring and Corrective Action Report. January 31, 2022.

in groundwater quality. Therefore, the landfill remains in detection monitoring.

c. Examples of CCRMU With Identified SSIs or SSLs From Comments

EPA received several comments about potential damage cases from CCRMU. In addition, many comments provided additional potential CCRMU but evidence of a thorough groundwater quality investigation in this area was not presented. If there are monitoring wells at the facility, the wells are not sufficient to characterize groundwater impacts from the CCRMU. Therefore, due to lack of data, EPA and the commenters could not definitively determine if certain unregulated placement of CCR at facilities is a CCRMU or if the CCRMU could be potential damage cases. EPA presents the following additional examples of CCRMU that have adequate groundwater monitoring to show impacts.

Brandywine Ash Management Facility, Maryland

The Brandywine Ash Management Facility in Prince George's County, Maryland has a 217-acre CCR landfill. It is operated by GenOn MD Ash Management, LLC. CCR has been landfilled at the facility since approximately 1971. As of 2018, an estimated 6.8 million cubic yards, or 7 billion kilograms, of CCR were placed at the site. CCR at Brandywine has contaminated groundwater and surface water, leading to legal action by the State of Maryland. A 2013 Consent Decree resulted in the development of a Corrective Measures Plan and a Nature and Extent of Contamination Study.^{110 111} According to the Consent Decree, "The original design of the disposal cells and operation of the disposal areas. . . has resulted in some leachate escaping the disposal cells via groundwater and constructed outfalls and entering surface waters. . . ." ¹¹²

"Based on a review of the quarterly Discharge Monitoring Reports . . . and other quarterly and annual monitoring reports submitted by GenOn, [Maryland Department of the Environment (MDE)] has determined that wastewater discharges from monitoring points at Brandywine have at times exceeded ambient surface water quality standards for cadmium and/or selenium. MDE has also determined that leachate has entered groundwater and is causing the

[maximum contaminant level (MCL)] for cadmium to be exceeded at times at certain groundwater monitoring points, as were federally recommended secondary standards for manganese, sulfate, iron, [total dissolved solids (TDS)], aluminum and chloride." ¹¹³

This broader context related to State law—which is absent from documents submitted pursuant to the 2015 CCR Rule—is important for understanding the complexity of the Brandywine site and its impacts. For example, unsafe lithium levels hundreds of times higher than the default GWPS in the 2015 CCR Rule have been documented at groundwater monitoring wells, as have unsafe molybdenum levels up to approximately 80 times higher than its default GWPS. Some of these unsafe levels are found in monitoring wells not included in the network used to demonstrate compliance with the Federal CCR Rule.¹¹⁴

The Brandywine site includes four areas of interest: Historical Area 1, Historical Area 2, Phase I, and Phase II.^{115 116} Because these four areas are all part of a single landfill and in some cases overlap, they should have all been subject to the 2015 CCR Rule—even though three of the areas were closed before the rule took effect. In its filings to comply with the 2015 CCR Rule, GenOn has treated the Historical Area 1, Historical Area 2, and Phase I areas as unregulated units and has pointed to these areas as the source of pollution in its ASDs. For this reason, the site has remained in detection monitoring through at least 2021.¹¹⁷

Bull Run Fossil Plant, Tennessee

The Bull Run Fossil Plant is owned and operated by Tennessee Valley Authority (TVA) in Clinton, Tennessee and has two unregulated CCR landfills. Groundwater monitoring results show the landfills have been leaching arsenic, boron, cobalt, manganese, and

molybdenum into the groundwater for decades, resulting in groundwater that exceeds health standards for these toxins by many times. In addition, a portion of one of the landfills, the Dry Fly Ash Stack, is not regulated by the 2015 CCR Rule as it ceased receipt of CCR in 2015 an interim soil cover was placed on Phase 2, and in accordance with a permit issued by the Tennessee Department of Environment and Conservation, it will be closed in conjunction with the currently operating Dry Fly Ash Stack Lateral Expansion.¹¹⁸ Among other things, the 2023 Bull Run Environmental Assessment Report states that the Dry Fly Ash Stack contains 3.7 million cubic yards of coal ash, and shows that lithium and molybdenum in downgradient groundwater exceed groundwater screening levels by at least an order of magnitude.¹¹⁹

Hennepin Power Station, Illinois

The Hennepin Power Station in Hennepin, Illinois has five CCR units including four CCR surface impoundments (Ash Pond No. 2, East Ash Pond, Old West Ash Pond, and Old West Polishing Pond) and one CCR landfill (CCR Landfill). The East Ash Pond System includes Ash Pond No. 2, the East Ash Pond, and Ash Pond No. 4, which were built on top of historic CCR fill.¹²⁰ Ash Pond No. 4 was a 30-foot-deep gravel quarry where coal ash fill was disposed in the mid-1980s.¹²¹ Groundwater downgradient of the East Ash Pond System, showed concentrations of sulfate and boron that exceeded State groundwater standards.¹²² The groundwater was (and may still be) contaminated with coal ash constituents.¹²³

Will County Station, Illinois

The Will County Station in Romeoville, Illinois is owned and operated by Midwest Generation Co. The facility has two CCR surface impoundments, Ash Pond 2S and Ash Pond 3S. Ash Ponds 1N and 1S were removed from service in 2010, and although they were not actively used for

¹¹⁰ Consent Decree, *State of Maryland et. al v. Genon MD Ash Management, LLC* (No. 8:12-cv-03755-PJM, D. Md., May 1, 2013).

¹¹¹ Id.

¹¹² Id.

¹¹³ Geosyntec Consultants. 2018. 2017 Annual Groundwater Monitoring And Corrective Action Report, Brandywine Ash Management Facility Phase II, Brandywine, Maryland. Prepared for GenOn MD Ash Management. January.

¹¹⁴ Earthjustice et al. Legacy Proposal Comment Appendix VI. EPA-HQ-OLEM-2020-0107-0368.

¹¹⁵ Geosyntec Consultants. 2018. Nature and Extent of Contamination Study, Final Report, Brandywine Ash Management Facility, Brandywine, Maryland. Prepared for GenOn MD Ash Management. June.

¹¹⁶ Geosyntec Consultants. 2018. Corrective Measures Plan, Brandywine Ash Management Facility, Brandywine, Maryland. Prepared for GenOn MD Ash Management. June.

¹¹⁷ Geosyntec Consultants. 2022. 2021 Annual Groundwater Monitoring and Corrective Action Report, Federal CCR Rule, Brandywine Ash Management Facility, Phase II, Brandywine, Maryland. Prepared for GenOn MD Ash Management. January.

¹¹⁸ Tennessee Valley Authority. Bull Run Environmental Assessment Report. Appendix D—CCR Management Unit Cross Sections. August 2023.

¹¹⁹ Tennessee Valley Authority. Bull Run Environmental Assessment Report. Bull Run Fossil Plant, Clinton, Tennessee. August 2023.

¹²⁰ U.S. EPA, Damage Case Compendium, Technical Support Document, Vol. IIa: Potential Damage Cases (Reassessed, Formerly Published), Docket ID EPA-HQ-RCRA-2009-0640-12119 (Dec. 18, 2014) at 30, ns.110.

¹²¹ Id at 30.

¹²² Id at 30.

¹²³ Id at 30.

waste storage, they still contained at least one inch of water in 2019 and the base of these unlined impoundments are in contact with at least one foot of groundwater.¹²⁴ In addition, through borings taken at the facility, historical CCR has been buried around the ash ponds, and the Former Slag and Bottom Ash Placement Area has been identified at the southeast corner of the station's boundary.

When constructing the groundwater monitoring system in 2010 and 2011, well borings also showed a thick layer of CCR buried along the eastern edge of the four ash ponds. MW-1, MW-2, MW-3, MW-4, and MW-6 show layers of fill between five and twelve feet thick containing CCR.¹²⁵ Historical topographic maps and aerial imagery document ponds extending from north of Pond 1N to close to the southern property boundary. These historical waste storage areas would have surrounded the current regulated ponds and the area where CCR has been found buried near the ponds. The topographic map and aerial imagery from 1962 show a large pond extending from north of Pond 1N to the southern property boundary. In 1973, waste storage areas are present in the vicinity of Ponds 2S and 3S and extend to the southern property boundary. By 1980, waste areas are depicted south of Pond 3S and surrounding Pond 1N. The series of unregulated ponds near the southern property boundary south of Pond 3S are visible on available maps until present day.^{126 127}

Historical ash in fill near the ponds is in contact with groundwater. Groundwater elevations fluctuate between 579 and 584 feet above mean sea level in this area. CCR is buried at elevations as low as 578.6 feet above mean sea level. MW-2 provides an example of ash in contact with groundwater. The boring log completed during its installation shows CCR down to 578.6 feet above mean sea level and the groundwater elevation was at 580.6 feet above mean sea level, meaning that at least two feet of groundwater was in contact with CCR at that time. Groundwater measurements at this well commonly range from 582 to 584 feet, meaning three to five feet of CCR are

routinely saturated with groundwater near MW-2.¹²⁸

The Former Slag and Bottom Ash Placement Area is located at the southeast corner of the Will County site. A Phase II Environmental Site Assessment completed in 1998 identified this location as an ash disposal area. Borings revealed coal ash mixed with gravel up to three feet below the ground surface.¹²⁹

Groundwater monitoring completed under the 2015 CCR Rule also demonstrates groundwater contamination at Will County. SSIs for chloride, fluoride, and TDS have been identified since the inception of the monitoring program in 2017 and in 2022, SSLs for arsenic and selenium were detected.¹³⁰

While the regulated ponds are likely contributing to groundwater contamination, historical ash at the station is also a likely culprit. Historical ash along the eastern boundary of the four ponds is not capped or lined and is thus exposed to precipitation and groundwater. The regulated and unregulated ponds are unlined and are in contact with groundwater, making these units potential sources of groundwater contamination. Groundwater contamination increases as it passes through/under the ponds. Boron and sulfate concentrations doubled between well MW-1 upgradient of Pond 1N and MW-7 downgradient of the pond in monitoring data collected between 2010 and 2018.¹³¹

ASDs also provide evidence of a contaminant source other than the regulated ponds. An ASD completed in 2018 following SSIs for chloride, fluoride, and TDS at the regulated units concluded that the SSIs were from "other potential sources" and not from the regulated units.¹³²

Groundwater monitoring during 2022 identified SSIs for boron, calcium, chloride, fluoride, and TDS across the monitoring network. SSLs for selenium at one well and arsenic at two wells were also identified and resulted in initiation of an ACM for the site. Notably, the two upgradient monitoring wells are contaminated. MW-06 had an SSI for calcium and an SSI for boron and SSL for selenium were detected at MW-05. These two upgradient wells are

located along the eastern edge of the ponds in the area known to contain buried ash. SSIs and SSLs in downgradient wells indicate that the regulated ponds may also be contributing to groundwater contamination.¹³³

The ASD completed following identification of SSLs at regulated Pond 2S and 3S determined that Pond 3S is likely contributing to groundwater contamination. The ASD reported statistically significant decreasing trends in chloride concentrations in both upgradient monitoring wells and statistically significant increasing trends in chloride concentrations in MW-09 and MW-11, both of which are immediately downgradient of Pond 2S.¹³⁴

The prevailing groundwater flow at the site is from the east to the west across the ponds. Because historical ash is present along the eastern boundary of the ponds, the current monitoring network is not capable of accurately measuring groundwater contamination from each potential source. Further, all the wells designated upgradient are within the likely footprint of the historical CCR disposal area described above. Thus, none of the wells can assess upgradient groundwater quality accurately.

EPA Impoundment Assessments

Commenters provided additional reviews of EPA's impoundment assessment reports that were conducted in 2011–2013. During the impoundment assessments, EPA documented eight power plants with historical ponds where coal dams were constructed in whole or part of coal ash.¹³⁵ These plants include six plants on EPA's list of potential legacy CCR surface impoundments: Glen Lyn (VA), Hutsonville (IL), Jefferies (SC), Muskigum River (OH), Philip Sporn (WV), and Tanners Creek (IN). At two additional plants where historical ponds are identified, Cape Fear (NC) and Frank E. Ratts (IN), EPA also found coal ash used in the construction of the dams. The commenters included these plants as additional potential CCRMU.

2. Applicability and Definitions Related to CCR Management Units

EPA is finalizing new definitions and revising several existing definitions necessary to implement the new requirements for CCRMU. Specifically,

¹²⁴ Interim Opinion and Order, Sierra Club et al vs. Midwest Generation, LLC, Illinois Pollution Control Board, June 20, 2019.

¹²⁵ Id.

¹²⁶ Earthjustice et al. Legacy Proposal Comment Appendix VI. EPA-HQ-OLEM-2020-0107-0368.

¹²⁷ Earthjustice Appendix II. Examples of historical satellite imagery and topographic maps are included in Figure 23, Figure 24, and Figure 25. EPA-HQ-OLEM-2020-0107-0368.

¹²⁸ Interim Opinion and Order, Sierra Club et al vs. Midwest Generation, LLC, Illinois Pollution Control Board, June 20, 2019.

¹²⁹ Id.

¹³⁰ Earthjustice et al. Legacy Proposal Comment Appendix VI. EPA-HQ-OLEM-2020-0107-0368.

¹³¹ Earthjustice et al. Legacy Proposal Comment Appendix VI. EPA-HQ-OLEM-2020-0107-0368.

¹³² Id.

¹³³ Id.

¹³⁴ Id.

¹³⁵ EPA, Coal Combustion Residuals Impoundment Assessment Reports (2014), https://www.epa.gov/sites/default/files/2016-06/documents/ccr_impoundmnt_asesmnt_rprts.pdf.

the final rule establishes new definitions for “CCR management unit,” “Contains CCR and liquids,” “Inactive CCR landfill,” “Liquids,” and “Regulated CCR unit” and revises existing definitions for “CCR landfill or landfill,” “CCR unit,” “Operator,” “Owner,” and “State Director.” Some of these definitions are discussed elsewhere in the preamble.

EPA is also revising § 257.50(d) to specify that part 257, subpart D applies to CCRMU of 1,000 tons or greater, located at facilities with a regulated CCR unit or active facilities without a regulated CCR unit. That provision also applies to CCRMU greater than or equal to one ton and less than 1,000 tons, located at active facilities or facilities legacy CCR surface impoundment are only subject to the requirements of the FER in § 257.75 until a permitting authority determines that regulation of these units, either individually or in the aggregate, is warranted and determines the applicable requirements. Under the 2015 CCR Rule, § 257.50(d) exempted from regulation those CCR landfills that had ceased receiving CCR prior to October 19, 2015. This action amends the exemption included in the 2015 CCR Rule.

The sections below briefly explain what EPA proposed, summarize the public comments received, and provide the Agency’s responses. The Agency addresses new and revised definitions in the following order: (1) CCR management unit; (2) CCR unit; (3) Owner and operator; and (4) Conforming revisions to other existing definitions.

a. Definition of CCR Management Unit

EPA proposed to define a *CCR management unit* or CCRMU to capture the solid waste management practices that have been demonstrated in the 2014 and 2024 Risk Assessments and the damage cases to have the potential to contaminate groundwater. EPA proposed to define a CCRMU as any area of land on which any non-containerized accumulations of CCR are received, placed, or otherwise managed, that is not a CCR unit. EPA explained in the proposed rule that the definition of a CCRMU is based on the current definitions of a CCR pile—which is currently regulated as a CCR landfill under part 257, subpart D—and of a CCR surface impoundment, which both rely on the concept of “accumulations of CCR.” See, 40 CFR 257.53 and 88 FR 32018.

EPA proposed that CCRMU would include historical solid waste management units such as CCR landfills and surface impoundments that closed

prior to the effective date of the 2015 CCR Rule (October 19, 2015), as well as inactive CCR landfills (including abandoned piles). The proposal stated that a CCRMU would also include any other areas where the solid waste management of CCR on the ground has occurred, such as structural fill sites, CCR placed below currently regulated CCR units, evaporation ponds, or secondary or tertiary finishing ponds that have not been properly cleaned up, and haul roads made of CCR if the use does not meet the definition of beneficial use in § 257.53. EPA explained that all of these examples involved the direct placement of CCR on the land, in sufficient quantities to raise concern about releases of hazardous constituents, and—in most, if not all cases—with no measures in place to effectively limit the contact between the CCR and liquids, and subsequent generation and release of any leachate.

EPA acknowledged that the proposed definition was broad, but the Agency did not intend that the placement of any amount of CCR would necessarily constitute a CCRMU. Accordingly, EPA proposed that the following would not be considered CCRMU: consistent with the current regulations, closed or inactive process water ponds, cooling water ponds, wastewater treatment ponds, and stormwater holding ponds or aeration ponds. EPA explained that these units are not designed to hold an accumulation of CCR, and in fact, do not generally contain a significant amount of CCR. See, 80 FR 21357. EPA also explained, consistent with the existing regulations, neither an area or unit at which exclusively non-CCR waste is managed, nor any containerized CCR, such as a silo, would be considered CCRMU because neither of these units present conditions that give rise to the risks modeled in EPA’s assessment or identified in the damage cases. See, *Id.* at 21356.

For similar reasons, the Agency proposed that any CCR used in roadbed and associated embankments would not be considered CCRMU. As EPA explained in the 2015 rule the methods of application are sufficiently different from CCR landfills that EPA cannot extrapolate from the available risk information to determine whether these activities present similar risks. Roadways are subject to engineering specifications that generally specify CCR to be placed in a thin layer (*e.g.*, six to 12 inches) under a road. The placement under the surface of the road limits the degree to which rainwater can influence the leaching of the CCR. There are also significant differences between the manner in which roadways and

landfills can potentially impact groundwater, such as the nature of mixing in the media and the leaching patterns. First, CCR landfills are typically a homogeneously mixed system, and as a result, there are no spatial variations of the chemical and physical properties of the media (*e.g.*, bulk density, hydraulic conductivity and contaminant concentration). By contrast, roadways are generally constructed of several layers with different material properties (heterogeneity). This difference affects the hydraulic conductivity of a mass of CCR in a landfill, as compared to CCR placed in an embankment. Any potential leaching will tend to spread over the length of the embankment, as opposed to the leaching in a downward motion that would occur in a homogeneously filled landfill. Finally, EPA is concerned that groundwater monitoring of a road may not be practicable. However, even though EPA considers that the available information does not demonstrate that use in roadbed present sufficient risk to warrant the suite of requirements applicable to CCRMU, that calculus changes in the event the CCR in roadbed is contaminating groundwater. Accordingly, EPA proposed that if a facility subsequently determines that the CCR in onsite roadbed is contributing to contamination to the aquifer, the facility would be required to address the contamination. For example, if during an ongoing corrective action, a facility identifies the roadbed as an additional source of contamination, it would be required to address that contamination as part of the ongoing remediation of the aquifer. In addition, the measures EPA proposed to require facilities to take would not be expected to identify truly de minimis quantities of CCR. As discussed in greater detail in the next section, EPA proposed that facilities would only be required to identify accumulations if records confirm the existence of the CCRMU or visual evidence of CCR placement on the ground.

In addition, EPA proposed to define the term *inactive CCR landfill* to mean an area of land or an excavation that contains CCR but that no longer receives CCR on or after the effective date of this final rule and that is not a surface impoundment, an underground injection well, a salt dome formation, a salt bed formation, an underground or surface coal mine or a cave. For purposes of this subpart, this term also includes sand and gravel pits that received CCR and abandoned CCR piles.

i. RCRA Authority

Some commenters contended that *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) requires EPA to have clear congressional authorization to regulate CCRMU, and that Congress has not provided EPA with such authorization under either RCRA sections 4004(a) or 4005(d). The commenters are incorrect. All of the requirements adopted in this rulemaking to regulate CCRMU fall squarely within the authority Congress delegated to the Agency in RCRA sections 1008(a)(3), 4004(a), and 4005(d). Commenters' arguments to the contrary are based misunderstandings of the statutory structure and EPA's historical practice. The rule does not expand the scope of CCR regulation beyond what Congress envisioned. Further, in large part, commenters' arguments are premised on aspects of the proposal which have been revised in this final action in response to comments. Although the revisions were not necessary under *West Virginia v. EPA* (because EPA's exercise of authority through this rule does not implicate a major question), the revisions resolve many of the commenters' objections based on their view of the major questions doctrine. EPA addresses the comments in turn.

Some commenters based their claim that the regulation of CCRMU presents a major question on the assertion that the proposal would regulate an undefinable number of past CCR management and disposal practices, "irrespective of risk, location, or even whether such past activities have been (or are currently being) addressed by state governments or by EPA itself under other federal authorities." These commenters claimed that the proposal has no bounds.

Just as an example, the Proposal would require operating power generation facilities to identify every CCRMU within its boundaries, even if located under existing structures critical to a plant's energy production operations, and to "close," and in many cases reclose, those CCRMUs under the CCR rule's closure provisions. The Proposal blithely ignores whether in fact such requirements could be met, the associated costs, and the resulting interruption to power generation activities that could be incurred in attempting to meet these requirements.

These commenters also note that Congress's failure to include the same authority for corrective action applicable to permitted hazardous waste sites found in section 3004(u) under subtitle D demonstrates that EPA lacks the authority to require CCRMU to comply with the part 257 corrective action and closure requirements.

Another commenter argued that the proposal "would impermissibly expand EPA's role in the Subtitle D statutory regime beyond the limited role that Congress envisioned for the Agency" based on their belief that the Congressional intent behind the WIIN Act was "to restore the States to their historical, congressionally-intended lead role under RCRA Subtitle D in the implementation and enforcement of solid waste management programs." According to this commenter,

[w]hether or not EPA should have such a "central role" in the regulation of CCR under RCRA Subtitle D—one that would allow the Agency to assert federal jurisdiction over any area of land in any state simply because the land was, at any time, used to manage any non-containerized accumulation of CCR, regardless of whether the land has been and is in compliance with applicable state regulations—is a major policy question of significant national economic and political magnitude that Congress has not clearly delegated EPA the authority to address. . . . At its core, EPA's delegated RCRA Subtitle D authority entails only the authority to promulgate guidelines and criteria, to be implemented by the States, to prohibit open dumping and to ensure that units are classified as sanitary landfills "only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid wastes at such facility. EPA's Proposal construes "open dumps" and "sanitary landfills" to now include historically state-regulated solid waste management and resource conservation and recovery practices that Congress never intended (clearly or otherwise) for the Agency to regulate federally, as most recently evidenced by Congress's definition of a "sanitary landfill" in the WIIN Act as a CCR unit that complies with a state CCR permit, or a federal CCR permit in a nonparticipating state, or the requirements of the CCR Rule applicable to CCR units in the absence of a federal CCR permitting program.

This commenter stated that the WIIN Act limited the reach of EPA's authority to "CCR units," as defined in the 2015 CCR Rule, *i.e.*, to "any CCR landfill, CCR surface impoundment, or lateral expansion of a CCR unit, or a combination of more than one of these." In addition, the commenter argued that EPA lacks the authority to now regulate units that were expressly exempted from regulation under the EPA regulations that Congress specifically incorporated by reference in the WIIN Act. According to this commenter, in 2015 EPA interpreted its RCRA Subtitle D statutory authority to regulate, as "CCR units," only existing and new CCR landfills, existing and new CCR surface impoundments, and inactive CCR surface impoundments at active facilities, and Congress did not in 2016 grant the Agency any authority to

regulate anything else. The commenter further claimed that EPA has acknowledged that the definition of a "CCR unit" does not include the areas of land that EPA proposed to regulate as CCRMU. Finally, the commenter objected that the proposal would regulate activities or sites that "have historically been regulated under state programs, per EPA approved State Solid Waste Management Plans, and have closed or continued to operate in accordance with the State's program and plan."

EPA disagrees that the regulation of CCRMU under this final rule is fairly characterized as an "unprecedented" expansion of authority under RCRA Subtitle D or otherwise presents a major question under *West Virginia v. EPA*, 142 S. Ct. at 2609. The commenters have mischaracterized EPA's proposal, which largely just removes regulatory exemptions adopted in 2015, and requires the owners and operators of solid waste disposal units to clean up the contamination from their disposal of solid waste (CCR). These are the same requirements that apply to the currently regulated CCR landfills and CCR impoundments—most of which are located at the same sites as the CCRMU regulated under this final rule—and that Congress incorporated into RCRA in the 2016 WIIN Act. See, *e.g.*, See, 42 U.S.C. 6945(d)(3), (6), (7). EPA has imposed these types of requirements on these kinds of entities and activities since 1980. Characterizing this as novel or unprecedented fundamentally misstates both the nature of EPA's action and the authority Congress delegated to the Agency in RCRA sections 1008(a)(3), 4004(a), and 4005(d).

(a) Types of Units and Activities Regulated

As an initial matter, these commenters have mischaracterized EPA's statements about the extent of its authority under subtitle D. EPA never stated that its authority was limited to the particular CCR units regulated by the 2015 CCR Rule. The only citation the commenter provides to support its assertion is 80 FR 21303, which is simply a factual recitation of the CCR units covered by the 2015 CCR Rule. That section contains no statement about EPA's authority to regulate; nor does any other section of the 2015 CCR Rule preamble contain such a statement.

Similarly, EPA never stated or in any way suggested in the May 2023 proposed rule that the existing regulatory definition of a CCR unit—and by implication, the statutory term in 4005(d)—does not include the "areas of land that EPA proposed to regulate as

CCRMUs.” Based on the pages in the proposal that the commenter cites, it appears the commenter was confused by EPA’s explanation that it was proposing to use two different terms to distinguish between: (1) the CCR units that would be subject to all of the requirements in part 257 and (2) the CCR units that would subject to only a subset of the existing requirements. EPA proposed to use the terms CCR unit and CCRMU, respectively, to refer to these two categories of units. To effectuate this, EPA proposed to *revise* the existing definition of a CCR unit by adding a statement that CCR management units are not covered by the definition. If the commenter were correct that EPA did not consider CCRMU to be a type of CCR unit, EPA would not have needed to revise the definition.

But to the larger point, the CCRMU regulated under this rule clearly fall within RCRA sections 1008(a)(3), 4004(a) and 4005(d). In essence, as the commenter recognizes, CCRMU are simply CCR landfills and CCR surface impoundments that were not regulated by the 2015 Rule: inactive CCR landfills, or CCR surface impoundments and landfills that were closed prior to the effective date of the 2015 rule.¹³⁶ As EPA explained in the May 2023 proposal, the proposed definition of a CCRMU was based on the existing definitions of a CCR pile—which is currently included in the definition of a CCR landfill—and of a CCR surface impoundment, which both rely on the concept of “accumulations of CCR.” See, 40 CFR 257.53 and 88 FR 32018. And the record for this rulemaking documents that the CCRMU regulated under this final rule present risks at least as significant as the units regulated under the 2015 rule. CCRMU thus clearly are CCR units under both the regulations and the statute. As the commenter itself notes, when the WIIN Act was passed in 2016, and Congress incorporated the term CCR unit into the statute, the 2015 CCR Rule defined (and still defines) a CCR unit as “any CCR landfill, CCR surface impoundment, or lateral expansion of a CCR unit, or a combination of more than one of these.” 40 CFR 257.53 (*emphasis added*).

The commenter relies heavily on the fact that CCRMU were exempt under the 2015 CCR Rule; but that is ultimately irrelevant. First, as noted above, CCRMU actually fall within the 2015 regulatory definition of a CCR unit.

More to the point, Congress did not define the term “CCR unit,” thereby leaving it to EPA develop a definition. Although the WIIN Act incorporates the 2015 regulations into the statute, Congress simultaneously made clear that EPA retains the authority to modify or expand those requirements as necessary to ensure that the standard in section 4004(a) will continue to be met. See, e.g., 42 U.S.C. 6945(d)(1)(A)(i), (3), (6) (referencing “or successor regulations promulgated pursuant to sections 6907(a)(3) and 6944(a) of this title”). The commenters never acknowledge these provisions or address their logical implications.

Instead, the commenters focus on two aspects of the CCRMU definition to support their claims of an “unprecedented expansion”: (1) the proposal to define a CCRMU as “any non-containerized accumulation of CCR” without limitation or threshold; and (2) the regulation of “any area of land” on which CCR “is received, placed, or otherwise managed at any time.” With the incorporation of the thresholds in § 257.50(d) the first issue has been rendered moot. EPA has also deleted the phrase “at any time” from the CCRMU definition. EPA had originally included that phrase to clarify that it did not matter when the CCR was originally placed, received, or otherwise managed, provided the CCR remained at the site. EPA deleted the phrase from the final definition because, as the D.C. Circuit explained, this concept is fully communicated by the phrase “is placed.”

Importantly, while the “is” retains its active present tense, the “disposal” takes the form of a past participle (“disposed”). In this way, the disposal itself can exist (it “is”), even if the act of disposal took place at some prior time Properly translated then, an open dump includes any facility (other than a sanitary landfill or hazardous waste disposal facility), where solid waste still “is deposited,” “is dumped,” “is spilled,” “is leaked,” or “is placed,” regardless of when it might have originally been dropped off. See 42 U.S.C. 6903(3), (14).

901 F.3d at 440. The same logic applies to the phrases “is received” and “is otherwise managed.” Including the phrase “at any time,” is consequently at best redundant, and at worst confusing—as demonstrated by the above comments.

In any event, these aspects of the CCRMU definition were either taken directly from or largely mirror existing regulatory or statutory definitions. The phrase “any non-containerized accumulation of CCR” appears verbatim in the existing “CCR pile” definition, which as EPA previously explained,

essentially mirrors the existing definition of a “waste pile or pile” from § 257.2 (*i.e.*, the regulation that applied to CCR facilities prior to 2015), as well as the definition in part 260 that has been in place since 1982. See 80 FR 21356. Compare, §§ 257.2, 257.53, and 260.10. More to the point, regulating the placement of non-containerized¹³⁷ CCR directly on any land is fully consistent with RCRA’s definition of disposal, which is defined in part as the “‘placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.’” 42 U.S.C. 6903(3) (*emphasis added*). Similarly, and as illustrated by the D.C. Circuit decision quoted above, the phrase “is received, is placed, or is otherwise managed,” flows from the statutory definition of an open dump, which RCRA defines as “any facility or site where solid waste *is disposed of*” 42 U.S.C. 6903(14) (*emphasis added*).

EPA responds to comments about the “any area of land” portion of the CCRMU definition in relevant portions of the discussions below.

(b) Extent of Requirements

The commenters complain that the proposal was “virtually unbounded” as it would require operating power generation facilities to identify every CCRMU within its boundaries, even if located under existing structures critical to a plant’s energy production operations, and to “close,” and in many cases reclose, those CCRMUs under the CCR rule’s closure provisions. While EPA disagrees with the commenters’ characterization of the proposal, the final rule, in any event, is more limited than the proposal, and is not unbounded. Under the final rule a covered facility must still identify every CCRMU of one ton or more within its boundaries, but groundwater monitoring, corrective action, closure, and post-closure requirements apply only to CCRMU containing at least 1,000 tons of CCR. Regulation of CCRMU between one and 1,000 tons is deferred to a subsequent permitting authority who will assess the risks posed by these smaller CCRMU, individually and/or in the aggregate, and determine which, if any, requirements are appropriate for the CCRMU. In addition, this final rule defers the requirement to demonstrate

¹³⁶ The proposal described an additional category: any solid waste management that involves the placement or receipt of CCR directly on the land; such activities fall within the existing definition of a CCR pile, which is in turn defined as a CCR landfill.

¹³⁷ The phrase “non-containerized” means that specific measures to control exposures to human health and the environment have not been adopted. See 80 FR 21356.

compliance with § 257.102 for CCRMU that closed prior to the effective date of this rule in accordance with alternative, substantially equivalent requirements. EPA is also deferring the requirement to initiate closure where the CCRMU is located beneath critical infrastructure, such as high power electric transmission towers, air pollution control or wastewater treatment systems, or an electrical substation until the infrastructure is no longer needed, a permit authority determines closure is necessary to ensure that there is no reasonable probability of adverse effects on human health or the environment, or the closure or decommissioning of the facility, whichever occurs first.

The commenters also objected to the imposition of corrective action and closure obligations on disposal units that were closed in accordance with State law or on areas where the State considered the placement of CCR on the land to be beneficial use under State law. But the regulation under subtitle D of closed or inactive disposal units or of activities exempt under State law is neither novel nor unprecedented. Indeed, many CCR units currently regulated under the 2015 CCR rule were inactive or exempt under State law. See, 80 FR 21322–21323, 21456. And in this case EPA is only extending the part 257 regulations to activities or placements of CCR that, as discussed above, are already defined as “disposal” under Federal law—and that the record demonstrates present risks exceeding the threshold for regulation in section 4004(a).

Under section 4004(a), EPA is charged with issuing regulations to address all “reasonable probabilities of adverse effects” (*i.e.*, all reasonably anticipated risks) to health and the environment from the disposal of solid waste.¹³⁸ The statute is clear that this includes regulations to address the current risks from previous solid waste management activities (including disposal). EPA explained at length the basis for this conclusion as part of the Agency’s rationale for regulating inactive impoundments. See, 80 FR 21344–21345. See also *USWAG, et al. v. EPA* 901 F.3d at 440. See also *In re Consolidated Consol. Land Disposal Regulation Litig.*, 938 F.2d 1386, 1389 (D.C. Cir. 1991) (EPA’s reading of the term “disposal” in RCRA’s Subtitle C, 42 U.S.C. 6924, to include “the continuing presence of waste” was

reasonable); *USWAG*, 901 F.3d at 453–54 (Henderson, J., concurring) (same). By the same logic, these provisions authorize EPA to regulate inactive landfills and closed disposal units that continue to pose risks to health or the environment, for example by requiring the owners and operators of such units to remediate any contamination from these units, or to take action to prevent such contamination.

The 2016 WIIN Act amendments reaffirmed EPA’s authority over these activities. In section 4005(d), Congress relied on the 2015 regulations, and expressly stated that the amendments were not intended to limit or restrict the authority already provided under sections 1008(a)(3) and 4004(a). See, 42 U.S.C. 6945(d)(3), (6), (7). With these amendments, Congress also affirmed the Agency’s authority to impose the kind of requirements established in part 257 (*e.g.*, corrective action to remediate groundwater contamination and closure to prevent it). This rule simply extends many of those same requirements to additional areas at which disposal of CCR is occurring—often at the same sites covered by the original 2015 CCR Rule. Moreover, Congress made clear that EPA retains the authority to modify or expand the requirements in the 2015 CCR rule as necessary to ensure that the standard in section 4004(a) will continue to be met. See, *e.g.*, 42 U.S.C. 6945(d)(1)(A)(i), (3), (6) (referencing “or successor regulations promulgated pursuant to sections 6907(a)(3) and 6944(a) of this title”). None of the commenters acknowledge these provisions or address their logical implications.

Moreover, this rule requires CCR facilities to remediate only the contamination associated with the disposal of CCR on site of a facility with other currently regulated CCR disposal units. Although expanding the corrective action obligations to other areas of CCR disposal on site may seem similar to the facility wide corrective action obligations applicable under the hazardous waste program—in that a facility will be required to clean up all of the on-site contamination caused by its disposal of CCR—the two requirements are not commensurate. For example, in contrast to a clean up under 3004(u), this rule does not require a facility to clean up any Appendix IV constituent from any source on-site, such as a spilled commercial product, unconnected to the solid waste (CCR) in the disposal unit. Rather, this rule imposes the same unit specific obligations that CCR facilities have been required to comply with since 2015, that were clearly authorized under 4004(a)

and that Congress effectively affirmed in 2016 with the WIIN Act.

(c) Relationship to State Law

Finally, EPA disagrees that either the proposed or final rule expands “EPA’s role in the Subtitle D statutory regime” or otherwise alters the Congressionally mandated relationship between EPA and the States.

The fact that EPA regulation affects the status of activities or units that were previously regulated under State law is precisely what the statute authorizes. Even under the more limited authority conferred upon the Agency prior to WIIN Act, EPA’s subtitle D criteria established minimum national standards with which facilities were required to comply, irrespective of State law. See 80 FR 21310–21311.

Moreover, the commenter has misunderstood both the intent and effect of the WIIN Act. Under the legal framework in place when the 2015 CCR rule was enacted,

EPA’s delegated RCRA Subtitle D authority entails the authority to promulgate guidelines and criteria, to be implemented by the States, to prohibit open dumping and to ensure that units are classified as sanitary landfills “only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid wastes at such facility

See 80 FR 21310–21311. Congress deliberately expanded EPA’s role under that framework in 2016 when it granted EPA the authority to enforce the Federal criteria, issue permits in nonparticipating States, and to establish the minimum national standards that are both applicable directly to facilities and used to evaluate State programs. The commenter’s description of the section 4005(d)(6) definition of a “sanitary landfill” is similarly misleading. Congress did not define a sanitary landfill as a CCR unit that complies with any State CCR permit, but a State permit issued in accordance with an EPA approved program. See 42 U.S.C. 6845(d)(6)(A)(i).

(d) Other Comments Concerning Authority To Regulate CCRMU

Other commenters stated that the proposed CCRMU definition exceeds the Agency’s authority under RCRA subtitle D because EPA has failed to demonstrate that any amount of CCR placed anywhere on the land at any time presents the level of risk necessary to warrant regulation under section 4004(a). These commenters contend that the proposed CCRMU definition unlawfully eliminates the concept of risk out of the statutory definition of disposal. These commenters further asserted that the authority to regulate

¹³⁸ Although section 1008(a)(3) expands EPA’s authority to address the risks from any of the listed activities, the CCRMU regulated under this final rule—consisting of CCR surface impoundments and landfills (including CCR piles) only involve disposal.

“solid waste management practices” under section 1008(a)(3) similarly does not authorize the regulation of any amount of CCR placed anywhere on the land at any time. Finally, a commenter raised concern that the proposed definition would encompass CCR used as fill material pursuant to acts of Congress or validly issued Section 404 permits under the Clean Water Act, which commenter alleged falls outside the scope of RCRA.

EPA disagrees that it lacks the authority for any of the provisions in this final rule. The record demonstrates that the CCRMU regulated under the final rule meet the standard for regulation under section 4004(a). This rule is supported by two separate risk assessments; the final rule adheres closely to the results, and regulates only the units and activities that present risks that warrant regulation under sections 1008(a)(3) and 4004(a). Further, the results of EPA’s risk assessments are consistent with the damage cases discussed in Unit III.C.1 of this preamble.

As discussed at length in Unit III.A of this preamble, leakage from CCRMU can adversely impact groundwater quality and pose risk to future receptors in the range that EPA typically considers for regulation. Closed and inactive landfills and surface impoundments pose substantially the same levels of risk to offsite receptors as those estimated in 2014 for currently regulated units. This is particularly true if the unit has not been properly closed, *e.g.*, lacks a final cover system.

In response to comments received on the proposed rule raising concerns about the adequacy of EPA’s basis for regulating smaller CCRMU, EPA modeled groundwater concentrations at the boundary of smaller CCRMU fills to understand the potential for exceedance of GWPS that would trigger corrective action. The results of that 2024 Risk Assessment confirm that smaller CCRMU fills can pose risk to onsite receptors and materially contribute to broader groundwater contamination across the facility. In addition, depending on the location of these fills, they can also pose risk to offsite receptors that exceed the levels at which EPA normally regulates. On the whole, this analysis identified the potential for both moderate and high-end groundwater concentrations of molybdenum (among other Appendix IV constituents) to exceed GWPS.

EPA conducted further sensitivity analysis to better understand whether there is an amount below which there is no reasonable probability of adverse impacts to groundwater quality. EPA

remodeled quantities of CCR between one ton and 78,000 tons to determine both the risks associated with the potential for groundwater contamination and radioactivity. EPA modeled only individual placements of CCR in these quantities rather than the aggregate risks from the placement of multiple small quantities of CCR co-located at the same site.

This analysis found that exceedances of the GWPS by a factor of as much as 40 are still possible for placements below 1,000 tons of CCR. Thus, such placements can meaningfully contribute to groundwater contamination at these facilities, including, for example by adding two contaminant plumes already present on site from larger placements, or in the aggregate. Although further analysis of the results indicates that there will be a tonnage that does not present a reasonable probability of adverse effects to groundwater quality, EPA was unable to identify that amount based on the available information. EPA conducted no modeling below one ton; however all indications in the existing data are that groundwater concentrations from individual quantities below one ton are very unlikely to exceed GWPSs. In other words, although EPA’s modeling indicates that some amount between one ton and 1,000 tons is likely below EPA’s level of concern, EPA cannot determine what that precise amount would be. It was not possible to identify a limit much lower than 1,000 tons because too few model runs were conducted at smaller amounts to support extrapolation.

To ensure that the final rule is consistent with the Agency’s authority under RCRA section 4004(a), this final rule incorporates thresholds consistent with the results of its risk analyses. Accordingly, the final rule only requires CCRMU containing 1,000 tons or more of CCR to comply with the applicable requirements for CCRMU.

However, EPA estimated the risks associated with a 1,000 ton CCRMU to be an HQ of 40, which exceeds the Agency’s normal level of acceptable risk by a significant margin. In addition, EPA’s risk assessment may underestimate the risks at some sites. EPA modeled the risks associated with individual CCRMU of varying sizes, rather than the aggregate risks associated with numerous smaller CCRMU across the facility. It is possible that even though smaller CCRMU may not individually give rise to levels of concern, the risks may be greater when all of the CCRMU are considered together. According to many of the commenters, it is common for multiple

small CCRMU to be located at a single facility. And although EPA’s modeling estimated radiation risks of concern at lower quantities, EPA’s concerns were based on a *future* residential use of the property (*e.g.*, after clean closure of the regulated units, but where smaller CCRMU remain on site). As several commenters noted, current exposures at existing facilities (occupational) are very different. To address these risks, as section 4004(a) requires, the final rule does not exempt CCRMU containing between one and 1,000 tons of CCR, but defers the regulation of such units to a permitting authority who will assess the risks posed by these smaller CCRMU, individually and/or in the aggregate, and determine which, if any, requirements are appropriate for the CCRMU to ensure there will be no reasonable probability of adverse effects on health or the environment. In order to facilitate this, the final rule requires facilities to identify these smaller units as part of the FER, so that this information can be submitted as part of their permit application. The facility will also continue to monitor the regulated units and larger CCRMU at the site, consistent with the requirements in this rule and the existing regulations. To the extent that these smaller unmonitored CCRMU are leaching contaminants and contributing to groundwater plumes, that should become apparent as the facility continues to monitor and conduct any necessary corrective action at the currently monitored units.

EPA has codified these provisions in the “Scope” section of the regulations, at § 257.50(d). The provision reads as follows:

(1) This subpart applies to CCR management units of 1,000 tons or greater, located at facilities with a regulated CCR unit or active facilities without a regulated CCR unit.

(2) CCR management units greater than or equal to 1 ton and less than 1,000 tons, located at facilities with a regulated CCR unit or active facilities without a regulated CCR unit, are only subject to the requirements of the facility evaluation report in § 257.75 until a permitting authority determines that regulation of these units, either individually or in the aggregate, is warranted and determines the applicable requirements.

Finally, the commenter is mistaken that CCR used as fill material pursuant to acts of Congress or validly issued CWA section 404 permits under the State falls outside the scope of RCRA. To support its allegation, the commenter references section 1006(a), claiming that this “expressly carves out any activity covered by 33 U.S.C. 1251 *et seq.*” But RCRA section 1006(a) does not bar EPA

from imposing requirements under one of the listed statutes and RCRA on the same units and waste streams, unless those requirements are inconsistent with a requirement in one of the statutes. 42 U.S.C. 6906(a). This is clear from the second sentence, which provides that “such integration shall be effected only to the extent that it can be done in a manner consistent with the goals and policies expressed in this chapter and in the other acts referred to in this subsection,” and thus expressly contemplates that there will be situations in which EPA regulates under both RCRA and one of the listed statutes. *Id.* See, *Chemical Waste Management v. EPA*, 976 F.2d 2, 23, 25 (D.C. Cir. 1992).

Numerous courts have upheld this interpretation. See, *Ecological Rights Foundation v. Pacific Gas & Electric Co.*, 874 F.3d 1083, 1095 (9th Cir., 2017) (“RCRA’s anti-duplication provision does not bar RCRA’s application unless that application contradicts a specific mandate imposed under the CWA (or another statute listed in RCRA section 1006(a))”); *Goldfarb v. Mayor and City Council of Baltimore*, 791 F.3d 500 510 (4th Cir. 2015) (The CWA must require something fundamentally at odds with what RCRA would otherwise require to be “inconsistent” under 1006(a)); *Edison Electric Institute v. EPA*, 996 F.2d 326, 337 (D.C. Cir.1993) (rejecting “generalized claim” that EPA action was barred under section 1006(a) because it interfered with “the primary purpose” of the Atomic Energy Act); *U.S. v. E.I. du Pont de Nemours & Co., Inc.*, 341 F.Supp.2d 215, 236 (W.D. N.Y. 2004) (approving EPA action as “not inconsistent” under RCRA where CERCLA’s heightened standard would not be met by release of hazardous substance). The commenter has identified no requirement in the Clean Water Act that is inconsistent with EPA’s regulation of CCRMU.

The same is true with respect to the commenter’s contention regarding acts of Congress. Although the commenter refers to “acts of Congress” it cites only to 33 U.S.C. 59d. That provision of the Clean Water Act states only that a particular area is not a water of the United States, and authorizes the owner to place fill in the area.

The old channel of the River Raisin in Monroe County, Michigan, lying between the Monroe Harbor range front light and Raisin Point, its entrance into Lake Erie, is declared to be not a navigable stream of the United States within the meaning of the Constitution and the laws of the United States, and the consent of Congress is hereby given for the filling in of the old channel by the riparian owners on such channel.

Regulation of CCRMU neither contradicts a specific mandate nor is fundamentally at odds with this provision, which does not require the owner to place CCR in the old channel or grant the owner an exemption from any requirement other than section 404 of the Clean Water Act.

ii. Subcategorization Is Appropriate for CCRMU Because CCRMU Are Dissimilar

Commenters stated that the proposal groups all pre-2015 CCR Rule disposal areas into one large category. According to the commenters, this approach treats many different scenarios as a worst-case by imposing burdensome requirements for all. Commenters provided examples of potential subcategories, including: past CCR disposal varies based on site location (close to a surface water body), geography (eastern vs western sites), hydrology (flow variability/distance to uppermost aquifer), regulatory status (State closed-units vs unaddressed CCR sites), and historical CCR disposal areas currently used to harvest CCR for beneficial use. By categorizing all these situations together, the commenters claimed that EPA ignores the risk profiles of these subcategories and forces actions not tailored to the issues at hand. Some of these commenters opposed including in the CCRMU definition former landfills, impoundments and other accumulations of CCR that been closed in accordance with existing Federal or State regulations and regulatory oversight that pose no risk to groundwater.

As discussed in Unit III.A, the risk record does not support the distinctions the commenters make. This final rule already imposes only a subset of the regulations in part 257 on CCRMU, consisting primarily of groundwater monitoring and closure. Corrective action is required only if triggered by site-specific determinations particular to individual units. EPA disagrees that the commenters have shown that any further differentiation is warranted.

iii. Size Threshold for a CCRMU

Many commenters stated that the proposed definition of CCRMU does not provide the regulated community with “fair notice” of what in fact is forbidden or required. Citing to *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012), these commenters stated that due process requires that “laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” According to these commenters, the proposed CCRMU definition does not give fair notice of what is regulated because it is an overly broad definition that would

apply to “any non-containerized accumulation of CCR.” Furthermore, commenters raised concern that EPA has not provided any clarity on how much non-containerized CCR is enough to trigger regulation, nor does the proposal provide any criteria for determining significance, but instead points to examples where it does not expect this to be the case, such as closed or inactive process water ponds, cooling water ponds, wastewater treatment ponds, and stormwater holding ponds or aeration ponds. These commenters also questioned the references to evaporation ponds or secondary or tertiary finishing ponds that have not been properly cleaned up as examples of potential CCRMU, because in the 2015 CCR Rule preamble, EPA had identified these as examples of impoundments that would not be considered CCR surface impoundments because they contained only de minimis concentrations of CCR. These commenters argued that the burden is on EPA to provide the regulated community with ascertainable certainty as to what the regulation requires, a mark for which they believe the proposed CCRMU definition falls short.

Commenters also pointed out that the limitations of or exemptions from the definition were only discussed in the preamble to the proposed rule but were not reflected in the regulatory text itself. These commenters argued that the CCRMU definition must include various limitations and exceptions in the final rule, such as, specifying a *de minimis* or insignificant quantity threshold in the definition of a CCRMU. Commenters further stated that without such clarity, owners or operators would be required to consider all CCR placement as CCRMU.

As discussed in the preceding section, EPA has revised the rule to be consistent with the results of the 2024 Risk Assessment, and the final rule defers the regulation of CCRMU containing between one and 1,000 tons of CCR to a permitting authority. Only CCRMU containing 1,000 tons or more of CCR will be subject to the applicable requirements for CCRMU after the effective date of this rule. Although EPA has codified the thresholds in § 257.50(d) rather than the CCRMU definition, the effect is the same. In addition, as discussed in more detail in Unit III.C.2.a, EPA has revised the CCRMU definition in response to concerns raised by commenters that the definition was confusing and unclear. The combined effect of these revisions is more than sufficient to address the commenters’ concerns about the clarity of the definition including claims that

the proposed regulations would not provide regulated entities fair notice of what the regulations require.

Finally, EPA acknowledges that the reference in the proposal to evaporation ponds, or secondary or tertiary finishing ponds that have not been properly cleaned up as examples of potential CCRMU was a mistake. EPA agrees that these units would generally be expected to contain no more than a *de minimis* amount of CCR.

iv. Exemption for Beneficial Use of CCR

Several commenters stated that the CCRMU definition is too broad and does not account for the beneficial use of CCR. According to these commenters, the proposal to regulate CCRMU effectively revoked or amended the current exemption for beneficial use in § 257.50, and the broad CCRMU definition now requires previously approved beneficial uses to be reexamined for potential regulation. Several of these commenters criticized the agency for failing to address the issue in the proposal, and argued that the Agency lacked the authority to include such beneficial uses, either because neither RCRA section 1008(a)(3) nor section 4004(a) authorize EPA to regulate use or because such regulation would be inconsistent with the 2015 Regulatory Determination. These commenters recommended that the CCRMU definition be revised to exclude any beneficial use of CCR as defined by § 257.53 or as previously approved by State agencies.

By contrast, several commenters request EPA to prohibit the use of coal ash as fill unless full protective measures such as liners, monitoring, and caps are required everywhere it is placed. Commenters claimed that immediate attention to this recommendation will protect the health and environment of millions of U.S. residents by preventing the spread of toxic coal ash pollution.

EPA disagrees that the proposal to regulate CCRMU effectively revoked or amended the current exemption for beneficial use in § 257.50. The proposal merely accurately reflects the existing regulations, which these commenters have misunderstood.

Under the existing regulations, the direct placement of CCR on the land on site of a utility, with nothing to control releases is, by definition, a CCR pile and therefore not beneficial use. The examples of historical CCRMU discussed in the proposal, structural fill and CCR placed below currently regulated CCR units on-site of a utility also clearly fit that definition.

These are the same provisions that have been in place since 2015. The existing definition of a CCR pile is

Any non-containerized accumulation of solid, non-flowing CCR that is placed on the land. CCR that is beneficially used *off-site* is not a CCR pile.

§ 257.53 (emphasis added). The second sentence expressly limits the beneficial use of CCR to “off site,” and thus any non-containerized CCR placed directly on the land on-site of a utility is not beneficial use.

EPA previously explained this in its August 14, 2019, proposal “Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Enhancing Public Access to Information; Reconsideration of Beneficial Use Criteria and Piles” to revise the definition of a CCR pile with respect to temporary piles. 84 FR 40353. Specifically, EPA proposed to establish a new set of requirements that would apply equally to temporary or “storage piles” located on-site and off-site of a utility. As part of the background to that proposal, EPA described the requirements under the existing regulation so that the public could fully understand what it was—and was not¹³⁹—proposing to revise. The proposal reiterated the existing definition of a CCR pile in § 257.53, and explained that this definition closely mirrors the RCRA definition of disposal, which is defined in part as the “placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.” See 42 U.S.C. 6903(3). EPA further explained:

Under this regulation, CCR piles constitute disposal and are consequently subject to all regulatory criteria applicable to CCR landfills. In contrast, activities that meet the definition of a beneficial use are not considered disposal, even if they involve the direct placement on the land of “non-containerized” CCR. See §§ 257.50(g) and 257.53 (definitions of CCR landfill and CCR pile); 80 FR 21327–30.

The current regulation distinguishes piles of CCR on-site (at an electric utility or independent power producer site) from temporary piles of CCR off-site (at a beneficial use site), based on whether CCR from the pile could fairly be considered to be in the process of being beneficially used. See § 257.53 (definition of CCR pile); 80 FR

21356 (April 17, 2015). While the CCR from the pile on-site may someday be beneficially used, it is not currently in the process of being beneficially used . . . If CCR is not containerized, the pile is a CCR pile and subject to the same requirements as a CCR landfill. See *Id.*

In contrast, the regulations treat CCR stored off-site at a beneficial use site in a temporary pile to be in the process of being beneficially used (even though a pile is not itself a beneficial use). If the CCR is temporarily placed at a beneficial use site and meets the regulatory definition of a beneficial use, the pile is not a CCR pile and is not subject to disposal requirements.

. . . .

In the current definition [of a CCR pile], EPA distinguishes between piles on-site (which were almost always regulated as landfills) and piles off-site, (which, if temporary, were generally considered to be beneficial use, subject only to the four criteria in the definition). The current regulation also distinguishes between on-site piles that are not containerized and those that are containerized. See 80 FR 21356 (April 17, 2017); § 257.53.

84 FR 40365.

Thus, under the 2015 CCR Rule the activities covered under the definition of a CCRMU (*i.e.*, permanent placement of CCR on the land, on-site of a utility, without controlling releases) were defined as disposal rather than beneficial use. In 2019, EPA did not propose to revise or reconsider that. Instead, EPA proposed to extend that existing requirement to permanent piles located off-site of a utility. EPA therefore declines to reconsider the issue here.

In the May 2023 proposed rule EPA expressly stated that it did not intend to reopen or reconsider any issue other than those on which the agency expressly solicited comment.

In this proposal, EPA is not reconsidering, proposing to reopen, or otherwise soliciting comment on any other provisions of the existing CCR regulations beyond those specifically identified in this proposal. For the reader’s convenience, EPA has provided a background description of existing requirements in several places throughout this preamble. In the absence of a specific request for comment and proposed change to the identified provisions, these descriptions do not reopen any of the described provisions.

88 FR 31984. EPA further advised the public that it would “not respond to comments submitted on any issues other than those specifically identified in this proposal, and such comments will not be considered part of the rulemaking record.” *Id.*

Nowhere in the May 2023 proposed rule did EPA solicit comment on or suggest that it was in any way reconsidering the existing definition of

¹³⁹ EPA expressly advised the public that it was “not reconsidering, proposing to reopen, or otherwise soliciting comment on any other provisions of the final CCR rule beyond those specifically identified in this proposal.” 84 FR 40355.

a CCR pile. The sole mention in the proposal is EPA's explanation that its proposed definition of a CCRMU was "based on the current definitions of a CCR pile—which is currently regulated as a CCR landfill. . . ." Id at 32018. Consistent with the interpretation that all CCR placed on the land on-site of a utility is currently regulated, EPA also characterized structural fill and CCR placed below currently regulated CCR units on-site of a utility as "historical" solid waste management. Id. While commenters mischaracterize such activities as beneficial use, EPA's characterization of this conduct as "historical" shows that the Agency assumed that facilities were complying with the existing requirement and had not continued these practices on-site.

Accordingly, EPA declines the commenters' request to reconsider the definition of a CCR pile. EPA also declines to prohibit the use of CCR structural fill as part of this rulemaking. That issue is related to the 2019 proposal¹⁴⁰ to revise the fourth criterion in the definition of beneficial use, which remains pending.

v. Exemption for Roadbeds and Associated Embankments

EPA proposed to exempt CCR used in roadbeds and associated embankments. EPA further proposed that if a facility subsequently determined that the CCR in onsite roadbed is contributing to contamination of the aquifer, the facility would be required to address the contamination as part of the ongoing remediation.

No commenters opposed EPA's proposal, and several commenters supported it. However, commenters pointed out that EPA had neglected to include an exemption for roadbeds and associated embankments in the proposed regulatory text.

EPA is finalizing the exemption for roadbeds as proposed, and has amended the definition of a CCRMU accordingly.

b. Revision to Definition of CCR Unit

In order to distinguish between CCR units that would be subject to all of the requirements in part 257, and those that would be subject to only a subset, EPA proposed to rely on two terms: (1) CCR unit and (2) CCR management unit. Under the proposal the term, "CCR units" would refer to only the units subject to all of part 257, subpart D. As defined in the proposal, the term "CCR management unit" would refer to the units subject only to the subset of groundwater monitoring, corrective action, closure, and post-closure

requirements. To effectuate this EPA proposed to modify the definition of *CCR unit* by stating that *CCR management units* are not covered by the definition of a *CCR unit*. Under the existing regulations, CCR units are defined as "CCR landfills and CCR surface impoundments, as well as any lateral expansion of a CCR landfill or CCR surface impoundment. In addition, the term *CCR unit* already covers inactive CCR surface impoundments at active facilities because these units are CCR surface impoundments." 40 CFR 257.53

Commenters raised concern about the "circularity" of these definitions, and requested clarification on what type of unit would be considered a CCR unit, CCRMU, CCR landfill, or CCR surface impoundment. Several commenters noted that

"[f]or instance, 'CCR landfill,' 'CCR management unit,' and 'CCR unit' are defined by reference to each other. For example, a 'CCR landfill is 'not a surface impoundment' and not a 'CCRMU,' while a 'CCRMU' is 'not a CCR unit' but includes 'inactive CCR landfills' and 'CCR units that closed prior to October 17, 2015.' And similarly, a 'CCR unit' is 'not a CCRMU,' but includes CCR landfills and CCR surface impoundments. Similar circular references are contained in the definitions of 'inactive CCR landfill,' 'inactive facility,' and 'legacy CCR surface impoundment.'

Commenters claimed that defining one term by exclusion of another and in turn defining the latter term by exclusion of the former provides no clarity on the boundary between the two. These commenters went on to state that "in a context in which definitional clarity is essential for regulatory clarity—i.e., what's "in" and what's "out"—such ambiguity is fatal, EPA must clarify these definitions to define these terms by their essential characteristics, not by circular references to each other." And as discussed in a previous section, some commenters were also confused by EPA's explanation in the proposal that, because it planned to use the term "CCR unit" to refer only to those CCR units that would be subject to all of the regulations in subpart D, CCRMU would not be included in this term.

In light of these comments, EPA reevaluated the proposed definitions and agrees that revisions are necessary. As noted, the proposed terms were intended to categorize units according to the requirements that would eventually be applied to them. EPA hoped that as a consequence, few revisions to the regulations would be necessary, with the idea that this would be less confusing to regulated entities and the public. Unfortunately, that was

not the case and as the commenters noted, the definitions were frequently circular. Consequently, the final rule relies on three definitions: *CCR unit*, *Regulated CCR unit*, and *CCR management unit*.

EPA has largely reverted to the existing definition of a *CCR unit*. The definition, as it was promulgated in 2015, provides that

"*CCR unit* means any CCR landfill, CCR surface impoundment, or lateral expansion of a CCR unit, or a combination of more than one of these units, based on the context of the paragraph(s) in which it is used. This term includes both new and existing units, unless otherwise specified.

Section 257.53. To avoid any ambiguity, EPA has also added a sentence stating that "This term includes both Regulated CCR units and CCR management units." This is now the broadest term under the regulations and encompasses all units subject to 40 CFR part 257, subpart D.

This final rule now also includes the term *Regulated CCR unit*, which refers to the units regulated by the 2015 CCR rule, i.e., new CCR landfills and new CCR surface impoundments (which include all lateral expansions of CCR landfills and CCR surface impoundments), existing CCR landfills, existing CCR surface impoundments, and inactive surface impoundments at active facilities. It also includes legacy CCR surface impoundments. Because legacy CCR surface impoundments will be subject to the same requirements as other inactive CCR surface impoundments, using this term will allow the Agency to implement this with relatively few revisions to the regulatory text.

Finally, the final rule largely reverts to the proposed definition of a CCR management unit. This final rule defines *CCR management unit* to mean any area of land on which any noncontainerized accumulation of CCR is received, is placed, or is otherwise managed, that is not a regulated CCR unit. This term includes inactive CCR landfills and CCR units that closed prior to October 19, 2015. EPA has also included a definition of the phrase, "closed prior to October 19, 2015," which provides that the term means "the CCR landfill or surface impoundment completed closure of the unit in accordance with state law prior to October 19, 2015."

EPA deleted the phrase "at any time" from the proposed definition. EPA had originally included that phrase to clarify that it did not matter when the CCR was placed, received, or otherwise managed, provided the CCR remained present at the site. EPA deleted the phrase from

¹⁴⁰ 84 FR 40353 (August 14, 2019).

the final definition because, as the D.C. Circuit has already explained, this concept is fully communicated by the phrase “is placed,” and the inclusion of the phrase “at any time,” is therefore redundant. In addition, several commenters were confused by the phrase, assuming it meant that if CCR had ever been placed on the land at any time, even if it is no longer present, the site would be considered a CCRMU.

These definitions are all codified in the regulatory text at § 257.53. EPA also made conforming changes throughout 40 CFR part 257, subpart D to clarify which types of CCR units are subject to which requirements. As discussed elsewhere in this preamble, consistent with the proposal, EPA is extending only a subset of the existing requirements in part 257, subpart D to CCRMU, consisting of requirements for groundwater monitoring, corrective action, closure, post-closure care, and recordkeeping.

c. Revisions to Definitions of Owner and Operator

EPA proposed revisions to the existing definitions of *Owner* and *Operator*. The existing definition of *Owner* is the “person(s) who owns a CCR unit or part of a CCR unit.” First, EPA proposed to revise the definition to incorporate the concept of CCRMU into the existing definition because CCRMU would otherwise be excluded from the definition of a CCR unit as discussed in the preceding Unit of the preamble. This would be accomplished by adding “or CCR management unit” to the existing definition. Second, the Agency proposed to revise the definition of *Owner* to include the owner(s) of the entire facility, which would be achieved by adding “or a facility, whether in whole or in part” to the definition. EPA did not propose to revise the definition of a “facility,” which under the existing regulations means “all contiguous land, and structures, other appurtenances, and improvements on land, used for treating, storing, disposing, or otherwise conducting solid waste management of CCR. A facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them).” 40 CFR 257.53.

Some commenters opposed changing the definition of *Owner*. One commenter said “It may be the current owner is unaware he owns the newly regulated facility. The current operator may have none of those parties responsible conducting activities since the parties may have ceased to exist long ago. Or, if the current owner is unwilling to work with those who previously

disposed of the ash (potentially beneficially) there are legal issues (including potential access and trespass rules) that will need to be resolved.”

Commenters agreed that it would not be appropriate to include an innocent owner provision, specifically because of the difficulty in defining complex owner structures where direct accountability is difficult to define. One commenter “does not fully agree with this ‘limited accountability’ and suggest accountability must also honor indemnity and the assignment of liability defined in a Purchase and Sale Agreement (PSA). Specifically, any entity should transition or maintain liability based on an established purchase and sale agreement, thus responsibility cannot be limited to only the current owner. In addition, it is reasonable to expect that for known active or inactive CCR Units at an active facility, the current owner should be responsible for required closure that satisfies the requirements of the 2015 CCR Rule and for corrective action that does not exceed industry standard for remediation. However, it is unreasonable to expect only current owners to be accountable for all past practices and the responsibility for the unknown, specifically for areas that were undefined and unknown and most importantly unregulated at the time of a transaction from a previous owner, most often a regulated utility.”

EPA proposed and is finalizing this revision in part to account for the more complicated ownership arrangements that exist at some utilities. EPA has found that there may be multiple owners at the same facility; for example, one entity may hold title to a single impoundment, while another entity may own the remaining disposal units at the site. Moreover, ownership can change over time, as individual units or portions of the facility are parceled off. This final rule also more accurately reflects the nature of the obligations EPA is establishing for CCRMU. For example, as discussed below, EPA is finalizing the regulations to require an investigation of the entire facility to identify CCRMU. At many sites, this would involve areas other than those encompassed by the definition of a CCR unit, extending to all areas where disposal or other solid waste management may be occurring. Moreover, relying exclusively on the “owner” of the CCRMU may be ambiguous in this context, as at some sites the owner may not yet be aware that a CCRMU is present (e.g., because it results from the historic placement or accumulation of CCR). EPA recognizes that this final rule will apply to

currently regulated facilities and newly regulated facilities, but EPA does not expect that this revision will actually amend the entities that currently are liable. EPA expects that most (if not all) utilities currently operate as though the regulation already required the owner and operator of the facility to take actions; for example, under the existing regulations owners and operators are required to conduct corrective action even where the plume has migrated beyond the footprint of the regulated unit. In addition, EPA is extending the deadlines for the CCRMU requirements, which can accommodate any issues with access to the facility in order to conduct the applicable requirements.

For similar reasons, EPA proposed to revise the definition of *Operator* to incorporate the concept of CCRMU into the existing definition by adding “or CCR management unit” to the existing definition. In addition, the Agency proposed revisions to account for the unique characteristics of a CCRMU. In cases where the CCRMU is closed (i.e., not receiving waste or otherwise in operation) or is a historic placement or accumulation of CCR, there may not be an entity that neatly fits the normal concept of an “operator,” because there may not be any current or ongoing oversight or activity with respect to the continued use of the unit. To avoid any ambiguity, EPA proposed to revise the definition of “operator” to clarify that the term *Operator* includes those person(s) or parties responsible for disposal or otherwise actively engaged in solid waste management of CCR. It also includes those responsible for directing or overseeing groundwater monitoring, closure, or post-closure activities at a CCR unit or CCRMU.

Commenters said the revised definition of operator is “too broad and may be interpreted to impose CCR Rule liability on individuals or contractors who are retained by owners or operators to ‘actively engage’ in CCR waste management. This definition should be revised to reflect the standard principles for ‘operator’ liability under environmental laws, which should not include employees, individuals, or contractors operating under the direction of a responsible owner or operator.” Another commenter disagreed with the revised definition of *Operator*, “which can imply the operator could have obligations under this rule. We disagree. While some owners and operators are one and the same many facilities are operated by third parties operators and in these cases, such operators should have no obligations under this proposed rule. We request EPA clarify that distinction

and clearly state that third party operators have no obligation.”

Another commenter stated “Companies actively engaged in the solid waste management of CCR” would include the construction contractors responsible for installation of CCR units including excavation, lining, filling, regrading, covering, closure, and more. Companies “responsible for directing or overseeing groundwater monitoring, closure or post-closure activities” would include well drillers, the professional engineers who certify the plans for CCR units, and again, construction contractors. Contractors will no longer be willing to ‘actively engage[] in the solid waste management of CCR’ or ‘direct[] or oversee[] groundwater monitoring, closure or post-closure activities’ if they will consequently become liable for compliance with the CCR rule. As a result, the ‘shortage of contractors’ will continue and grow worse. EPA should revise the definition of ‘Operator’ to clarify that contractors are not Operators.”

The revision to the definition of *Operator* is not intended to include every person who is “actively engaged in the solid waste management of CCR” but would follow the standard “operator” liability under environmental regulations. Such liability would include the operator who oversees the facility to ensure compliance with the regulations.

Because multiple entities may potentially be liable, (i.e., owners and operators) EPA is providing the following guidance. Consistent with EPA’s typical practice, unless otherwise provided in the regulations, as long as one responsible entity (an owner or operator) has complied with the requirements, EPA will consider the obligation satisfied as to all potentially liable parties and will initially rely on owners and operators to determine among themselves how best to ensure compliance with the requirements. See, e.g., 45 FR 33295 (May 19, 1980). (“EPA has no intention to require both owner and operator to take all or even most compliance actions in tandem. EPA will regard compliance by either owner or operator with any given obligation under the permit as sufficient for both of them”).

EPA is finalizing the revisions to *Owner* and *Operator* as proposed without revision. This is codified in the regulatory text at § 257.53.

d. Conforming Revisions to Other Existing Definitions

EPA proposed revisions to eight definitions in § 257.53 to refer to CCRMU. These definitions currently

refer only to CCR units and EPA proposed to add the words “or CCR management unit” to the definitions to incorporate the concept of CCRMU into the existing definition. The eight definitions for which EPA proposed this revision are: Active life or in operation, Active portion, Closed, CCR landfill or landfill, Qualified person, Qualified professional engineer, State Director, and Waste boundary. EPA received comments only about clarifying the definition of “closed,” which is discussed in the Volume II Response to Comments document. EPA did not receive comments about the other seven definitions for which EPA proposed this revision. As described in Unit III.C.2.b of this preamble, EPA has revised the definition of “CCR unit” in response to comments, and as a consequence the definitions for Active life or in operation, Active portion, Closed, Qualified person, Qualified professional engineer, and Waste boundary no longer need to be amended. EPA is finalizing the proposed revisions to the definitions of CCR landfill and State Director. These are codified in the regulatory text at § 257.53.

e. Scope of Regulated Facilities With CCRMU

EPA proposed to require the owners or operators of both active facilities with one or more currently regulated CCR unit(s) and inactive facilities with a legacy CCR surface impoundment to comply with the CCRMU regulations. The term active facility or active electric utilities or independent power producers is defined in § 257.53. Inactive facilities are discussed in Unit III.A.1.c of this preamble.

Some commenters on the proposed rule opposed limiting the universe to active facilities and inactive facilities with at least one CCR unit. They argued that CCR in landfills, dewatered surface impoundments, and CCRMU at other, currently unregulated, active facilities pose the same risks to groundwater, surface water, and air as facilities with CCR units. These commenters said RCRA section 4004(a) cannot be met if these leaking units are arbitrarily excluded from regulation. Other commenters said EPA does not have the authority to regulate CCRMU at all and should limit the scope of the final rule to units that pose risks.

After reviewing the comments on the proposed rule, EPA reconsidered whether the regulated universe should be expanded to include other facilities currently generating power for the electrical grid that only have CCRMU on-site. These unregulated active facilities, or “Other Active Facilities,”

are those that: (1) On or after October 19, 2015, were producing electricity for the grid; (2) Had ceased placement of CCR in their on-site CCR units before the effective date of the 2015 CCR Rule (October 19, 2015); and (3) Had no inactive CCR surface impoundments. As such, CCRMU (e.g., inactive CCR landfills, closed CCR landfills, or closed CCR surface impoundments) are located at these facilities. Commenters on the proposed rule identified 13 units at six other active facilities, based on sourced data, and these units including inactive CCR landfills, closed CCR landfills, or closed CCR surface impoundments. Based on the most recent information, including from NODA comments, EPA believes there are nine units at five other active facilities.¹⁴¹

The addition of these units provides regulatory consistency; the CCRMU at these active facilities pose the same risks to human health and the environment whether or not they are co-located with a currently regulated CCR unit or a legacy CCR surface impoundment. And with the expansion of corrective action and closure obligations to CCRMU, these facilities are more similarly situated to the currently regulated active utilities and independent power producers than they are to the inactive facilities that remain exempt under this final rule (i.e., inactive facilities with only CCRMU). Moreover, in contrast to the exempt facilities, EPA was able to identify the affected facilities and evaluate the potential consequences of regulating them.

EPA disagrees that it lacks the authority to regulate these CCRMU, for the same reasons discussed in Units II.C and III.C.2.a of this preamble.

The Agency also considered whether to regulate all CCRMU at inactive power plants. But as EPA explained in Unit III.B.1.b.i.(b) of this preamble, the location and number of inactive facilities without a legacy CCR surface impoundment are unknown, as is the number and condition of the units at these facilities. Without being able to better understand the full extent of the sites and entities that could be affected, EPA is not prepared to expand the regulations to this extent at the current time. Even though CCRMU pose the same risk when located at active or inactive facilities, EPA considers that the higher priority is to ensure that active facilities address the full extent of the contamination that currently exists, and to prevent further contamination at

¹⁴¹ This universe is included in “Universe of CCR Management Units. April 2024.” in the docket for this action.

these sites—in other word to address rather “those ills we have, than fly to others that we know not of.”

Therefore, EPA is finalizing amendments to regulate CCRMU at all active electric utilities or independent power producers that generated power for the electrical grid on or after October 19, 2015, in addition to those facilities with legacy CCR surface impoundments. As noted, EPA refers to these facilities as “covered facilities” throughout this preamble. This is codified in the regulatory text at § 257.50(d).

3. Facility Evaluation for Identifying CCR Management Units

EPA proposed that owners or operators of active facilities with a currently regulated unit or inactive facilities with a legacy CCR surface impoundment would need to conduct facility evaluations. The purpose of the facility evaluation is to confirm whether any CCRMU exist on-site, and, if so, to delineate the lateral and vertical extent of the unit(s). In developing the proposal, EPA relied heavily on the RCRA subtitle C Facility Assessment process for identifying solid waste management units at a hazardous waste facility. In addition, EPA accounted for certain existing requirements in the CCR regulations; for example, under the 2015 CCR Rule, facilities were required to compile a history of construction for their existing impoundments. 40 CFR 257.73(c)(1). Facilities were generally able to obtain all information specified in § 257.73(c)(1)(i) through (ix), even for units constructed decades ago. EPA expected that facilities will similarly be able to obtain the information that EPA proposed would be required in the Facility Evaluation Report (FER).

EPA proposed that facilities prepare one report, to be completed in two consecutive steps, with a single deadline. As proposed, the first step would consist of a thorough review of available records in combination with a physical facility inspection and any necessary field work, such as soil sampling, to fill any data gaps from the information obtained from the review of available records. The second step of the facility evaluation would be to generate a FER to document the findings of the facility evaluation. EPA proposed separate deadlines to complete the investigation and to compile the report: a deadline of no later than the effective date of this final rule to initiate the facility evaluation and a deadline of no later than three months after the effective date to complete the FER. Commenters suggested that EPA follow more closely the investigation processes developed under the current RCRA and

CERCLA regulatory programs, that is, RCRA Facility Assessment Guidance, CERCLA all appropriate inquiry (Phase I and Phase II) process. Commenters suggested that separating the information collection requirements from the physical evaluation requirements will provide a more thorough evaluation of existing available information to better inform the physical evaluation to fill data gaps and properly identify CCRMU.

EPA is finalizing the procedures for facility evaluation for identifying CCR management units with a few revisions from the proposal. Owners or operators of any covered facilities will need to conduct a facility evaluation. The purpose of the facility evaluation is to confirm whether any CCRMU containing one ton (or more) exist on-site, and, if so, to delineate the lateral and vertical extent of the unit(s). In developing the final rule EPA relied heavily on the investigation processes EPA developed under the current RCRA and CERCLA regulatory programs, that is, the RCRA subtitle C Facility Assessment process for identifying solid waste management units at a hazardous waste facility, and the CERCLA all appropriate inquiry (Phase I and Phase II) process.

There is a two-step process for a facility evaluation. The first step consists of a thorough review of available records. The second step of the facility evaluation is to conduct a physical facility inspection and any necessary field work, such as soil sampling, to fill any data gaps from the information obtained from the review of available records.

In response to comments, EPA examined facility evaluation processes currently being implemented under RCRA and CERCLA and concurs that creating two separate reports—one for each step of the process—is consistent with these established approaches. EPA believes this two-step approach to facility evaluation will reduce the need for rework and the overall burden for both facility owners or operators and contractors who may be hired to complete this work. Additionally, EPA concludes this approach increases transparency by allowing the public the opportunity to see the work plan developed by the owner or operator.

Therefore, the final rule creates two parts to the facility evaluation—the Part 1 FER includes the results of the available information collection and evaluation. The Part 2 FER addresses data and information gaps through a physical evaluation of the facility. Together, the Part 1 and Part 2 reports will give a complete picture of the

historic use, placement and the current status of CCR at each facility, ultimately identifying any CCRMU containing 1,000 tons or more that will be required to meet the regulatory requirements of this final rule. The FER must also identify those CCRMU containing between one and 1,000 tons, whose regulations is deferred until permitting. See, Unit III.C.2.a.iii of this preamble for further discussion.

a. Final Requirements for Facility Evaluation for CCR Management Units

During the facility evaluation, the owner or operator of a covered facility will need to identify and delineate the extent, laterally and vertically, of any CCRMU containing one ton or more at the facility. To begin, the owner or operator reviews all existing records and documents reasonably and readily available to (including information that is readily and reasonably attainable by) the facility, that contain information regarding any past and present CCR management that resulted in the accumulation of CCR on the ground. Consistent with the definition of a CCRMU, in this context EPA considers the terms “placement” and “receipt” to include situations in which spilled or released CCR has been left on the ground. During this first step, the facility is required to gather and review reasonably and readily available information to identify potential locations of CCR placement at, and to determine preliminary boundaries, lateral and vertical dimensions, and estimates of volume of any CCRMU. Then, at the second step, the facility evaluation requires physical inspection of the facility. Where necessary, the physical inspection must include field investigation activities, such as conducting exploratory soil borings, geophysical assessments, or any other similar physical investigation confirmation activities to establish the location and boundaries of identified CCRMU, and to affirmatively rule out other areas of potential CCR placement at the facility that were identified during the information review. The scope of the facility evaluation is the entire facility as the term is currently defined in 40 CFR 257.53.

As noted, the facility evaluation begins with a review of all reasonably and readily available information regarding past and present placement of CCR at the facility. In this first stage, the facility must gather all reasonably and readily available existing information that may be useful to determine any locations at the facility where CCR may have been placed (including spilled) on the ground. EPA expects that in this

initial phase, the facility will cast a wide net, and collect all reasonably and readily available information that could potentially contain useful information to identify the potential locations of CCR placement at the facility. Finally, to complete the information review, the investigatory process must be documented, any data gaps identified, and plans for conducting a physical inspection of the site to verify locations, boundaries, and volumes of CCR placement at the facility formalized. This information is documented in the Part 1 FER. Then, at Part 2, the physical inspection must be documented. Each step of this process is described in greater detail below.

All recorded observations and data gathered during the facility evaluation, including any conclusions regarding the status of each CCRMU containing one ton or more of CCR at the facility (e.g., delineation of the lateral and vertical extent of each CCRMU and an associated site map that identifies the location of the CCRMU (including GIS coordinates)), must be assembled and incorporated into the FER.

If, after conducting a thorough document review and a visual inspection, the facility has found no evidence of any CCRMU containing one ton or greater, no further testing or sampling is required to conclude that no such CCRMU are present at the facility. Consistent with the proposal, the final rule does not require facilities to conduct widespread site sampling to prove that no such CCRMU exists on-site.

The FER must include a certification to be signed by a P.E. and the owner or operator or an authorized representative. Owners or operators of active or inactive facilities with one or more CCR unit(s) that do not contain any CCRMU would need to complete and place in the operating record a certified FER documenting the steps taken during the facility evaluation to determine the absence of any CCRMU. Both Part 1 and Part 2 of the FER must be placed in the facility operating record (§ 257.105(f)(25)), submitted to the appropriate regulating entity (§ 257.106(f)(24)), and published on the facility's website (§ 257.107(f)(24)). Further, the Agency is requiring that the FER include a certification to be signed by the owner or operator or an authorized representative similar to the certification that is required at § 257.102(e) and (f) for existing units undergoing closure.

i. Facility Evaluation Report Part 1—Information Collection, Data Gap Identification

The first step in the facility evaluation process involves the collection of reasonably and readily available information that contains any detail or information on whether CCR was either routinely and systematically placed on land, or where facility activities otherwise resulted in measurable accumulations of CCR on land. The quality and reliability of the information review will depend greatly on the owner's and operator's ability to collect relevant information. Information reviews may provide misleading results when significant sources of information are not considered. The information that must be gathered during this step should include any documents that contain information relevant to past facility operations and waste disposal processes. By the conclusion of the facility evaluation, EPA expects that the facility would be able to identify the date, locations, durations, and volumes or estimated quantities of CCR placement.

EPA expects that the amount of available written information and documentation that will be available for review during the document review phase may vary by facility. However, the following documents developed as part of complying with 40 CFR part 257, subpart D, which are reasonably and readily available to facilities, would normally contain information that can be useful in identifying CCRMU: inspection reports; history of construction reports; fugitive dust control plans; annual groundwater monitoring and corrective action reports; ASDs; ACM reports or other corrective action reports; and closure plans and reports. Further, there are other sources of reasonably and readily available data that frequently contain information relevant to past facility operations and waste disposal processes, such as facility compliance reports produced for non-CCR programs (e.g., Toxic Substances Control Act [TSCA]/Occupational Safety and Health Administration [OSHA]/National Pollutant Discharge Elimination System [NPDES]/Clean Air Act [CAA]/Clean Water Act [CWA]); permits and permit applications, including NPDES, solid waste, dam safety, and air permits; historical and contemporary monitoring and reporting data, and facility operating logs and maps; and site imagery including available historical aerial photographs, site photographs, topographic maps, and/or engineering or construction drawings, including

drawings for physical facility improvement projects, such as surface water control, water and power infrastructure and utilities, roads, berms, ponds and/or other physical features at the facility. EPA expects that facilities will search all reasonably and readily available records to determine whether they contain information relevant to the potential existence and locations of CCRMU containing at least one ton of CCR.

EPA proposed that as part of this process, owners and operators must further gather information by conducting meetings with current facility personnel familiar with the facility to the extent that those persons are available and have knowledge about past and/or present facility operations. The goal of the meeting process was to help gather any information relevant to the facility operations and waste disposal processes.

Commenters objected that conducting interviews of current or former facility personnel and any available State and local officials is burdensome and will place a significant strain, specifically, on State and local agencies. In addition, commenters stated that interviews with State personnel would put the State personnel in a difficult position to verify compliance on EPA's behalf without receiving State permit approval first.

In this final rule, EPA is not requiring the owner or operator to conduct interviews of current or former facility personnel, nor any available State and local officials. The regulatory language of the final rule only requires documentation of any interviews that are conducted as part of the information collection process. Nevertheless, owner and operator interviews of current or former personnel could well assist in identification of data and information that will be helpful in identifying CCRMU, particularly at those facilities that have not been in operation recently. Consequently, EPA continues to recommend that facilities use good faith efforts to collect information through interviews where current or past personnel are willing to assist in the identification of information or data that will assist the identification of CCRMU.

During this stage, EPA is requiring that a P.E. review the documents and information gathered during the information review process to draw conclusions regarding the existence of CCRMU at the facility. At the end of this stage, EPA expects the facility to identify: (1) Any areas where the facility can affirmatively conclude based on the reasonably and readily available information that one or more CCRMU

containing greater than one ton are present; and (2) Any areas where the reasonably and readily available information indicates that CCR may have been either routinely and systematically placed on the land, or where facility activities otherwise could have resulted in one ton of CCR on the land (*i.e.*, areas where the available information indicates that one or more CCRMU may be present).

Each of the information sources discussed above can provide valuable information that can be used to identify the existence and locations of CCRMU. In addition, some specific examples are provided below:

- Environmental reports for multimedia inspections contain useful information on site management practices, monitoring data, and unit conditions. These reports can also describe comprehensive monitoring evaluations at the site that can indicate where releases or areas of concern exist.

- Multimedia permit and permit applications contain large amounts of information on the facility design, waste management practices including how wastes were disposed of, and the physical characteristics of the surrounding area. These documents can contain old topographic maps, facility figures and drawings, wastestream flow diagrams, and unit and process descriptions.

- If a groundwater monitoring report for a CCR unit indicates that contaminant levels in groundwater monitoring wells are the result of CCRMU rather than the monitored CCR unit, this would need to be further investigated during the facility evaluation process to fully delineate the locations of areas where CCR was placed on the ground, including the size of the unit and other related unit details.

- Similarly, a review of aerial photographs can identify potential CCRMU at the facility at locations that have become overgrown or otherwise hidden over time. When used in conjunction with USGS topographic maps, owners or operators can look for evidence that may be indicative of placement of CCR on the ground. As an example, if aerial photographs and USGS topographic maps indicate the existence of a pond or dam system at the site, this may be enough to warrant further investigation of available documents and may require field investigation depending on the strength of information to determine if the changes were made to allow placement of CCR on the ground.

One of the primary purposes of the information review is to provide an understanding of the CCR management

activities at the facility, allowing for subsequent observations during the physical site inspection to be focused to the greatest extent practical. While information obtained during the review may be insufficient to support affirmative conclusions regarding the existence or non-existence of a CCRMU, based on the information available at most facilities, EPA expects that it will be possible to determine which areas at the facility would need to be inspected, and the type of data that would be needed to draw definitive conclusions. The Agency expects that the information gathered in the information review will be relevant to determining the areas to be inspected during the physical (visual) site inspection. Further, the information gathered during the information review would be used to support any necessary field activities.

EPA notes that the amount of available written information and documentation that will be available for review during the document review phase will vary by facility. Commenters confirmed this expectation by noting that many of the facilities subject to this final rule may have ceased operations years, and sometimes decades, ago. They also stated that record retention and storage locations may be difficult to determine and require some effort to access for some facilities. Based on past experience, EPA continues to believe that sufficient information is reasonably and readily available to allow facilities to obtain the information required under the FER. For example, as discussed in the proposal, under the 2015 CCR Rule facilities were generally able to obtain all of the information needed to compile a history of construction for their existing impoundments, even for units constructed decades ago. See, 40 CFR 257.73(c)(1). Nevertheless, owners or operators are required to compile this information only to the extent it is reasonably and readily available. EPA acknowledges that there may be certain information or data that may be unknown or lost. EPA intends that facilities provide relevant information only if documentation exists or if it is obtained during the physical site inspection. EPA does not expect owners or operators to provide anecdotal or speculative information regarding the presence or absence of CCRMU. However, if data gaps exist, owners or operators subject to these provisions may need to collect additional field data to fill the gaps.

The Part 1 FER must also include a narrative that documents the data reviewed as part of the facility evaluation process, and that lists all of

the data and information reviewed that indicates the presence or absence of CCR management units at the facility. Finally, the FER must identify any data gaps, and provide a plan for remedying all identified data gaps through a physical examination of the facility, including any field or laboratory work needed to remedy data gaps identified in the narrative in the Part 1 FER record. The plan must include the major milestones needed to fill each identified data gaps (*e.g.*, a physical examination of the facility, sampling of media, measurements of CCR concentrations or physical presence, delineation of CCRMU) and dates to complete the needed tasks.

EPA is finalizing that Part 1 FER must contain the following: (1) The name and address of the person(s) owning and operating the facility; the unit name associated with any regulated CCR unit and CCRMU containing one ton or more of CCR at the facility; and the identification number of each CCR unit and CCRMU if any have been assigned by the State or by the owner; (2) The location of any CCRMU identified on the most recent U.S. Geological Survey (USGS) 7.5-minute or 15-minute topographic quadrangle map, or a topographic map of equivalent scale if a USGS map is not available, with the location of each regulated CCR unit at the facility identified. The location of each regulated CCR unit at the facility must also be identified in the same manner; (3) A statement of the purpose(s) for which each CCRMU at the facility is or was being used; (4) A description of the physical and engineering properties of the foundation and abutment materials on which each CCRMU is constructed; (5) A discussion of any known spills or releases of CCR, including any associated remediation activities, from each CCRMU and whether the spills or releases were reported to State or Federal agencies; (6) Any record or knowledge of structural instability of each CCRMU; (7) Any record or knowledge of groundwater contamination associated or potentially associated with each CCRMU; (8) The size of each CCRMU, including the general lateral and vertical dimensions and an estimate of the volume of waste contained within the unit; (9) Identification of all types of CCR in each CCRMU at the facility; (10) A narrative description of any closure activities that have occurred, including any applicable engineering drawings or reports; (11) A narrative that documents the data reviewed as part of the facility evaluation process, and that lists all data and information indication the

presences or absence of CCRMU at the facility; (12) Any supporting information used to identify and assess CCRMU at the facility, including but not limited to any construction diagrams, engineering drawings, permit documents, wastestream flow diagrams, aerial photographs, satellite images, historical facility maps, any field or analytical data, groundwater monitoring data or reports, inspection reports, documentation of interviews with current or former facility workers, and other documents or sources of information used to identify and assess CCRMU at the facility; (13) narrative description of any data gaps, for information in paragraphs (c)(i) through (xiii) of this section, not available in existing information collection records and a plan for remedying identified data gaps through a physical examination of the facility, including any field or laboratory work needed to remedy data gaps in the FER Part 1 record. The plan must include the major milestones needed to fill the identified data gaps (e.g., a physical examination of the facility, sampling of media, measurements of CCR concentrations in and around the unit or physical presence, delineation of CCR management unit(s)) and dates to complete such needed tasks. Also, as necessary and timely, any updates to data gap remedy plans must be added to the public record during the FER Part 1. In addition, the FER is required to include a certification from a P.E. stating that the FER meets the requirements at § 257.75(c).

ii. Facility Evaluation Report Part 2—Physical Evaluation and Remedy of Data Gaps

A facility must conduct a physical site inspection of the entire facility in all cases. The purpose of the physical site inspection is to visually inspect the entire facility for evidence of CCR placement on the land, ensure that all CCRMU containing one ton or more of CCR have been identified, and fill any data gaps identified during the initial information evaluation. To that end, EPA is finalizing without revision the requirement that the physical site inspection must consist of a visual inspection of the entire facility to look for evidence that CCR is currently being managed on the land. At a minimum, a facility is required to visually inspect the site to confirm the information obtained from the information review phase and to identify any anomalies that warrant further investigation, such as an unnatural topographic rise or depression or an area where unspecified liquid waste was applied over several

years. In addition, the facility is required to conduct any field work, such as soil sampling, necessary to determine whether areas that had been identified as a potential CCRMU in fact contain at least one ton of CCR and to obtain the information required for the FER.

The complexity of past and current facility operations, combined with the amount of data that was available for review during the information review phase would impact how extensive the facility inspection must be. For example, if facility records are sparse or contain data gaps, the Agency expects that the facility inspection would be more thorough than in situations where detailed records exist. However, even in situations where detailed facility records exist, the facility must still conduct a visual inspection to ensure that all CCRMU containing one ton or more of CCR have been identified, whether or not those areas were identified in the initial document review. In addition, EPA expects that in most cases, a facility will need to conduct some sampling or other fieldwork to obtain all the information required for the FER. For example, even if the facility had as-built engineering drawings for an old landfill, EPA expects that in some cases the facility may still need to conduct some sampling to establish the lateral and vertical dimensions of the CCRMU.

A facility can use a variety of visual means to inspect the entire site (e.g., physically walking the site, using motorized vehicles to inspect the site, using drone video footage to inspect the site) to confirm the information obtained from the information review in Part 1 and to identify any anomalies that warrant further investigation, such as an unnatural topographic rise or depression or an area where unspecified liquid waste was applied over several years. EPA recommends that any sampling be conducted using standard industry methods, including any relevant standards and methodologies established by State environmental agencies. The FER must also include a discussion of quality assurance procedures, sampling equipment handling, sample collection, analytical methods, and data reporting.

If, after conducting a thorough document review and a visual inspection, the facility has found no evidence of any CCRMU, no further testing or sampling would be required to conclude that there is no CCRMU present at the facility. EPA is not requiring facilities to conduct widespread site sampling to prove that no CCRMU exists on-site. All recorded

observations and data gathered during the facility evaluation, including any conclusions regarding the status of each CCRMU at the facility, must be assembled and incorporated into a FER, which is described in detail below.

EPA is finalizing that Part 2 FER must contain the following: (1) The name and address of the person(s) owning and operating the facility; the unit name associated with any regulated CCR unit and CCRMU containing one ton or more of CCR at the facility; and the identification number of each CCR unit and CCRMU if any have been assigned by the State; (2) The location of any CCRMU containing one ton or greater identified on the most recent U.S. Geological Survey (USGS) 7.5-minute or 15-minute topographic quadrangle map, or a topographic map of equivalent scale if a USGS map is not available. The location of each regulated CCR unit at the facility must also be identified in the same manner; (3) A statement of the purpose(s) for which each CCRMU at the facility is or was being used; (4) A description of the physical and engineering properties of the foundation and abutment materials on which each CCRMU was constructed; (5) Any further evidence of known spills or releases of CCR, including any associated remediation activities, of CCR from each CCRMU and whether the spills or releases were reported to State or Federal agencies; (6) Any further evidence of structural instability of each CCRMU; (7) Any further evidence of groundwater contamination associated or potentially associated with each CCRMU; (8) The size of each CCRMU, including the general lateral and vertical dimensions and an estimate of the volume of CCR contained within the unit; (9) Identification of the types of CCR in each CCRMU; (10) A narrative description of any closure activities that have occurred, including any applicable engineering drawings or reports; (11) A narrative that documents the nature and extent of field oversight activities and data reviewed as part of the facility evaluation process, and that lists all data and information that was reviewed indicating the presence or absence of CCRMU at the facility; and (12) Any additional supporting information used to identify and assess CCRMU at the facility, including but not limited to any construction diagrams, engineering drawings, permit documents, wastestream flow diagrams, aerial photographs, satellite images, historical facility maps, any field or analytical data, groundwater monitoring data or reports, inspection reports, documentation of interviews with

current or former facility workers, and other documents or sources of information used to identify and assess CCRMU at the facility. In addition, the FER is required to include a certification from a P.E. stating that the FER meets the requirements at § 257.75(c).

In addition to the information described in numbers (1)-(12) in the preceding paragraph, Part 2 of the FER must include a narrative that documents the nature and extent of field oversight activities and data reviewed as part of the facility evaluation process, and that lists all data and information reviewed that indicated the absence or presence of any CCRMU containing one ton or more of CCR at the facility. The narrative must also discuss how each data gap identified in Part 1 was addressed. As many commenters stated, the physical examination and any field work will require the hiring of specialized contractors. EPA understands this level of field and laboratory work will require a detailed work plan, and EPA expects the FER Part 1 data gap remedy plan to reflect this detail, including milestones and time frames for completion. EPA also anticipates that as field activities commence, plans to address data gaps may change and/or additional field work may be necessary based on ongoing discoveries. In these cases, the owner or operators will need to update the plans accordingly and update the publicly available information in the Part 1 or Part 2 FER, depending on the timing of the update.

b. Certification of Facility Evaluation Report—Part 1 and Part 2

The Agency proposed to require that the FER include a certification from a P.E. stating that the FER meets the requirements at § 257.75(c). Further, the Agency proposed to require that the FER include a certification to be signed by the owner or operator or an authorized representative similar to the certification that is required at § 257.102(e) and § 257.102(f) for existing units undergoing closure. Commenters raised concerns that the rules were not sufficiently objective or technically precise for a P.E. to be able to certify. One commenter raised that EPA has indicated that no facility has successfully implemented the 2015 CCR Rule's requirements to date, even though facilities have secured the certification of Qualified Professional Engineers as prescribed by the 2015 CCR Rule.

These commenters have misunderstood the purpose and role of the P.E. in the FER reports. The P.E. does not make final determinations; the

role of the P.E. is to act as an engineer in information collection, data gap identification, physical site inspection, and remedy of data gaps and certify accordingly. As stated in the preamble of the 2015 CCR Rule, EPA reasoned that the requirement for a P.E. maintains the most important components of any certification requirement: (1) That the engineer be qualified to perform the task based on training and experience; and (2) that she or he be a professional engineer licensed to practice engineering under the title Professional Engineer which requires following a code of ethics with the potential of losing his/her license for negligence. The final rule requirements are sufficient for an P.E. to implement the final rule and follow industry standards.

Other commenters raised that the P.E. certification requirement is overly burdensome and will extend the timeframe to complete the facility evaluation. EPA has re-structured the process for the FER by extending the time frame and separated the FER into two parts with separate and adequate time frames to prepare the reports. When determining the new compliance deadlines, EPA considered the shortages and backlogs of qualified contractors as well as the increased strain on those contractors.

Another commenter asked for EPA to modify or add language to acknowledge the good faith and due diligence efforts of a P.E., especially when considering the age and nature of the potential CCRMUs. EPA does not agree with this suggestion. As discussed above, EPA discussed in the preamble of the 2015 CCR Rule that the P.E. follows a code of ethics with the potential of losing their license for negligence. As stated in the 2015 CCR Rule preamble, the Agency maintains that an engineer is able to give fair and technical review because of the oversight programs established by the State licensing boards that will subject the professional engineer to penalties, including the loss of license and potential fines if certifications are provided when the facts do not warrant it.

EPA does not agree with suggestions to modify the certification and therefore we are finalizing the certification language as proposed.

c. Facility Evaluation Reports Deadlines

The majority of the comments related to the timing and due date of the FER report stated that EPA had not allowed sufficient time to gather the required information and conduct a physical inspection of the facility. Comments cited many concerns with the proposed time frame, *i.e.*, the time frame was too

short to complete all the tasks required, for the FER, *e.g.*, the difficulty in collecting historic information/data that may or may not be accessible at the facility or place of off-site records retention, the possible extensive volume of information, reports and/or data that owner or operators would need to review, the possible iterative nature of field work and sampling, the impact of seasonal disruptions to field work, the lack of qualified field personnel and the timing to acquire their services through contracts. Commenters suggested allowing significantly more time to complete individual aspects of the FER requirements.

EPA has reviewed the information provided by commenters citing the shortages and backlogs of qualified contractors, increased strain on those contractors related to the number of CCR units complying with the CCR rule simultaneously, difficulty accessing and reviewing historical documentation, potential seasonal disruptions, and time needed to perform quality control and quality assurance, and considers it to be persuasive. After considering these factors EPA has extended the time frame and separated the FER into two parts with separate and adequate time frames to prepare the reports.

The FER Part 1 is required to be prepared and placed in the operating record and posted on the facility's website, pursuant to § 257.105(f) no later than 15 months after the effective date of the final rule. This time frame was determined based on suggestions from commenters as to the time necessary to conduct a thorough review of historic records, and, if necessary, conduct interviews of those with facility and site knowledge, and by EPA further considering the time needed under RCRA Subtitle C and CERCLA to do similar reviews for historic sites.

The FER Part 2 is required to be prepared and included in the public record no later than 27 months after the effective date of the final rule. EPA established this time frame by also considering suggestions from commenters, who gave examples of timelines to hire contractors and conduct site work, as well as EPA's own experience and timelines at RCRA Subtitle C and CERCLA sites for conducting facility investigations. EPA believes the provided limited additional time is adequate to perform all necessary tasks under the FER, Part 1 and Part 2 respectively.

After completing the information gathering part of the facility evaluation process, owners or operators of covered facilities must compile and place in the operating record information pertaining

to every CCRMU containing one ton or more of CCR located at the facility no later than the deadline identified below. Both Part 1 and Part 2 of the FER must be posted to the facility's CCR publicly accessible internet site within 30 days of that date. In developing the list of items to be included in the FER, the Agency examined certain requirements from existing regulations for History of Construction reports that must be generated for existing CCR surface impoundments at § 257.73(c)(1) as well as other requirements necessary to provide basic information about each CCRMU containing one ton or more of CCR at the facility.

After gathering the information required for the FER Part 1 (*i.e.*, not including a physical evaluation of the facility), the owner or operator must prepare a Part 1 FER by placing the information required in the facility's operating record as required by § 257.105(f)(25).

4. Applicable Existing CCR Requirements for CCR Management Units and Compliance Deadlines

EPA proposed that in addition to the facility evaluation requirements discussed in Unit III.C.3 of this preamble, owners or operators of a CCR facility comply with the existing requirements in part 257 for fugitive dust, groundwater monitoring, corrective action, closure, post-closure care, recordkeeping, notification, and internet posting. As explained in the preamble of the proposed rule, these requirements are intended to address the risks posed by any existing releases of CCR or CCR constituents to the groundwater, regardless of when the CCR was placed in the units and prevent future releases. The other existing requirements in 40 CFR part 257, subpart D are not necessary for CCRMU. For example, (1) since CCRMU should not contain sufficient liquids to create a hydraulic head or to otherwise cause the conditions that might lead to a structural failure, the structural stability requirements are not appropriate; (2) similar to legacy CCR surface impoundments, since CCRMU are existing units and will be required to close, the location restriction and liner design requirements would not be appropriate. EPA proposed that the fugitive dust, groundwater monitoring, corrective action, closure, post-closure care, recordkeeping, notification, and internet posting requirements apply to all CCRMU at active facilities and at inactive facilities with one or more legacy CCR surface impoundment.

Several commenters generally supported the regulatory approach,

although a commenter suggested that CCRMU be subject to more existing CCR regulations, namely the location restrictions at §§ 257.60 through 257.64, the liner design criteria at § 257.71, and the structural stability requirements at § 257.73. This commenter stated that these requirements were necessary to protect human health and the environment from the risk of failure posed by poorly constructed and sited CCRMU and to provide information "critical" to developing unit closure plans and any necessary corrective action.

EPA disagrees that generally applying location restrictions, the structural stability requirements, and the liner design criteria to CCRMU would be appropriate. First, as explained in the proposed rule, the structural stability criteria are more appropriate for operational units and those units that maintain a hydraulic head. Second, the consequence of failing to comply with the location restrictions and liner design criteria requirements is closure by a specific date. 40 CFR 257.101(a) through (b)(1). Except for those situations described in Unit III.C.4.e (*i.e.*, deferral for CCRMU beneath critical infrastructure and deferral for CCRMU closed under a regulatory authority), because CCRMU are not operational CCR units and will in any event be required to close, the consequence for failure to comply with location restrictions or the liner design criteria (*i.e.*, ceased receipt of waste and closure) is moot. Additionally, the commenter failed to identify any information necessary for conducting corrective action pursuant to §§ 257.96 through 257.98 or closure in accordance with §§ 257.101 and 257.102 that would be gained by requiring CCRMU to comply with the location restrictions or liner design criteria that would not be gained by compliance with the facility evaluation and groundwater monitoring requirements.

Other commenters opposed the regulation of CCRMU holistically, citing lack of authority or lack of demonstrated risk to human health or the environment from CCRMU. Other commenters opposed EPA's proposal to apply specific existing requirements to CCRMU (*i.e.*, groundwater monitoring, corrective action, closure). Several of the commenters that opposed requiring CCRMU to comply with the existing regulations stated that applying a "one-size-fits-all" approach to CCRMU was not appropriate due to the variety of units that would be captured in the definition of CCRMU and suggested the EPA wait to regulate these units until site-specific requirements could be

developed (*i.e.*, permitting programs). Comments regarding lack of authority or lack of demonstrated risk from CCRMU are summarized and addressed in Units III.A and III.C.2.a.i of this preamble, respectively. Comments about the applicability of specific existing requirements are described and responded to in later portions of this unit (Unit III.C.4). Regarding comments about the existing regulations being what commenters characterized as a "one-size-fits-all" approach to the variety of CCR units captured under the definition of CCRMU, EPA disagrees that the existing regulations are not holistically appropriate to apply to CCRMU or to address the potential risk from these units. Furthermore, commenters did not provide suggestions on how to regulate these units under the existing regulatory framework (*i.e.*, self-implementing rule) and EPA, as explained in Units III.A and III.C.1, finds the risks posed by these units to be not only credible but significant enough to warrant regulation at this time (*i.e.*, under the self-implementing rule as opposed to waiting until the Federal permitting program is established).

In response to comments and for the reasons laid out below, EPA is finalizing the requirements for CCRMU to comply with fugitive dust, groundwater monitoring, corrective action, closure, post-closure care, recordkeeping, notification, and internet posting requirements. These requirements apply to all CCRMU at active CCR facilities, at inactive facilities with one or more legacy CCR surface impoundments, and at active facilities that ceased placement of CCR in onsite CCR units before October 19, 2015, regardless of how or when the CCR was placed in the CCRMU. These issues are discussed in more detail in this Unit of the preamble.

a. Compliance Deadlines for CCR Management Units

EPA proposed compliance deadlines for CCRMU that closely aligned to the proposed compliance deadlines for legacy CCR surface impoundments. The proposed rule explained that the 2015 CCR Rule compliance deadlines were based on the amount of time determined to be necessary to implement the requirements and the proposed compliance dates for legacy CCR surface impoundments, and CCRMU were determined using the same approach. The proposed rule further explained that some factors considered in determining the 2015 CCR Rule compliance deadlines were not relevant for CCRMU, such as the need to coordinate compliance deadlines with

the then recently promulgated ELG rule. In addition, EPA anticipated most owners or operators of CCRMU would already be familiar with the existing regulations, and therefore most of the proposed requirements for CCRMU. Consequently, EPA proposed generally expedited deadlines, as compared to the 2015 CCR Rule deadlines, based on the expected shortest average amount of time needed to complete the necessary activities to meet the requirements. In the proposed rule, EPA requested comment on the proposed compliance deadlines and the feasibility of meeting the proposed compliance time frames for CCRMU.

EPA received numerous comments regarding the proposed compliance deadlines. Several commenters expressed support for the proposed compliance deadlines for CCRMU. Generally, these commenters stated that expedited compliance was appropriate due to significant risk posed by these units, the likelihood that these units are actively contaminating groundwater, and the urgent need for corrective action to address that contamination for the protection of human health and the environment. Some of these commenters echoed the proposed rule, stating that owners' or operators' familiarity with the existing requirements, along with the fact that these units are no longer in use and therefore would not need time to cease receipt of waste, further justified the expedited deadlines.

Many other commenters stated the proposed compliance deadlines were infeasible and should, at a minimum, allow as much time for compliance as the 2015 CCR Rule deadlines, although several commenters expressed that even the 2015 CCR Rule deadlines were inadequate, and that the insufficient time frames were likely a factor in the gap between EPA's expectations and facilities' good faith efforts and utilization of best practices in developing groundwater monitoring networks, sampling and analysis plans, corrective action programs, and closure plans. Commenters pointed to several factors that they believed EPA did not fully incorporate into the proposed deadline calculations that make compliance with the proposed deadlines infeasible: EPA's grossly underestimated number of CCRMU; the large number of CCR units (*i.e.*, existing CCR units, legacy CCR surface impoundments, CCRMU) competing for limited resources to meet overlapping compliance deadlines; the limited number of qualified contractors available to conduct necessary activities to reach the compliance deadlines; the

nationwide labor shortage exacerbated by impacts from the COVID-19 pandemic; limited existing alternative disposal options; overlapping regulatory requirements (*e.g.*, State drilling permits, timing restrictions related to protected habitats, State CCR permits, Consent Decrees/Orders); seasonality impacts in different regions across the nation; and accessibility and completeness, or lack thereof, of historical documentation and information. One commenter provided specific information regarding typical delays experienced during the implementation of the 2015 CCR Rule caused by third-party availability and backlogs: two to four weeks for contractor mobilization; two to six weeks for site clearing; two to three weeks for surveys; three to 12 weeks for environmental drillers; and three to four weeks for laboratory analyses. These commenters also said EPA grossly underestimated the amount of time needed to hire a contractor, locate and review historical information, access historical or heavily vegetated portions of facilities, characterize and delineate a site, comply with the groundwater monitoring requirements, and conduct quality control or quality assurance on data and reports. Several of these commenters expressed the belief that the proposed deadlines would result in unintentional non-compliance despite facilities' best efforts to comply due to the constraints listed above. Finally, a few commenters suggested EPA create alternative deadlines or mechanisms for extensions based on site-specific characteristics.

In response to comments, EPA reevaluated the compliance deadlines for CCRMU. EPA reconsidered the impact of the following on the amount of time facilities needed to complete the activities involved in meeting the requirements: the potential size of the CCRMU universe; accessibility and abundance, or lack thereof, of historical documentation; seasonality; clearing restrictions and required local and State approvals to clear vegetation or drill wells; need to coordinate with local or State regulatory authorities; existing disposal options; impact of the national labor shortage and contractor and laboratory backlogs; and the strain on limited resources from overlapping compliance deadlines for legacy CCR surface impoundments, existing units (*i.e.*, groundwater monitoring, closure, and post-closure care), and CCRMU. Overall, EPA found the information provided regarding the infeasibility of the proposed deadlines convincing. Specifically, EPA acknowledges the

potential for an underestimation of the CCRMU universe given the number of comments received regarding non-containerized CCR historically being spread across facilities. Additionally, EPA agrees that the shortage of qualified contractors and laboratory resources has persisted, if not increased, since the 2015 CCR Rule and that the increasing demand on these finite resources from new and existing CCR units, legacy CCR surface impoundments, and CCRMU complying with overlapping requirement deadlines will likely result in additional delays. EPA acknowledges that the proposed deadlines did not adequately account for those nationwide impacts of seasonality and extreme weather events; necessary coordination with outside parties (*e.g.*, State agencies, local governments); locating disposal capacity for those units closing by removal; the need to comply with overlapping regulatory requirements, such as State drilling permits or timing restrictions related to protected habitats; or necessary quality assurance and quality control in calculating the proposed deadlines. Furthermore, as detailed in Unit III.C.3.c, EPA recognizes that the proposed CCRMU deadlines did not provide sufficient time for the completion of the FER which serves as the prerequisite requirement for all other CCRMU requirements. Additionally, the concurrent deadlines for legacy CCR surface impoundments and CCRMU did not allow for inactive facilities to first determine if there is a legacy CCR surface impoundment onsite before complying with the CCRMU regulations. Therefore, as detailed in Units III.C.3 and III.C.4.c through e, EPA extended the deadlines for CCRMU to provide: (1) At least as much time facilities had to come into compliance with the 2015 CCR Rule, (2) Sufficient time for owners or operators to complete a robust FER, and (3) Additional time such that the deadlines for legacy CCR surface impoundment do not coincide with the CCRMU deadlines, with the exception of the requirement to establish a CCR website and the completion of the history of construction (for legacy CCR surface impoundments) and the FER Part 1 (for CCRMU) which can be conducted concurrently. These extended deadlines for CCRMU will mitigate factors mentioned by commenters that convinced EPA the proposed deadlines would be infeasible for CCRMU. Overall, most of the comments EPA received supported deadlines that allowed at least as much time as EPA originally provided in the 2015 CCR Rule.

Note that all deadlines herein are framed by reference to the effective date of the rule; the final rule will be effective six months after publication of

the final rule. Accordingly, facilities will have an additional six months beyond the deadlines to come into compliance. The Agency has included a

document in the docket for this rule that summarizes the finalized compliance deadlines.¹⁴²

TABLE 2—FINAL COMPLIANCE TIME FRAMES FOR CCRMU

40 CFR Part 257, Subpart D requirement	Description of requirement to be completed	Deadline (months after effective date of the final rule)	Date
Internet Posting (§ 257.107)	Establish CCR website	15	Monday, February 9, 2026.
Facility Evaluation Report (§ 257.75).	Complete the Facility Evaluation Report Part 1 ..	15	Monday, February 9, 2026.
Facility Evaluation Report (§ 257.75).	Complete the Facility Evaluation Report Part 2 ..	27	Monday, February 8, 2027.
GWMCA (§ 257.91)	Install the groundwater monitoring system	42	Monday, May 8, 2028.
GWMCA (§ 257.93)	Develop the groundwater sampling and analysis program.	42	Monday, May 8, 2028.
GWMCA (§§ 257.90–257.95)	Initiate the detection monitoring and assessment monitoring. Begin evaluating the groundwater monitoring data for SSLs over background levels and SSLs over GWPS.	42	Monday, May 8, 2028.
GWMCA (§ 257.90(e))	Complete the initial annual GWMCA report	January 31, 2029	January 31, 2029.
Closure (§ 257.102)	Prepare written closure plan	48	Wednesday, November 8, 2028.
Post-Closure Care (§ 257.104)	Prepare written post-closure care plan	48	Wednesday, November 8, 2028.
Closure and Post-Closure Care (§ 257.101).	Initiate closure	54	Tuesday, May 8, 2029.

b. Fugitive Dust Requirements for CCR Management Units

The air criteria in the existing regulations address the pollution caused by windblown dust by requiring the owners or operators of CCR units to minimize CCR from becoming airborne at the facility. 40 CFR 257.80. These requirements apply to the entire facility, which means that the owner or operator is required to minimize CCR fugitive dust originating not only from the CCR unit, but also from roads and other CCR management and material handling activities at the facility. Consequently, under the proposal, CCRMU would already be covered by the fugitive dust requirements in § 257.80 because CCRMU are located at facilities with a CCR unit. EPA therefore only proposed to make those changes to the fugitive dust requirements in § 257.80 that are necessary to make clear that these requirements also apply to CCRMU. Specifically, EPA proposed to amend the regulations to add “CCRMU” to the list of units subject to the requirements under § 257.80 and associated provisions under §§ 257.105 through 257.107. Additionally, EPA solicited comments on amending § 257.80(b)(6) to include a deadline for facilities to amend the fugitive dust control plan no later than 30 days following a triggering event, such as the closure of a CCRMU

or change in facility or CCR unit operations.

No commenters raised concern about requiring CCRMU to comply with the existing requirements in § 257.80. EPA is therefore finalizing this provision without revision.

One commenter supported creating a deadline for the amendment of the fugitive dust plan no later than 30 days following a triggering event. This commenter went on to suggest that EPA further revise § 257.80 to require owners or operators to notify potentially impacted populations including residents living within three miles of the plant, populations potentially impacted by transportation of CCR, and residents living near disposal areas where CCR will be off-loaded and disposed and to require air monitoring at excavation sites and plant boundaries. The commenter was not clear on the circumstances in which owners or operators would notify potentially impacted population or what these populations would be notified of and did not provide a factual basis to support the need for air monitoring at regulated CCR units. Therefore, EPA is therefore only finalizing an amendment to § 257.80(b)(6) to require owners or operators to amend the fugitive dust plan no later than 30 days following a triggering event, such as the closure of

a CCR unit or change in facility or CCR unit operations.

c. Groundwater Monitoring and Corrective Action Requirements for CCR Management Units

EPA proposed to require CCRMU to comply with the existing groundwater monitoring and corrective action criteria in 40 CFR 257.90 through 257.98, with one revision, to require sampling and analysis of constituents listed in Appendix IV at the same time as those listed in Appendix III. As explained in the proposed rule at 88 FR 32003, §§ 257.90 through 257.95 require owners or operators of a CCR unit to install a system of monitoring wells, specify procedures for sampling these wells, and set forth methods for analyzing the groundwater data collected to detect hazardous constituents (e.g., toxic metals) and other monitoring parameters (e.g., pH, total dissolved solids) released from the units. If the groundwater monitoring required in § 257.95, demonstrates an exceedance of the groundwater protection standards for constituents identified in Appendix IV of part 257, corrective action is required as laid out in §§ 257.96 through 257.98. These requirements apply until closure in accordance with § 257.102(c) is

¹⁴² A document “Final Rule Compliance Deadlines for CCR Management Units. April 2024.” is available in the docket for this action.

complete or the post-closure care period of the CCRMU ends.

Several commenters expressed support for requiring CCRMU to comply with these groundwater monitoring and corrective action requirements, stating CCRMU can and have caused groundwater contamination. Some commenters suggested additional requirements be added to those in §§ 257.90 through 257.98, including a mandate to test groundwater quality outside the boundary of the facility and make those results public, a deadline for the completion of the selection of remedy required by § 257.97, and a prohibition against using intrawell groundwater data comparisons at CCRMU. However, other commenters stated that applying the existing groundwater monitoring and corrective action requirements to CCRMU is not appropriate and suggested that instead EPA incorporate flexibility into the CCRMU regulations by providing for alternative groundwater monitoring standards and site-specific risk-based corrective action into the CCR regulations. These commenters suggested groundwater monitoring standards that allow owners or operators to complete evaluations to determine if Appendix IV constituents are above the GWPS instead of conducting monitoring, allowing a site-wide groundwater network, and exempting units from groundwater monitoring when owners or operators are able to demonstrate through site-specific risk assessments there is no probable risk to groundwater. These commenters said these alternative approaches are necessary to address the overburdensome nature of compliance with groundwater monitoring and corrective action when a unit has already completed closure under a State authority and when units are completing groundwater monitoring under a State or other Federal program. Some of these commenters stated that EPA does not have the record to demonstrate potential risk from these units to justify requiring groundwater monitoring and corrective action as laid out in the existing regulations, especially for units that have already completed closure under a State authority. Other commenters said that flexibility is needed due to the diversity of CCR units captured in the definition of CCRMU, age of some of the units, and overlapping State requirements.

EPA further proposed two deadlines for the groundwater monitoring requirements, as opposed to the single deadline in the 2015 CCR Rule. EPA received numerous comments on EPA's proposal to split the single deadline for

groundwater monitoring requirements contained within the 2015 CCR Rule (24 months from the effective date of the final 2015 rule) into two separate deadlines (six months from the effective date of the final rule for the installation of the groundwater monitoring network and development of the groundwater sampling and analysis plan and 24 months from the effective date of the final rule for the initiation of the combined detection and assessment monitoring). A few commenters expressed support of the two separate deadlines for groundwater monitoring requirements, stating it increased accountability and ensured owners or operators were not unnecessarily delaying the installation of the groundwater monitoring system. However, overall, commenters stated that the groundwater monitoring requirements should have a single deadline as the separate deadlines made compliance with the rule infeasible. Several commenters said the proposed split deadlines eliminated the flexibility necessary for compliance that was contained within the 2015 CCR Rule's single deadline. Those commenters went on to say the single deadline allowed facilities to accommodate for delays associated with factors outside their control, such as third-party availability, weather, and required permits or approvals, by making schedule adjustments necessary to achieve compliance (*e.g.*, expedite the development of the sampling plan in the case of delays with the well installation). Other commenters said the proposed two deadlines were unnecessarily prescriptive. One commenter pointed out that the proposed rule contained no deliverables to verify compliance for the installation of wells or the development of the sampling and analysis plan.

As explained in the proposed rule, the existing groundwater monitoring and corrective action requirements are essentially the same requirements that have been applied to both hazardous waste and municipal solid waste disposal units for decades, and with the one exception discussed below, there is nothing about CCRMU that makes them distinct enough to warrant separate groundwater monitoring requirements from other CCR units. No commenter provided any factual basis for treating CCRMU differently than all of the other units that currently comply with the same groundwater monitoring and corrective action requirements. Specifically, for commenters who requested alternative groundwater monitoring requirements to allow site-

wide or property-boundary groundwater monitoring due to the potential presence of CCRMU across the facility, the commenters failed to explain how the provisions at § 257.91(d), which allow for multiunit groundwater monitoring systems fail to address their concern.

Regarding the request for alternative groundwater monitoring criteria to mitigate the inappropriateness of requiring compliance with the CCR groundwater monitoring and corrective action requirements when the CCRMU has already completed closure under a State authority or when the CCRMU is already subject to another State or Federal groundwater monitoring program, the commenters did not provide any factual or specific information to support the conclusions that groundwater monitoring and corrective action is not appropriate for all CCRMU that have completed closure under a State authority or that utilizing or augmenting an existing groundwater monitoring network that may have been required as part of the State closure or other groundwater monitoring program would be infeasible or inappropriate. Furthermore, as explained in Unit III.C.4.e, EPA received comments regarding State closures during which no groundwater monitoring was required, thereby highlighting the need for groundwater monitoring and corrective action, if necessary, even in situations in which closure has been completed under a State authority.

For those commenters requesting that EPA adopt "risk-based groundwater monitoring and corrective action" into the requirements, EPA notes that the commenters have provided no further explanation of what requirements in the existing regulations they wanted EPA to revise, what the revisions should accomplish, or any factual basis for why they are necessary or appropriate. As a general matter EPA considers that the corrective action regulations in §§ 257.95 through 257.98 do currently require facilities to tailor remedies to address the risks to human health and the environment, based on the conditions at the site. It is unclear what more the commenters are seeking. Accordingly, EPA is finalizing the proposal that CCRMU comply with the existing groundwater monitoring and corrective action requirements with one modification, combined detection and assessment monitoring.

However, EPA agrees that having a single deadline for groundwater monitoring requirements as opposed to two deadlines allows flexibility to complete tasks, such as installing groundwater wells and collecting

independent samples, that is necessary for compliance with a nationwide rule. The activities involved in achieving compliance with the groundwater monitoring requirements (*i.e.*, drilling wells, collecting samples, receiving lab results) are more susceptible to factors outside a facility's control, such as extreme weather events, shortages of qualified contractors, and permitting or approval delays, and therefore, warrant greater flexibility. Additionally, activities can be restricted dependent on the time of year and the location of the facility (*e.g.*, due to seasonality, protected species, clearing restrictions). Because the groundwater monitoring requirements build upon each other, EPA must ensure that facilities nationwide are reasonably able to achieve regulatory compliance by the deadline. Utilizing a single deadline for the groundwater monitoring requirements allows facilities to make reasonable accommodations for regional factors in a way the proposed deadlines do not, while still maintaining the same level of protection for human health and the environment. Furthermore, EPA agrees that the proposed rule does not have a clear mechanism for facilities to prove compliance or for interested parties to verify compliance with the separate deadlines for the installation of the groundwater monitoring network and the development of the groundwater sampling and analysis plan.

As stated in Unit III.C.4.a, EPA recognizes that the proposed CCRMU deadlines did not provide sufficient time for the completion of the FER and therefore extended the deadline for the completion of the FER by 24 months as detailed in Unit III.C.3.c. The FER informs the owner or operator of the presence or absence of CCRMU at the facility, which is vital information for the completion of the groundwater monitoring system requirements (*i.e.*, design and installation of the groundwater monitoring system). As such, the deadline for the groundwater monitoring requirements must be extended as well to allow owners or operators time to locate CCRMU as part of the FER. Furthermore, EPA was convinced that the deadlines for compliance with the legacy CCR surface impoundments and CCRMU requirements should be offset to mitigate impacts mentioned by commenters regarding the current labor shortages and backlogs experienced by third-parties necessary to accomplish tasks involved in complying with the groundwater monitoring requirements (*e.g.*, drillers for well installation,

laboratories for sample analysis) and the need for owners or operator of inactive facilities to first determine if there are legacy CCR surface impoundments onsite. Finally, based on the above-mentioned factors and the information provided by commenters, specifically the information regarding the suspected underestimation of the CCRMU universe due to historic facility-wide placement of non-containerized CCR on land, time needed to obtain necessary approvals (*e.g.*, State permits to drill water wells or clear vegetation), and to accommodate for seasonality, EPA has calculated 18 months as the appropriate extension of the groundwater monitoring system deadlines for the latest groundwater monitoring requirement. In the proposed rule, the latest proposed deadline for groundwater monitoring requirements was the deadline of 24 months from the effective date of this final rule for the initiation of the combined detection and assessment monitoring and the collection of the eight baseline samples. Therefore, EPA is finalizing a single deadline of no later than 42 months after the effective date of this final rule for the groundwater monitoring requirements found at §§ 257.90 through 257.95.

i. Design and Installation of the Groundwater Monitoring System for CCR Management Units

EPA proposed that owners or operators of CCRMU install the groundwater monitoring system as required by § 257.91 no later than six months from the effective date of this final rule. EPA further proposed that existing monitoring wells can be used as a part of the CCRMU groundwater monitoring systems provided the wells meet the Federal criteria. As explained in the proposed rule, based on the amount of time most facilities needed to complete or to collect baseline sampling, EPA calculated that facilities would be able to install the necessary monitoring wells within a single year.

As mentioned earlier, some commenters supported the expedited deadlines. However, most commenters stated the proposed deadline of six months from the effective date of the final rule for the design and installation of the groundwater monitoring network was infeasible and should be extended to no less than 24 months from the effective date to align with the 2015 rule deadline. As explained above, many of these commenters expressed the need for a single deadline for groundwater monitoring requirements. Furthermore, as described in Unit III.C.4.a of this preamble, these commenters cited

seasonality restrictions, the nationwide labor shortages, limited qualified contractor availability, the need for State approvals and permits, and the number of facilities competing for limited resources as reasons for why the proposed expedited deadline is infeasible. A few commenters noted that in recent decisions on Part A demonstrations, EPA cited deficiencies in the groundwater monitoring network as a basis for noncompliance. These commenters went on to state that the proposed deadline does not facilitate the establishment of a monitoring system that would meet the standards laid out in the CCR rule or the recent proposed decisions and thus, the proposed deadline creates *de facto* non-compliance. Some of these commenters elaborated by saying that the deadline does not allow facilities to acquire the permits that may be required to drill wells and precludes the observation of groundwater levels over time, which is needed to properly characterize groundwater flow. Other commenters stated meeting the proposed compliance deadline would prevent a facility from conducting proper site characterization, which is needed to inform well placement and depth and providing P.E.s sufficient information to certify the groundwater monitoring system. Lastly, commenters stated that contrary to EPA's assertion in the proposed rule that expediting the installation of the groundwater monitoring network is protective of human health and the environment, to meet the proposed deadline, facilities would likely be forced to design groundwater monitoring systems based on inadequate data resulting in unreliable groundwater monitoring data. Commenters provided estimates of time needed to comply with the design and installation of the groundwater monitoring system requirements ranging from nine to 36 months.

As stated in Unit III.C.4.a of this preamble, in response to comments EPA reevaluated the compliance deadline for the design and installation of the groundwater monitoring network and found the information provided regarding the general infeasibility of the proposed deadline compelling. Specifically, EPA agrees that more time is needed to allow inactive facilities time to determine if a legacy CCR surface impoundment is online prior to complying with the CCRMU requirements and to account for limited third-party availability (*e.g.*, contractor shortages and laboratory backlogs), seasonality and extreme weather events, procuring a contractor, complying with

overlapping regulatory requirements, and coordinating with outside parties. EPA acknowledges the importance of proper site characterization as the foundation for designing a groundwater monitoring system and is convinced that although there may be some facilities that have adequate information for site characterization, many of these facilities, especially inactive facilities, may need to conduct more extensive site reconnaissance and field work to obtain the necessary information due to the widespread use of non-containerized CCR across facilities. EPA further recognizes that groundwater monitoring systems designed using inadequate data would be unable to properly monitor groundwater quality coming from the unit and therefore would not be protective of human health and the environment. Lastly, because EPA is convinced by information from the commenters that facilities would be unable to conduct all the steps necessary to design and install a groundwater monitoring system capable of meeting the standards in § 257.91 by the proposed deadline, EPA has extended the deadline.

As stated in Unit III.C.4.c, based on information provided by commenters, EPA concluded that a single deadline of 42 months from the effective date of this final rule should be used for the groundwater monitoring requirements. Therefore, EPA is finalizing a deadline for the completion of the design and installation of the groundwater monitoring system of no later than Monday, May 8, 2028, which is 42 months from the effective date of this final rule. This is codified in the regulatory text at § 257.90(b)(3)(i).

To complete the installation of the groundwater monitoring system, the owner or operator of a CCRMU must ensure the monitoring system consists of sufficient number of wells both upgradient and downgradient of the CCR unit, installed at appropriate locations and depths, to yield groundwater samples from the uppermost aquifer that accurately represent the quality of background groundwater and groundwater passing the downgradient waste boundary of the CCR unit, monitoring all potential contaminant pathways. 40 CFR 257.91(a)(1) through (2). Because hydrogeologic conditions vary so widely from one site to another, the regulations do not prescribe the exact number, location, and depth of monitoring wells needed to achieve the general performance standard. Rather the regulation requires installation of a minimum of one upgradient and three downgradient wells, as well as any

additional monitoring wells necessary to achieve the general performance standard of accurately representing the quality of the background groundwater and the groundwater passing. See, 80 FR 21399. The number and placement of the monitoring wells is critical to proper characterization of the groundwater. Thus, the specific number, spacing, and depth of the monitoring wells must be determined based on site-specific information, including but not limited to the thorough characterization of aquifer thickness, groundwater flow rate, groundwater flow direction throughout seasonal and temporal fluctuations, the unit's geological setting, and the unit's hydrogeological setting.

The monitoring wells must be cased, constructed, operated, and maintained in a way that preserves the integrity of the monitoring well borehole, screened interval and other components so as to ensure the well performs to the design specifications throughout the life of the monitoring system. EPA expects owners or operators to ensure the groundwater monitoring wells are adequately protected from activities that may damage the wells or otherwise adversely impact their performance, such as accidental damage caused by livestock, vehicles, machinery, or other activities near the unit.

The owner or operator of the unit must ensure that the design, installation, development, and decommissioning of any aspect of the groundwater monitoring system is thoroughly documented and included in the operating record. Furthermore, the owner or operator must obtain a P.E. certification or approval from the Participating State Director or EPA stating the groundwater monitoring system meets the standards set out in § 257.91.

ii. Development of the Groundwater Sampling and Analysis Plan for CCR Management Units

EPA proposed to require owners or operators of CCRMU to comply with the existing groundwater sampling and analysis program requirements for CCR units, including the selection of the statistical procedures that will be used for evaluating groundwater monitoring data. 40 CFR 257.93. EPA proposed a deadline of no later than six months after the effective date of the final rule for owners or operators to comply with this requirement.

One commenter suggested EPA prohibit use of intrawell groundwater data comparisons for CCRMU. This commenter stated that intrawell comparisons are only appropriate when

the background samples are collected before CCR was placed in the unit and therefore, since these units are likely already contaminating groundwater, they would be ineligible for intrawell data comparisons. Other commenters requested EPA allow alternative groundwater monitoring requirements, such as alternative groundwater sampling procedures and statistical analysis because of the inability to collect groundwater samples unaffected by CCR at some facilities due to the number of CCRMU at the site. As stated in Unit III.C.4.c, the existing groundwater monitoring and corrective action requirements are essentially the same requirements that have been applied to both hazardous waste and municipal solid waste disposal units for decades, and with the one exception discussed below, there is nothing about CCRMU that makes them distinct enough to warrant separate or additional requirements. Furthermore, while EPA expects many CCRMU have leaked or are potentially leaking, the commenter did not provide any evidence for creating a prohibition against intrawell data comparisons. Therefore, EPA will not be finalizing a prohibition on intrawell data comparisons at CCRMU. However, EPA acknowledges that since the 2015 CCR Rule went into effect, intrawell groundwater data comparisons have been misused to a large degree. Regarding the commenter who stated that the owner or operator would be unable to accurately represent background groundwater quality due to the potential extensive presence of CCRMU across the facility, during implementation of the 2015 CCR Rule, EPA has not found a situation in which representing background groundwater quality was impossible nor does EPA believe such a situation exists, as owners or operators are allowed to collect samples as far upgradient as needed, even offsite, to ensure that the groundwater sample is not impacted by CCR. Additionally, at § 257.91(a)(1), EPA allows the owner or operator to collect background groundwater samples at other representative wells when hydrogeologic condition do not allow the determination of what wells are hydraulically upgradient wells or when other wells are more representative of background groundwater quality than upgradient wells. Furthermore, the commenter's assertion relied solely on the exhaustive presence of CCRMU at the facility as evidence of the inability to represent background water quality and did not provide any factual basis to support their claim that the requirement to

establish background groundwater quality as part of the groundwater monitoring requirements is infeasible. EPA is therefore finalizing this provision without revision. This is codified in the regulatory text at § 257.90(b)(3)(ii).

EPA received several comments on the proposed deadline for the development of the groundwater sampling and analysis plan. As mentioned in Unit III.C.4.c, some commenters supported the expedited deadline. However, several other commenters pointed out that the sampling and analysis plan cannot be completed prior to the collection of the baseline samples, which had a proposed deadline of 24 months from the effective date. Many of these commenters went on to state that the proposed expedited deadline for the development of the sampling and analysis plan could result in too frequent sampling leading to non-independent, autocorrelated baseline samples for a large number of facilities, undermining the required statistical analysis. A few commenters further stated that EPA published decisions on Part A and Part B demonstrations citing lack of statistical independence in sampling as a basis for non-compliance, and failure for EPA to extend the deadline for the sampling and analysis plan to allow adequate time for facilities nationwide to gather independent samples would create de facto non-compliance.¹⁴³ Commenters also said that the proposed deadlines do not account for the backlogs already experienced due to the existing CCR units using the small number of laboratories qualified to conduct the specialized analyses required by the rule, coupled with the national labor shortages. The commenters predicted the backlogs with laboratories will only increase with the regulation of legacy CCR surface impoundments and CCRMU, making the proposed deadlines even more infeasible. Finally, as mentioned in Unit III.C.4.c, commenters emphasized the need for one deadline for all groundwater monitoring requirements.

EPA agrees that a sampling and analysis plan cannot reasonably be completed before the collection of

baseline samples. EPA also acknowledges the adverse impact of too frequent sampling on the validity of statistical analysis and the need to account for seasonal variability in groundwater flow, groundwater levels, and constituent concentrations. EPA further acknowledges that providing insufficient time for the collection of baseline samples or the development of the sampling and analysis plan would likely result in ineffective groundwater monitoring programs that may fail to alert facilities to groundwater contamination coming from CCR units. As explained in Unit III.C.4.a and Unit III.C.4.c respectively, EPA recognizes the need for more time to accommodate third-party availability and a single deadline for the groundwater monitoring requirements. As stated in Unit III.C.4.c.i, for the reasons laid out above, EPA is finalizing a single deadline for the groundwater monitoring requirements of no later than Monday, May 8, 2028, which is 42 months from the effective date of this final rule. This is codified in the regulatory text at § 257.90(b)(3)(ii).

The owner or operator must develop the groundwater sampling and analysis program that satisfies the requirements in § 257.93 and includes a list of monitoring wells to be sampled (*i.e.*, the monitoring network), the schedule for sampling, sampling procedures and techniques, sample preservation and shipping protocols, analytical procedures including an appropriate statistical method for analysis, and quality assurance and quality control methods. The sampling and analysis plan must include all analytes listed in Appendix III and Appendix IV. Recommendations and information on how to comply with many of the requirements for the groundwater sampling and analysis program (*e.g.*, analytical procedures, QA/QC controls, sampling protocol) can be found in the following EPA guidance documents (*e.g.*, *RCRA Groundwater Monitoring: Draft Technical Guidance*, 1992, EPA/530/R-93/001; *Low-Flow (Minimal Drawdown) Ground-Water Sampling Procedures*, 1996, EPA/540/S-95/504).

iii. Detection Monitoring Program and Assessment Monitoring Program Combined

EPA proposed to require sampling and analysis of constituents listed in Appendix IV at the same time as those listed in Appendix III. The proposed rule explained that this would expedite groundwater monitoring and initiation of corrective action by at least six months at sites where units have potentially been leaking for a long

period of time, as is likely the case at CCRMU. The proposed rule further explained that the expediting Appendix IV constituent detection and any resulting corrective action is necessary for the protection of human health and the environment. EPA proposed no other revisions to the existing groundwater monitoring requirements in §§ 257.90 through 257.95.

EPA received several comments on its proposal to combine detection and assessment monitoring. One commenter pointed out the increased demand on laboratory services, facility staff and/or contractors, and professional engineers that would result from having CCRMU comply with both monitoring programs simultaneously. Another commenter stated that by combining detection and assessment monitoring and assuming groundwater contamination, EPA has rendered detection monitoring superfluous. Further, the commenter asserted that skipping detection monitoring entirely would lose critical data regarding whether there are statistically significant increases in groundwater constituents specifically due to the unit being monitored. One commenter stated that EPA lacked the record demonstrating risk posed by CCRMU to warrant combined detection and assessment monitoring and should either maintain the approach in the existing regulations or only apply groundwater monitoring to those CCRMU that have been identified as a source of an SSI or SSL in an ASD. Another commenter said that the justification in proposed rule regarding phased groundwater monitoring being “best suited to situations where there is little likelihood of pre-existing contamination” conflicts with EPA’s position in the 2015 CCR Rule. According to the commenter, in the 2015 CCR Rule, the Agency was aware many CCR surface impoundments were decades old and potentially leaking; yet EPA still adopted a phased approach with detection monitoring to monitor indicators of potential groundwater contamination and assessment monitoring to determine if releases of CCR constituents of concern did occur.

As a practical matter, EPA expects combining Appendix III and Appendix IV constituents into a unified sampling and analysis plan and approach will likely have only minor effects on schedules, as this change will not require additional field mobilizations or sampling events and will only require collection of a slightly larger number of sample containers at each monitoring well to allow for analysis for both Appendix III and IV constituents. As such, no additional shipments of

¹⁴³ On January 25, 2023, EPA proposed determinations on six Part B applications for alternate liner demonstrations (“Part B”). All six proposals are proposed denials. The CCR Part B Final Rule (85 FR 72506, November 12, 2020), allowed a limited number of facilities to demonstrate to EPA or a Participating State Director that, based on groundwater data and the design of a particular surface impoundment, the unit has and will continue to ensure there is no reasonable probability of adverse effects to human health and the environment.

samples to the analytical laboratory will be required. However, EPA acknowledges that combining Appendix III and Appendix IV constituents into a unified sampling and analysis plan may increase the total throughput burden on analytical laboratories and related services. Similarly, while combined monitoring may require additional evaluation (e.g., concentration and trend analysis of data concerning both Appendix III and Appendix IV constituents), this incremental increase is unlikely to significantly increase the overall reporting level of effort, as the number of reports will be essentially unchanged.

Nevertheless, as discussed in Units III.C.4.a and III.C.4.c of this preamble, EPA acknowledges the commenters' concerns regarding existing and projected labor shortages, backlogs, and third-party availability, and agrees this has the potential to affect facilities' ability to comply with the proposed deadlines for groundwater monitoring requirements. EPA is therefore extending the deadline, as well as building in flexibility for facilities to accommodate for delays, by finalizing a single deadline for groundwater monitoring requirements in lieu of the proposed split deadlines.

However, EPA disagrees that combining detection and assessment monitoring will render detection monitoring redundant, and that critical data would be lost, by sampling for Appendix IV constituents at the same time as Appendix III constituents (*i.e.*, by collecting more information). The commenters provided no further explanation of what information they thought would be lost, but under the combined monitoring, the facility would collect the same information on Appendix III constituents that is collected under the detection monitoring in § 257.94. Given that under the existing assessment monitoring provisions, facilities must simultaneously analyze samples for all parameters in Appendix III and for any Appendix IV constituent detected in the initial sampling, it is not apparent why the commenter believes that requiring simultaneous monitoring more broadly is appreciably different. 40 CFR 257.95(d)(1).

As stated in the previous paragraph, concurrent monitoring for Appendix III and Appendix IV constituents provides considerably more information and enables a more complete understanding of the geochemical nature, fate, and transport of any detected releases. Additionally, simultaneously collecting samples for Appendix III and Appendix IV constituents will still provide the

basis for determining SSIs, should they exist, so no information will be lost. Contrary to the commenter's concern, additional information will be gained in an expedited manner (e.g., the potential spatial and temporal correlation of Appendix III SSIs with exceedances of SSLs for Appendix IV constituents). Furthermore, EPA disagrees that its explanation that phased groundwater monitoring is "best suited to situations where there is little likelihood of pre-existing contamination" fundamentally conflicts with EPA's decision to adopt phased monitoring in the 2015 CCR Rule. Unlike this rule, the 2015 CCR Rule applied to both new facilities, which would be expected to have little likelihood of pre-existing contamination, and to existing facilities. Over the long-term, EPA expected that there would eventually be a greater percentage of new units than existing units as the older units reached capacity and closed. In addition, as discussed in the proposal at 88 FR 32010 and in Unit III.A.2 of this preamble, it is clear from the data posted on facilities' websites that in 2015 EPA significantly underestimated the number of unlined units (both impoundments and landfills), and consequently, significantly underestimated the number of leaking units and the extent of contamination at these sites.

Under the phased approach in the current regulations, detection monitoring was intended to provide an early detection of whether groundwater was potentially being contaminated. In selecting the parameters for detection monitoring, EPA chose constituents present in CCR that would be expected to move rapidly through the subsurface and thus provide an early detection of a potential problem before significant releases of constituents of greatest concern (*i.e.*, those in Appendix IV) had occurred. This approach rests on a presumption that the unit is not already leaking and the record shows (see Unit III.C.1) that presumption is largely inappropriate for CCRMU.

If an alternate source is causing an exceedance of an Appendix III constituent, it may also be the source of any SSL detected for any Appendix IV constituents; in such a case, a facility may simply prepare a single ASD that covers constituents from both appendices. The sole difference between phased monitoring and combined monitoring is if the alternate source is only responsible for the Appendix III constituent, but the unit actually is releasing one or more Appendix IV constituents. In such a case, under a phased approach detection of the Appendix IV constituent can be delayed

or even remain undetected, because the facility would not trigger assessment monitoring absent an SSI from another Appendix III constituent. In such situations, combined monitoring can make the monitoring program more accurate; it is unclear why the commenter believes this is inappropriate.

Ultimately, the combined monitoring expedites the initiation of assessment monitoring which in turn, allows for more expeditious identification of statistically relevant exceedances of Appendix IV constituents. This will in turn expedite ASD development or corrective action, depending on the circumstances.

The phased approach in the 2015 CCR Rule provides for a graduated response to groundwater contamination as the evidence of contamination increases over time. This approach allows facilities ample time to investigate the source of contamination as well as the transport characteristics of CCR constituents in groundwater, while usually being protective of human health and the environment. However, at sites where there is a strong likelihood that groundwater contamination has been occurring for a long time, the advantages provided by a protracted graduated response are outweighed by disadvantages of persistent or even increasing contamination that continues to move downgradient. At these sites, the need to protect human health and the environment necessitates the quick detection of Appendix IV constituents of concern to expedite any necessary corrective action. See, *USWAG*, 901 F.3d at 427–30. In this case, as highlighted in Unit III.A, the record provides strong reason to conclude that many CCRMU are contaminating groundwater, given the large number of currently regulated CCR units that have been found to be leaking.

Therefore, EPA is finalizing this requirement as proposed to be completed no later than Monday, May 8, 2028, which is 42 months after the effective date of this final rule. This is codified in the regulatory text at § 257.90(b)(3)(iv) and (v).

iv. Collection and Analyses of Eight Independent Samples for CCR Management Units

EPA proposed that no later than 24 months after the effective date of the final rule, owners or operators of CCRMU initiate the detection monitoring program by completing sampling and analysis of a minimum of eight independent samples for each background and downgradient well, as

required by § 257.94(b). The proposed rule explained that within 90 days after initiation of the detection monitoring program, owners or operators must identify any SSIs over background levels for the constituents listed in Appendix III, as required by § 257.94. To expedite the time to initiate any required corrective action, EPA also proposed that by this same deadline owners or operators initiate the assessment monitoring program by establishing groundwater protection standards and by starting to evaluate the groundwater monitoring data for an SSL over GWPS for the constituents listed in Appendix IV as required by § 257.95.

EPA is finalizing this requirement as proposed. This is codified in the regulatory text at § 257.90(b)(3)(iii).

EPA received several comments on the proposed deadline for the collection of the eight baseline samples. As mentioned in Unit III.B.2.a.ii, some commenters supported the expedited deadline. However, several other commenters requested that the groundwater monitoring requirement deadlines be combined into a single deadline that provided at least as much time to come into compliance as was provided in the 2015 CCR Rule deadlines (*i.e.*, 24 months after the effective date of the final rule). As stated in Unit III.C.4.c, based on information provided by commenters, EPA concluded that a single deadline of 42 months after the effective date of this final rule should be used for the groundwater monitoring requirements. Therefore, EPA is finalizing a deadline for the completion of sampling and analysis of a minimum of eight independent samples for each background and downgradient well of no later than Monday, May 8, 2028, which is 42 months from the effective date of this final rule.

v. Preparation of Initial Groundwater Monitoring and Corrective Action Report for CCR Management Units

EPA proposed to apply the existing requirements in § 257.90(e) to CCRMU and require that owners or operators of CCRMU comply no later than January 31 of the year following the calendar year after a groundwater monitoring system has been established (and annually thereafter).

One commenter suggested that the initial groundwater monitoring and corrective action report be due no later than January 31 of the year following the collection of the eight baseline samples and the first semi-annual sampling event in order to allow facilities to provide all the documentation required by § 257.90(e).

EPA disagrees that the information required by § 257.90(e) would not be available to a facility upon completion of the groundwater monitoring system, as the annual report serves as an update on the activities related to the groundwater monitoring program, including the installation of groundwater monitoring wells. Additionally, when specific actions are not required by the CCR regulations (*e.g.*, a facility has not triggered corrective action), facilities are not out of compliance merely because they do not have activities related to that action to discuss in the groundwater monitoring and corrective action annual report (*e.g.*, not describing progress in selecting a remedy when not in corrective action).

EPA is finalizing the requirement for owners or operators of CCRMU to comply with the requirements in § 257.90(e), which mandate the preparation of an annual groundwater monitoring and corrective action report no later than January 31, 2029 and annually thereafter. This is codified in the regulatory text at § 257.90(e).

The report documents the activities associated with the groundwater monitoring program and progress of any corrective action over the past year and must contain specific information identified in the regulations, including but not limited to maps; aerial images or diagrams showing the CCRMU and all upgradient (background) and downgradient wells; identification of any monitoring wells installed or decommissioned in the previous year; monitoring data collected under §§ 257.90 through 257.98; and a narrative discussion of any transition between monitoring programs (*i.e.*, detection and assessment monitoring). The annual reporting requirement will help ensure that groundwater level data collected over the reporting period is tabulated, presented, and analyzed to determine groundwater levels relative to any residual CCR left in place as well as to confirm or determine groundwater flow directions.

Upgradient and downgradient well locations and depths should be validated annually with respect to measured and mapped flow directions. Groundwater quality sampling data should be included in appendices and summarized and tabulated in the annual reports. If appropriate, exceedances (SSIs and SSLs) of Appendix III and IV constituents should be tabulated and highlighted. As mentioned in some comments, annual reports should identify the nearest downgradient surface water bodies as well as

groundwater supply wells in the vicinity of the unit.

It is critical that annual corrective action and monitoring reports provide the basis for selection and documentation of corrective actions as early as possible. The owner or operator must not only document compliance in the annual report, but also post the annual report on the public CCR website to allow the public to review the groundwater monitoring results. It is critical that the annual reports contain the basic data which informs the positions and status reported in those documents, including but not limited to boring logs, monitoring well installation diagrams, water level data, field sampling data sheets for groundwater sample collection, laboratory analytical data including QA/QC data, data validation, etc. In summary, the annual groundwater monitoring and corrective action reports should not only contain the information required by the regulations but should be organized in such a way that: (1) Compliance with the CCR regulations is evident; (2) Data supporting compliance conclusions are easily located within the document; and (3) The public is readily able to review the groundwater monitoring data and related information. Lastly, the name of the document on the public CCR website should be such that it is clear what the file is and it must be capable of being readily printed and downloaded by the public.

vi. Corrective Action Requirements for CCR Management Units

EPA proposed to require owners or operators of CCRMU to comply with the existing corrective action criteria, as appropriate in §§ 257.96 through 257.98. The proposed rule explained that conducting the sampling simultaneously would expedite groundwater monitoring and, where necessary, initiation of corrective action by at least six months at sites where units have potentially been leaking for a long period of time, as is likely the case at many CCRMU. The proposed rule further explained that expediting Appendix IV constituent detection, assessment and any required corrective action would protect human health and the environment.

Under the existing regulations, if groundwater monitoring demonstrates an exceedance of the groundwater protection standards for constituents identified in Appendix IV of part 257, corrective action is required, as laid out in §§ 257.96 through 257.98. These requirements apply throughout the active life and any post-closure care period of the CCR unit.

A commenter suggested EPA create a deadline for the completion of the selection of remedy required by § 257.97 of 90 days after the completion of the assessment of corrective measures (ACM) with the ability to extend the deadline up to 180 days after the completion of the ACM. The commenter pointed to the failure of owners and operators of units regulated by the 2015 CCR Rule to select a remedy as soon as feasible after the completion of the ACM as required by the rule and the subsequent unnecessary delay in addressing contaminated groundwater. Other commenters stated that applying the existing groundwater monitoring and corrective action requirements to historic sites, such as CCRMU, is not appropriate and suggested that instead EPA incorporate site-specific risk-based corrective action or State corrective action programs into the CCR regulations. Finally, some commenters requested EPA adopt a RCRA subtitle C approach and utilize existing EPA guidance. One of these commenters further stated that the application of the existing CCR corrective action requirements conflict with EPA's decision-making frameworks in other programs such as RCRA and CERCLA due to lack of site-specific risk assessments to evaluate risk and drive corrective action decisions. This commenter suggested that EPA utilize site-specific, risk-based corrective action that is consistent with the guidance documents EPA has developed for RCRA and CERCLA programs.

EPA acknowledges the widespread non-compliance with the mandate to complete the selection of remedy as soon as feasible after the completion of the ACM. However, EPA disagrees with the commenter's suggested deadline for two reasons. First, the recommended deadline extends the deadline for the completion of the selection of remedy beyond that in 2015 CCR Rule since "as soon as feasible" in many cases would likely be before 90 days after the completion of the ACM and granting owners or operators more time to select a remedy would be less protective of human health and the environment. Second, EPA is taking action to address the non-compliance related to the failure of owner or operators to select a remedy as soon as feasible as part of the EPA's National Enforcement and Compliance Initiative and expects this enforcement initiative to address the concern raised by the commenter.¹⁴⁴

EPA disagrees with the suggestion that existing corrective action requirements, if triggered, are inappropriate at CCRMU. As stated in Units III.A and III.C.4.d, the physical characteristics and potential risks of CCRMU are not sufficiently different from currently regulated units to justify different requirements. For those commenters requesting that EPA adopt "risk-based corrective action" into the requirements, EPA notes that the commenters have provided no further explanation of what requirements in the existing regulations they wanted EPA to revise, what the revisions should accomplish, or why such revisions are necessary or appropriate. As a general matter EPA considers that the corrective action regulations in §§ 257.95 through 257.98 do currently require facilities to tailor remedies to address the risks to human health and the environment, based on the conditions at the site. It is unclear what more the commenters are seeking. Additionally, regarding incorporating or allowing State corrective action programs to substitute for the existing corrective action requirements, the commenters failed to demonstrate through factual or specific information that the State corrective action programs referenced are either different than that required by the CCR regulations or adequate to address the risks posed by CCRMU. Even if individual examples were sufficient to overcome the record with respect to State programs generally, none of the examples presented by the commenters provided sufficient detail for EPA to actually evaluate the adequacy of the corrective action programs. More to the point, EPA lacks the record necessary to support a broad exemption for all CCRMU conducting corrective actions under any State requirements. Regarding comments requesting a RCRA subtitle C approach be adopted for CCRMU, a RCRA subtitle C approach is more appropriate for regulation under a permitting program than under the existing regulatory framework (*i.e.*, self-implementing) and as explained in Units III.A and III.C.1, EPA finds the risks posed by CCRMU to be not only credible but significant enough to warrant regulation at this time (*i.e.*, under the self-implementing rule as opposed to waiting until the Federal permitting program is established). Lastly, the commenter that stated that the existing corrective action regulations conflict with other EPA programs (*i.e.*, RCRA and CERCLA) failed to fully explain how the existing corrective

action regulations conflict with EPA-published RCRA or CERCLA guidance documents or how they preclude corrective action decisions driven by site-specific risks. Accordingly, EPA is finalizing, without revision, its proposal that CCRMU comply with the existing corrective action requirements at §§ 257.95 through 257.98.

As explained in the proposed rule at 88 FR 32003, §§ 257.90 through 257.95 require that an owner or operator of a CCR unit to install a system of monitoring wells, specify procedures for sampling these wells, and set forth methods for analyzing the groundwater data collected to detect hazardous constituents (*e.g.*, toxic metals) and other monitoring parameters (*e.g.*, pH, total dissolved solids) released from the units (*i.e.*, all parameters listed in Appendices III and IV). If the groundwater monitoring required in § 257.95, demonstrates an exceedance of the groundwater protection standards for constituents identified in Appendix IV of part 257, corrective action is required as laid out in §§ 257.96 through 257.98. These requirements apply throughout the active life and post-closure care period of the CCRMU.

When corrective action is required, it must be initiated without delay, in accordance with the time frames laid out in the regulations. The corrective action program includes initiating an ACM to prevent further releases, to remediate any releases, and to restore affected areas to original conditions, as specified in § 257.96(a). After the ACM has been completed, the owner or operator must select a remedy that meets prescribed standards, including a requirement that the remedy attain the groundwater protection standards. See § 257.97(a) and (b). Finally, the corrective action program requires the owner or operator of the CCR unit to initiate remedial activities within 90 days of selecting a remedy. See § 257.98(a). The requirement to address releases under this requirement is identical to those requirements for any CCR unit undertaking groundwater corrective action with the additional requirement that implementation of corrective action begin during the active life of the unit.

EPA expects that when assessing corrective measures and selecting a remedy, the owner or operator of the unit will consider the impact of the corrective measures on the water quality and safety of the nearest surface water bodies and the nearest private and/or public groundwater wells.

With respect to completion of an ACM and remedy selection, § 257.96(a) requires an ACM be initiated within 90

¹⁴⁴ EPA Enforcement Alert, National Enforcement and Compliance Initiative, Protecting Communities from Coal Ash Contamination. EPA Document #310F23002. December 2023. [https://www.epa.gov/](https://www.epa.gov/system/files/documents/2023-12/ccr-enf-alert-2023.pdf)

days of determining an SSL has occurred, and then completed within another 90 days. An extension, not to exceed 60 days, may be warranted due to site-specific conditions or circumstances. Prior to closure of a CCR unit, the facilities have been required to characterize site conditions, including groundwater flow conditions and geology. The facilities have knowledge of the wastestreams and water volumes it discharges to CCR units. This information can be used to develop a groundwater model to predict groundwater flow conditions after waste stream disposal ceases and closure is initiated. Therefore, EPA believes this would provide sufficient characterization of post-closure conditions to assess and compare groundwater cleanup alternatives to complete an ACM.

Once the ACM is complete, a public meeting has been held, and community input has been considered, a remedy must be selected as soon as feasible. A selected remedy may include closure by removal to comply with source control requirements. This would constitute commencing implementation of a remedy. However, the selected groundwater remediation portion of the remedy must also be implemented within a reasonable time, in accordance with the schedule established in the remedy selection report. 40 CFR 257.97(d). Implementation of the source control measure does not negate this requirement.

d. Closure and Post-Closure Care Criteria for CCR Management Units

EPA proposed that all of the existing closure and post-closure care requirements in §§ 257.101 through 257.104 would apply to CCRMU, except for the alternative closure requirements in § 257.103(f). EPA further explained that the alternative closure provisions in § 257.103(f) were not appropriate for CCRMU as these units, by definition, are inactive impoundments at inactive facilities and could not therefore demonstrate the need to continue to use the disposal unit, which is a qualifying component of the alternative closure provisions. In addition, EPA solicited comments on two potential revisions to the existing closure standards in § 257.102(d). The first potential revision would extend the existing dewatering requirement in § 257.102(d)(2)(i) to any CCR landfill constructed in groundwater or otherwise saturated by liquids. The second potential revision would incorporate a definition of the term “infiltration” into § 257.102.

EPA also proposed to require that all CCRMU initiate closure within 12

months of the effective date of this final rule. While EPA proposed that the CCR unit closure requirements would apply, EPA also solicited comment on other approaches to how a facility might implement the requirement to close at a site where the CCRMU lies beneath an operating unit.

Finally, EPA proposed to apply the existing post-closure care requirements in § 257.104 to CCRMU. Each of these proposals and the comments are discussed in detail below.

EPA received numerous comments on its proposal to apply the existing closure and post-closure care requirements §§ 257.100–257.104 to CCRMU. Several commenters stated that EPA must require all CCRMU to close, because the risks EPA identified in the proposal, together with information provided by regulated facilities under the 2015 CCR Rule, indicate that CCRMU pose significant and ongoing threats of contamination if not properly closed. These commenters also identified several examples of units that the commenters believe demonstrate the need for CCRMU to close. One commenter referenced a report it submitted to support EPA’s proposal to regulate CCRMU. The report focuses on six sites with both CCR units currently regulated by the CCR Rule and with CCRMU. According to the commenter the report documents significant and harmful coal ash pollution that has been allowed to persist under the 2015 CCR Rule and that would be remediated under the proposed rule.

For example, the report analyzes the Brandywine Ash Management Facility in Maryland, which has a single landfill that its operator GenOn has treated as four distinct CCR dumpsites for purposes of the CCR Rule. This artificial division of the landfill has enabled GenOn to claim that three of the four areas of the landfill are unregulated under the CCR Rule; to attribute contamination at the site, such as molybdenum levels eighty times above the GWPS, to the three purportedly unregulated areas; and to keep the site in detection monitoring through ASDs. The Proposed Rule will compel GenOn to address all coal ash at the site. Another site that demonstrates the necessity of regulating CCRMU under the Proposed Rule is the Joliet #29 Station owned by Midwest Generation in Illinois. This site has one regulated pond, Ash Pond 2, and a number of additional units that would be treated as CCRMU under the Proposed Rule. In fact, the site was used for coal ash disposal long before it had a power plant, potentially as early as 1917, indicating the presence of unlined landfills going back decades. Midwest Generation has found statistically significant increases (“SSIs”) for TDS, sulfates, chloride, and calcium at the site, but is only monitoring the groundwater around Ash Pond 2 and two former ash ponds, and

not monitoring the groundwater around three large onsite landfills.

These commenters also described a facility where, according to the commenters, two million tons of fill containing CCR sits behind corroding steel pilings on the shore of Lake Michigan, and is leaking arsenic and other hazardous chemicals into the lake, as well as into an adjacent creek commonly used for fishing and boating. These commenters also pointed to a facility with an inactive 90-acre unlined CCR landfill that, according to the commenter, is contaminating groundwater with unsafe levels of sulfate, lithium, radium, cobalt, arsenic, molybdenum and selenium. Similarly, a private citizen also provided the following example of a potential CCRMU during one of public hearings:

My utility is City Utilities. Once the current coal ash landfill is full, CU plans to dispose of future coal ash at a temporarily closed landfill next to Lake Springfield, which feeds into the James River. Both dumps are in karst terrain. This makes them susceptible to sinkhole collapses and leakage of pollutants into the James River watershed and the area’s shallow and deep aquifers. These waters affect a four-state area, including Table Rock Lake near Branson where tourism is the main industry. Safer methods of disposal exist, although they are more cumbersome and expensive. In December 2022, CU held a public meeting regarding the utility’s future. After questions about pollution, one representative said he wasn’t aware of any pollutants coming from the landfill. The Interdisciplinary Environmental Clinic at Washington University School of Law researched this. Twelve rounds of sampling done by CU from late 2016 to early 2018 showed 387 statistically significant increases in pollutants in every down-gradient well. Those increases included 27 out of the 35 monitored parameters. Regarding CU’s dye tests at the dump site, a 2017 memo from the Missouri Department of Natural Resources stated, “Dye is moving through the karst system and not being detected by the monitoring well network.”

These commenters also pointed to the high likelihood that many CCRMU have waste in contact with groundwater, as many are located in floodplains, wetlands, or near large rivers and lakes. According to the commenters, if EPA does not mandate closure of CCRMU, aquifer contamination would not be identified until it is too late to be prevented—in contravention of RCRA’s protectiveness standard. These commenters have also argued that CCRMU are inactive units with no practical justification to avoid closure.

A number of other commenters however argued that a national requirement to close was not appropriate for CCRMU and that EPA should instead determine whether

closure is warranted at each site based on a finding that the individual unit at that particular site poses unacceptable risks. Many of these commenters suggested that the risks associated with CCRMU can be better managed through corrective action implemented under a permit program, which the commenters believed would make the mandate to close these units unnecessary. For example, one commenter claimed that mandating the closure of all CCRMU as part of the proposed CCR corrective action regime is more stringent than what EPA requires under subtitle C for solid waste management units (SWMUs), and therefore any final CCRMU rule cannot impose a mandatory closure requirement on CCRMU. According to this commenter, the subtitle C process does not require the closure of SWMUs, because EPA recognizes that addressing the risks from SWMUs via the site-specific subtitle C corrective action process alone is fully protective. Many commenters also raised concern that CCRMU at their facilities are located beneath vital infrastructure, such as pipelines or transmission lines, active CCR units, or buildings and that requiring closure of these CCRMU could adversely impact grid reliability, business operations, or other necessary public services (e.g., military infrastructure). These commenters suggested that EPA exempt these units or at least extend the closure time frames to allow for closure of the CCRMU when the other unit or structure is closed or decommissioned.

Numerous commenters again requested that EPA exempt any CCRMU that had been closed in accordance with State requirements. These commenters claimed that these closures were protective and that EPA should only regulate these CCRMU where the Agency has affirmative evidence that the particular unit is contaminating groundwater or otherwise presents unacceptable risks. For example, one commenter stated that a more rational approach to regulating CCRMU would be first to determine if the uses are impacting groundwater before requiring expensive closure. According to the commenter,

[i]t is not clear why EPA requires closure before groundwater data indicates there is a problem. If groundwater is impacted by the CCRMU then other corrective action measures should be taken, but only after data indicates that groundwater is being affected. As noted earlier, the 2015 CCR Rule did not require unlined landfills to close unless they failed to meet the location restrictions for unstable areas. In the event an unlined CCR landfill is the source of groundwater

contamination, the unit is subject to the CCR Rule's corrective action requirements, but closure is not mandatory.

But many other commenters characterized the proposed deadline as infeasible for the reasons discussed in Unit III.B.2.a.ii, including seasonality, the need to comply with overlapping regulatory requirements, labor shortages, and the limited resources available to achieve compliance (e.g., contractors, laboratories, P.E.s), which the commenters claimed would become even more limited as a consequence of the number of CCR units that would need to come into compliance at the same time. Commenters also stated that compliance with the closure requirements should not be required until after the groundwater monitoring system was installed and baseline samples collected so that closure could be informed by the groundwater monitoring data.

EPA has largely adopted the proposal, with a few significant revisions. This final rule requires CCRMU that contain 1,000 tons or greater of CCR to comply with the existing closure and post-closure care requirements in §§ 257.101 through 257.104, except for the alternative closure requirements in § 257.103(f). The final rule also extends the existing dewatering requirement in § 257.102(d)(2)(i) to any CCR landfill constructed in groundwater or otherwise saturated by liquids, and incorporates a definition of the term "infiltration" in § 257.53.

However, consistent with the provision adopted for legacy CCR surface impoundments, EPA is deferring, in certain cases, the requirement to demonstrate compliance with § 257.102 for CCRMU that closed prior to the effective date of this rule in accordance with alternative requirements that are likely to be as protective as the requirements in § 257.102. This is the same provision that EPA is establishing for legacy CCR surface impoundments, as EPA is not aware of a reason to treat CCRMU differently. In addition, EPA is deferring the requirement to initiate closure where the CCRMU is located beneath critical infrastructure or large buildings or structures vital to the continuation of current site activities, such as beneath high power electric transmission towers, air pollution control or wastewater treatment systems, large buildings, or an electrical substation. In this case, the potential exists for adverse, localized impacts on electric reliability (e.g., voltage support, local resource adequacy) from requiring all facilities to meet these requirements on the same time frame, and EPA lacks the record to

determine that such impacts are unlikely. Consequently, EPA is deferring the requirement to initiate closure of such a CCRMU until the infrastructure is no longer needed, a permit authority determines closure is necessary to ensure that there is no reasonable probability of adverse effects on human health or the environment, or the closure or decommissioning of the facility, whichever occurs first.

Finally, EPA has extended the deadline to initiate closure to Wednesday, November 8, 2028, which is 48 months the effective date of the final rule to allow groundwater monitoring data to inform closure, consistent with the approach for legacy CCR surface impoundments.

Each of these issues are discussed in greater detail in subsequent sections of this preamble.

i. Requirement To Initiate Closure

The final rule requires CCRMU containing 1,000 tons or greater of CCR to close. Closure will address the existing risks associated with these units. In addition, requiring the closure of CCRMU is consistent with the existing regulations, which require closure of all units that no longer receive waste as a preventative measure, whether or not the unit is currently leaking. See, 40 CFR 257.102(e)(1). CCRMU, which consist of inactive CCR landfills and previously closed CCR surface impoundments and CCR landfills, meet these criteria as they also no longer receive waste.

The closure of CCRMU of 1,000 tons or greater also provides significant risk mitigation. As laid out in Unit III.A of this preamble, CCRMU at both active facilities and inactive facilities with legacy impoundments pose risks to human health and the environment that are at least as significant as the risks presented by legacy CCR surface impoundments and the units currently regulated under the 2015 CCR Rule. In particular, for highly exposed individuals off site, landfill CCRMU were estimated to pose cancer risks as high as 7×10^{-6} from arsenic III, while surface impoundment CCRMU were estimated to pose cancer risks as high as 8×10^{-5} from arsenic III and noncancer HQs as high as two for arsenic III, two for lithium, and one for molybdenum. Differences in national risks between currently regulated units and these older units are attributed largely to the proportion of units that were modeled at the time as lined. However, the risks associated with these older units may be even higher than EPA modeled in the 2014 Risk Assessment for active units. These units have been present onsite

longer and had more time to leak. In addition, there are several management practices that have the potential to result in higher leakage, but that were previously modeled either less frequently for active units—based on a belief that the practices had declined over time—or not at all—due to data constraints on a national scale. These include: (1) The greater prevalence of unlined units; (2) The greater likelihood of co-management of CCR with coal refuse and other wastes in surface impoundments, making the overall waste pH far more acidic and (3) The potential for the units to be constructed below the water table or to have become inundated with groundwater after the time of construction. As discussed in Unit III.A, each of these practices individually have the potential to result in nationwide risks higher than previously reported on a national basis for the currently operating universe of CCR units. For example, unlined landfill CCRMUs were estimated to pose cancer risks as high as 1×10^{-5} from arsenic III, while unlined surface impoundment CCRMUs were estimated to pose cancer risks ranging from 2×10^{-4} from arsenic III and noncancer HQs as high as 5 for arsenic III, 3 for lithium, 2 for molybdenum, and 1 for thallium. A combination of these practices could push risks even higher than modeled.

In addition, the modeling conducted in 2024 confirms that smaller CCRMUs fill can meaningfully contribute to groundwater contamination across a facility. The 90th percentile concentrations at the waste boundary exceeded GWPS by factors of 26 for arsenic III, 19 for arsenic V, 156 for molybdenum, and 19 for thallium. The 50th percentile concentrations exceeded GWPS by a factor of two for molybdenum. EPA's modeling also confirms that any prior contamination from CCRMUs is likely to still be present. EPA calculated, for example, that it could take around 2,300 years from the time of first exceedance for high-end releases of arsenic V to fully dissipate.

Depending on their location, leakage of Appendix IV constituents from individual CCRMUs may not migrate off-site at levels of concern. However, according to the commenters it is highly unlikely that only one CCRMU would be present on-site. In addition, these concentrations can combine with contamination from other CCRMUs, currently regulated CCR units, or legacy CCR surface impoundments that are also present on the same site. EPA did not model the aggregate or cumulative risk associated with these potential sources of co-located contamination, which may

underestimate the risks. At a minimum, EPA expects that the presence of multiple sources of potential contamination at the same facility would increase the likelihood of a contaminant plume that could migrate off-site at levels of concern. In sum, the record confirms that, at a minimum, regulation of the smaller sized CCRMUs fills is necessary for any corrective action to successfully reduce the concentrations of Appendix IV constituents in the aquifer to concentrations below the GWPS.

Available toxicological profiles indicate that ingestion of arsenic is linked to increased likelihood of cancer in the skin, liver, bladder and lungs, as well as nausea, vomiting, abnormal heart rhythm, and damage to blood vessels; ingestion of lithium is linked to neurological and psychiatric effects, decreased thyroid function, renal effects, cardiovascular effects, skin eruptions, and gastrointestinal effects; and ingestion of molybdenum is linked to higher levels of uric acid in the blood, gout-like symptoms, and anemia. 80 FR 21451. To date, groundwater monitoring required by the 2015 CCR Rule has revealed that at least 40% of currently regulated surface impoundments and landfills have identified groundwater contamination and require corrective action to mitigate the associated risks. This number is expected to increase as more facilities come into compliance with the groundwater monitoring requirements. Another 23% of existing CCR units have identified evidence of leakage and continue to monitor groundwater to ensure that contamination does not occur before the unit can be closed and source controls put in place. In many cases, CCRMUs are historical landfills and surface impoundments. Thus, the relevant release pathways, exposure routes, and associated harm that can result are the same.

Given the locations of many CCRMUs (located in floodplains, or wetlands, or near large surface water bodies), EPA is also concerned that the base of these units may intersect with the groundwater beneath the unit. If such CCRMUs were not required to close, EPA would not adequately address the risks from those units that still contain CCR saturated with free liquids.

In general, EPA considers that closure is the only effective way to adequately address the source of potential or existing releases from these units. Although, as some commenters suggested, EPA could rely upon the existing corrective action requirements to achieve source reduction, the Agency is concerned that this will not

adequately prevent harm, as the statute requires, because these requirements would only apply upon a determination that the CCRMU has contaminated the aquifer above the GWPS. In addition, the closure requirements in § 257.102 provide a uniform approach that EPA is confident will adequately protect human health and the environment.

Contrary to the commenter's contentions the regulation of CCRMUs under RCRA section 4004(a) is not analogous to the corrective action requirements applicable to SWMUs under RCRA section 3004(u). Nor is the absence of a national mandate to close SWMUs as part of every corrective action under section 3004(u) based on the recognition that closure is unnecessary because the corrective action process alone is fully protective. The closure and corrective action regulations are distinct and independent requirements that generally serve different purposes. The closure requirements under both subtitle C and D are largely intended to be prevent contamination from occurring in the first place, by ensuring that the closed unit does not become a source of future contamination. See, e.g., 47 FR 32318, 32321, 32323. By contrast, corrective actions are remedial or retrospective in that they are designed to clean up contamination that has already occurred. EPA has previously promulgated regulations mandating the closure of disposal units for wastes under both subtitles C and D for wastes within each subsection's jurisdiction. See, 40 CFR 264, subpart G, 258, subpart F. But the requirement for corrective action of *solid waste* management units under the provisions applicable to hazardous wastes under section 3004(u) is an anomaly; Congress has otherwise limited subtitle C to the regulation of hazardous wastes. The appropriate comparison is thus not to EPA's regulation of SWMUs under subtitle C, but rather to EPA's regulation of hazardous waste units under subtitle C, where the Agency requires hazardous waste units to comply with both closure and corrective action requirements.

In sum, the record demonstrates that closure is warranted for CCRMUs, even for those that are not yet leaking. As the D.C. Circuit explained, RCRA requires EPA to set minimum criteria for sanitary landfills that prevent harm, not merely to ensure that contamination is remediated. See, *USWAG*, 901 F.3d at 430.

Consistent with the requirements for legacy CCR surface impoundments, EPA is not requiring previously closed CCRMUs to automatically re-close but simply to evaluate whether the unit

meets the requirements of § 257.102(d), and if they do not, to take such measures as are necessary to bring the unit into compliance.

ii. Deferral for CCRMU Under Critical Infrastructure

As noted above, many commenters stated that some CCRMU are currently located beneath critical infrastructure. For example, a number of commenters stated that CCR has historically been used on-site at generating stations for many years as structural fill, including for utility line bedding, and under site infrastructure such as switchyards, coal piles, railroad embankments, and occupied buildings. Additionally, commenters pointed to many areas at their existing facilities with CCR currently located under existing critical energy infrastructure such as generating units, cooling towers, substations, levees, dikes, on-site wastewater treatment systems, dams, transmission towers, gas lines, and solar installations.

These commenters claimed that requiring closure of CCRMU beneath infrastructure could adversely impact grid reliability, business operations, or other necessary public services and suggested EPA create exemptions or extensions for these units. According to these commenters, attempting to close any of these areas under the rule's closure standards would not only be impossible, but also would require disturbing and/or even disassembling critical components of power plant's energy infrastructure, which would only further exacerbate the pressures on grid reliability. Other commenters raised concern that remediation would require removal of existing infrastructure to access the CCR, which in some cases could present significant operational risk and potential danger. As one commenter characterized it,

Particularly at active power plants, requiring closure of CCRMU . . . would cause massive ripple effects that need to be more carefully considered. Closure would be incredibly disruptive for these type of sites—particularly given the inadequate time for electricity resource planning—and exacerbate the grid reliability challenges that co-ops and other utilities are already facing. Moreover, EPA must consider and allow for power plant owners to follow the mandated procedures put in place by the relevant balancing authority, such as regional transmission organizations or electric utilities, and by state authorities which have a role in ensuring the reliability of the local grid.

Several commenters also expressed concern about the closure of CCRMU located under active CCR landfills, asserting that such closures pose complex challenges that EPA did not fully understand or account for in the

proposed rule. Many of these commenters asserted that these closed landfill or surface impoundment CCRMU present no risks. For example, one commenter discussed a closed surface impoundment located beneath its active CCR landfill. The commenter asserted that the permitted, Federally regulated CCR landfill above the closed unit, combined with the collective effect of the CCR landfill liner and leachate collection system, runoff controls, and engineered cap, keeps the impoundment isolated from exposure to stormwater runoff and other sources of water infiltration. The commenter further asserts that there is no evidence that this former impoundment is impounding or otherwise contains any significant amount of free liquids, and that such a condition is unlikely given the overlying landfill infrastructure.

By contrast, numerous commenters supported the proposed mandate to close due to the substantial risks that these kinds of “overfill” units can pose. As one of these commenters explained,

In this situation the underlying CCRMU serves the function of the foundation of the overlying CCR unit. The liner of the overlying CCR unit serves as a cap over the underlying CCRMU. CCR contaminants released from either the overlying CCR unit or underlying CCRMU can adversely impact groundwater quality with little potential for distinguishing between contaminants released from one or the other of these units. Each of the co-located units must be capable of containing CCR contaminants if releases to the environment are to be avoided.

Construction of a CCR unit over a previously existing CCRMU is known to have the potential to increase concentrations of CCR groundwater contaminants. A 2001 study by the Electric Power Research Institute (EPRI) showed that reducing the hydraulic gradient beneath a CCR impoundment can induce increased contaminant concentrations when the waste is in contact with groundwater. EPRI concluded that reducing the hydraulic gradient by dewatering an impoundment slowed groundwater flow and increased contact time between the waste and groundwater. Contact time between waste and water is an important variable that influences concentrations of contaminants found in groundwater.

Release of contaminants from the overlying unit, while possible, is not necessary to cause increasing contaminant concentrations. The bottom liner of the overlying CCR unit reduces infiltration of water from above, reducing the hydraulic gradient and increasing waste/water contact time. The increased contact time can increase contaminant concentrations in downgradient monitoring wells.

The commenters acknowledged that where the waste in the CCRMU is dry and the owner/operator can assure that separation of the waste from water (groundwater and/or infiltration from

above) will be maintained the unit may be closed in place under the CCR rule without posing ongoing risks. The commenter also noted, however, that where unlined waste units are continually or periodically in contact with groundwater, more extensive closure techniques such as engineering controls designed to prevent groundwater from flowing through waste or to stabilize the waste and fix contaminants in place may be attempted, or excavation and clean closure of the unit may ultimately be necessary.

Unlike the comments received on legacy CCR surface impoundments, the overwhelming majority of commenters provided concrete examples of concerns with respect to the timing of closure activities for CCRMU. In total, these commenters have provided sufficient information to raise a legitimate question whether adverse, localized impacts on electric reliability (e.g., voltage support, local resource adequacy) could result from a nationwide requirement to close all CCRMU within the deadlines under the regulations.

EPA agrees that closing CCRMU underlying critical infrastructure at active generating facilities is very different and more challenging than closing disposal units at inactive utilities. When it was developing the proposal, EPA was unaware of the extent to which facilities had historically used CCR as part of the foundation supporting generating units, cooling towers, substations, or on-site wastewater treatment systems. In some cases, it appears that in order to close these CCRMU individual facilities may need to disturb substantial portions of the entire site and disassemble critical components of the power plant's energy infrastructure, such as high power electric transmission towers, and electrical substations.

EPA agrees that its proposal did not adequately account for this circumstance. This is particularly true in the case of a CCRMU located beneath infrastructure necessary for energy production, where the potential exists for adverse, localized impacts on electric reliability (e.g., voltage support, local resource adequacy). This issue arises whenever multiple facilities need to take their EGU offline for an extended period to complete construction or other compliance activities. The likelihood of an adverse impact on electric reliability can be greater if multiple facilities need to schedule outages simultaneously in order to comply with EPA's closure deadlines. EPA understands that it is

also possible that in some instances temporarily taking generating units (including coal-fired units) offline could have an adverse, localized impact on electric reliability (e.g., voltage support, local resource adequacy). If a generating asset were needed for local reliability requirements, the grid operator might not approve a request for a planned outage. In such instances, the owners/operators of the generating unit could find themselves in the position of either operating in noncompliance with RCRA or halting operations and thereby potentially causing adverse reliability conditions. In addition, failure of an electric transmission or generation system can lead to substantial risks to human health (e.g., if an outage impairs the ability of emergency services to function properly or it causes home heating or cooling systems to fail, which increases risk, particularly for vulnerable populations).

However, such impacts are far less likely to arise from an individual facility-specific decisions, and should normally be adequately managed by the established RTO processes for scheduling outages. EPA recognizes that this final rule provides a substantial amount of time for facilities to complete these closures. In contrast with the proposal, the final rule provides facilities 54 months to initiate closure, and depending on the CCRMU, the facility may have as much as an additional seven to 15 years to complete closure. Based on the comments, however it appears that the overwhelming majority of CCRMU below critical energy production infrastructure are likely to be landfills, and therefore the seven year deadline is more likely to be applicable.

Further, this situation is not analogous to the closure of unlined and clay lined impoundments in response to the *USWAG* vacatur, and thus the information used to develop the deadline for those CCR units in the Part A rule cannot be used to develop a comparable requirement for these CCRMU. For example, there appear to be a greater number of CCRMU at these sites and the construction estimates EPA relied upon in 2020 in the Part A final rule applied exclusively to the six specific technologies that a facility might use to develop alternative disposal capacity. That rulemaking did not involve the potential effect of disturbing substantial portions of the entire site or disassembling critical components of the power plant's energy infrastructure, such as high power electric transmission towers or electrical substations, which is what some

commenters have alleged will be necessary in this case.

Unfortunately, because EPA only became aware of these facts after development of the proposal the Agency has not had the time to obtain the information necessary to evaluate—or to consult with balancing authorities and other electric reliability authorities (e.g., DOE or NERC) on the feasibility of mandating closure of all CCRMU within these deadlines, within the time to complete this rulemaking.¹⁴⁵

EPA acknowledges that the risks associated with CCRMU above the regulatory threshold are substantial, and generally warrant a mandate to close in accordance with § 257.102. Moreover, the fact that EPA did not model the aggregate risks associated with the widespread use of small amounts of unencapsulated CCR throughout the entire facility raises questions about whether EPA may have underestimated the potential risks associated with these CCRMU. EPA also agrees that overfills can present significant risks, particularly when the closed CCR unit remains inundated by groundwater or otherwise continues to contain free liquids. EPA therefore concludes that exempting these CCRMU from the requirement to close in accordance with § 257.102 is not appropriate.

Given that EPA has the ability to rely on the permitting process to address issues on a case-by-case basis, and because doing so will allow the Agency to adequately address both the competing environmental and reliability risks presented at individual sites, it is reasonable for the Agency to choose this option. Consequently, EPA is deferring the requirement to initiate closure of CCRMU located beneath critical infrastructure until either: (1) The infrastructure is no longer essential for the activity to be successful; (2) A permit authority determines closure is necessary to ensure there will be no reasonable probability of adverse effect on health or the environment; or (3) The closure or decommissioning of the facility, whichever occurs first.

The final rule also includes an additional condition on CCRMU under active disposal units. In order for these units to qualify for the deferral, the facility must document that the CCRMU meets one of two existing performance standards: either (1) The standard in § 257.60 that the unit was constructed with a base that is located no less than 1.52 m (5 feet) above the upper limit of

the uppermost aquifer, or must demonstrate that there is no intermittent, recurring, or sustained hydraulic connection between any portion of the CCR unit and the upper limit of the uppermost aquifer or surface water; or (2) The dewatering standard in § 257.102(d)(2)(i) that all free liquids have been eliminated. EPA believes the location standard in § 257.60 is likely to be more directly applicable to many CCRMU, as they are landfills that would not have been constructed or designed to hold free liquids. EPA has also included the dewatering standards in § 257.102(d)(2)(i) for those closed CCR surface impoundment CCRMU. Based on the descriptions provided by commenters EPA expects that this requirement will largely be relevant to closed CCRMU located beneath active disposal units, rather than CCRMU located beneath infrastructure vital to energy production, which are unlikely to be inundated by groundwater. Moreover, this requirement directly addresses the reason that EPA has concluded that many previously completed closures do not meet the standard in RCRA section 4004(a).

To be clear, EPA is not exempting these CCRMU from the requirement to close as commenters requested, but merely extended the deadline for compliance until the Agency can address it on an individualized basis as part of permitting. In addition, these units will be required to comply with all other requirements applicable to CCRMU, including the requirements for groundwater monitoring and corrective action, if necessary.

As noted above and discussed in the next section, in response to public comments, EPA has extended the deadline to initiate closure to Tuesday, May 8, 2029, which is 54 months after the effective date of this final rule. Based on its current schedule, EPA expects to be issuing permits before that deadline.

EPA is defining “critical infrastructure” as infrastructure, large buildings, or other structures vital to the success or continuation of current site operations or activities for the public welfare. This does not include infrastructure, large buildings, or other structures that solely provide commercial or financial benefit to private entities. Examples of critical infrastructure include high power electric transmission towers, large buildings, and electrical substations. The structures must be both (1) necessary for the continued generation of power or currently used for an ongoing site activity; and (2) not readily replaced or relocated. For example, a

¹⁴⁵ EPA is obligated to take final action on the proposal no later than May 6, 2024, pursuant to *Statewide Organizing for Community eMpowerment v. EPA*, No. 1:22-cv-2562-JDB (D.D.C.).

parking lot that could easily be replaced by a parking lot in a different location onsite would not qualify as critical infrastructure; but a lined industrial stormwater ponds, wind or solar farms, substations, or military infrastructure would qualify.

The owner or operator of a CCRMU located under critical infrastructure must include information documenting their eligibility for the deferral in the FER part 2 in § 257.75(d) that includes at a minimum a description of the infrastructure, its current and anticipated use(s), and the decommissioning date or anticipated active lifespan. The documentation must also demonstrate that the CCRMU complies with either § 257.60 or § 257.102(d)(2)(i). The documentation must also demonstrate that the structures are both: (1) Necessary for the continued generation of power or currently used for an ongoing site activity; and (2) Not readily replaced or relocated.

When it comes time for a permit authority to evaluate the CCRMU, EPA intends to rely on the permit application process as the primary mechanism to collect the information to allow a determination to be made as to whether to require closure of the CCRMU prior to facility closure. The permit application process is a well-established system for reviewing the types of groundwater, soil and other sampling and analytical data that will typically be required in determining the potential risks associated with the CCRMU.

When the permit application is called in, the facility must provide sufficient information, including data on contaminant levels in groundwater, to demonstrate that the criteria listed above for the deferral have been met, and for the permit authority to be able to evaluate the risks associated with the CCRMU. EPA (or other permit authority) will review the information to determine whether the criteria for deferral have been met and whether closure is necessary to mitigate unacceptable risks to human health or the environment from the CCRMU.

Finally, EPA received a substantial number of comments requesting that the Agency not require facilities to “re-close” any unit that already completed closure. This final rule does not mandate that any previously closed unit automatically re-close. But as described in the next section, the final rule does require all CCRMU to meet the performance standards in § 257.102, although as discussed above, some may not be required to do so until the permitting process begins for that unit. EPA does not consider this to be

equivalent to a requirement to “re-close” as facilities may be able to implement engineering measures to address any deficits without removing the cover system or entirely re-closing the whole impoundment. Whether any particular measure will be effective is a site-specific determination, but some reasonably available engineering measures that may be effective and should be considered include the installation of physical barriers (e.g., slurry walls), groundwater diversion techniques (e.g., interception trench) or hydraulic containment systems (e.g., groundwater extraction wells) to prevent groundwater infiltration.

iii. Requirement To Comply With Performance Standards in § 257.102

As discussed above, this final rule requires that the closure of CCRMU meet the performance standards in either § 257.102(c) or (d). Under this final rule all closures initiated after the effective date of this rule, as well as to those that were not completed prior to the effective date of this rule, will need to comply with these requirements.

And in general, the same is true with respect to closures that were completed prior to the effective date of this rule. As discussed previously, a facility that can certify that prior closure of a unit meets the performance standards in § 257.102(c) only needs to post the documentation that the closure meets the standard. Similarly, if a facility can demonstrate that the closed unit meets the requirements under § 257.102(d), EPA will consider the unit to be closed and the only requirements that will be applicable are those that apply to closed units under post closure care—that is groundwater monitoring, and if necessary, corrective action. EPA never intended to require facilities that otherwise met the closure standards to go through the process again and re-close the unit. In addition, as discussed in the next section, where the facility was subject to standards that are different than the Federal CCR closure standards—e.g., if the closure was conducted as part of a CERCLA cleanup—but otherwise is equivalent in terms of mitigating the risks, the requirement to meet the § 257.102 standards will be deferred to permitting, where a closure equivalency determination will be made.

(a) Closure of CCRMU Under State Law and Deferral of Certain Completed Closures to Permitting

In response to EPA’s proposal that all CCRMU comply with § 257.102, many commenters requested that EPA exempt any unit that has either completed

closure or is in the process of closing pursuant to State law (e.g., solid waste permit, consent orders or decrees). Commenters also requested that EPA exempt any site that closed as part of a cleanup conducted pursuant to another Federal requirement, such as CERCLA or RCRA subtitle C. For the most part, these commenters simply repeated the comments that they had made with respect to legacy CCR surface impoundments, stating that EPA had failed to demonstrate that these units posed any risk as a consequence of the lack of ponded water, and that “re-closure” of these previously closed units is consequently unnecessary and overly burdensome. However, several commenters also presented individual examples of CCRMU that had been closed in accordance with State requirements, which the commenters believed would demonstrate the State closures were equally as protective as those conducted in accordance with § 257.102. These included the following examples:

[A facility] has an approximately 20-acre dry stack landfill with 20 plus years of groundwater monitoring that does not show groundwater exceedances, zero potential receptors downstream (from the direction of groundwater) that use wells for drinking water (also no potable wells within a two-mile radius). The landfill construction using best practices to minimize erosion potential, including only placement of stabilized material in the landfill, perimeter ditch surrounding the entire landfill to collect any runoff that is processed before discharge, and the unit is regulated by the Florida Department of Environmental Protection that includes semi-annual groundwater monitoring results review and yearly on-site regulatory inspections.

[Another facility] had two CCRMU landfills that were closed prior to the effective date of the 2015 CCR Rule and were closed in accordance with the State of Florida’s Chapter 62–701, F.A.C., for municipal and solid waste landfills. Neither landfill was built on top of a liner system. The closed landfills were subject to design criteria for cover systems and stormwater management, as well as long-term operations and maintenance provisions. The groundwater monitoring system requirements for landfills in Florida are similar to, but not the same as, those in the 2015 CCR rule. Both closed cells would be subject to corrective action if dictated by the monitoring program. Maintenance, inspections, and repair of the cover systems, as needed, are also part of the long-term care program.

[Another facility] reported closing an inactive CCR landfill in the 1980s. The 20-acre site was used to dispose of bottom and fly ash, including scrubber sludge. The owner performed monitoring of a nearby spring to demonstrate whether any ponded water was leaking. Upon visual inspection, it was determined that the bentonite/clay-lined pond remained intact throughout the active

operation of the landfill. However, because of the age of the site, groundwater monitoring wells were not required.

In addition, several States provided information about their existing programs or individual closures. In some instances, the information was intended to demonstrate that the closures were equally as protective as § 257.102, and to provide factual support for an exemption for CCRMU that closed in accordance with State requirements. Other States acknowledged the risks but urged EPA to make the CCRMU requirements “more flexible and allow for practical alternatives to closure and corrective action for units that have not impacted groundwater,” or to provide an opportunity to demonstrate if the previous closure of the CCRMU is protective of human health and the environment.

By contrast, several commenters supported EPA’s proposal to require all CCRMU to comply with the performance standards in § 257.102, even if the closure was previously approved by a State regulatory agency. These commenters also largely made the same comments they had made with respect to legacy CCR surface impoundments, pointing to EPA’s conclusions in 2015 that significant gaps remain in many State programs. These commenters also identified recent examples of closures approved by various State agencies that they believed were not consistent with the Federal closure standards.

No commenter submitted any information that would support a conclusion that different provisions are warranted for CCRMU that closed prior to the effective date of this rule than EPA adopted for similarly situated legacy CCR surface impoundments. Even if individual examples were sufficient to overcome the record with respect to State programs generally, none of the examples presented by the commenters provided sufficient detail for EPA to actually evaluate the adequacy of the closures. For instance, in the three examples presented above, neither of the first two examples actually describe the groundwater monitoring that was required; while the second states that “groundwater monitoring system requirements for landfills in Florida are similar to, but not the same as, those in the 2015 CCR rule” it provides no further information. The third example explains that no groundwater monitoring at all was required because of the age of the unit; it is unclear why the commenter believes that this supports a finding that

the State program is as protective as those in part 257.

More to the point, as EPA explained in Unit III.B.2.g of this preamble, with respect to legacy CCR surface impoundments, EPA lacks the record necessary to support a broad exemption for all CCRMU closures under any State requirement. The limited information currently available does not demonstrate that all closures conducted under State authority, particularly those completed prior to 2015, “will ensure there is no reasonable probability of adverse effects on health or the environment.” 42 U.S.C. 6944(a).

EPA, however, agrees that there are examples of closures that are substantially equivalent to those conducted in accordance with § 257.102. Moreover, EPA has no basis for concluding that the same considerations that warrant deferral of certain legacy CCR surface impoundments closures are not equally applicable to comparable CCRMU closures. Accordingly, EPA is deferring the requirement for a CCRMU that closed prior to the effective date of this rule to demonstrate compliance with § 257.102(d) until a permit application is required to be submitted where the facility can document that all of the following conditions have been met. First, the deferral is limited to circumstances in which a regulatory authority played an active role in overseeing and approving the closure activities. EPA considers a “regulatory authority” to include a State or Federal agency or department that oversaw implementation of requirements imposed through a permit, an administrative order, or consent order issued after 2015 under CERCLA or by an EPA-approved RCRA State program. The permit, order, regulatory or other authority must have required groundwater monitoring to ensure there was no contamination coming from the unit that is not addressed by corrective action until cleanup standards are achieved.

To support deferral of a prior closure of a CCRMU as substantially equivalent, the facility must also document that the CCRMU meets one of two existing performance standards: either: (1) The standard in § 257.60 that the unit was constructed with a base that is located no less than 1.52 m (5 feet) above the upper limit of the uppermost aquifer, or must demonstrate that there is no intermittent, recurring, or sustained hydraulic connection between any portion of the CCR unit and the upper limit of the uppermost aquifer or surface water; or (2) The dewatering standard in § 257.102(d)(2)(i) that all free liquids

have been eliminated. This requirement directly addresses the reason that EPA has concluded that many previously completed closures do not meet the standard in RCRA section 4004(a).

In addition, a facility must document that it had installed a groundwater monitoring system and performed groundwater monitoring that meets a subset of the performance standards found in § 257.91(a). Specifically, the facility must demonstrate that the groundwater monitoring system was capable of: (1) Accurately representing background water quality, (2) Accurately representing the quality of water passing the waste boundary, and (3) Detecting contamination in the uppermost aquifer. The groundwater monitoring system must have monitored all potential contaminant pathways.

Next, a facility would need to demonstrate that a site-specific risk assessment was conducted or approved by the regulatory authority prior to (or as part of) approving the closure, and that the closure and any necessary corrective action has been overseen by the regulatory authority, pursuant to an enforceable requirement.

Finally, the facility would be required to prepare and include documentation in the applicability report and operating record, demonstrating that it has met these criteria and is eligible for deferral. The documentation must include specifics including the State permit, order, data, GWM results, etc. This must be certified by the owner/operator or an authorized representative using the same language in § 257.102(e).

When it comes time for the permit authority to evaluate the closure, EPA intends to rely on the permit application process as the primary mechanism to collect the information to allow a determination to be made as to whether a CCRMU that closed under these alternative standards did so in compliance with the requirements of § 257.102. The permit application process is a well-established system for reviewing the types of groundwater, soil and other sampling and analytical data that will typically be required in determining the “equivalency” of alternative closures.

When the permit application is called in, the facility must provide sufficient information, including data on contaminant levels in ground water, to demonstrate that the applicable § 257.102 standards have been met. EPA or an approved State Director (the permitting authority) will review the information to determine whether the “equivalency” of the closure has been successfully demonstrated. If EPA determines that the closure has met the

appropriate part 257 closure standard, EPA or an approved State Director will issue a post-closure permit. If EPA or an approved State Director determines that the closure does not meet the part 257 standards, the owner or operator will be required to submit a permit application containing all the applicable information for an operating permit, and EPA will issue a permit that contains the specific requirements necessary for the unit to achieve compliance with § 257.102.

(b) Revisions to Performance Standards for Closing With Waste in Place

(1) Expansion of § 257.102(d)(2)(i) to CCR Landfills

Given the locations of many CCRMU (located in floodplains, or wetlands, or near large surface water bodies), EPA is concerned that the base of these units may intersect with the groundwater beneath the unit. As EPA has previously explained, where the base of a surface impoundment intersects with groundwater, the facility will typically need to include engineering measures specifically to address any continued infiltration of groundwater into the impoundment in order to close with waste in place consistent with § 257.102(d). See, *e.g.*, 87 FR 72989 (November 28, 2022), 85 FR 12456, 12464 (March 3, 2020). The same holds true for CCRMU that intersect with groundwater. The existing requirements in § 257.102(d)(1) and (3) apply to all CCR units and EPA proposed that these provisions would also apply to CCRMU without revision. By contrast, the existing requirements in § 257.102(d)(2), which establish performance standards for drainage and stabilization of the unit, only apply to CCR surface impoundments. These performance standards are critical to ensuring that units that contain liquids are properly and safely closed, and therefore should apply to any unit, including a CCRMU and a CCR landfill, where free liquids remain in the unit. Accordingly, EPA proposed to revise § 257.102(d)(2) so that it applies to all CCR units and CCRMU. To assist commenters, the proposal included a background discussion of the existing closure performance standards. Finally, EPA explained that if there are no liquids in the unit, the proposed revision would not require the facility to do anything to meet the performance standards.

Several commenters supported the proposed revision. For example, one commenter provided data about an unlined CCR landfill that was constructed above the groundwater table and was found to be “impacting

groundwater with high concentrations of heavy metals, with particularly high concentrations of boron fluctuating between 14 and 30 mg/L.” The State of Michigan required closure of this landfill due to groundwater impacts and after the landfill completed closure, “the boron concentrations returned to background concentrations approximately five years later.” The commenter further went on to state, “this example is provided to demonstrate that any type of water contact with CCR disposal areas can impact groundwater, causing concentrations to rise to concerning levels above water quality standards.” Another commenter suggested that, consistent with its statement in the proposal, EPA should further revise § 257.102 to clarify that the performance standards are met if there is no liquid in the CCRMU. The commenter recommended the following revisions to § 257.102(d)(1) and (2):

(1) General performance standard. The owner or operator of a CCR unit or CCR management unit that contains liquid must ensure that, at a minimum, the CCR unit or CCR management unit is closed in a manner that will: * * *

(2) Drainage and stabilization of CCR units and CCR management units. The owner or operator of any CCR unit or CCR management unit that contains liquid must meet the requirements of paragraphs (d)(2)(i) and (ii) of this section prior to installing the final cover system required under paragraph (d)(3) of this section.

A few commenters opposed extending § 257.102(d)(2) to CCR landfills and CCRMU, asserting that EPA had failed to provide a factual basis to justify the revision. For example, one commenter stated that:

There are two purposes for free liquids removal—addressing stability and potential groundwater contamination. For long-closed units, stability is demonstrably not a concern. For groundwater, any potential contamination can be addressed through corrective action rather than closure. . . . EPA does not explain why the existing corrective action regulations—which would require corrective action and potentially source control in the event groundwater contact causes impacts to groundwater—are insufficient. In short, the proposed extension of the requirements is unnecessary and unsupported by the record.

Another commenter contested the factual basis for the “proposed rule’s assumption” that CCR are in contact with groundwater. According to the commenter, CCR surface impoundments and CCR landfills are not located in the same hydrogeological environments and requires a site-specific evaluation to determine, which is beyond the requirements of the existing CCR

regulations. One commenter criticized EPA for failing to identify the 19 landfills “already regulated under the 2015 CCR final rule, but which have waste in contact with groundwater,” and depriving the public of an opportunity to comment on the accuracy of that proposed finding. Another commenter said it takes a very long time to eliminate free liquids in a CCRMU or landfill, which typically happens during post-closure care.

EPA disagrees that it has failed to justify the revision. The proposed rule did not rest on an assumption but on information (*e.g.*, annual groundwater monitoring and corrective action reports, closure plans) posted to facility CCR websites showing that the bases of their CCR landfills are in contact with groundwater. EPA has included a list of these facilities in the docket for this final rule. In addition, other commenters have provided further examples of landfills that are submerged in the aquifer. Moreover, while the commenter is correct that whether groundwater is infiltrating a particular unit is a site-specific determination, the commenter failed to provide any factual basis for its assertion that CCR surface impoundments and CCR landfills are never located in the same hydrogeological environments. And contrary to the commenter’s assertion EPA has repeatedly explained why it is insufficient to rely on corrective action rather than closure to address the risks associated with CCR landfills. The closure and corrective action regulations are distinct and independent requirements, each of which must be met. The closure in-place standards are designed to ensure that the waste in the closed unit has been dried out and is kept dry so that leachate cannot form in the closed unit and subsequently be released to the environment. See, *e.g.*, 47 FR 32318, 32321, 32323. For impoundments that are not yet leaking compliance with these provisions are largely designed to ensure that the closed unit does not become a source of future contamination. In other words, the closure standards are expressly designed to *prevent* groundwater contamination. By contrast, the corrective action provisions in §§ 257.96 through 257.98 contain the standards and procedures for cleaning up the contamination in the groundwater that has already leaked out of the unit. See, *e.g.*, 40 CFR 257.97(b)(2) and (4) (requiring that clean up remedies “attain the groundwater protection standard [in] § 257.95(h)” and “remove from the environment as much of the contaminated material as was released

from the CCR unit as feasible”). See, *USWAG*, 901 F.3d at 429–430, 431.

EPA appreciates the commenter’s suggested alternative regulatory text; however, EPA is concerned that the suggested revision is effectively redundant of the new definition of “contains CCR and liquids” and would not clearly communicate the entities that are subject to the regulation. Therefore, EPA is finalizing this requirement as proposed. In addition, because it can take a significant amount of time to meet the performance standards in § 257.102(d)(2), EPA has extended the closure deadlines applicable to any CCR landfill that needs to meet these standards.

(2) Definition of Infiltration

EPA requested comment on whether to adopt a regulatory definition of the term “infiltration,” consistent with term’s plain meaning and the dictionary definitions discussed in the preamble.

Several commenters agreed that EPA should adopt a regulatory definition of infiltration that explicitly recognizes the myriad ways that liquids can infiltrate CCR surface impoundments. Some commenters supported EPA’s proposed definition of “infiltration” because industry has argued that “the presence of groundwater in ash ponds is essentially irrelevant to closure compliance and that the CCR Rule’s closure in place requirements are limited to draining the surface portion of the pond, constructing a final cover, and preventing surface water—but not groundwater—infiltration thereafter.” Another commenter stated EPA should define “infiltration” to make clear that it is “a general term that refers to the migration or movement of liquid into or through a CCR unit from any direction, including the top, sides, and bottom of the unit.”

Other commenters objected to EPA’s proposal to adopt a definition, citing ongoing litigation in *Electric Energy, Inc., et al. v. EPA*, Case Nos. 22–1056 and 23–1035. These commenters complained that EPA makes no mention of this litigation in the proposed rule, even as it claims that its interpretation is “sufficiently clear that a definition is not necessary.” One commenter further stated that if EPA ultimately elects to adopt regulatory definitions of those terms, it should wait until the court rules so that the definitions are informed by and consistent with any such ruling.

Another commenter asserted that EPA must acknowledge (and make a good faith attempt to reconcile) the competing interpretations of key terms

of art in the 2015 CCR Rule before extending them into this final rule.

One commenter argued that even if EPA adopted its proposed definition, the rule provides no criteria—in contrast to the detailed criteria for the necessary cover system—for how to “control, minimize or eliminate to the maximum extent feasible” horizontal groundwater “infiltration.” The commenter alleged that “this type of undefined performance standard would be void for vagueness, especially when compared to the great lengths EPA went to specify the other technical criteria to address vertical infiltration in the performance standard.”

EPA also received numerous comments recommending that infiltration be defined by reference to technical definitions that define infiltration as exclusively the vertical flow of water from the surface down into the unit. These included a definition provided by the U.S. Geological Survey (“USGS”), as “flow of water from the land surface into the subsurface.” Also, according to the USGS: “Water that infiltrates at land surface moves vertically downward to the water table to become ground water. The ground water then moves both vertically and laterally within the ground-water system.”

As discussed previously, EPA disagrees that it is necessary to wait until the court issues its decision in the pending litigation (*Electric Energy, Inc., et al. v. EPA*, Case Nos. 22–1056 and 23–1035). However, the court may rule on the procedural question at issue, it would not resolve the substantive question EPA posed in the proposal, of whether the inclusion of a definition would be useful.

EPA also disagrees that it should adopt a definition of infiltration as exclusively the vertical flow of water from the surface down into the unit. The purpose of adopting a definition is not to establish a generic definition of infiltration, but to assist in the application of standards to ensure that a CCR unit closes in a manner that will protect human health and the environment. When promulgating definitions applicable in regulatory programs, EPA relies not only on available dictionary definitions, but also the surrounding context of the regulation as a whole, as well as what will best achieve the overall purpose of the regulation, and the Agency’s statutory mandate. None of the commenters address any of these factors in recommending that EPA adopt their various technical definitions. In this case, the plain language definition of infiltration best fits within the context

of the regulation as a whole, and best achieves both the purpose of the regulation and the RCRA section 4004(a) mandate to protect human health and the environment. This is because under the commenters’ unnecessarily restrictive definitions the regulation would allow a significant number of sites to continue leaking hazardous constituents, such as arsenic and mercury, indefinitely.

Accordingly, the final rule adopts a definition of infiltration based on the dictionary definitions discussed in the proposal. The final rule defines infiltration to mean “the migration or movement of liquid, such as surface water or ground water, into or through a CCR unit from any direction, including from the surface, laterally, and through the bottom of the unit.” This definition also is consistent with two technical sources that use infiltration more broadly by incorporating lateral flow through continuous porous media. As EPRI explained in its comments, *Geotechnical Aspects of Landfill Design and Construction* (Qian 2002) does not contain an explicit definition of infiltration but does refer to both “surface water infiltration” and “groundwater infiltration” in its description of landfill leachate. Similarly, the National Research Council in *Assessment of the Performance of Engineered Waste Containment Barriers* (National Research Council 2007) does not explicitly define infiltration but uses infiltration to describe surface water and groundwater movements into waste as well as soil migration into drainage systems.

With respect to the comment requesting EPA to “acknowledge (and make a good faith attempt to reconcile) the competing interpretations of key terms of art in the 2015 regulation,” EPA considers that its adoption of this definition does this. As noted, the definition is consistent with both the plain language meaning of the term, and with relevant technical sources. Further, the definition fits within the context of the regulation as a whole and best achieves both the purpose of the regulation and RCRA’s mandate to protect human health and the environment.

Finally, EPA disagrees that the regulation, with or without a regulatory definition of infiltration, is unconstitutionally vague. The scope of the regulatory definition is clear, and thus regulated parties have adequate notice of the rule’s requirements.

In point of fact, the commenter’s complaint is not that it cannot

determine what is required under the regulation, but that it dislikes what the plain language clearly compels. Relying on the plain language definition of infiltration simply requires facilities that want to close an unlined CCR impoundment with waste in place to implement engineering measures to “control, minimize, or eliminate, to the maximum extent feasible” liquid entering the unit from the sides or the base of the unit. EPA has previously identified several reasonably available engineering measures exist that can prevent, or at least control, the flow of groundwater into the unit (and consequently the releases out of the unit). For example, EPA’s 1982 guidance on the closure of hazardous waste surface impoundments, which the commenter also references, identifies several engineering controls “to prevent the subsurface flow of ground water into the impounded waste.” EPA Office of Solid Waste, Closure of Hazardous Waste Surface Impoundments, SW-873, p 81 (September 1982), Revised Edition (emphasis added). In other words, the regulation “clearly proscribes” the commenter’s preferred conduct of closing its CCR impoundments without addressing the groundwater in its unit. Finally, § 257.102(d)(1)(i) is no more vague than the corresponding requirement in § 265.111(a), which has been in effect since 1982 (requiring interim status facilities to “control, minimize or eliminate to the extent necessary to protect human health and the environment, post-closure releases of leachate . . .”). The clarity of this regulation is shown by the fact that, over the past 40 years the regulation has been in effect, interim status hazardous waste facilities have been able to adequately determine what the regulation requires and comply with it. The commenter has offered nothing to distinguish the interim status requirements from those in § 257.102(d)(i).

(3) Closure in Place Performance Standards Under § 257.102(d)

The May 2023 proposal explained how the performance standards for closing with waste in place applied to a CCR surface impoundment that intersected with groundwater. EPA received a number of comments that agreed with the Agency’s explanation, as well as several that opposed it. Several commenters raised objections they had previously presented in the context of prior decisions. EPA has previously responded to these comments in detail in (1) U.S. EPA. Denial of Alternative Closure Deadline for General James M. Gavin Plant,

Cheshire, Ohio (November 18, 2022) in the docket at EPA-HQ-OLEM-2021-0590-0100; (2) 88 FR 31982 (May 18, 2023); and (3) 88 FR 55220 (August 14, 2023). EPA continues to be unpersuaded by the commenters objections and to avoid any confusion is reiterating below the explanation provided in the May 2023 proposal.

The CCR closure requirements applicable to closing with waste in place include general performance standards and specific technical standards that set forth individual engineering requirements related to the drainage and stabilization of the waste and to the final cover system. The general performance standards and the technical standards complement each other, and both must be met at every unit.

The specific technical standards related to the drainage of the waste in the unit require that, “free liquids must be eliminated by removing liquid wastes or solidifying the remaining wastes and waste residues.” 40 CFR 257.102(d)(2)(i). Free liquids are defined as all “liquids that readily separate from the solid portion of a waste under ambient temperature and pressure,” regardless of whether the source of the liquids is from sluiced water or groundwater. 40 CFR 257.53. Consequently, the directive applies to both the freestanding liquid in the impoundment and to all readily separable porewater in the impoundment, whether the porewater was derived from sluiced water, stormwater run-off, or groundwater that migrates into the impoundment. In situations where the waste in the unit is inundated with groundwater, the requirement to eliminate free liquids thus obligates the facility to take engineering measures necessary to ensure that the groundwater, along with the other free liquids, has been permanently removed from the unit prior to installing the final cover system. See, 40 CFR 257.102(d)(2)(i).

In addition to the process-specific technical requirements, all closures must meet the requirements in the general performance standard to “control, minimize or eliminate, to the maximum extent feasible,” both post closure infiltration of liquids into the waste and releases of CCR or leachate out of the unit to the ground or surface waters, and to “preclude the probability of future impoundment of water, sediment, or slurry.” 40 CFR 257.102(d)(1)(i), (ii).

In situations where the groundwater intersects an unlined CCR unit, water may infiltrate into the unit from the sides and/or bottom of the unit because

the base of the unit is below the water table. In this scenario, the CCR in the unit will be in continuous contact with water. This contact between the waste and groundwater provides a potential for waste constituents to be dissolved and to migrate out of (or away from) the closed unit. In such a case, the general performance standard also requires the facility to take measures, such as engineering controls, that will “control, minimize, or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste” as well as “post-closure releases to the groundwater” from the sides and bottom of the unit. 40 CFR 257.102(d)(1).

Whether any particular unit can meet these performance standards is a fact and site-specific determination that will depend on a number of considerations, such as the hydrogeology of the site, the design and construction of the unit, and the kinds of engineering measures implemented at the unit. Accordingly, the fact that prior to closure the base of a unit intersects with groundwater does not mean that the unit may not ultimately be able to meet the performance standards in § 257.102(d) for closure with waste in place.

Depending on the site conditions, a facility may be able to meet these performance standards by demonstrating that a combination of engineering measures and site-specific circumstances will ensure that as a consequence of complying with the closure performance standards, the groundwater will no longer be in contact with the waste in the closed unit. As one example, where groundwater intersects with only a portion of an impoundment, the facility could close that portion of the unit by removing the CCR from that area of the unit but leaving waste in place in other areas. As another example, if the entire unit sits several feet deep within the water table, engineering controls can potentially be implemented to stop the continued flow of groundwater into and out of the waste. See, EPA Office of Solid Waste, Closure of Hazardous Waste Surface Impoundments, SW-873, p 81 (September 1982), Revised Edition.

(4) Methods and Tools for the Identification and Elimination of Free Liquids

Many commenters requested EPA provide greater clarity regarding the closure performance standard that requires that “free liquids must be eliminated by removing liquid wastes or solidifying the remaining wastes and waste residues.” 40 CFR 257.102(d)(2)(i). Commenters stated that there continues to be confusion over

what technical means and methods can be implemented to meet EPA's expectations and, in particular, what design considerations must be taken into account to achieve compliance with the existing closure performance standards (as applied to both currently and newly regulated units). The commenters explained that there are no regulatory specifications for eliminating free liquids prior to installing the final cover system or controlling, minimizing or eliminating, to the maximum extent feasible, the post-closure infiltration of liquids as required by § 257.102(d)(2)(i) and (d)(1)(i), respectively.

In response to these requests, EPA is providing further information with this final rule. EPA has included in the docket to this rulemaking a document titled "Methods and Tools for the Identification and Elimination of Free Liquids." A summary of some of the main points of the guidance are discussed below.

The document discusses many of the methods and tools needed to identify and eliminate free liquids that are already widely used by industry to investigate and close surface impoundments. For example, tools that may be used to identify free liquids include soil borings and cone penetrometers to map the stratigraphy of the CCR unit and characterize the geotechnical and hydraulic properties of the various CCR layers, as well as the installation of traditional piezometers, monitoring wells and vibrating wire piezometers to monitor pore pressures and water levels. Properly constructed wells and piezometers screened in the appropriate locations and depths have a prominent role in networks of instruments necessary for assessing free liquids in that their design directly measures water levels under ambient conditions. At the most basic level water levels in wells and piezometers are indicative of free liquids. Conversely, networks of wells and piezometers could be used as part of a program used to determine that free liquids no longer exist. Similarly, methods and tools to eliminate free liquids within the CCR, such as rim ditches, pumping wells, extraction wellpoints are also currently employed by industry. These technologies also provide insights into the presence and nature of free liquids at a given CCR unit, *e.g.*, rim ditches and open excavations enable direct observation of free liquids.

Finally, the document identifies considerations useful to developing successful site-specific strategies and approaches to identify, measure, monitor and eliminate free liquids.

Longer term variables such as potential groundwater intrusion or other influences are also discussed. In summary, full compliance requires successful sustained attainment of performance standards over the long term. Designing successful approaches will necessarily involve careful consideration of all potential sources of free liquids, including groundwater. Owners or operators of units that contain CCR in contact with groundwater will likely need to take additional actions such as CCR removal or implement specific engineering measures applied over time frames needed to preclude groundwater from intruding back into CCR units after free liquids have been initially eliminated.

iv. Preparation of a Written Closure Plan for CCR Management Units

EPA proposed that owners or operators of CCRMU comply with the existing requirements of § 257.102(b) requiring the preparation of a written closure plan no later than 12 months after the effective date of the final rule.

As mentioned in Unit III.C.4.d, aside from those commenters that disagreed with requiring CCRMU to comply with overall closure requirements, commenters on the proposed rule agreed that the written closure plan requirement would generally be appropriate for CCRMU. One commenter suggested additional requirements for the content of the closure plan including the elevation of the base of the unit, groundwater information, and descriptions of compliance with § 257.102 will be achieved (*e.g.*, how free liquids would be eliminated, how waste will be stabilized, measures to minimize the need for further maintenance of the CCR unit). A few commenters supported the proposed deadline but as summarized in Units III.C.4.a and III.C.4.d of this preamble, other commenters stated the proposed deadline was infeasible and inappropriate. One commenter suggested the deadline for the closure plan be extended to be concurrent with the initiation of closure. Another commenter requested EPA create extension mechanisms for this requirement based on the number of CCRMU at the facility. Commenters suggestions for the deadline for the completion of the closure plan ranged from 12 (the 2015 CCR Rule deadline) to 60 months.

EPA disagrees with the commenter that additional requirements regarding the content of the closure plan are necessary. The information the commenter requested be included in the closure plan is 1) already required to be

in the closure plan pursuant to §§ 257.102(b) or 2) readily available in other required reports (*e.g.*, the annual groundwater monitoring and corrective action reports). Furthermore, the commenter failed to fully explain how compliance with § 257.102(b) does not provide the information needed to determine if compliance with the closure performance standards will be met.

Regarding the deadline, for the same reasons in Units III.B.2.g and III.B.2.g.iv.b for legacy CCR surface impoundments, EPA concludes that the deadline for the closure plan should be extended from the proposed deadline to allow for owners or operators to incorporate information about groundwater quality, groundwater flows, seasonality impacts, and the migration of contaminants (if any) into the plan. Therefore, EPA is finalizing a deadline of no later than Wednesday, November 8, 2028, which is 48 months after the effective date. This final deadline extends the proposed deadline by 36 months and EPA expects that this adequately address the concern regarding the infeasibility of the deadline expressed by a commenter requesting EPA create extension based on the number of CCRMU at the facility. This is codified in the regulatory text at § 257.102(b)(2)(iii).

However, consistent with the requirements for legacy CCR surface impoundments, EPA is not requiring compliance with the written closure plan requirement for CCRMU that, by the effective date of this final rule, have completed: (1) closure with waste in place or (2) a closure eligible for deferral to permitting as described in § 257.101(g). Instead, the final rule requires the owner or operator to provide information on the completed closure of the CCRMU, along with supporting documentation to demonstrate that the closure meets the performance standards in § 257.102(d) or the standards specified in § 257.101(g). This is codified in the regulatory text at § 257.102(b)(2)(v).

Based on comments on the proposed rule and experience from the 2015 CCR Rule, EPA expects the incorporation of this information into the closure plan will allow facilities to select a closure method that most appropriately addresses issues like waste that is in contact with groundwater, groundwater contamination, and long-term structural stability concerns. Closure plans that adequately address these issues will result in better protection of human health and the environment.

The closure plan describes the steps necessary to close a CCR unit at any

point during the active life of the unit based on recognized and generally accepted good engineering practices. 40 CFR 257.102(b)(1). The plan must set out whether the closure of the CCR unit will be accomplished by leaving CCR in place or through closure by removal and include a written narrative describing how the unit will be closed in accordance with the section, or in other words, how the closure will meet all the performance standards in the regulations. 40 CFR 257.102(b)(1)(i). The written closure plan must also provide a schedule for completing all activities necessary to satisfy the closure criteria of the rule. See also 80 FR 21410–21425.

If the CCR is left in place, the closure plan must include a description of the final cover system and how the final cover system will achieve the regulatory performance standards. If the base of the impoundment intersects with groundwater, the closure plan would need to discuss the engineering measures taken to ensure that the groundwater had been removed from the unit prior to the start of installing the final cover system, as required by § 257.102(d)(2)(i). The closure plan would also need to describe how the facility plans to meet the requirements in § 257.102(d)(1) to “control, minimize or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste and releases of CCR, leachate, or contaminated run-off to the ground or surface waters.” This could include, for example, the installation of engineering controls that would address the post-closure infiltration of liquids into the waste from all directions, as well as any post-closure releases to the groundwater from the sides and bottom of the unit.

v. Preparation of a Written Post-Closure Care Plan for CCR Management Units

EPA proposed that owners or operators of CCRMU would be required to comply with the existing requirement in § 257.104(d) regarding the preparation of a written post-closure no later than 12 months after the effective date of the final rule.

As mentioned in Unit III.C.4.d, aside from those commenters that disagreed with requiring CCRMU to comply with overall closure requirements, commenters on the proposed rule agreed that the written post-closure care plan requirement would generally be appropriate for CCRMU. Overall commenters requested an extension of the post-closure care deadline to allow for a more feasible deadline and the incorporation of groundwater monitoring data. Another commenter requested EPA create extension

mechanisms for this requirement based on the number of CCRMU at the facility. For the same reasons in Units III.B.2.g and III.B.2.g.iv.c for legacy CCR surface impoundments, EPA is finalizing a deadline of no later than Wednesday, November 8, 2028, which is 48 months from the effective date of the final rule to comply with the post-closure care requirement in § 257.104(d). This final deadline extends the proposed deadline by 36 months and EPA expects that this adequately address the concern regarding the infeasibility of the deadline expressed by commenter requesting EPA create extension based on the number of CCRMU at the facility. This is codified in the regulatory text at § 257.104(d)(2)(iii).

Section 257.104(d) requires that an owner or operator of a CCR unit prepare a written post-closure plan. The contents of the P.E.-certified plan are stated in the rule § 257.104(d)(1)(i) through (iii) and can be summarized as a description of the monitoring and maintenance activities required for the unit, the frequency that these activities will be performed, information for the point-of-contact during the post-closure care period, and planned uses of the property.

vi. Deadline To Initiate Closure for CCR Management Units

EPA proposed that owners or operators of CCRMU initiate closure no later than 12 months after the effective date of the final rule. As explained in the proposed rule, the proposed deadline was expedited from the 2015 CCR Rule to address the risks posed from these units and EPA’s estimated minimum amount of time necessary to collect the information needed to determine whether to close the unit in place or close by removal.

Several commenters expressed support for the proposed 12-month deadline to initiate closure, stating that the shorter deadlines are necessary to address the increased risk from CCRMU and likelihood these units are and have been contaminating groundwater. However, as mentioned in Unit III.C.4.d, many other commenters characterized the proposed deadline as infeasible for the reasons mentioned in Unit III.C.4.a, including seasonality, need to comply with overlapping regulatory requirements, labor shortages, and the strain on the limited resources necessary to achieve compliance (e.g., contractors, laboratories, P.E.s) caused by the number of CCR units coming into compliance at the same time. Commenters emphasized the importance of the groundwater monitoring data to inform closure,

stating that compliance with the closure requirements should not be required until after the groundwater monitoring system was installed and baseline samples collected. These commenters pointed to recent EPA Part A and Part B decisions as evidence of the gap between EPA’s expectations and the closure and post-closure plans developed by owners or operators and best practices; these commenters further stated that the proposed deadline precludes the incorporation of groundwater monitoring data in developing closure plans and is likely a contributing factor to the gap between EPA’s expectation and closure and post-closure care plans submitted by owners or operators of currently regulated units. Additionally, as described in Unit III.C.4.d.ii, several commenters requested the delays for the initiation of closure for CCRMU beneath critical infrastructure until the decommissioning or closure of the infrastructure or facility. Finally, a few commenters suggested EPA create extensions for the deadline to initiate closure to address concerns about comply with overlapping State permitting requirements or based on the number of CCRMU present at the facility. Commenters’ suggestions for alternative deadlines to initiate closure ranged from 12 with extensions to 60 months, or at least after the collection of the baseline groundwater monitoring samples required by § 257.94.

Consistent with the approach for legacy CCR surface impoundments closure, EPA acknowledges the benefit of allowing owners or operators the time needed to incorporate groundwater monitoring data into the closure plan. Additionally, as stated in the proposed rule, EPA acknowledges the importance of using information gained by compliance with the groundwater monitoring and corrective action requirements to inform closure decisions and therefore the initiation of closure. For the reasons explained in Unit III.C.4.c, EPA is extending the deadline for the groundwater monitoring and corrective action requirements to a single deadline of no later than 42 months from the effective date of the final rule. As such, the initiation of closure is being extended as well. To ensure owners or operators have enough groundwater monitoring data to draw conclusions about seasonality impacts on groundwater levels and flow and the source of any potential groundwater contamination in the area, EPA is finalizing a deadline of no later than Tuesday, May 8, 2029, which is 54 months from the effective

date of the final rule. This is codified in the regulatory text at § 257.101(f)(1). This final deadline extends the proposed deadline by 42 months and EPA expects that the concerns expressed by commenters requesting EPA create extensions (*i.e.*, the need to comply with State permitting requirements and the number of CCRMU at the facility) are addressed by this overall deadline extension. Finally, regarding those CCRMU under critical infrastructure, owners or operators of these units have the opportunity to defer the deadline to initiate closure until the Agency can address these units on an individual basis as part of permitting. See Unit III.C.4.d.ii.

vii. Deadline To Complete Closure for CCR Management Units

EPA proposed to apply the current CCR surface impoundment closure time frames at § 257.102(f) to CCRMU. The existing CCR regulations currently require an owner or operator of a CCR surface impoundment generally to complete closure activities within five years from initiating closure. The regulations also establish the conditions for extending this deadline, upon a showing that additional time is necessary. Consistent with the existing requirements for CCR surface impoundments, EPA proposed the amount of additional time that an owner or operator could obtain would vary based on the size (using surface area acreage of the CCR unit as the surrogate of size) of the CCRMU. For CCRMU 40 acres or smaller, the proposed maximum time extension is two years. For CCRMU greater than 40 acres, the proposed maximum time extension is five 2-year extensions (10 years), and the owner or operator must substantiate the factual circumstances demonstrating the need for each year extension.

Several commenters expressed support for the proposed deadlines to complete closure, citing the increased risk from CCRMU and likelihood these units are and have been contaminating groundwater. However, many commenters on the proposed rule requested an extension of the deadline to complete closure to allow for a more feasible deadline and to mitigate the factors mentioned in Unit III.C.4.a. Some of these commenters stated if the deadline to initiate closure was extended to no less than the time granted for CCR unit closure in the 2015 CCR Rule, then the proposed deadlines would be feasible. These commenters supported the ability of CCRMU to seek extensions of the deadline based on size. However, a few of the commenters requested longer extensions or an

increase in the maximum number of extensions for CCRMU. These commenters cited factors mentioned in Unit III.C.4.a as reasons to allow for longer or more extensions (*i.e.*, third-party availability, need to comply with State permitting requirements prior to certain activities, backlogs, number of CCR units coming into compliance at the same time). One commenter stated more extensions were necessary to meet the closure performance standards in § 257.102 (*i.e.*, remove liquid from the unit and meet the groundwater protection standards).

For the reasons described throughout this Unit of the preamble, EPA has extended the deadline for the initiation of closure. EPA expects the extension to the deadlines for the closure plan and initiation of closure, as well as the options to defer closure requirements for CCRMU under critical infrastructure and those that have completed closure under a regulatory authority (see Units III.C.4.d.ii and III.C.4.d.iii.a, respectively), to address the concerns commenters expressed with the infeasibility or inappropriateness of the deadline to complete closure. Furthermore, with respect to requests for longer or more extensions for CCRMU as compared to the existing CCR regulations, EPA still concludes that as explained in the proposed rule, CCRMU closure will closely resemble CCR impoundment closures because of half of these identified potential CCRMU were associated with former, Federally unregulated CCR surface impoundments. Additionally, the requirements for former impoundments to be closed with waste in place (*i.e.*, procurement, transportation, and placement of substantial volumes of soil or borrow material), would also apply to certain CCR fill placements as well as to inactive CCR landfills where past waste disposal did not reach the landfill's design capacity (*i.e.*, landfill airspace was not fully utilized). As such, in these situations, EPA has determined the time frames to complete closure for existing CCR surface impoundments are appropriate (*i.e.*, 5 years). Finally, as discussed in proposed rule, the Agency believes that the base of at least some CCRMU may intersect with the groundwater because CCRMU may be located in floodplains or wetlands, or near large surface water bodies. EPA's experience in implementing the regulations is that such closures are generally more complex and take longer to complete. EPA thus believes the time frames to complete closure of CCRMU should be the same as the time frames provided for existing CCR surface

impoundments. No commenters provided factual information or evidence to support the conclusion that CCRMU closure, apart from those CCRMU under critical infrastructure or closed under a regulatory authority mentioned above, is different enough from closure of units regulated under the 2015 CCR Rule to warrant additional extensions or separate requirements. Therefore, EPA is finalizing the deadline for the completion of closure of CCRMU as proposed. This is codified in the regulatory text at § 257.102(f).

viii. Post-Closure Care for CCR Management Units

EPA proposed to apply the existing post-closure care requirements at § 257.104 to CCRMU without revision. These criteria are essential to ensuring the long-term safety of CCRMU.

As mentioned in Unit III.C.4.d, aside from those commenters that disagreed with requiring CCRMU to comply with overall closure requirements, no commenters raised specific concern about requiring CCRMU to comply with the existing requirements in § 257.104. However, one commenter suggested that EPA allow units that have closed under a State program to either continue post-closure care under that State program or reduce the post-closure care period for these units by the number of years of post-closure care completed under the State program. As described in Unit III.C.4.d.iii(a), EPA is finalizing a provision to address closures completed under other authorities provided the closure meets specific criteria by deferring any closure activities to permitting, including the determination of when post-closure care is completed. In instances where the criteria for deferral to permitting has been met and units have conducted post-closure care under a State program for many years, the permitting authority, once authorized, will be able to look at the site-specific information, including the closure and the specific activities required by the State's post-closure care program, and determine what, if any, further closure or post-closure activities would be appropriate. EPA is therefore finalizing this provision without revision.

The existing post-closure care criteria require the monitoring and maintenance of units that have closed in place for at least 30 years after closure has been completed. 40 CFR 257.104. During this post-closure period, the facility would be required to continue groundwater monitoring and corrective action, where necessary.

e. Recordkeeping, Notification and Internet Posting for CCR Management Units

EPA proposed that, like legacy CCR surface impoundments, owners or operators of CCRMU be subject to the existing recordkeeping, notification and website reporting requirements in the CCR regulations found at §§ 257.105 through 257.107. EPA also proposed changes to add CCRMU to § 257.107(a) to require the facility to notify the Agency using the procedures for the establishment of the website no later than the effective date of the final rule. For reasons specified in the 2015 CCR Rule, the CCR regulations require the owner or operator of a new or existing CCR unit to record specific information in the facility's operating record, maintain files of all required information (e.g., demonstrations, plans, notifications, and reports) that supports implementation and compliance with the rule, notify State Director and Tribal authorities, and maintain a public CCR website that hosts this information. 80 FR 21427.

A commenter supported applying recordkeeping, notification, and internet posting requirements to CCRMU but stated that the existing requirements were ineffective at ensuring compliance with the CCR regulations or allowing for meaningful public awareness or participation. The commenter suggested that EPA create mechanisms within the rule to ensure the public has the opportunity to participate in the decision-making processes at regulated CCR units; standardize reporting to make the report more easily understood by the public; establish organizational requirements for the CCR websites; require public notice and engagement when notifying the State Director and/or appropriate Tribal authority as required by the CCR rule; extend the period of time the files required by the CCR rule must be maintained in the operating record; and require owners or operators certify compliance documentation for the CCR units. This commenter also suggested EPA clarify what records owners or operators are required to retain and to publish. Other commenters suggested the website requirement not be due until the first document is required to be posted.

EPA agrees with the commenter on the importance of meaningful public participation. The current regulations allow for public participation by requiring owner or operators to hold a public meeting as part of the assessment of corrective measures in § 257.96, creating a mechanism for the public to file dust complaints in § 257.80(b), and

the "contact us" form or specific email address on facilities' public CCR websites for questions or issues from the public as required by § 257.107(a). Public comment periods are also held as part of the determination process for Part A and Part B demonstrations; however, these demonstrations are not applicable to CCRMU. EPA does not have evidence to support the claim by the commenter that these opportunities for public participation are ineffective. Furthermore, EPA does not find other decision-making points in the rule appropriate for mandatory public meetings or public comment periods although facilities are encouraged to engage with the public and to both solicit and incorporate public input into decisions, such as closure methods, as able and appropriate.

With respect to the commenter's suggestions that EPA require the owners or operators of CCR units to certify compliance documentation and create standardized reporting and website layout requirements, as explained in the proposed rule, EPA does not have evidence that CCRMU are sufficiently different than currently regulated facilities to necessitate substantially different requirements. The commenter provided no factual basis to support the suggestion that requiring owner or operator certifications would improve compliance with the regulations beyond the certifications currently required by professional engineers. When justifying the request for standardized reporting and website layout requirements, the commenter failed to explain how compliance with the public website posting requirements in § 257.107, including the requirement to ensure all information is "clearly identifiable and must be able to be immediately printed and downloaded by anyone accessing the site" is inadequate or a hindrance to the public accessing the required information. Therefore, EPA does not believe additional notification, certification, or public engagement requirements for CCRMU would be appropriate.

EPA agrees with the commenter on the need to extend the period of time files required by the CCR rule must be maintained on the facilities' public websites and in the operating records. As described in Unit III.D.5, EPA is extending how long files must be maintained in the operating record and on the public website. While EPA believes the regulations at §§ 257.105 and 257.107 clearly lay out what records must be retained and published, EPA has included in Unit III.D.5. a table that details what records are required to be maintained in the operating record and

on the public website as well as the corresponding retention periods. No commenters raised concerns about requiring CCRMU to comply with the existing requirements in §§ 257.105 through 257.107.

Lastly, EPA agrees with the commenters who suggested the deadline for the establishment of the website coincide with the first required document (i.e., the FER Part 1). Therefore, EPA is finalizing a deadline of 15 months after the effective date for the establishment of the website.

EPA is also finalizing the requirement that owners or operators of CCRMU comply with recordkeeping, notification, and internet posting requirements at §§ 257.105 through 257.107.

As discussed in Unit III.B.2.h of this preamble, owners or operators must document implementation and compliance with the rule and must place these files into the facility's operating record. Each required file must be maintained in the operating record for the entirety of the retention period specified in § 257.105 following submittal of the file into the operating record. Each file must also indicate the date the file was placed in the operating record. Files are required to be submitted into the operating record at the time the documentation becomes available or by the compliance deadline specified in the CCR regulations. Section 257.105 contains a comprehensive listing of each recordkeeping requirement and corresponding record retention periods.

Furthermore, the owner or operator of a CCRMU must maintain a CCR website titled, "CCR Rule Compliance Data and Information" that hosts the compliance information so that it may be viewed by the public. Unless provided otherwise in the rule (see, Unit III.E.5), information posted to the CCR website must be available for a period no less than five years from the initial posting date for each submission. Posting of information must be completed no later than 30 days from the submittal of the information to the operating record. Owners or operators of CCRMU have 15 months from the effective date of this rule to establish a CCR website and post the required applicable information.

D. Closure of CCR Units By Removal of CCR

1. Background

On March 3, 2020, in the Proposed Rule entitled: Hazardous and Solid Waste Management System: Disposal of CCR; A Holistic Approach to Closure Part B: Alternate Demonstration for

Unlined Surface Impoundments; Implementation of Closure, EPA proposed to revise the 2015 CCR Rule to, among other things, provide facilities with an additional option for CCR units being closed by removal of CCR. 85 FR 12456. Specifically, EPA proposed to allow a facility to complete the closure in two stages: first, by completing all removal and decontamination procedures; and second, by completing all groundwater remediation in a separate post-closure care period. 85 FR 12456. In this final rule, the Agency is taking final action on this proposal.

The closure by removal regulation consists of two performance standards. In the first standard, the owner or operator must remove all CCR from the unit and decontaminate all areas affected by releases from the CCR unit. In the second standard, the regulation specifies that closure is complete when all CCR in the unit and any areas affected by releases from the CCR unit have been removed and groundwater monitoring demonstrates that there are no exceedances of any groundwater protection standard. See § 257.102(c). Importantly, the second performance standard requires groundwater corrective action of a unit to be completed in order for closure of the unit to be considered complete.

As previously discussed, the CCR regulations also establish deadlines to initiate and complete closure activities. For example, the regulations generally require owners and operators of CCR surface impoundments to complete closure activities within five years of commencing closure activities, while closure of CCR landfills must be completed within six months. See § 257.102(f)(1). Notwithstanding these deadlines to complete closure, the CCR regulations also allow for additional time provided the owner or operator can make the prescribed demonstrations that are based on site-specific circumstances beyond the facility's control. For CCR surface impoundments, the amount of additional time beyond the five years varies based on the demonstrated need and the surface area acreage of the impoundment. For impoundments 40 acres or smaller, the maximum time extension that can be obtained is two years. For impoundments greater than 40 acres, the maximum time extension is five two-year extensions (for a total extension of ten years). For CCR landfills, the amount of additional time beyond the six months does not vary according to the size of the landfill, rather the maximum time extension is two one-year extensions (for a total extension of two years). To obtain

additional time, owners or operators of CCR units must substantiate the factual circumstances demonstrating the need for the extension. See § 257.102(f)(2). In all instances the number of time extensions is capped to a certain number of years.

The CCR regulations also require the owner or operator of the CCR unit to obtain a certification from a qualified professional engineer or approval from the Participating State Director (or EPA where EPA is the permitting authority) verifying that closure has been completed in accordance with the written closure plan and all applicable closure requirements of § 257.102. See § 257.102(f)(3). In addition, the owner or operator must prepare a notification stating that closure of the unit has been completed. This notification must be completed within 30 days of completion of unit closure and must include the certification required by § 257.102(f)(3). See § 257.102(h). As the CCR regulations are currently structured for units closing by removal of CCR, the closure certification and notification cannot be completed until all CCR removal and decontamination activities, including groundwater corrective action,¹⁴⁶ are completed. Prior to this final rule, owners and operators that complete closure of a unit by removal of CCR were exempt from any other post-closure care requirements for the unit and were also exempt from the deed notation requirements upon certification that closure by removal of CCR has been completed.

2. March 2020 Proposed Rule

Under the March 2020 proposal, an owner or operator that cannot complete groundwater corrective action by the time all other closure by removal activities have been completed (*i.e.*, during the active life¹⁴⁷ of the CCR unit) may complete groundwater corrective action during a post-closure care period. Under this option, the owner or operator must first complete all other removal and decontamination activities within the time frames provided for completing closure. In addition, EPA proposed to require the owner or operator to have implemented the remedy selected under § 257.97 such that all components of the remedy are in place and operating as intended prior to completing all

¹⁴⁶ For purposes of this preamble discussion, the term "groundwater corrective action" includes those actions taken to implement the selected remedy specified in § 257.98(c) to attain the groundwater protection standards in § 257.95(h).

¹⁴⁷ The "active life" of a CCR unit is defined in § 257.53 as the period of operation beginning with the initial placement of CCR in the CCR unit and ending at completion of closure activities in accordance with § 257.102.

removal and decontamination activities. Upon completion of all removal and decontamination activities (except for completion of groundwater corrective action) and implementation of the selected remedy, the owner or operator would be allowed to certify that the CCR unit has been closed. Thereafter, the CCR unit would be required to continue to conduct corrective action in accordance with the existing requirements in § 257.98 and would be subject to the existing post-closure care requirements in § 257.104 until completion of groundwater corrective action. EPA did not propose any substantive revisions to the current closure standard when closing by removal of CCR under § 257.102(c), but presented the current closure standard in a slightly revised format to accommodate the proposed action.

EPA proposed this option because the Agency received new information indicating that the closure of CCR units will likely be more complex than EPA envisioned in 2015, and that more than 40% of existing CCR surface impoundments were planned to be closed by removal of CCR. In addition, available information indicated that more than 70% of all CCR surface impoundments are unlined. EPA determined that, given the number of unlined CCR units, many of which have already reported exceedances of groundwater protection standards, it was evident that many CCR units have released CCR constituents into the surrounding soils and groundwater. EPA concluded that this meant that closure would not simply be a matter of removing CCR from the unit, but would likely require a significant undertaking to remediate impacted soil and groundwater in order to achieve the current CCR removal and decontamination standards. The proposal explained that based on this new information EPA concluded that the existing timelines to complete closure by removal of CCR were not designed to also provide sufficient time to complete groundwater corrective action. The Agency explained that it was also concerned that the existing deadlines in § 257.102(c) may create a disincentive to close a unit by removal of CCR.

After considering the comments received, the same considerations discussed in the proposal remain relevant. Moreover, the groundwater monitoring installed pursuant to the 2015 CCR Rule has documented groundwater contamination that is more extensive and more frequent than EPA had originally estimated. It is now apparent not only that a greater number

of facilities are electing to close by removal than EPA originally estimated, but also that some facilities may need to close by removal because they are unable to meet the standards to close with waste in place due to the site conditions. And more critically, EPA is concerned that, based on the existing time frames, some facilities could not comply with either performance standard because it is not feasible to remediate the contamination within the existing deadlines in § 257.102(f). EPA has therefore incorporated this provision into this final rule.

Most of the comments EPA received on this proposal¹⁴⁸ related to the revised regulatory text in § 257.102, the requirement to implement the corrective action remedy during the active life of the unit and the requirement for deed notifications. One commenter also stated that there was nothing in the record to demonstrate that facilities were not able to meet the existing § 257.102(c) performance standard by deadlines in § 257.102(f). The commenter also expressed concern that the proposed option would allow exceedances of groundwater protection standards to continue indefinitely after an impoundment is closed by removal. Further, the commenter contended that the proposed change did not include any additional requirements for owners and operators to substantiate the need to take additional time following removal activities. This, they stated, could incentivize the selection of the slowest, least protective corrective measures such as “natural attenuation,” allowing dangerous contamination to persist for long periods of time when it could have been stopped decades earlier. They were concerned that owners or operators would unreasonably select remedies that take much longer to achieve compliance over other available options that could achieve compliance faster.

The Agency disagrees that there is no record to support the need for additional time to complete groundwater remediation within the time frames provided in § 257.102(f). For example, this same commenter submitted comments on the May 2023 proposed rule providing examples of numerous plants who have certified the removal portion of closure by removal while noting the need for additional time beyond the existing deadlines in § 257.102(f) in order to be able to certify compliance with GWPS.¹⁴⁹ These facilities include Duke Energy’s Gibson Station, LG&E-KU’s Ghent Generating

Station, and Dominion Energy’s Possum Point Power Station.

Additionally, EPA compiled data on remediation efforts published in the Superfund 5-Year Review Reports conducted pursuant to CERCLA § 121(c).¹⁵⁰ The data review focused on sites that presented releases of metals similar to those expected at CCR facilities and sites that were likely to choose remediation technologies that could also be applicable to CCR facilities. The compilation included data for 20 sites with groundwater remediation remedies in place for at least 15 years. There were eight sites that implemented a combination of remediation strategies (for example, pump and treat and vertical barrier wall in the same site). The most common remedy noted was pump and treat (14 sites), followed by monitored natural attenuation (MNA) (eight sites), barrier walls (five sites), in-situ stabilization (two sites), and permeable reactive barriers (one site). At the time of this data compilation, 18 out of 20 remedies were still ongoing with cleanup durations ranging from 15 to more than 32 years. 11 of 20 remedies exceeded 20 years of operation.

The Agency also disagrees that the proposal would allow exceedances to continue indefinitely, and the owner or operator to purposely choose the slowest, least protective groundwater remediation technology. The facility would remain subject to the existing requirements for corrective action, §§ 257.96 through 257.98, which prohibit the actions the commenter describes. Additionally, the facility must have initiated remedial activities as required by § 257.98(a) during the active life of the unit in order to be eligible for this closure alternative. The sole exception to this would be where the facility only triggered corrective action for the constituent near the end of the closure process, and the facility cannot extend the active life of the unit because it would exceed a deadline in § 257.102(f). In such a case, the facility would be required to document that (1) it was in compliance with all applicable requirements in §§ 257.96 through 257.98; and (2) that it could not extend the active life of the unit, consistent with § 257.102(f).

¹⁵⁰ Memorandum from RTI International to Mary Jackson, U.S. EPA, Development of Benchmark Times for Conducting the Closure of CCR Units, February 29, 2024. Superfund 5-Year Review Reports conducted pursuant to CERCLA § 121(c). Available in the docket.

3. What EPA Is Finalizing Related to the March 2020 Proposed Rule

EPA is finalizing its proposal with some limited revisions adopted in response to public comments. Under this final rule and consistent with the proposal an owner or operator would be able to close a CCR unit by completing removal of all CCR from the unit and decontamination of all areas affected by releases from the CCR unit, except for groundwater, during the active life of the CCR unit, and completing the groundwater corrective action during post-closure care. The owner or operator will need to meet the following requirements when closing a CCR unit under this option. First, the owner or operator must complete all removal and decontamination activities, except groundwater corrective action, during the active life of the unit. Second, with one exception, the owner or operator must have begun to implement the corrective action remedy selected in accordance with §§ 257.96 through 257.97 to achieve compliance with the GWPS during the active life of the unit (*i.e.*, before completing closure). Third, groundwater corrective action must be completed during post-closure care. Fourth, the owner or operator must amend the written closure and post-closure plans to reflect this approach to close the unit. Fifth, the owner or operator must obtain the certification or approval of closure completion within the current time frames for closure in § 257.102(f). Finally, prior to the start of the post-closure care period, the owner or operator must record the notation on the deed to the property that the land has been used as a CCR unit. Each of these requirements is discussed further below. EPA is revising the regulatory text of § 257.102(c) and § 257.104(g) and (h). The revisions to § 257.104 are to make it clear that the unit must be in detection monitoring in order to complete post closure care.

a. Removal and Decontamination Activities

EPA proposed to revise the closure performance standard at § 257.102(c) to specify all of the various actions that would be required prior to certifying that closure is complete. EPA proposed that this would include removing or decontaminating all CCR and CCR residues, containment system components, contaminated subsoils, contaminated groundwater, and CCR unit structures and ancillary equipment. To qualify for the new closure by CCR removal option, owners or operators would need to complete all the specified removal and decontamination

¹⁴⁸ See the Response to Comments document found in the docket for this rule.

¹⁴⁹ EPA-HQ-OLEM-2020-0107-0368.

activities within the closure time frame except for completing groundwater remediation. The proposal specified that to demonstrate that all CCR has been removed from the unit, the owner or operator would need to remove the entire contents of the CCR unit, including all CCR and any CCR residues. This would include, for example, the removal of any fugitive dust (CCR) discovered outside the waste unit boundary. In addition, the proposal specified that any containment system components such as a bottom liner, contaminated subsoils, and unit structures and equipment (e.g., concrete outlet structures and ancillary piping) would have to be removed prior to closure of the unit. Finally, EPA proposed that any areas affected by releases from the CCR unit must have been removed (e.g., impacted soils beneath the bottom liner system).

Commenters pointed out that the term “CCR residues” was not a defined term. They also pointed out that it may not be necessary or wise to require the removal of ancillary equipment or structures if they are not contaminated with CCR. Further, they pointed out that requiring the removal of fugitive dust outside the unit boundary would expand the closure performance standard.

One commenter was concerned that the term “CCR unit structures,” appears to encompass both areas impacted by CCR disposal (which should be removed) and non-contaminated disposal unit structural components, which, according to the commenter, in some cases includes CCR that has been beneficially used in the construction of the impoundment or other disposal units (which the commenter asserted need not be removed). The commenter further stated that structural components, including those structures built with beneficially reused CCR (e.g., bottom ash), must be allowed to remain in place.

The Agency does not agree that components of the unit that are constructed with CCR can be left in place if the unit is in fact closing by removal of CCR. If the unit is to be “closed by removal of CCR,” consistent with the existing requirement to remove all CCR, the final rule requires that any components of the unit made of or including CCR must also be removed.

The regulatory text included in this final rule requires removing all CCR from the unit, including CCR mixed with soils or that are included in berms, liners or other unit structures, and either removing or decontaminating all areas affected by releases from the CCR unit. Although there are no soil cleanup standards in the CCR regulations, if the

soil beneath the unit is contaminated sufficiently to serve as a secondary source of groundwater contamination, its removal may be required as part of the source control portion of a remedy selected under § 257.97. To clarify, contaminated groundwater (groundwater with constituent concentrations triggering corrective action) must be remediated through the corrective action process detailed in §§ 257.96 through 257.98.

Although the regulatory text now specifies the removal and decontamination activities to be conducted, the Agency does not consider this to be a substantive revision to § 257.102(c). The revision is intended to clearly describe the activities that must be completed prior to closure under the new alternative in § 257.102(c)(2). The regulation now expressly describes how EPA interpreted the original phrase “CCR removal and decontamination.” Therefore, the regulatory text for § 257.102(c) has been revised from what was proposed:

(c) *Closure by removal of CCR.* An owner or operator closing a CCR unit by removal of CCR must follow the procedures specified in either paragraph (c)(1) or (c)(2) of this section. Closure by removal activities include removing or decontaminating all CCR and CCR residues, containment system components such as the unit liner, contaminated subsoils, contaminated groundwater, and CCR unit structures and ancillary equipment.

To what is being finalized:

(c) *Closure by removal of CCR.* An owner or operator that elects to close a CCR unit by removal of CCR must follow the procedures specified in either paragraph (c)(1) or (c)(2) of this section. Closure by removal is complete when CCR has been removed; any areas affected by releases from the CCR unit have been removed or decontaminated; and groundwater monitoring concentrations of the constituents listed in appendix IV to this part do not exceed groundwater protection standards established pursuant to § 257.95(h). Removal and decontamination activities include removing all CCR from the unit, CCR mixed with soils, and CCR included in berms, liners or other unit structures, and removing or decontaminating all areas affected by releases from the CCR unit.

Under this provision, the owner or operator must complete all CCR removal activities during closure prior to transitioning to the post-closure care period which will largely consist of a groundwater cleanup activity.

b. Implementation of Selected Remedy

Under the existing regulations, if one or more constituents in Appendix IV to part 257 are detected at SSLs above the

GWPS in any sampling event, the owner or operator must, among other requirements, initiate a corrective action program. See § 257.95(g). The corrective action program includes initiating an assessment of corrective measures to prevent further releases, to remediate any releases, and to restore affected areas to original conditions, as specified in § 257.96(a). After the ACM has been completed, the owner or operator must select a remedy that meets prescribed standards, including a requirement that the remedy attain the GWPS. See § 257.97(a) and (b). Finally, the corrective action program requires the owner or operator of the CCR unit to initiate remedial activities within 90 days of selecting a remedy. See § 257.98(a). EPA did not propose to revise any of these requirements as part of this option. However, under this closure option, the owner or operator must have initiated remedial activities required by § 257.98(a) prior to certifying that it has completed closure. This requirement would help ensure that impacted groundwater is returned to original conditions as soon as is feasible.

Several commenters objected to this requirement. Some of these commenters suggested that at many sites, it is not appropriate to implement a remedy before source removal is complete. Other commenters claimed that after excavation is complete at certain sites, new groundwater flow patterns may be established and/or groundwater chemistry may need to stabilize, and in these cases neither design nor implementation of a corrective measure may be practical before CCR removal is finished. A few commenters went further yet, stating that it would not be appropriate to require completion of an ACM and selection of a remedy until after CCR removal activities are complete. Finally, other commenters state that source control is required by § 257.97(b) and may be considered part of the remedy, therefore, implementation of the remedy would commence with closure by removal.

Under the existing regulations, the closure requirements and the corrective action requirements operate independent of one another, and facilities are required to comply with both. The commenters cite nothing to support their claim that closure must be completed prior to initiating corrective action. In fact, it would be inconsistent with the existing mandatory deadlines for initiating and pursuing corrective action. For example, § 257.96(a) requires an ACM to be initiated within 90 days of determining an SSL has occurred, and then completed within another 90

days. An extension, not to exceed 60 days, may be warranted due to site-specific conditions or circumstances. EPA did not propose to revise these deadlines, so comments suggesting changes to these provisions are outside the scope of the rulemaking. Additionally, the commenters provided no reason why corrective measures could not be assessed and compared in an ACM and a remedy could not be selected. Long before initiating closure of a CCR unit, the facility was required to characterize site conditions, including groundwater flow conditions and geology to design and install the groundwater monitoring system. See, e.g., § 257.91(b). The facility already has knowledge of the wastestreams and water volumes it disposes into a CCR surface impoundment. This information can be used to develop a groundwater model to predict groundwater flow conditions after wastestream disposal ceases and closure is initiated, which would provide sufficient characterization of post-closure conditions to assess and compare groundwater cleanup alternatives to complete an ACM. The commenters have provided neither reasons nor explanation why this would not be feasible.

Once the ACM is complete, a public meeting has been held, and community input has been considered, a remedy must be selected as soon as feasible. EPA agrees that a selected remedy may include closure by removal to comply with source control requirements, and that this would constitute commencing implementation of a remedy. However, the selected groundwater remediation portion of the remedy must also be implemented within a reasonable time, in accordance with the schedule established in the remedy selection report. 40 CFR 257.97(d). Implementation of the source control measure does not satisfy this separate requirement.

With respect to commenters' assertion that the design and implementation of the groundwater remediation portion of the remedy is not feasible until closure by removal is complete, the commenters provided no explanation or reasons to support this claim, although one commenter identified MNA as an example of such a remedy. EPA does not agree that design or implementation of MNA would need to be delayed due to closure activities. The ACM would include identification of attenuation mechanisms and characterization of site conditions influencing them. This could be based on current site conditions and any modeled future conditions. If MNA is evaluated more favorably than other

groundwater remedies and is ultimately selected, it requires no construction other than installation of additional monitoring wells to identify plume boundaries and monitor performance. This installation would occur downgradient of the unit and should not be affected by unit closure activities. The data from downgradient wells are critical to determining if MNA is working. While groundwater elevations may decrease after dewatering a surface impoundment, and therefore additional wells may need to be installed with screens at lower elevations later in the corrective action process, this would be an expected aspect of implementing MNA for a CCR unit.

Some commenters mentioned that geochemical conditions of groundwater may change during closure. The commenters did not provide specific reasons for this or the anticipated effects of excavation. While removal of CCR is not expected to remove reactants available for immobilization reactions (i.e., any attenuation mechanisms) from the environment, EPA agrees that groundwater chemistry could be impacted, particularly near the excavation site. However, in the absence of evidence that permanent immobilization mechanisms are viable at the site, either under current conditions or in modeled future conditions, MNA would not meet the § 257.97(b) criteria for selection as a remedy.

The CCR regulations establish independent performance standards for corrective action and closure. The regulations do not provide for delaying corrective action while closure occurs, or vice versa. In the example of MNA or, in fact, any groundwater remedy, delaying remedy implementation until after closure is complete would be inconsistent with the requirement in § 257.98(d) to complete remedial activities within a reasonable period. This is particularly true in this example, because collecting monitoring data is the primary action required in an MNA remedy. When data collection is delayed, those data are lost. Because this monitoring can be done during closure, it is required in order to move forward with corrective action as soon as possible.

Additionally, delaying groundwater remediation would not be protective. When a release has been detected, corrective action to clean up the contamination is necessary to prevent it from migrating to downgradient receptors, both human and environmental. Because Appendix IV constituents persist in the environment, delaying corrective action increases the

amount of the contamination that is released to the environment and allows existing contamination to move further downgradient. To ensure there will be no reasonable probability of adverse effect on health or the environment as EPA is required to do under RCRA section 4004(a), the final regulation requires that corrective action be implemented in accordance with the requirements of §§ 257.96 through 257.98 without unnecessary or unreasonable delays.

Further, as one commenter mentioned, in the event that measures taken to implement the remedy following closure are not proving to be effective, the remedy can be altered during corrective action. Under the existing regulations, an owner or operator is required to "implement other methods or techniques that could feasibly achieve compliance" if, after the remedy is implemented, it is determined that compliance is not being achieved. 40 CFR 257.98(b). If such additional measures are necessary after certification of closure, an owner/operator would have the ability to undertake those measures without impacting the facility's closure certification.

Therefore, EPA is finalizing the proposal that the owner or operator must have initiated the remedial activities as required by § 257.98(a) in order to be eligible for this closure alternative.

The sole exception would be if the facility only triggered corrective action for a constituent sufficiently late in the closure process that it would not be feasible to delay closure until a remedy could be selected. For example, if a facility first detected an SSL of antimony one week before the deadline to complete closure in § 257.102(f), it would not be possible to comply with all of the requirements in §§ 257.96–257.97 before the deadline. As explained above, the closure and corrective action obligations are independent of one another and run concurrently. To prevent placing a facility in such a position, EPA has incorporated a provision to allow the facility to demonstrate that it was not feasible to implement the corrective action remedy prior to the expiration of a deadline in § 257.102(f). In such a case, the facility must document that (1) it was in compliance with all applicable requirements in §§ 257.96 through 257.98; and (2) that it could not extend the active life of the unit, consistent with § 257.102(f).

c. Groundwater Corrective Action

For owners and operators that close a unit under this provision, the CCR unit would remain subject to the post-closure care requirements under § 257.104 until groundwater corrective action has been completed. These units would not be subject to the requirement to conduct post-closure care for 30 years; rather, these units would remain in post-closure care until all groundwater monitoring and corrective action requirements are completed, which may be longer or shorter than 30 years. EPA proposed that groundwater corrective action is complete when the groundwater monitoring concentrations do not exceed the groundwater protection standards for constituents listed in Appendix IV to part 257. EPA has reconsidered this, as the Agency did not intend to modify the existing requirement for completing post-closure care, which also applies to concluding post closure care for a unit closed with waste-in-place. The existing provision in § 257.104(c) states that post-closure care ends after 30 years unless at the end of the post-closure care period the owner or operator of the CCR unit is operating under assessment monitoring in accordance with § 257.95. If the unit remains in assessment monitoring, the owner or operator must continue to conduct post-closure care until the owner or operator returns to detection monitoring in accordance with § 257.95. This means that there can be no detections of any Appendix IV constituents for two consecutive sampling events. Therefore, the final regulatory text has been revised to account for this.

The requirement to be in detection monitoring to conclude the post-closure care is the same standard currently specified in the requirements for closure by leaving waste in place. This rule does not change any requirements of the groundwater monitoring and corrective action program. The owner or operator would need to conduct groundwater monitoring and corrective action in accordance with the requirements of §§ 257.90 through 257.98. See revised § 257.104(c).

d. Closure and Post-Closure Care Plans

The Agency is finalizing as proposed the requirement that owners and operators closing a CCR unit under this new closure alternative would need to revise their written closure plan. The closure plan describes the closure of the unit and provides a schedule for implementation of the plan. The owner or operator would need to revise the current plan and describe how the CCR

unit would be closed in accordance with the revised closure options. The current CCR regulations already include procedures to amend written plans under certain circumstances, including when there is a change in the operation of a CCR unit that would substantially affect the current written plan or when unanticipated events necessitate a revision of the plan. See § 257.102(b)(3)(ii). EPA expects owners and operators to revise the current closure plan according to these existing procedures. This rule also requires owners or operators opting for this approach to prepare an initial post-closure care plan within six months of the effective date of this final rule. The post-closure care plan describes how the CCR unit will be maintained after closure of the unit is completed. Prior to this final rule, CCR units that closed by removal of CCR are exempt from any post-closure care requirements so the preparation of a post-closure care plan will be a new requirement for owners and operators closing a unit under this new option. EPA believes that six months from the effective date of this final rule, or one year from publication of this final rule is a reasonable amount of time to prepare the post-closure care plan because the owner or operator should already have prepared the closure plan for the unit and begun implementation of the corrective measures remedy.

EPA is aware that some facilities that planned to close a unit by removal of CCR nonetheless completed a post-closure care plan. In this situation, the CCR regulations already include requirements to amend written plans under certain circumstances, including when there is a change in the operation of a CCR unit that would substantially affect the current written plan or when unanticipated events necessitate a revision of the plan. See § 257.104(d)(3). EPA expects that these owners or operators would revise the existing post-closure care plan according to these existing procedures.

e. Notation on the Deed to the Property

Under the existing regulations, following the closure of a CCR unit that will be subject to post-closure care, the owner or operator must record a notation on the deed to the property, or some other instrument that is normally examined during title search, notifying any potential purchaser of the property in perpetuity that the land has been used as a CCR unit, and its use is restricted under the post-closure care requirements. See § 257.102(i). The rationale for this requirement is to ensure that prospective and subsequent

owners are aware of the presence of a closed unit on the property and of the need for continued maintenance of the cover or of any ongoing corrective actions. Following that same logic, units that have closed by removal in accordance with § 257.102(c) have been exempt from the deed notation requirement, both because all waste and associated contamination have been removed, and because there is no continuing post-closure care that needs to be maintained.

Units closing under this new closure option will be required to record a deed notation because they would not have closed by removal in accordance with § 257.102(c)(1) (as corrective action would not have been completed) and because post-closure care would be required. See § 257.102(i)(4). But these units are not wholly analogous to the other units subject to a deed notation (*i.e.*, those closing with waste in place). Units falling under this new closure option will have already had all waste removed in its entirety and so would require no continued maintenance. However, groundwater remediation actions would be continuing, raising concern about potential exposures.

Therefore, EPA proposed that the owner or operator record a notation on the deed to the property (or some other instrument normally examined during a title search) until all groundwater corrective action has been completed—that is, when groundwater monitoring concentrations do not exceed the groundwater protection standard established pursuant to § 257.95(h) for constituents listed in appendix IV to part 257. EPA proposed the deed notation because all removal and decontamination actions have not been completed. Given that groundwater corrective action may continue for years or decades, the deed restrictions are a practical way of limiting human exposure during a period when contamination is still present, and thereby ensuring that the statutory standard under RCRA section 4004(a) continues to be met.

As part of the post-closure care provisions under § 257.104, EPA proposed to allow removal of the deed notation, or the addition of a second notation reflecting the inapplicability of the first notation, as may be applicable under existing State or local law, when groundwater corrective action is completed for the CCR unit. Under this closure option, completion of groundwater corrective action would indicate that all removal and decontamination actions have been completed. To remove the deed notation (or add a second notation), the owner or

operator would need to complete two actions. First, the owner or operator would need to demonstrate that groundwater monitoring concentrations no longer exceed any groundwater protection standard established pursuant to § 257.95(h) for constituents listed in Appendix IV to part 257. See § 257.104(g). Second, the owner or operator would need to complete the notification stating the post-closure care requirements have been met as required in § 257.104(e). Removing the deed notation upon completion of all removal and decontamination activities is consistent with the current procedures for CCR units that close by removal under § 257.102(i)(4).

The existing CCR regulations require a specific type of control (*i.e.*, deed notations) to communicate use limitations to present and future users of the land with the closed CCR unit. The Agency solicited comments on whether the use of deed restriction controls is too narrow under this new closure option and whether the CCR regulations should allow for the use of different legal mechanisms and controls to communicate limits on the activities that can safely take place at the site. Some commenters supported inclusion of more flexibility and alternative instruments to accomplish this purpose. For example, one commenter pointed out that in Colorado, the State routinely uses Environmental Use Restrictions/Environmental Covenants. Other commenters asserted that EPA should allow the owner or operator to determine which instrument to use or allow the Participating State Director to decide. ASTSWMO commented that the proposed language requiring the use of deed restriction controls appears to be consistent with language in 40 CFR 258.60(i) as applicable to Municipal Solid Waste (MSW) Landfills, and that it might be helpful for States that the language between CCR and MSW landfills aligns.

Other commenters mentioned the importance of deed notations is that it compels impoundment owners to create a publicly accessible record attached to a property deed noting that the property is subject to ongoing groundwater corrective action requirements. Attaching such a note to the deed also ensures any subsequent owner of the property would be on notice of ongoing cleanup obligations and would be liable for following through on them. The commenter stated that any alternative to deed notification that EPA may be considering (*i.e.*, other approaches under private property law) should only be considered if they also provide these

benefits of the deed notification requirement.

The Agency has decided to finalize the proposal to require that the owner or operator record a notation on the deed to the property until all groundwater corrective action has been completed. EPA agrees that a deed notation performs an important function to ensure any subsequent owner of the property is on notice of the ongoing cleanup obligations and of the liability of any subsequent owner until those obligations are completed. None of the commenters provided sufficient information for EPA to conclude that the alternative measures that they suggested would provide the same level of assurance as a deed notation. Moreover, the use of a deed notation is consistent with the requirements for MSW landfills and with CCR units closing by leaving waste in place, and therefore EPA expects the public and regulated entities will be familiar with them. Additionally, as discussed above, once the closure by removal is complete, the owner or operator can remove the deed notification.

f. Closure Certification or Approval

The Agency is adopting without revision the proposal that the owner or operator will continue to be subject to the same certification or approval requirement that is currently applicable to all CCR units as specified in § 257.102(f)(3). Under this requirement, the owner or operator must obtain a certification from a qualified P.E. or approval from the Participating State Director (or EPA where EPA is the permitting authority) verifying that closure has been completed in accordance with the written closure plan and all applicable closure requirements of § 257.102. Under this provision, the certification or approval would reflect that all removal and decontamination activities, except for groundwater corrective action, have been completed. The certification or approval would not address the remediation of the impacted groundwater because groundwater corrective action will be completed during the post-closure care period, including applicable post-closure care certification and approval requirements.

E. Technical Corrections

Through the implementation of the 2015 CCR Rule, the Agency identified several minor errors and inconsistencies. Therefore, EPA is amending the CCR regulations to clarify definitions, accurately reference the definition of wetlands, and use consistent language when referring to

publicly accessible internet sites. The Agency is also amending an incorrect reference to § 257.99 in the groundwater monitoring scope section. Finally, EPA is extending the period for certain document retention and posting.

1. Definitions of “Technically Feasible” and “Technically Infeasible”

EPA proposed to revise the definition of *technically feasible* to clarify that the terms *technically feasible* and *feasible* have the same meaning in the regulations. The existing regulations define *technically feasible* as “possible to do in a way that would likely be successful.” EPA codified this definition in 2020 when amending the alternative closure requirements for landfills and impoundments. 85 FR 53542 (August 28, 2020). As EPA explained, the definition was based on two dictionary definitions of “feasible”: “capable of being done or carried out” (Merriam website (<https://www.merriam-webster.com/dictionary/feasible>)) and “possible to do and likely to be successful” (Cambridge English Dictionary (<https://dictionary.cambridge.org/us/dictionary/english/feasible>)). Id.

However, some rule provisions use the term *feasible*. EPA never intended to distinguish between these terms. See, *e.g.*, 80 FR 21422–21423, 85 FR 53542. Therefore, EPA proposed to add the term *feasible* to the existing definition of *technically feasible* to make clear that both terms have the same meaning in the regulations. This definition revision would be accomplished by adding “or feasible” to the existing definition so that the definition would read “*Technically feasible or feasible means possible to do in a way that would likely be successful.*” For similar reasons, EPA proposed to also revise the definition of *technically infeasible* to clarify that the terms *technically infeasible* and *infeasible* have the same meaning in the regulations.

EPA received comments on this issue that opposed adding “feasible” and “infeasible” as definitions. The commenters said the term “feasible” is used in the § 257.102(f)(2)(i) standard for obtaining extensions to the closure time frames, and that if EPA finalizes the provision as proposed, the change should not be applied retroactively to facilities that used the closure extension. Other commenters said this is not how EPA should correct regulatory errors and there is a lack of discussion on all situations and regulatory history regarding these terms.

EPA disagrees that these terms have different meanings under the CCR regulations or that this clarification will

negatively impact implementation of the requirements by regulated entities. See, 85 FR 53542 (relying on dictionary definitions of “feasible” to define ‘technically feasible’). EPA is simply clarifying the meaning of these synonymous terms. *Id.* Therefore, EPA is finalizing these changes as proposed. This is codified in the regulatory text at § 257.53.

2. Wetlands Reference Correction

When the 2015 CCR Rule was finalized in April 2015, § 257.61(a) referenced § 232.2, which contained a definition of wetlands. An EPA and United States Army Corps of Engineers joint final rule published June 29, 2015 (80 FR 37053) amended § 232.2 by removing the definition of wetlands. However, the reference to § 232.2 in § 257.61(a) of the 2015 CCR Rule was not updated. EPA proposed an amendment that would correct the CFR reference for the wetlands definition by referring to 40 CFR 230.41(a) (December 24, 1980, 45 FR 85344). EPA received one comment on this issue about the U.S. Supreme Court decision in *Sackett v. EPA*, 21–454, in which the Court substantially narrowed the scope of wetlands subject to Federal jurisdiction under the Clean Water Act. EPA reviewed the *Sackett* decision and determined that the wetlands definition contained in § 257.61(a) remains valid after that decision. EPA is therefore finalizing this provision as proposed. This is codified in the regulatory text at § 257.61.

3. Groundwater Monitoring and Corrective Action Applicability

EPA proposed to correct a typographical error in the initial applicability paragraph of the groundwater monitoring and corrective action regulations. In § 257.90(a), the existing regulations refer to the “groundwater monitoring and corrective action requirements under §§ 257.90 through 257.99”; however, there are no requirements codified under § 257.99. This was brought to EPA’s attention by a State interested in permit program approval. To avoid confusion with the regulations, EPA proposed to revise the section references in § 257.90(a) to read “groundwater monitoring and corrective action requirements under §§ 257.90 through 257.98.” EPA did not receive any comments on this issue and is therefore finalizing this provision as proposed.

4. Publicly Accessible Internet Site

EPA proposed to change several provisions using the term “CCR website” to “CCR website,” which is the

term used in § 257.107(a). The inconsistent spelling of CCR website was brought to our attention by a State interested in permit program approval. To avoid confusion with the regulations, EPA proposed to correct such references in §§ 257.100(e)(1)(iii) and 257.107(b) through (j). EPA did not receive any comments on this issue and is therefore finalizing these provisions as proposed.

EPA is also revising § 257.107(b) to provide owners and operators the flexibility to maintain one website for multiple electric power sector rules. This new provision allows an owner or operator to document the facility’s compliance with the requirements of other environmental rules on the same website that is used for CCR units. In order to use a combined website, the final rule requires that the owner or operator delineate the postings for each regulatory program under a separate heading on the website. For example, the required CCR rule postings must be placed under a “CCR Rule Compliance Data and Information” heading, while postings required by the ELG rule would be posted under a separate heading “ELG Rule Compliance Data and Information.”¹⁵¹ EPA is providing this flexibility to reduce paperwork burden and make it easier for communities to access this information.

5. Document Retention

The CCR regulations require the production of many documents that provide information on many aspects of regulated CCR units, for example from history of construction to periodic inspections, as well as closure activity and groundwater sampling and cleanup, if necessary. These documents must be retained in the facility operating record as well as posted on the facility CCR website, generally for a five-year period. In the proposed rule, EPA requested comment on potential revision of document posting and retention times currently in the regulations. EPA raised the concern that some of the current retention times may be too short to accomplish the goals underlying the posting requirement, namely transparency and information availability. This concern stems from the fact that information that is still relevant for CCR units may reach the original retention time limit while the availability of the documents would still serve the purposes of transparency and information availability after the original retention deadline.

The comments received were largely in favor of revising the document

retention periods, though those commenters who provided suggested approaches or examples of longer retention periods were not entirely consistent in the approaches offered.

One commenter opposed the concept of expanding the retention time for any documents that are required to be posted on facility websites. This commenter stated the current retention period provides clear guidance to the regulated community and that extending the retention period could add to additional redundant or outdated material on the websites. This commenter also said that the purpose of the website posting requirement has been obviated by the passage of the WIIN Act. For several reasons, EPA disagrees with this comment. First, the regulations already include provisions to decrease or eliminate redundancy or outdated postings. See, for example, § 257.107(g)(1), which requires only the most recent dust suppression plan to be maintained on the website. Second, the core principle of the website posting requirement is relevance: facilities are required to post information relevant to the operation and closure of CCR units and cleanup of any releases from those units. It is clear that a five-year retention period may not be adequate for documents that remain relevant well beyond that length of time, which is proving to be true for many of the required documents. Third, while it is true that website posting is one of several measures EPA implemented in the original rule before the WIIN Act was enacted, nothing in the WIIN Act makes the goals of transparency and information availability for communities and other interested parties obsolete.

The other commenters all agree that extensions to the website posting and retention time periods are warranted. Those comments that included actual time frame suggestions based those suggestions on the type of document and relevance to the operation, closure, and cleanup requirements of the regulations, though they varied in the exact approach and length of extensions.

EPA has decided that to accomplish the regulatory goals underlying the document preparation and retention requirements, longer retention times are required. Therefore, EPA is revising the retention periods as provided in this final rule. EPA does agree that the approach for extensions should be based on the nature of each document and the relevance of each document to demonstrating compliance with regulatory milestones. This approach was already employed in the 2015 CCR

¹⁵¹ See § 423.19 for ELG rule posting requirements.

Rule for numerous documents (*e.g.*, the groundwater remedy selection document is currently required to be retained until remedy completion). See § 257.107(h)(9). In this rule, EPA is applying this same approach to other documents prepared under the regulations.

There are several related issues that are involved in the document preparation, retention and posting requirements that deserve discussion here. First, the website posting regulations in § 257.107 are companions to, and cross-reference, the operating record regulations in subpart § 257.105. The interrelation of these sections means that this revisiting of the website posting regulations necessitates a review of those regulations that address the placing and retaining of documents in the facility operating record. Accordingly, EPA is including accompanying retention time period changes to § 257.105 as appropriate and relevant to the changes to § 257.107. Additionally, as suggested by several commenters, the retention of the documents in the operating record for a longer period than retention on the website not only makes sense for some documents, but supports the Agency not requiring that every prepared document remain on the website. This is particularly true for documents that are either periodically updated or result from recurring assessments. In implementing this approach, the Agency is mindful of and in agreement with the comments that urged the

Agency to not require the posting of all documents out of concern that the websites would become cluttered and confusing.

Second, a related issue arises where there may be more than one version of a document, which version of a required document must be posted or retained in the operating record. This situation arises, for example, when a required document is updated or a document is required to be prepared for recurring assessments. Where appropriate, the regulations are being revised to ensure they are clear about what version or versions of documents must be posted and retained.

A third issue is that, for some documents, the five-year retention and posting duration requirements may have expired. However, some of these documents are still relevant to an operating or closing unit, or a unit in post-closure care status or undergoing groundwater cleanup. For these documents, the purposes of retaining and posting them are still viable and there are compelling reasons to ensure these documents are available on the facility website and in the facility operating record. EPA is, therefore, requiring that documents that may have been taken down and removed from operating records are placed back in the operating records and reposted on the website. Although it is unlikely that documents that were required to be prepared under the CCR regulations, placed in the operating record, and posted on the website were destroyed or

discarded after the applicable retention time ran, this requirement nonetheless includes such documents. In other words, any required documents that have been destroyed or discarded must be reproduced and placed in the operating record and reposted on the facility website. Otherwise, there could be inconsistencies among the required facility websites totally dependent upon whether a facility had elected to remove documents from the website and operating record and not otherwise retain the documents in any facility files. EPA believes that allowing this inconsistency across facility websites is an unacceptable approach to ensuring information relevant to each CCR unit is publicly available.

Finally, while the approach adopted here links retention and posting times to document relevance and the status of the CCR unit and work undertaken at the unit, EPA does not believe that the interest in information availability ends at the moment a unit's status changes or required work ends (*e.g.*, completion of closure). Therefore, EPA is requiring that documents remain available for a reasonable time period after related milestones are reached. For many documents, EPA has chosen five years as the reasonable time period for document posting and retention after work is completed or the unit's status changes. This is also consistent with timeframes offered by commenters where specific timeframes were suggested.

TABLE 3—DOCUMENT RETENTION IN THE OPERATING RECORD AND CCR WEBSITE

Document	Operating record	CCR website
Location restrictions demonstration as specified in §§ 257.60–257.64.	§ 257.105(e): 5 years after: closure by removal (CBR) or post-closure care ends.	§ 257.107(e): 5 years after: CBR or post-closure care ends.
Landfill liner and leachate collection preconstruction design certification and post construction certification as specified in § 257.70(e) and (f).	§ 257.105(f)(1): 5 years after: CBR or post-closure care ends.	§ 257.107(f)(1): 5 years after: CBR or post-closure care ends.
Documentation of liner type as specified in § 257.71(a).	§ 257.105(f)(2): 5 years after: CBR or post-closure care ends.	§ 257.107(f)(3): 5 years after: unit ends post closure care OR liner is removed.
Surface impoundment liner preconstruction design certification and postconstruction certification as specified in § 257.72(c) and (d).	§ 257.105(f)(3): 5 years after: CBR or post-closure care ends.	§ 257.107(f)(2): 5 years after: CBR or post-closure care ends OR liner is removed.
Documentation that permanent identification marker was installed as specified in §§ 257.73(a)(1) and 257.74(a)(1).	§ 257.105(f)(4): 5 years after: CBR or post-closure care ends.	N/A.
The initial and periodic hazard potential classification assessments as specified in §§ 257.73(a)(2) and 257.74(a)(2).	§ 257.105(f)(5): Retain all versions CBR Until closure is complete not including meeting GWPS. Closure in place (CIP): until post-closure care is complete.	§ 257.107(f)(4): Current and previous one. CBR Until closure is complete not including meeting GWPS. CIP: Until post closure care is complete.
The emergency action plan, and any revisions of it, as specified in §§ 257.73(a)(3) and 257.74(a)(3).	§ 257.105(f)(6): Retain all 5 years after: CBR not including meeting GWPS or unit ends post-closure care.	§ 257.107(f)(5): Current version, if EAP is required.

TABLE 3—DOCUMENT RETENTION IN THE OPERATING RECORD AND CCR WEBSITE—Continued

Document	Operating record	CCR website
Documentation prepared by the owner or operator recording the annual face-to-face meeting or exercise between representatives of the owner or operator of the CCR unit and the local emergency responders, as specified in §§ 257.73(a)(3)(i)(E) and 257.74(a)(3)(i)(E).	§ 257.105(f)(7): Retain all 5 years after: CBR or unit ends post closure care.	§ 257.107(f)(6): Current version, if EAP is required.
Documentation prepared by the owner or operator recording any activation of the emergency action plan, as specified in §§ 257.73(a)(3)(v) and 257.74(a)(3)(v).	§ 257.105(f)(8): Retain all 5 years after: CBR or unit ends post closure care.	§ 257.107(f)(7): Any documentation prepared in the last five years; if no activation in the last 5 years, a statement posted relating that information.
The history of construction, and any revisions of it as specified in § 257.73(c).	§ 257.105(f)(9): Retain all 5 years after: CBR or unit ends post closure care.	§ 257.107(f)(8): Only most recent and any revisions from the last 5 years. 5 years after: CBR or unit ends post closure care.
The initial and periodic structural stability assessments as specified in §§ 257.73(d) and 257.74(d).	§ 257.105(f)(10): Retain all CBR Until closure is complete not including meeting GWPS. CIP: Until post closure care is complete	§ 257.107(f)(9): Current and previous one. CBR Until closure is complete not including meeting GWPS. CIP: Until post closure care is complete.
The documentation detailing the corrective measures taken to remedy the structural stability deficiency for existing or new surface impoundments as specified in §§ 257.73(d)(2) and 257.74(d)(2).	§ 257.105(f)(11): Retain all 5 years after: CBR or unit ends post closure care.	§ 257.107(f)(10): Current and any corrective measures. 5 years after: CBR or unit ends post closure care.
The initial and periodic safety factor assessments as specified in §§ 257.73(e) and 257.74(e).	§ 257.105(f)(12): Retain all 5 years after: CBR or unit ends post closure care.	§ 257.107(f)(11): Current and previous one. 5 years after: CBR or unit ends post closure care.
The design and construction plans of the unit, and any revisions of the plans as specified in § 257.74(c).	§ 257.105(f)(13): Retain all 5 years after: CBR or unit ends post closure care.	§ 257.107(f)(12): Current and previous one. 5 years after: CBR or unit ends post closure care.
The application and any supplemental materials submitted in support of the alternative liner demonstration application as specified in § 257.71(d)(1)(i)(E).	§ 257.105(f)(14): 5 years after: CBR or unit ends post closure care.	§ 257.107(f)(13): 5 years after: CBR or unit ends post closure care.
CCRMU Facility Evaluation Report Document Part 1 as specified in § 257.75(c).	§ 257.105(f)(25): 5 years after: CBR or unit ends post closure care.	§ 257.107(f)(24): 5 years after: CBR or unit ends post closure care.
CCRMU Facility Evaluation Report Document Part 2 as specified in § 257.75(d).	§ 257.105(f)(26): 5 years after: CBR or unit ends post closure care.	§ 257.107(f)(25): 5 years after: CBR or unit ends post closure care.
The decision on the alternative liner application as specified in § 257.71(d)(2)(iii)(F).	§ 257.105(f)(19): 5 years after: CBR or unit ends post closure care.	§ 257.107(f)(18): 5 years after: CBR or unit ends post closure care.
The CCR fugitive dust control plan, or any subsequent amendment of the plan as specified in § 257.80(b).	§ 257.105(g)(1): Retain all until last CCR unit at the facility completes post closure care or CBR.	§ 257.107(g)(1): Only most recent. Retain until last unit completes post closure care or CBR.
The annual CCR fugitive dust control report as specified in § 257.80(c).	§ 257.105(g)(2): Retain all until last CCR unit at the facility completes post closure care or CBR.	§ 257.107(g)(2): Current plus last 5 years. Retain until last unit completes post closure care or CBR.
The initial and periodic run-on and run-off control system CCR landfill plans as specified in § 257.81(c).	§ 257.105(g)(3): Only most recent Until 5 years after closure of the landfill is complete not including achievement of GWPS.	§ 257.107(g)(3): Current plus any other versions from the last 5 years (if updated). Until 5 years after closure of the landfill is complete not including achievement of GWPS.
Initial and periodic inflow design flood control system CCR surface impoundment plans as specified in § 257.82(c).	§ 257.105(g)(4): Only most recent Until 5 years after closure of the landfill is complete not including achievement of GWPS.	§ 257.107(g)(4): Current plus any other versions from the last 5 years (if updated). Until 5 years after closure of the landfill is complete not including achievement of GWPS.
Documentation recording the results of each CCR surface impoundment inspection and monitoring as specified in § 257.83(a).	§ 257.105(g)(5): Retain all until 5 years after closure is complete not including achievement of GWPS.	N/A.
Annual CCR surface impoundment inspection reports as specified in § 257.83(b)(2).	§ 257.105(g)(6): Retain all until 5 years after closure is complete not including achievement of GWPS.	§ 257.107(g)(5): Current plus last 5. Retain until 5 years after closure is complete not including achievement of GWPS.
The documentation detailing the corrective measures taken to remedy the deficiency or release as specified in §§ 257.83(b)(5) and 257.84(b)(5).	§ 257.105(g)(7): Retain all until 5 years after closure is complete not including achievement of GWPS.	§ 257.107(g)(6): Any corrective measures until 5 years after closure is complete not including achievement of GWPS.
Documentation recording the results of weekly landfill structural weakness inspection as specified in § 257.84(a).	§ 257.105(g)(8): Retain all until 5 years after closure is complete not including achievement of GWPS.	N/A.
Annual landfill inspection reports as specified in § 257.84(b)(2).	§ 257.105(g)(9): Retain all until 5 years after closure is complete not including achievement of GWPS.	§ 257.107(g)(7): Current plus last 5. Retain until 5 years after closure is complete not including achievement of GWPS.

TABLE 3—DOCUMENT RETENTION IN THE OPERATING RECORD AND CCR WEBSITE—Continued

Document	Operating record	CCR website
Annual groundwater monitoring and corrective action report as specified in § 257.90(e).	§ 257.105(h)(1): Retain all until 5 years after the last CCR unit at the facility completes post-closure care or completion of CBR including achieving GWPS for 3 consecutive years.	§ 257.107(h)(1): Current plus previous 5 years. Retain until 5 years after last unit completes post-closure care or completion of CBR including achieving GWPS for 3 consecutive years.
Documentation of design, installation, development, and decommissioning of any monitoring wells, piezometers and other devices as specified in § 257.91(e)(1).	§ 257.105(h)(2): 5 years after CBR and GWPS have been met or 5 years after completion of post-closure care.	N/A.
Groundwater monitoring system certification as specified in § 257.91(f).	§ 257.105(h)(3): 5 years after CBR and GWPS have been met or 5 years after completion of post-closure care.	§ 257.107(h)(2): 5 years after CBR and GWPS have been met or 5 years after completion of post-closure care.
Selection of a statistical method certification as specified in § 257.93(f)(6).	§ 257.105(h)(4): 5 years after CBR and GWPS have been met or 5 years after completion of post-closure care.	§ 257.107(h)(3): 5 years after CBR and GWPS have been met or 5 years after completion of post-closure care.
Assessment of corrective measures as specified in § 257.96(d).	§ 257.105(h)(10): 5 years after CBR and GWPS have been met or 5 years after completion of post-closure care.	§ 257.107(h)(8): 5 years after CBR and GWPS have been met or 5 years after completion of post-closure care.
Documentation recording the public meeting for the corrective measures assessment as specified in § 257.96(e).	§ 257.105(h)(11): 5 years after CBR and App IV GWPS have been met or 5 years after completion of post-closure care.	N/A.
Notification that the remedy has been completed specified under in § 257.98(e).	§ 257.105(h)(13): 5 years after completion of remedy.	§ 257.107(h)(10): 5 years after completion of remedy.
Demonstration supporting the suspension of groundwater monitoring activities as specified in § 257.90(g).	§ 257.105(h)(14): 5 years after last unit ends post closure care.	§ 257.107(h)(11): 5 years after posting.
Written closure plan, and any amendment of the plan as specified in § 257.102(b).	§ 257.105(i)(4): Only the most recent 5 years after CBR or 5 years after post-closure care is complete.	§ 257.107(i)(4): Only the most recent. 5 years after CBR or 5 years after post-closure care is complete.
Demonstration(s) for a time extension for initiating closure as specified in § 257.102(e)(2)(ii) and (iii).	§ 257.105(i)(5): Until notice of closure completion is posted.	§ 257.107(i)(5): Until notice of closure completion is posted.
Demonstration(s) for a time extension for completing closure as specified in § 257.102(f)(2)(i) and (iii).	§ 257.105(i)(6): 5 years after closure is complete.	§ 257.107(i)(6): 5 years after closure is complete.
Notification of intent to close a CCR unit as specified in § 257.102(g).	§ 257.105(i)(7): 5 years after closure complete	§ 257.107(i)(7): 5 years after closure complete.
Notification of completion of closure of a CCR unit as specified in § 257.102(h).	§ 257.105(i)(8): 5 years after unit ends post closure care or CBR.	§ 257.107(i)(8): 5 years after unit ends post closure care or CBR
Notification recording a notation on the deed as specified in § 257.102(i).	§ 257.105(i)(9): 5 years after unit ends post closure care.	§ 257.107(i)(9): 5 years after unit ends post closure care.
Notification of intent to comply with the alternative closure requirements for landfills as specified in § 257.103(c)(1).	§ 257.105(i)(10): 5 years after the unit completes closure.	§ 257.107(i)(10): 5 years after the unit completes closure.
Annual progress reports under the alternative closure requirements for landfills as specified in § 257.103(c)(2).	§ 257.105(i)(11): 5 years after the unit completes closure.	§ 257.107(i)(11): 5 years after the unit completes closure.
Written post-closure plan, and any amendment of the plan as specified in § 257.104(d).	§ 257.105(i)(12): 5 years after unit ends post closure care.	§ 257.107(i)(12): 5 years after unit ends post closure care.
Notification of completion of post-closure care as specified in § 257.104(e).	§ 257.105(i)(13): 5 years after unit ends post closure care.	§ 257.107(i)(13): 5 years after unit ends post closure care.
Notification of intent to comply with the site-specific alternative to initiation of closure due to development of alternative capacity infeasible as specified in § 257.103(f)(1)(ix)(A).	§ 257.105(i)(14): 5 years after: CBR or unit ends post closure care.	§ 257.107(i)(14): 5 years after: CBR or unit ends post closure care.
Approved or denied demonstration for the site-specific alternative to initiation of closure due to development of alternative capacity infeasible as specified in § 257.103(f)(1)(ix)(B).	§ 257.105(i)(15): 5 years after: CBR or unit ends post closure care.	§ 257.107(i)(15): 5 years after: CBR or unit ends post closure care.
Notification for requesting additional time to the alternative cease receipt of waste deadline as specified in § 257.103(f)(1)(ix)(C).	§ 257.105(i)(16): 5 years after: CBR or unit ends post closure care.	§ 257.107(i)(16): 5 years after: CBR or unit ends post closure care.
Semi-annual progress reports for the site-specific alternative to initiation of closure due to development of alternative capacity infeasible as specified in § 257.103(f)(1)(xi).	§ 257.105(i)(17): 5 years after: CBR or unit ends post closure care.	§ 257.107(i)(17): 5 years after: CBR or unit ends post closure care.
Notification of intent to comply with the site-specific alternative to initiation of closure due to permanent cessation of a coal-fired boiler(s) by a date certain as specified in § 257.103(f)(1)(viii).	§ 257.105(i)(18): 5 years after: CBR or unit ends post closure care.	§ 257.107(i)(18): 5 years after: CBR or unit ends post closure care.

TABLE 3—DOCUMENT RETENTION IN THE OPERATING RECORD AND CCR WEBSITE—Continued

Document	Operating record	CCR website
Approved or denied demonstration for the site-specific alternative to initiation of closure due to permanent cessation of a coal-fired boiler(s) by a date certain as specified in § 257.103(f)(2)(ix).	§ 257.105(i)(19): 5 years after: CBR or unit ends post closure care.	§ 257.107(i)(19): 5 years after: CBR or unit ends post closure care.
Annual progress report for the site-specific alternative to initiation of closure due to permanent cessation of a coal-fired boiler(s) by a date certain as specified in § 257.103(f)(2)(x).	§ 257.105(i)(20): 5 years after: CBR or unit ends post closure care.	§ 257.107(i)(20): 5 years after: CBR or unit ends post closure care.
Legacy Applicability Report as specified in § 257.100(f)(1)(i).	§ 257.105(k)(1): 5 years after: CBR or unit ends post closure care.	§ 257.107(k)(1): 5 years after: CBR or unit ends post closure care.

IV. Effect on State CCR Permit Programs

In the proposed rule, EPA discussed the effect of the amended regulations on State CCR permit programs. The revisions to the CCR regulations both establish standards for new types of units and revise existing requirements for CCR units defined in and subject to the 2015 CCR Rule. For this reason, the requirements for approval and retention of a State CCR permit program in accordance with RCRA section 4005(d) will change. How these revisions will affect States depends on whether the State has received approval for the provisions that are ultimately included in any final rule and whether the State is seeking full or partial approval of its permit program.

EPA received several comments asking for clarification on what States need to do to adopt these revisions. As EPA explained in the proposed rule, if a State has an approved program pursuant to RCRA section 4005(d), that State program will continue to operate in lieu of the portions of the Federal program adopted by the State, even if EPA revised the Federal analog of that regulation in this final action. See 42 U.S.C. 6945(d)(1)(A), (3). This means that the applicable revisions to the Federal CCR regulations will only take effect in an approved State when the State revises its program to adopt them. For this reason, RCRA requires a State to revise its program within three years of any applicable revision to the Federal CCR regulation that is more protective than the existing State program in order to maintain approval. See, 42 U.S.C. 6945(d)(1)(D)(i)(II). Conversely, the Federal requirements continue to apply directly to CCR facilities in States without an approved CCR program and in States with a partial CCR program. EPA will work with each State that is interested in adopting these regulations to ensure the State CCR permit program is at least as protective as the Federal program. If a State chooses not to adopt

certain portions of this final rule, when EPA establishes a Federal CCR permit program, EPA will begin issuing permits for CCR units, legacy CCR surface impoundments, and CCRMU in nonparticipating States.

As discussed in Units III.A. and III.B of this preamble, EPA is establishing requirements for legacy CCR surface impoundments and CCRMU. Because legacy CCR surface impoundments and CCRMU are new types of Federally regulated units, no State is currently approved to issue State CCR permits to such units in lieu of the Federal CCR regulations. Thus, any State that wants approval to issue permits to such units will be required to update the State CCR regulations and go through the State CCR permit program approval process set forth in RCRA section 4005(d).

As discussed in Units III.B.g and III.D of this preamble, EPA is also revising requirements under the existing CCR regulations. The revised requirements will directly apply to affected facilities except to the extent EPA has already approved the State to issue permits for the original requirement. In such a case, the State requirement will apply in lieu of the new Federal requirement until the State program is revised. certain provisions (*i.e.*, the requirement to expand § 257.102(d)(2) to landfills that are inundated with groundwater, document retention timeframes) to be more protective

One commenter asked if a State can adopt regulations for either legacy CCR surface impoundments or CCRMU, but not both. EPA issued the Coal Combustion Residuals State Permit Program Guidance Document; Interim Final (82 FR 38685, August 15, 2017) (the “Guidance Document”) to advise States interested in developing a State CCR permit program for approval by EPA. The Guidance Document explains the process for developing a State CCR permit program and expressly contemplates a State requesting partial approval of such a program. Thus, a

State may request approval of the final rule provisions applicable to either or both the legacy CCR surface impoundments and the CCRMU requirements.

Some commenters discussed the process for approving State CCR permit programs and inquired about the number of States that EPA is currently working with and the timeframe for approval of a State program package. As noted above, the Guidance Document explains the process for States to develop of State CCR permit program. The time it takes to develop an approvable State program depends on a number of factors, including the time it takes for a State to promulgate or enact regulations that are as protective as the Federal CCR regulations. Once the State has a complete and approvable program, EPA will issue the final program determination within 180 days of determining that the State’s submission is complete. EPA commits to working with States to adopt regulations that are at least as protective as the Federal CCR regulations and to review any draft application materials and provide comments to ensure the final application package can go through EPA’s approval process in a timely manner. The process for approving program modifications is the same as for the initial program approval: EPA will propose to approve or deny the program modification and hold a public hearing during the comment period. EPA will then issue the final program determination within 180 days of determining that the State’s submission is complete.

Finally, EPA received comments saying that EPA seems to be finalizing these regulations under the self-implementing regulatory scheme that existed when the 2015 CCR rule was promulgated. The comments further say that since then, Congress enacted the WIIN Act, which fundamentally changed the regulatory landscape and now requires implementation through

State and Federal permit programs. EPA acknowledges this Congressional mandate and is working to finalize the Federal CCR permit program in addition to approving State permit programs. States have requested that EPA finalize the legacy CCR surface impoundment provisions and other provisions that were remanded back to the Agency to allow States to apply for full program approval. EPA disagrees that the self-implementing rule is inappropriate in lieu of the WIIN Act requirements because all owners and operators of CCR units and CCRMU will need to follow the self-implementing rule until they obtain a State or Federal permit. Lastly, any permits that are issued by EPA will refer to the regulatory requirements in 40 CFR part 257, subpart D, or the equivalent State regulation in the case of State permits.

V. The Projected Economic Impact of This Action

A. Introduction

EPA estimated the costs and benefits of this action in a Regulatory Impact Analysis (RIA), which is available in the docket for this action.

B. Affected Universe

The universe of facilities and units affected by the final rule includes four categories. The first is comprised of facilities with legacy CCR surface impoundments. The RIA identifies 194 legacy CCR surface impoundments located at 84 facilities. The second component of the affected universe is composed of CCRMU. The RIA identifies 195 CCRMU at 104 facilities. The third component of the affected universe is composed of CCRMU at “other active facilities,” or OAFUs. The RIA identifies 15 OAFUs at six facilities. The final component of the universe is comprised of CCR landfills that are already regulated under the 2015 CCR Rule, but which have waste in contact with groundwater. The RIA identifies 39 such landfills at 33 facilities.

C. Baseline Costs

The RIA examines the extent to which baseline practices at legacy CCR surface impoundments and CCRMU address contamination in a manner consistent with the requirements of the final rule. To the extent that legacy CCR surface impoundments and CCRMU are already sufficiently addressing contamination, they are assumed to not incur costs or realize benefits under the final rule. To estimate the proportion of legacy CCR surface impoundments addressing contamination in the baseline, the RIA examines relevant Federal and State

programs and determines that about 9.8% of legacy CCR surface impoundments are addressing site contamination. To estimate the proportion of CCRMU addressing contamination, the RIA examines publicly available filings from owners and operators of regulated coal-fired power plants. The RIA estimates that about 20.8% of CCRMU are undergoing sitewide corrective action and closure in a manner sufficient to meet the requirements of the final rule.

D. Costs and Benefits of the Final Rule

The RIA estimates that the annualized costs of this action will be approximately \$214–\$240 million per year when discounting at 2%. Of this, \$123–\$135 million is attributable to the requirements for legacy CCR surface impoundments, which are subject to the D.C. Circuit’s order in *USWAG*, \$79–\$92 million is attributable to the requirements for CCRMU, \$8–\$9 million is attributable to the requirements for OAFUs, and \$4 million is attributable to requirements for landfills. The costs of this final rule are discussed further in the RIA and include the costs of unit closure, corrective action, fugitive dust controls, structural integrity inspections, and recordkeeping and reporting.

The RIA estimates that the annualized monetized benefits attributable to this action will be approximately \$53–\$80 million per year when discounting at 2%. Of this, \$43–\$57 million is attributable to the requirements for legacy CCR surface impoundments, \$9–\$21 million is attributable to the requirements for CCRMU, \$1–\$2 million is attributable to the requirements for CCRMU at “other active facilities,” or OAFUs. Requirements for landfills account for a de minimis amount of benefits. The monetized benefits of this proposed rule are discussed further in the RIA, and include reduced incidents of cancer from the consumption of arsenic in drinking water, avoided intelligence quotient (IQ) losses from mercury and lead exposure, non-market benefits of water quality improvements, and the protection of threatened and endangered species. EPA also monetized the benefits of avoided impoundment failures, including both “catastrophic” failures and smaller-volume releases. One example of a severe impoundment failure is the Dan River Steam Station failure that occurred in 2014, when a stormwater drainage pipe under the inactive surface impoundments at the Dan River Steam Station caused the inadvertent release of 39,000 tons of CCR directly into the nearby Dan River. The resulting high-

end estimate of the costs of this impoundment failure is \$300 million.

The monetized benefits in the RIA are incomplete and omit categories of benefits that are known to be significant. One such category of benefits is avoided cases of lung and bladder cancers due to exposure to arsenic III and arsenic V. Inorganic arsenic is known to occur in CCRs, and can leach into drinking water from leaking CCR disposal units. The EPA IRIS Toxicological Review of Inorganic Arsenic (CASRN 7440–38–2) draft, published in October 2023, provides updated toxicity values for cancer outcomes associated with inorganic arsenic exposure. From these values the benefits of avoided cancer cases can be monetized. The RIA does not consider these avoided cancer benefits in the main analysis because the IRIS report underlying them is still draft and subject to revision. These benefits are instead monetized in a sensitivity analysis and are estimated to be \$19 million per year when discounting at 2%. As these benefits are but two health endpoints from a single contaminant, they point to the possible true magnitude of benefits attributable to the final rule.

The RIA also describes a number of important benefits that cannot currently be quantified or monetized due to data limitations or limitations in current methodologies. These benefits include reducing the baseline risk of unit leakage and failure attributable to climate-change driven severe weather events. Many legacy CCR surface impoundments and CCRMU are situated close to rivers or are located along the coast. These units are vulnerable to inland or coastal flooding, which may occur at an increased frequency due to the effects of climate change. Flooding events may cause these units to overtop or catastrophically collapse, releasing CCR into the environment, exposing nearby communities to toxic contamination and necessitating potentially costly cleanup and remediation. EPA has identified 62 legacy CCR impoundments at medium or high risk from climate change-driven flooding, and 74 CCRMU at medium or high risk from climate change driven-flooding.

Another set of benefits outside the scope of quantification include reducing the instance of negative human health impacts such as cardiovascular mortality, neurological effects, and cancers (separate from the quantified cancer benefits) brought on by exposure to toxins found in coal ash. Either through leaking impoundment sites or release events, many pollutants from legacy CCR surface impoundments are

likely to contaminate nearby water bodies, affecting surface waters, local fish populations, and drinking water reservoirs. Because known transport pathways exist between these release events and human health endpoints, EPA expects the proposed rule to cause risk reductions for various categories that are not yet quantifiable. Toxins such as thallium, molybdenum, and lithium, while all present in CCR, lack the data to create dose-response relationships between ingestion rates and specific health endpoints, and thus precludes EPA from quantifying associated benefits.

The RIA describes several surface water quality benefits such as the improved health of ecosystems proximate to CCR disposal units, and the avoided costs of treating public drinking water impacted by CCR contamination. EPA expects leakages or releases of effluent from any CCR surface impoundment site to contaminate nearby surface waters and environments. Introduction of arsenic, selenium, and other heavy metals associated with CCR surface impoundment contents are shown to accumulate in sediments of nearby stream and lake beds, posing risks and injury to organisms and consequently ecosystems. Although surface waters are broadly protected from high levels of contaminants under EPA's regulations and Water Quality Criteria (WQC), complex interactions from trace amounts of heavy metals and other toxins known to be released from legacy CCR surface impoundment sites have displayed measurable impact to aquatic animals and ecosystems.¹⁵²

The RIA discusses how the final rule may result in avoided drinking water treatment costs and drinking water quality improvements at public water systems. First, by reducing the risk of CCR leakage events and impoundment failures, the proposed rule will help avoid costs of water quality treatment at public intake sources. Second, by preventing release events the proposed rule has the potential to reduce the incidence of eutrophication in source waters for public drinking supplies. Eutrophication is primarily caused by an overabundance of nitrogen and phosphorus. It causes foul tastes and odors, which require additional treatment, and commensurate expenditure, to remove.

The RIA discusses potential impacts on the market for the beneficial use of

CCR as a substitute for virgin materials. Future uses of CCR are unknown. Research on the recovery of rare earth elements and yttrium from coal fly ash is ongoing but currently only at laboratory scale. It is possible that in the future, the availability of additional CCR may reach an equilibrium price that encourages demand, particularly as coal plants retire and the supply of "new" CCR falls. However, the quality of CCR in legacy CCR surface impoundments and CCRMU may limit their value. Older, closed impoundments or other CCR storage areas are less likely to have CCR material of a known and reliable composition.

The RIA also discusses potential reductions in fugitive dust emanating from legacy CCR surface impoundments, which will benefit fence line communities by reducing the amount of resuspended ash from legacy CCR surface impoundments that could otherwise lead to respiratory health hazards for communities surrounding a given legacy impoundment.

The RIA discusses the benefits of improved property values near closed and remediated sites. Neighborhoods located near hazardous waste sites often experience depressed property values due to health risks posed by contaminant exposure pathways, potential reductions in ecological services, unsightly aesthetics of the disposal unit site, and potential stigma associated with proximity to a disposal site. Almost a million households, and over 2.5 million people are located within three miles of legacy CCR surface impoundments and CCRMU.

Approximately 75,000 households and 200,000 people are located within a mile. Improvements in home values resulting from the proposed rule have the potential to bestow welfare gains to homeowners located near legacy CCR surface impoundments and CCRMU.

The RIA also discusses the value of reusing land formerly occupied by legacy CCR surface impoundments, and CCRMU. Once legacy CCR surface impoundments and CCRMU are closed by removal, landfills are properly capped, or corrective action activities are completed, the land is more likely to move into alternative, economically productive purposes. For example, these land reuse projects might include industrial redevelopment or implementation of green energy generation which can utilize the existing electricity grid infrastructure.

Finally, based on the demographic composition and environmental conditions of communities within one and three miles of legacy CCR surface impoundments, the final rule will

reduce existing disproportionate and adverse effects on economically vulnerable communities, as well as those that currently face environmental burdens. For example, in Illinois the population living within one mile of legacy CCR surface impoundment sites is over three times as likely compared to the State average to have less than a high school education (35.66% compared to 10.10%, see RIA exhibit ES.14), and that population already experiences higher than average exposures to particulate matter, ozone, diesel emissions, lifetime air toxics cancer risks, and proximity to traffic, Superfund sites, Risk Management Plan sites, and hazardous waste facilities (see RIA exhibit ES.15).

The RIA also discusses the interaction of the CCR rules with Office of Air rules governing emissions at power plants. Following on the significant progress EPA has made over many decades to reduce dangerous pollution from coal-fired electric utilities' stack emissions and effluents, this proposed rule will help EPA further ensure that the communities and ecosystems closest to coal facilities are sufficiently protected from harm from groundwater contamination, surface water contamination, fugitive dust, floods and impoundment overflows, and threats to wildlife. The volume and toxicity of CCR at many sites persisted or increased over past decades even as coal-fired units' air and water emissions decreased, and this proposed rule will help EPA fulfill the promise of substantial public health and welfare gains from its full suite of regulations aimed at reducing the harms from coal-combustion pollution.

As noted previously, EPA establishes the requirements under RCRA sections 1008(a)(3) and 4004(a) without taking cost into account. *See, USWAG*, 901 F.3d at 448–49. Although EPA has accordingly designed its proposal based on its statutory factors and court precedent and has not relied on this benefit-cost analysis in the selection of its proposed alternative, EPA believes that after considering all unquantified and distributional effects, the public health and welfare gains that will result from the proposed alternative would justify the rule's costs.

VI. Statutory and Executive Order Reviews

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

¹⁵² Brandt, Jessica E., et al. "Beyond selenium: coal combustion residuals lead to multielement enrichment in receiving lake food webs." *Environmental science & technology* 53.8 (2019): 4119–4127.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14904: Modernizing Regulatory Review

This action is a “significant regulatory action” under section 3(f)(1) of Executive Order 12866, as amended by Executive Order 14094. Accordingly, the EPA submitted this action to the Office of Management and Budget (OMB) for review. Any changes made in response to recommendations received as part Executive Order 12866 review have been documented in the docket. The EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis, Regulatory Impact Analysis: Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments, is available in the docket and is briefly summarized in Unit V.

B. Paperwork Reduction Act (PRA)

The information collection activities in this rule will be submitted for approval to the Office of Management and Budget (OMB) under the PRA. EPA submitted the proposed rule ICR to OMB for approval on March 25th, 2024, triggering a 30-day public comment period for this proposed information collection. EPA anticipates the final ICR will be approved by the effective date of this final rule. If EPA receives any new and substantive comments on proposed collection, *i.e.*, substantive comments that were not received during the 60 day public comment period on the rule (from May 18, 2023–July 17, 2023), EPA will address those comments in a revision to the ICR via the standard PRA approval process. The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 2761.01. Due to the concurrent timing of this rulemaking and the timing of the renewal of the collection of information 2050–0223, *Disposal of Coal Combustion Residuals From Electric Utilities*, EPA is requesting a temporary OMB control number for this rulemaking collection, which will be assigned upon approval of the proposed ICR by OMB. EPA will submit a request to merge this rulemaking collection into the existing ICR for the program, 2050–0223, once the final rulemaking ICR and renewal for 2050–0223 are approved by OMB. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here. The information collection requirements are not enforceable until OMB approves them.

The final rule requires legacy CCR surface impoundments to comply with the reporting and recordkeeping requirements already in place for regulated CCR units. Many of these requirements are one-time requirements that will occur soon after the promulgation of the rule, while several are ongoing. The final rule also requires legacy CCR surface impoundments to submit an applicability report, unique to this universe of units, which will provide stakeholders with essential site characteristic and contact information for the unit.

Respondents/affected entities: Inactive electric utility plants with inactive CCR surface impoundments (legacy CCR surface impoundments), electric utility plants with CCRMU, electric utility plants with OAFUs, and electric utility plants with landfills already subject to regulation under the 2015 final CCR rule, but which have waste in contact with groundwater.

Respondent's obligation to respond: The recordkeeping, notification, and posting are mandatory as part of the minimum national criteria promulgated under Sections 1008(a), 2002(a), 4004, and 4005(a) and (d) of RCRA.

Estimated number of respondents: 2,083.

Frequency of response: one-time and annually.

Total estimated burden: 172,909 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: \$11.2 million (per year), includes \$11.2 million annualized capital or operation and maintenance costs.

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 OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. The small entities subject to the requirements of this action are owners and operators of coal fired electric utility plants in NAICS code 221112 and firms that own property on which an inactive/retired coal fired power plant is located. The Agency has identified 175 small entities

subject to the final rule. The Agency estimates that the average annual cost to a small entity will be approximately \$0.31 million; the vast majority of these entities do not own legacy CCR surface impoundments, CCRMU, or OAFUs, and must only complete the evaluation report requirements of the final rule. EPA has identified 15 small entities owning legacy CCR surface impoundments, CCRMU, and/or OAFUs; EPA assumes that small entities will not be able to pass on any compliance costs to ratepayers. This assumption, in EPA's opinion, constitutes a high-end scenario. In total, these 15 small entities are estimated to incur approximately \$52.1 million in annual costs. The Agency has determined that five small entities may experience an impact greater than 3% of annual revenues. Details of this analysis are presented in the Regulatory Impact Analysis, which can be found in the docket for this action.

D. Unfunded Mandates Reform Act (UMRA)

This action contains a Federal mandate under UMRA, 2 U.S.C. 1531–1538, that may result in expenditures of \$100 million or more for State, local and Tribal governments, in the aggregate, or the private sector in any one year. Accordingly, the EPA has prepared a written statement required under section 202 of UMRA. The statement is included in the docket for this action and briefly summarized here.

The RIA estimates that the proposed rule may affect 194 legacy CCR surface impoundments at 84 facilities, 195 CCRMU at 104 facilities, 15 OAFUs at six facilities, and 39 landfills already regulated under the 2015 final rule. The final rule will extend the existing requirements of the 2015 CCR final rule, found in 40 CFR part 257, subpart D, to these units.

In preparing the 2015 CCR final rule, and consistent with the intergovernmental consultation provisions of section 204 of the UMRA, EPA initiated pre-proposal consultations with governmental entities affected by the rule. In developing the regulatory options for the 2015 CCR Rule, EPA consulted with small governments according to EPA's UMRA interim small government consultation plan developed pursuant to section 203 of UMRA. The details of this consultation can be found in the preamble to the 2015 CCR final rule. Consistent with section 205 of UMRA, EPA identified and considered a reasonable number of regulatory alternatives, and adopted the least-costly approach (*i.e.*, a modified version

of the “D Prime” least costly approach presented in the 2010 proposed CCR rule). The final rule merely extends the provisions of the 2015 final rule to four additional classes of facilities.

This action is not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The threshold amount established for determining whether regulatory requirements could significantly affect small governments is \$100 million annually. The RIA estimates annual average costs of \$7 million total for the four local governments identified as owning units subject to the final rule. These estimates are well below the \$100 million annual threshold established under UMRA. There are no known Tribal owner entities of facilities that would incur substantial direct costs under the final rule.

E. Executive Order 13132: Federalism

This action does not have Federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

This action does not have Tribal implications as specified in Executive Order 13175. For the “Final Rule: Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities” published April 17, 2015 (80 FR 21302), EPA identified three of the 414 coal-fired electric utility plants (in operation as of 2012) as being located on Tribal lands. To the extent that these plants contain CCRMU subject to the proposed rule, the impacts to Tribes will be limited to document review and walking the site. As these are not substantial direct costs, this action does not impose substantial direct compliance costs or otherwise have a substantial direct effect on one or more Indian Tribes, to the best of EPA’s knowledge. Neither will it have substantial direct effects 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. Thus, Executive Order 13175 does not apply to this action.

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

Executive Order 13045 directs Federal agencies to include an evaluation of the health and safety effects of the planned regulation on children in Federal health and safety standards and explain why the regulation is preferable to potentially effective and reasonably feasible alternatives. This action is subject to E.O. 13045 (62 FR 19885, April 23, 1997) because it is a significant regulatory action under section 3(f)(1) of E.O. 12866, and EPA believes that the environmental health or safety risks addressed by this action may have a disproportionate effect on children. In addition, EPA’s Policy on Children’s Health applies. Accordingly, EPA evaluated the environmental health or safety effects of CCR constituents of potential concern on children. The results of this evaluation are contained in the Human and Ecological Risk Assessment of Coal Combustion Wastes available in the docket for this action.

As ordered by E.O. 13045 Section 1–101(a), EPA identified and assessed environmental health risks and safety risks that may disproportionately affect children in the revised risk assessment. Pursuant to U.S. EPA’s Guidance on Selecting Age Groups for Monitoring and Assessing Childhood Exposures to Environmental Contaminants, children are divided into seven distinct age cohorts: 1 to <2 yr, 2 to <3 yr, 3 to <6 yr, 6 to <11 yr, 11 to <16 yr, 16 to <21 yr, and infants (<1 yr). Using exposure factors for each of these cohorts, EPA calculated cancer and non-cancer risk results in both the screening and probabilistic phases of the assessment. In general, risks to infants tended to be higher than other childhood cohorts, and also higher than risks to adults. However, for drinking water cancer risks, the longer exposure periods for adults led to the highest risks over a standard adult lifetime. Screening risks exceeded EPA’s human health criteria for children exposed to contaminated air, soil, and food resulting from fugitive dust emissions and run-off. Similarly, 90th percentile child cancer and non-cancer risks exceeded the human health criteria for the groundwater to drinking water pathway under the full probabilistic analysis (Table 5–17 in the Human and Ecological Risk Assessment of Coal Combustion Wastes). The closure, groundwater monitoring and corrective action required by the rule will reduce risks from currently unregulated legacy CCR surface impoundments, and CCRMU. Thus,

EPA believes that this rule will be protective of children’s health.

In general, because the pollution control requirements under the CCR rule will reduce health and environmental exposure risks at all coal-fired electric utility plants, the CCR rule is not expected to create additional or new risks to children.

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

This action is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. Because the final rule addresses management of CCR and pertains mainly to inactive CCR units (legacy CCR surface impoundments at inactive facilities and CCRMU at facilities already regulated under the 2015 CCR rule), this final rule will have no effect on the production of crude oil, coal, fuel, or natural gas. In addition, the final rule will have no direct effect on electricity production, generating capacity, or on foreign imports or exports of energy.

Electricity price effects on the price of energy are only possible because in some cases, utilities may attempt to pass the costs of managing CCR under the proposed rule on to ratepayers in the form of increased electricity rates through Public Utility Commissions (PUCs). As a result, the final rule may indirectly affect electricity prices within the energy sector. To estimate what the electricity price effects of this final rule may be on a national level, EPA compared the expected costs of this rule to the expected costs and effects resulting from three previously conducted IPM runs for three previous RIAs, the 2015 CCR Rule, the 2015 ELG Rule (which included the costs of the 2015 CCR Rule in its baseline), and the 2019 ELG Rule, which was a deregulatory rule. Extrapolating from these IPM runs, EPA estimates that the effect of the current action on electricity prices will be between 0.060% and 0.156%. Since these effects fall below the 1% threshold, EPA concludes that this rule is not expected to generate significant adverse energy effects. The full energy impacts analysis is available in the Regulatory Impact Analysis that accompanies this action.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking involves technical standards. The EPA has decided to use technical standards in this rule as the existing CCR regulations rely on the

following: (1) RCRA Subpart D, Section 257.70 liner design criteria for new CCR landfills and any lateral expansion of a CCR landfill includes voluntary consensus standards developed by ASTM International and EPA test methods such as SW-846, (2) Section 257.71 liner design criteria for existing CCR surface impoundments includes voluntary consensus standards developed by ASTM International and EPA test methods such as SW-846, (3) Section 257.72 liner design criteria for new CCR surface impoundments and any lateral expansion of a CCR surface impoundment includes voluntary consensus standards developed by ASTM International and EPA test methods such as SW-846, and (4) Section 257.73 structural stability standards for new and existing surface impoundments use the ASTM D 698 and 1557 standards for embankment compaction. In this rulemaking, EPA expands the application of § 257.73 structural stability standards, which as noted, rely on the ASTM D 698 and 1557 standards for embankment compaction, to facilities with legacy CCR surface impoundments. This rulemaking does not adopt or otherwise involve any additional technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All

EPA believes that the human health or environmental conditions that exist prior to this action result in or have the potential to result in disproportionate and adverse human health or environmental effects on communities with environmental justice concerns.

EPA conducted a demographic screening analysis for all facilities subject to the rule to determine the composition of populations living within one and three miles of facilities with these units. Specifically, EPA looked at the percentages of the relevant populations that are identified as minority/people of color, households below the Federal poverty level, population with less than high school education (among those 25 years and older), and populations characterized by linguistic isolation. EPA chose to look at radii of one and three miles because they represent the areas most likely to be affected by groundwater contamination and surface water impacts from legacy CCR surface impoundments and CCRMU. EPA compared the demographic profile

within these radii to national and State averages to assess the extent to which marginalized groups are disproportionately affected by CCR-related contamination in the baseline.

To more fully explore the conditions in communities and populations surrounding facilities subject to the 2024 final rule, EPA expanded the demographic proximity analysis to include a suite of metrics that represent baseline health and social factors that are likely to be affected by, or interact with, changes in the management of facilities as a result of the rule. This analysis also focuses on populations within one mile of legacy CCR surface impoundments and CCRMU sites, but includes a combination of eight baseline indicators from the CDC Environmental Justice Index (EJI) and EPA's EJScreen that document community conditions that (a) suggest potential environmental justice concerns and (b) are relevant to actions resulting from the 2024 final rule. These include:

- CDC EJI Indicators: Lack of internet access, prevalence of disabilities, cancer, poor mental health, high blood pressure, asthma, and diabetes.

- EJScreen Indicators: PM_{2.5} concentrations and low life expectancy.

This specific subset of indicators captures health-related risks, environmental burdens, and access to information that affect a substantial number of communities living near the universe of facilities to provide a clearer picture of the baseline conditions. To assess the extent to which facilities affected by the final rule are located within communities with high baseline risks, the analysis specifically identifies, for each indicator, communities that fall in the highest (most at risk) 40 percent, or top two quintiles of communities nationwide. In other words, the analysis only identifies instances where a community is more at risk or more burdened than 60 percent of all communities in the U.S. For each indicator, the analysis calculates the number of communities within one mile of legacy CCR surface impoundments, CCRMU, and OAFU facilities that are in the top two quintiles.

Many of the health-related indicators appeared in communities with high percentiles for other health-related indicators, especially combinations of high blood pressure, diabetes, and asthma. Communities with high populations of people with disabilities were also likely to have high prevalence of high blood pressure, asthma, diabetes, poor mental health, and cancer. Additionally, high prevalence of poor mental health and lack of internet

accompanied prevalence of morbidities besides cancer.

EPA also identified lack of internet access, which is generally associated with poverty but also is a distinct factor in ensuring that information about regulated facilities and units that is required by the 2024 final rule is accessible to the people in surrounding communities. Half of the facilities with a lack of internet access in surrounding communities were also above two times the State average for households below the national poverty level, but the other half are not, suggesting that this barrier to information may be more widespread and less predictable in the 2024 rule context. In addition to the income-related implications, lack of internet access has consequences for information access that are pertinent to the 2024 final rule, which requires facilities to publish information online for public access. Therefore, a lack of internet access is a key barrier for communities who may be unable to receive important information.

These analyses found that of the roughly 182 sites in the regulated universe, more than half are located in areas with environmental justice concerns in surrounding communities. These communities are likely to face existing environmental burdens, economic stressors, and health conditions that put their residents and ecosystems at greater cumulative risk from the impacts associated with proximity to legacy impoundments. Because the final rule is designed to both prevent future contamination and eliminate existing contamination from CCR units that are near these already-vulnerable communities, EPA believes that the rule is likely to incrementally reduce existing disproportionate and adverse effects on communities with EJ concerns. EPA believes that the rule is particularly likely to reduce disproportionate and adverse effects on people of color and populations who experience low income. The rule improves overall environmental quality for all exposed communities and populations by ensuring protection and remediation of groundwater, resulting in avoided health effects (including cancer) from drinking water exposures to arsenic and other contaminants, and by reducing releases of CCR from impoundments into the surface waters, ecosystems, and air surrounding the facilities. The final rule is equity-enhancing in that it addresses EJ concerns present in the communities and populations near many of the facilities by reducing environmental and health burdens that contribute to the cumulative impacts experienced by

these communities, including the often-costly burdens associated with health effects. Moreover, the rule requires that facilities make information about their contamination and remediation actions available on public websites; this provides all interested members of the public, including communities with EJ concerns, improved access to information related to their environment or health, supporting effective community involvement.

Overall, EPA found that facilities affected by the rule are often located near populations of color with higher rates of poverty and linguistic isolation, and lower levels of education. Of the roughly 182 sites in the regulated universe, more than half are located in areas with environmental justice concerns in surrounding communities. These communities are likely to face existing environmental burdens, economic stressors, and health conditions that put their residents and ecosystems at greater cumulative risk from the impacts associated with proximity to legacy impoundments. Because the final rule is designed to both prevent future contamination and eliminate existing contamination from CCR units that are near these already-vulnerable communities, EPA believes that the rule is likely to incrementally reduce existing disproportionate and adverse effects on communities with EJ concerns. EPA believes that the rule is particularly likely to reduce disproportionate and adverse effects on people of color and populations who experience low income.

The information supporting this Executive Order review is contained in the accompanying Regulatory Impact Analysis, which can be found in the docket for this action.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action meets the criteria set forth in 5 U.S.C. 804(2).

List of Subjects

40 CFR Part 9

Environmental protection, Reporting and recordkeeping requirements.

40 CFR Part 257

Environmental protection, Beneficial use, Coal combustion products, Coal combustion residuals, Coal combustion

waste, Disposal, Hazardous waste, Landfill, Surface impoundment.

Michael S. Regan,
Administrator.

For the reasons set out in the preamble, title 40, chapter I, of the Code of Federal Regulations is amended as follows:

PART 9—OMB APPROVALS UNDER THE PAPERWORK REDUCTION ACT

- 1. The authority citation for part 9 continues to read as follows:

Authority: 7 U.S.C. 135 *et seq.*, 136–136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601–2671; 21 U.S.C. 331j, 346a, 31 U.S.C. 9701; 33 U.S.C. 1251 *et seq.*, 1311, 1313d, 1314, 1318, 1321, 1326, 1330, 1342, 1344, 1345 (d) and (e), 1361; E.O. 11735, 38 FR 21243, 3 CFR, 1971–1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–1, 300j–2, 300j–3, 300j–4, 300j–9, 1857 *et seq.*, 6901–6992k, 7401–7671q, 7542, 9601–9657, 11023, 11048.

- 2. Amend § 9.1 by adding an undesignated center heading and an entry for “257.50–257.107” in numerical order to read as follows:

§ 9.1 OMB approvals under the Paperwork Reduction Act

* * * * *				
40 CFR citation				OMB control No.
* * * * *				*
Disposal of Coal Combustion Residuals From Electric Utilities				
257.50–257.107				2050–0223
* * * * *				*
* * * * *				

PART 257—CRITERIA FOR CLASSIFICATION OF SOLID WASTE DISPOSAL FACILITIES AND PRACTICES

- 3. The authority citation for part 257 is revised to read as follows:

Authority: 42 U.S.C. 6907(a)(3), 6912(a)(1), 6927, 6944, 6945(a) and (d); 33 U.S.C. 1345(d) and (e).

Subpart A [Amended]

- 4. Amend § 257.1 by revising paragraph (c)(12) to read as follows:

§ 257.1 Scope and purpose.

* * * * *

(c) * * *

(12) Except as otherwise specifically provided in subpart D of this part, the

criteria in subpart A of this part do not apply to CCR units, as that term is defined in subpart D of this part. CCR units are instead subject to subpart D of this part.

Subpart D [Amended]

- 5. Amend subpart D by removing the phrase “Web site” and adding in its place the word “website” wherever it appears.

- 6. Amend § 257.50 by revising paragraph (c), (d), and (e) to read as follows:

§ 257.50 Scope and purpose.

* * * * *

(c) This subpart also applies to inactive CCR surface impoundments at active electric utilities or independent power producers, regardless of how electricity is currently being produced at the facility.

(d) (1) This subpart applies to CCR management units containing 1,000 tons or greater of CCR, located at active facilities or facilities with a legacy CCR surface impoundment.

(2) CCR management units containing greater than or equal to 1 ton and less than 1,000 tons of CCR, located at active facilities or facilities with a legacy CCR surface impoundment, are subject only to the requirements of the facility evaluation report in § 257.75 until a permitting authority determines that regulation of these units, either individually or in the aggregate, is warranted and determines the applicable requirements.

(e) This subpart applies to electric utilities or independent power producers that ceased producing electricity prior to October 19, 2015 and have a legacy CCR surface impoundment onsite.

* * * * *

§ 257.51 [Removed and Reserved]

- 7. Amend subpart D by removing and reserving § 257.51.

- 8. Revise § 257.52 to read as follows:

§ 257.52 Applicability of other regulations.

(a) Compliance with the requirements of this subpart does not affect the need for the owner or operator of a CCR unit to comply with all other applicable federal, state, tribal, or local laws or other requirements.

(b) Any CCR unit continues to be subject to the requirements in §§ 257.3–1, 257.3–2, and 257.3–3.

- 9. Amend § 257.53 by:

■ a. Revising the definition of “Active facility or active electric utilities or independent power producers”;

- b. Adding in alphabetical order the definition of “Closed prior to October 19, 2015”;
- c. Revising the definition of “CCR landfill or landfill”;
- d. Adding in alphabetical order the definition of “CCR management unit”;
- e. Revising the definitions of “CCR surface impoundment or impoundment” and “CCR unit”;
- f. Adding in alphabetical order the definitions of “Critical infrastructure”, “Contains both CCR and liquids” and “Inactive CCR landfill”;
- g. Revising the definition of “Inactive CCR surface impoundment”;
- h. Adding in alphabetical order the definitions of “Inactive facility or inactive electric utility or independent power producer”, “Infiltration”, “Legacy CCR surface impoundment”, and “Liquids”;
- i. Revising the definitions of “Operator” and “Owner”;
- j. Adding in alphabetical order the definition of “Regulated CCR unit”;
- k. Revising the definition of “State Director”;
- l. Removing the definitions of “Technically feasible” and “Technically infeasible”; and
- m. Adding in alphabetical order the definitions of “Technically feasible or feasible” and “Technically infeasible or infeasible”.

The revisions and additions read as follows:

§ 257.53 Definitions.

* * * * *

Active facility or active electric utilities or independent power producers means any facility subject to the requirements of this subpart that is in operation on or after October 19, 2015. An electric utility or independent power producer is in operation if it is generating electricity that is provided to electric power transmission systems or to electric power distribution systems on or after October 19, 2015. An off-site disposal facility is in operation if it is accepting or managing CCR on or after October 19, 2015.

* * * * *

Closed prior to October 19, 2015 means the CCR landfill or surface impoundment completed closure of the unit in accordance with state law prior to October 19, 2015.

* * * * *

CCR landfill or landfill means an area of land or an excavation that contains CCR and which is not a surface impoundment, an underground injection well, a salt dome formation, a salt bed formation, an underground or surface coal mine, or a cave. For

purposes of this subpart, a CCR landfill also includes sand and gravel pits and quarries that receive CCR, CCR piles, and any practice that does not meet the definition of a beneficial use of CCR.

CCR management unit means any area of land on which any noncontainerized accumulation of CCR is received, is placed, or is otherwise managed, that is not a regulated CCR unit. This includes inactive CCR landfills and CCR units that closed prior to October 19, 2015, but does not include roadbed and associated embankments in which CCR is used unless the facility or a permitting authority determines that the roadbed is causing or contributing to a statistically significant level above the groundwater protection standard established under § 257.95(h).

* * * * *

CCR surface impoundment or impoundment means a natural topographic depression, man-made excavation, or diked area, designed to hold an accumulation of CCR and liquids, and the unit treats, stores, or disposes of CCR.

CCR unit means any CCR landfill, CCR surface impoundment, or lateral expansion of a CCR landfill or CCR surface impoundment, or a combination of more than one of these units, based on the context of the paragraph(s) in which it is used. This term includes both new and existing units, unless otherwise specified. This term includes CCR management units and legacy CCR surface impoundments.

Contains both CCR and liquids means that both CCR and liquids are present in a CCR surface impoundment, except where the owner or operator demonstrates that the standard in § 257.102(d)(2)(i) has been met.

Critical infrastructure means physical structures, such as buildings, railways, bridges, or tunnels, that are not readily replaced or relocated and are either:

- (1) Necessary for the continued generation of power, or
- (2) Vital to the success or continuation of other on-going site activity for the public welfare. Examples of critical infrastructure include high power electric transmission towers, air pollution control or wastewater treatment systems, active CCR units, buildings, or an electrical substation. Buildings or other structures that exclusively provide commercial or financial benefit to private entities are not critical infrastructure.

* * * * *

Inactive CCR landfill means an area of land or an excavation that contains CCR but that no longer receives CCR on or

after October 19, 2015 and that is not a surface impoundment, an underground injection well, a salt dome formation, a salt bed formation, an underground or surface coal mine, or a cave. This term also includes sand and gravel pits that contain CCR and CCR piles, which have not received CCR on or after October 19, 2015, and abandoned or inactive CCR piles.

Inactive CCR surface impoundment means a CCR surface impoundment located at an active facility that no longer receives CCR on or after October 19, 2015, and still contains both CCR and liquids on or after October 19, 2015.

Inactive facility or inactive electric utility or independent power producer means any electric utility or independent power producer that ceased providing power to electric power transmission systems or to electric power distribution systems before October 19, 2015. An off-site disposal facility is inactive if it ceased accepting or managing CCR prior to October 19, 2015.

* * * * *

Infiltration means the migration or movement of liquid, such as surface water or ground water, into or through a CCR unit from any direction, including from the surface, laterally, and through the bottom of the unit.

* * * * *

Legacy CCR surface impoundment means a CCR surface impoundment that no longer receives CCR but contained both CCR and liquids on or after October 19, 2015, and that is located at an inactive electric utility or independent power producer.

* * * * *

Liquids means any fluid (such as water) that has no independent shape but has a definite volume and does not expand indefinitely and that is only slightly compressible. This encompasses all of the various types of liquids that may be present in a CCR unit, including water that was sluiced into an impoundment along with CCR, precipitation, surface water, groundwater, and any other form of water that has migrated into the impoundment, which may be found as free water or standing water ponded above CCR or porewater intermingled with CCR.

* * * * *

Operator means the person(s) responsible for the overall operation of a CCR unit. This term includes those person(s) or parties responsible for disposal or otherwise actively engaged in the solid waste management of CCR. It also includes those responsible for directing or overseeing groundwater

monitoring, closure or post-closure activities at a CCR unit.

* * * * *

Owner means the person(s) who owns a CCR unit or part of a CCR unit, or a facility, whether in full or in part.

* * * * *

Regulated CCR unit means any new CCR landfill, existing CCR landfill, new CCR surface impoundment, existing CCR surface impoundment, inactive CCR surface impoundment, or legacy CCR surface impoundment. This term does not include CCR management units.

* * * * *

State Director means the chief administrative officer of the lead state agency responsible for implementing the state program regulating disposal in CCR units.

* * * * *

Technically feasible or *feasible* means possible to do in a way that would likely be successful.

Technically infeasible or *infeasible* means not possible to do in a way that would likely be successful.

* * * * *

■ 10. Amend § 257.61 by revising the introductory text of paragraph (a) to read as follows:

§ 257.61 Wetlands.

(a) New CCR landfills, existing and new CCR surface impoundments, and all lateral expansions of CCR units must not be located in wetlands, as defined in § 230.41(a) of this chapter, unless the owner or operator demonstrates by the dates specified in paragraph (c) of this section that the CCR unit meets the requirements of paragraphs (a)(1) through (5) of this section.

* * * * *

■ 11. Amend § 257.73 by revising the introductory text of paragraph (a) to read as follows:

§ 257.73 Structural integrity criteria for existing CCR surface impoundments.

(a) The requirements of paragraphs (a)(1) through (4) of this section apply to all existing CCR surface impoundments and legacy CCR surface impoundments, except for those that are incised CCR surface impoundments.

* * * * *

■ 12. Add § 257.75 to read as follows:

§ 257.75 Requirements for identifying CCR management units.

(a) *Applicability.* The requirements of this section apply to owners and operators of active facilities or facilities with a legacy CCR surface impoundment.

(b) *Facility evaluation.* The owner or operator of an active facility or a facility with a legacy CCR surface impoundment must conduct a facility evaluation to identify all CCR management units at the facility in accordance with paragraphs (c) through (e) of this section. At a minimum, the presence or absence of CCR management units at the facility must be confirmed and documented through a thorough evaluation of reasonably and readily available records that contain the information needed to prepare the Facility Evaluation Reports Part 1 and Part 2 required by paragraphs (c) and (d) of this section. The facility evaluation must also include a physical inspection of the facility. Where necessary, the physical inspection must include field investigation activities to fill data gaps, such as conducting exploratory soil borings, geophysical assessments, or any other similar physical investigation activities to establish the location and boundaries of potential or likely CCR management units, and to affirmatively rule out other areas of potential CCR placement at the facility that were identified during the information review or physical inspection. The facility evaluation must identify all CCR management units at the facility regardless of when the CCR management unit came into existence.

(c) *Facility Evaluation Report Part 1.* (1) No later than Monday, February 9, 2026, the owner or operator of an active facility or a facility with a legacy CCR surface impoundment must prepare a Facility Evaluation Report Part 1, which shall contain, to the extent reasonably and readily available, the information specified in paragraphs (c)(1)(i) through (xiv) of this section. The owner or operator has prepared the Facility Evaluation Report Part 1 when the report has been placed in the facility's operating record as required by § 257.105(f)(25).

(i) The name and address of the person(s) owning and operating the facility; the unit name associated with each regulated CCR unit and CCR management unit at the facility; and the identification number of each regulated CCR unit and CCR management unit if any have been assigned by the state or by the owner.

(ii) The location of any CCR management unit identified on the most recent U.S. Geological Survey (USGS) 7½ minute or 15-minute topographic quadrangle map, or a topographic map of equivalent scale if a USGS map is not available. The location of each regulated CCR unit at the facility must also be identified in the same manner.

(iii) A statement of the purpose(s) for which each CCR management unit at the facility is or was used.

(iv) A description of the physical and engineering properties of the foundation and abutment materials on which each CCR management unit is constructed.

(v) A discussion of any known spills or releases of CCR, including any associated remediation activities, from each CCR management unit and whether the spills or releases were reported to state or federal agencies.

(vi) Any record or knowledge of structural instability of each CCR management unit.

(vii) Any record or knowledge of groundwater contamination associated or potentially associated with each CCR management unit.

(viii) The size of each CCR management unit, including the general lateral and vertical dimensions and an estimate of the volume of waste contained within the unit.

(ix) Dates when each CCR management unit first received CCR and when each CCR management unit ceased receiving CCR.

(x) Identification of all types of CCR in each CCR management unit at the facility.

(xi) A narrative description of any closure activities that have occurred, including any applicable engineering drawings or reports.

(xii) A narrative that documents the data reviewed as part of the facility evaluation process, and that lists all data and information indicating the presence or absence of CCR management units at the facility.

(xiii) Any supporting information used to identify and evaluate CCR management units at the facility, including but not limited to any construction diagrams, engineering drawings, permit documents, wastestream flow diagrams, aerial photographs, satellite images, historical facility maps, any field or analytical data, groundwater monitoring data or reports, inspection reports, documentation of interviews with current or former facility workers, and other documents used to identify and evaluate CCR management units at the facility.

(xiv) A narrative description of any data gaps for information in paragraphs (c)(i) through (xiii) of this section, not available in existing information collection records and a plan for remedying identified data gaps through a physical examination of the facility, including any field or laboratory work needed to remedy data gaps in the Facility Evaluation Report Part 1 record. The plan must include the major

milestones needed to fill the identified data gaps (e.g., a physical examination of the facility, sampling of media, measurements of CCR concentrations in and around the unit or physical presence, delineation of CCR management unit(s)) and dates to complete such needed tasks. Also, as necessary and timely, any updates to data gap remedy plans must be added to the public record during the Facility Evaluation Report Part 1.

(2) The owner or operator of any facility regulated under this subpart must obtain a certification from a qualified professional engineer stating that the Facility Evaluation Report Part 1 meets the requirements of paragraph (c)(1) of this section.

(3) The owner or operator of any facility regulated under this subpart must certify the Facility Evaluation Report Part 1 required by paragraph (c)(1) of this section with the following statement signed by the owner or operator or an authorized representative:

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this demonstration and all attached documents, and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

(4) No later than Monday, February 9, 2026, the owner or operator must notify the Agency of the establishment of a CCR website using the procedures in § 257.107(a) via the “contact us” form on EPA’s CCR website.

(5) The owner or operator of any facility regulated under this subpart that does not contain any CCR management unit must submit Facility Evaluation Report Part 1 documenting the steps taken during the facility evaluation to determine the absence of any CCR management unit. The Facility Evaluation Report Part 1 must include the certifications required under paragraph (c)(3) of this section.

(d) *Facility evaluation report part 2.*
(1) No later than Monday, February 8, 2027, the owner or operator of an active facility or a facility with a legacy CCR surface impoundment must prepare a facility evaluation report part 2, which shall contain, to the extent not provided in the Facility Evaluation Report Part 1 under paragraph (c) of this section, the information specified in paragraphs (d)(1)(i) through (xiii) of this section obtained from a physical evaluation of the facility, including where necessary

field sampling. The owner or operator has prepared the facility evaluation report part 2 when the report has been placed in the facility’s operating record as required by § 257.105(f)(26).

(i) The name and address of the person(s) owning and operating the facility; the unit name associated with each regulated CCR unit and CCR management unit at the facility; and the identification number of each regulated CCR unit and CCR management unit if any have been assigned by the state or by the owner.

(ii) The location of any CCR management unit identified on the most recent U.S. Geological Survey (USGS) 7½ minute or 15-minute topographic quadrangle map, or a topographic map of equivalent scale if a USGS map is not available. The location of each regulated CCR unit at the facility must also be identified in the same manner.

(iii) A statement of the purpose(s) for which each CCR management unit at the facility is or was used.

(iv) A description of the physical and engineering properties of the foundation and abutment materials on which each CCR management unit was constructed.

(v) Any further evidence of known spills or releases, including any associated remediation activities, of CCR from each CCR management unit and whether the spills or releases were reported to state or federal agencies.

(vi) Any further evidence of structural instability of each CCR management unit.

(vii) Any further evidence of groundwater contamination associated or potentially associated with each CCR management unit.

(viii) The size of each CCR management unit, including the general lateral and vertical dimensions and an estimate of the volume of CCR contained within the unit.

(ix) Identification of the types of CCR in each CCR management unit.

(x) A narrative description of any closure activities that have occurred, including any applicable engineering drawings or reports.

(xi) A narrative that documents the nature and extent of field oversight activities and data reviewed as part of the facility evaluation process, and that lists all data and information that was reviewed indicating the presence or absence of CCR management units at the facility.

(xii) Any additional supporting information used to identify and evaluate CCR management units at the facility, including but not limited to any construction diagrams, engineering drawings, permit documents, wastestream flow diagrams, aerial

photographs, satellite images, historical facility maps, any field or analytical data, groundwater monitoring data or reports, inspection reports, and other documents used to identify and assess CCR management units at the facility. Additionally, as necessary and timely, any updates to the part 1 data gap remedy plan must be added to the record during the facility evaluation report part 2 timeframe.

(xiii) The Facility Evaluation Report Part 2 must explain how each data gap identified in Facility Evaluation Report Part 1 was addressed.

(xiv) A description of each CCR management unit for which regulation under this subpart is deferred for allowable reasons as specified in § 257.101(g) or (h). The owner or operator must provide documentation in the Facility Evaluation Report Part 2 to substantiate that the requirements § 257.101(g) or (h) have been met.

(2) The owner or operator of any facility regulated under this subpart must obtain a certification from a qualified professional engineer stating that the Facility Evaluation Report Part 2 meets the requirements of paragraph (d)(1) of this section.

(3) The owner or operator of any facility regulated under this subpart must certify the Facility Evaluation Report Part 2 required by paragraph (d)(1) of this section with the following statement signed by the owner or operator or an authorized representative:

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this demonstration and all attached documents, and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

(4) The owner or operator of any facility regulated under this subpart that does not contain any CCR management unit must submit Facility Evaluation Report Part 2 documenting the steps taken during the facility evaluation to determine the absence of any CCR management unit. The Facility Evaluation Report Part 2 must include the certifications required under paragraph (d)(3) of this section.

(e) The owner or operator of the facility must comply with the recordkeeping requirements specified in § 257.105(f), the notification requirements specified in § 257.106(f), and the internet requirements specified in § 257.107(f).

■ 13. Amend § 257.80 by revising paragraphs (a) and (b)(6) to read as follows:

§ 257.80 Air criteria.

(a) The owner or operator of a CCR unit must adopt measures that will effectively minimize CCR from becoming airborne at the facility, including CCR fugitive dust originating from CCR units, roads, and other CCR management and material handling activities.

(b) * * *

(6) *Amendment of the plan.* The owner or operator subject to the requirements of this section may amend the written CCR fugitive dust control plan at any time provided the revised plan is placed in the facility's operating record as required by § 257.105(g)(1). The owner or operator must amend the written plan no later than 30 days whenever there is a change in conditions that would substantially affect the written plan in effect, such as the construction and operation of a new CCR unit.

* * * * *

■ 14. Amend § 257.82 by revising the introductory text of paragraph (a) to read as follows:

§ 257.82 Hydrologic and hydraulic capacity requirements for CCR surface impoundments.

(a) The owner or operator of an existing or new CCR surface impoundment, legacy CCR surface impoundment, or any lateral expansion of a CCR surface impoundment must design, construct, operate, and maintain an inflow design flood control system as specified in paragraphs (a)(1) and (2) of this section.

* * * * *

■ 15. Amend § 257.83 by revising the introductory text of paragraphs (a)(1) and (b)(1) to read as follows:

§ 257.83 Inspection requirements for CCR surface impoundments.

(a) * * *

(1) All CCR surface impoundments, including legacy CCR surface impoundments, and any lateral expansion of a CCR surface impoundment must be examined by a qualified person as follows:

* * * * *

(b) * * *

(1) If the existing or new CCR surface impoundment or any lateral expansion of the CCR surface impoundment or legacy CCR surface impoundments is subject to the periodic structural stability assessment requirements under § 257.73(d) or § 257.74(d), the CCR unit must additionally be inspected on a

periodic basis by a qualified professional engineer to ensure that the design, construction, operation, and maintenance of the CCR unit is consistent with recognized and generally accepted good engineering standards. The inspection must, at a minimum, include:

* * * * *

■ 16. Revise and republish § 257.90 to read as follows:

§ 257.90 Applicability.

(a) *Applicability.* All CCR units are subject to the groundwater monitoring and corrective action requirements under §§ 257.90 through 257.98, except as provided in paragraph (g) of this section.

(b) *Initial timeframes—(1) Existing CCR landfills and existing CCR surface impoundments.* No later than October 17, 2017, the owner or operator of the CCR unit must be in compliance with the following groundwater monitoring requirements:

(i) Install the groundwater monitoring system as required by § 257.91;

(ii) Develop the groundwater sampling and analysis program to include selection of the statistical procedures to be used for evaluating groundwater monitoring data as required by § 257.93;

(iii) Initiate the detection monitoring program to include obtaining a minimum of eight independent samples for each background and downgradient well as required by § 257.94(b); and

(iv) Begin evaluating the groundwater monitoring data for statistically significant increases over background levels for the constituents listed in appendix III of this part as required by § 257.94.

(2) *New CCR landfills, new CCR surface impoundments, and all lateral expansions of CCR units.* Prior to initial receipt of CCR by the CCR unit, the owner or operator must be in compliance with the groundwater monitoring requirements specified in paragraph (b)(1)(i) and (ii) of this section. In addition, the owner or operator of the CCR unit must initiate the detection monitoring program to include obtaining a minimum of eight independent samples for each background well as required by § 257.94(b).

(3) *CCR management units.* No later than Monday, May 8, 2028, the owner or operator of the CCR management unit must be in compliance with the following groundwater monitoring requirements:

(i) Install the groundwater monitoring system as required by § 257.91.

(ii) Develop the groundwater sampling and analysis program to include selection of the statistical procedures to be used for evaluating groundwater monitoring data as required by § 257.93.

(iii) Initiate the detection monitoring program to include obtaining a minimum of eight independent samples for each background and downgradient well, as required by § 257.94(b).

(iv) Begin evaluating the groundwater monitoring data for statistically significant increases over background levels for the constituents listed in appendix III of this part, as required by § 257.94.

(v) Begin evaluating the groundwater monitoring data for statistically significant levels over groundwater protection standards for the constituents listed in appendix IV of this part as required by § 257.95.

(c) *Requirement to conduct groundwater monitoring and corrective action.* Once a groundwater monitoring system and groundwater monitoring program has been established at the CCR unit as required by this subpart, the owner or operator must conduct groundwater monitoring and, if necessary, corrective action throughout the active life and post-closure care period of the CCR unit.

(d) *Responding to a release from a CCR unit.* In the event of a release from a CCR unit, the owner or operator must immediately take all necessary measures to control the source(s) of releases so as to reduce or eliminate, to the maximum extent feasible, further releases of contaminants into the environment. The owner or operator of the CCR unit must comply with all applicable requirements in §§ 257.96, 257.97, and 257.98.

(e) *Annual groundwater monitoring and corrective action report.* For existing CCR landfills and existing CCR surface impoundments, no later than January 31, 2018, and annually thereafter, the owner or operator must prepare an annual groundwater monitoring and corrective action report. For new CCR landfills, new CCR surface impoundments, and all lateral expansions of CCR units, the owner or operator must prepare the initial annual groundwater monitoring and corrective action report no later than January 31 of the year following the calendar year a groundwater monitoring system has been established for such CCR unit as required by this subpart, and annually thereafter. For CCR management units, the owner or operator must prepare the initial annual groundwater monitoring and corrective action report no later than January 31, 2029, and annually thereafter. For the preceding calendar

year, the annual report must document the status of the groundwater monitoring and corrective action program for the CCR unit, summarize key actions completed, describe any problems encountered, discuss actions to resolve the problems, and project key activities for the upcoming year. For purposes of this section, the owner or operator has prepared the annual report when the report is placed in the facility's operating record as required by § 257.105(h)(1). At a minimum, the annual groundwater monitoring and corrective action report must contain the following information, to the extent available:

(1) A map, aerial image, or diagram showing the CCR unit and all background (or upgradient) and downgradient monitoring wells, to include the well identification numbers, that are part of the groundwater monitoring program for the CCR unit;

(2) Identification of any monitoring wells that were installed or decommissioned during the preceding year, along with a narrative description of why those actions were taken;

(3) In addition to all the monitoring data obtained under §§ 257.90 through 257.98, a summary including the number of groundwater samples that were collected for analysis for each background and downgradient well, the dates the samples were collected, and whether the sample was required by the detection monitoring or assessment monitoring programs;

(4) A narrative discussion of any transition between monitoring programs (e.g., the date and circumstances for transitioning from detection monitoring to assessment monitoring in addition to identifying the constituent(s) detected at a statistically significant increase over background levels); and

(5) Other information required to be included in the annual report as specified in §§ 257.90 through 257.98.

(6) A section at the beginning of the annual report that provides an overview of the current status of groundwater monitoring and corrective action programs for the CCR unit. At a minimum, the summary must specify all of the following:

(i) At the start of the current annual reporting period, whether the CCR unit was operating under the detection monitoring program in § 257.94 or the assessment monitoring program in § 257.95;

(ii) At the end of the current annual reporting period, whether the CCR unit was operating under the detection monitoring program in § 257.94 or the assessment monitoring program in § 257.95;

(iii) If it was determined that there was a statistically significant increase over background for one or more constituents listed in appendix III to this part pursuant to § 257.94(e):

(A) Identify those constituents listed in appendix III to this part and the names of the monitoring wells associated with such an increase; and

(B) Provide the date when the assessment monitoring program was initiated for the CCR unit.

(iv) If it was determined that there was a statistically significant level above the groundwater protection standard for one or more constituents listed in appendix IV to this part pursuant to § 257.95(g) include all of the following:

(A) Identify those constituents listed in appendix IV to this part and the names of the monitoring wells associated with such an increase;

(B) Provide the date when the assessment of corrective measures was initiated for the CCR unit;

(C) Provide the date when the public meeting was held for the assessment of corrective measures for the CCR unit; and

(D) Provide the date when the assessment of corrective measures was completed for the CCR unit.

(v) Whether a remedy was selected pursuant to § 257.97 during the current annual reporting period, and if so, the date of remedy selection; and

(vi) Whether remedial activities were initiated or are ongoing pursuant to § 257.98 during the current annual reporting period.

(f) *Recordkeeping, notification, and internet requirements.* The owner or operator of the CCR unit must comply with the recordkeeping requirements specified in § 257.105(h), the notification requirements specified in § 257.106(h), and the internet requirements specified in § 257.107(h).

(g) *Suspension of groundwater monitoring requirements.* (1) The Participating State Director or EPA where EPA is the permitting authority may suspend the groundwater monitoring requirements under §§ 257.90 through 257.95 for a CCR unit for a period of up to ten years, if the owner or operator provides written documentation that, based on the characteristics of the site in which the CCR unit is located, there is no potential for migration of any of the constituents listed in appendices III and IV to this part from that CCR unit to the uppermost aquifer during the active life of the CCR unit and the post-closure care period. This demonstration must be certified by a qualified professional engineer and approved by the Participating State Director or EPA

where EPA is the permitting authority, and must be based upon:

(i) Site-specific field collected measurements, sampling, and analysis of physical, chemical, and biological processes affecting contaminant fate and transport, including at a minimum, the information necessary to evaluate or interpret the effects of the following properties or processes on contaminant fate and transport:

(A) Aquifer Characteristics, including hydraulic conductivity, hydraulic gradient, effective porosity, aquifer thickness, degree of saturation, stratigraphy, degree of fracturing and secondary porosity of soils and bedrock, aquifer heterogeneity, groundwater discharge, and groundwater recharge areas;

(B) Waste Characteristics, including quantity, type, and origin;

(C) Climatic Conditions, including annual precipitation, leachate generation estimates, and effects on leachate quality;

(D) Leachate Characteristics, including leachate composition, solubility, density, the presence of immiscible constituents, Eh, and pH; and

(E) Engineered Controls, including liners, cover systems, and aquifer controls (e.g., lowering the water table). These must be evaluated under design and failure conditions to estimate their long-term residual performance.

(ii) Contaminant fate and transport predictions that maximize contaminant migration and consider impacts on human health and the environment.

(2) The owner or operator of the CCR unit may renew this suspension for additional ten year periods by submitting written documentation that the site characteristics continue to ensure there will be no potential for migration of any of the constituents listed in Appendices III and IV of this part. The documentation must include, at a minimum, the information specified in paragraphs (g)(1)(i) and (ii) of this section and a certification by a qualified professional engineer and approved by the State Director or EPA where EPA is the permitting authority. The owner or operator must submit the documentation supporting their renewal request for the state's or EPA's review and approval of their extension one year before the groundwater monitoring suspension is due to expire. If the existing groundwater monitoring extension expires or is not approved, the owner or operator must begin groundwater monitoring according to paragraph (a) of this section within 90 days. The owner or operator may continue to renew the suspension for

ten-year periods, provided the owner or operator demonstrate that the standard in paragraph (g)(1) of this section continues to be met for the unit. The owner or operator must place each completed demonstration in the facility's operating record.

(3) The owner or operator of the CCR unit must include in the annual groundwater monitoring and corrective action report required by § 257.90(e) or § 257.100(e)(5)(ii) any approved no migration demonstration.

■ 17. Amend § 257.95 by revising paragraph (b) to read as follows:

§ 257.95 Assessment monitoring program.

* * * * *

(b) (1) Within 90 days of triggering an assessment monitoring program, and annually thereafter:

(i) Except as provided by paragraph (b)(1)(ii) of this section, the owner or operator of the CCR unit must sample and analyze the groundwater for all constituents listed in appendix IV to this part.

(ii) The owner or operator of a CCR management unit must sample and analyze the groundwater for all constituents listed in appendix IV to this part no later than Monday, May 8, 2028.

(2) The number of samples collected and analyzed for each well during each sampling event must be consistent with § 257.93(e), and must account for any unique characteristics of the site, but must be at least one sample from each well.

* * * * *

■ 18. Revise and republish § 257.100 to read as follows:

§ 257.100 Inactive CCR surface impoundments and Legacy CCR surface impoundments.

(a) *General.* (1) Inactive CCR surface impoundments are subject to all of the requirements of this subpart applicable to existing CCR surface impoundments, except that an active electric utility or independent power producer that generates electricity without the use of fuel is subject to the compliance deadlines applicable to legacy CCR surface impoundments, provided the facility has not generated electricity using fuels on or after October 19, 2015.

(2) Legacy CCR surface impoundments are subject to all of the requirements of this subpart applicable to existing CCR surface impoundments, except for the requirements in §§ 257.60 through 257.64 and 257.71.(b) through (d) [Reserved]

(e) *Timeframes for certain inactive CCR surface impoundments.* (1) An inactive CCR surface impoundment for

which the owner or operator has completed the actions by the deadlines specified in paragraphs (e)(1)(i) through (iii) of this section is eligible for the alternative timeframes specified in paragraphs (e)(2) through (6) of this section. The owner or operator of the CCR unit must comply with the applicable recordkeeping, notification, and internet requirements associated with these provisions. For the inactive CCR surface impoundment:

(i) The owner or operator must have prepared and placed in the facility's operating record by December 17, 2015, a notification of intent to initiate closure of the inactive CCR surface impoundment pursuant to § 257.105(i)(1);

(ii) The owner or operator must have provided notification to the State Director and/or appropriate Tribal authority by January 19, 2016, of the intent to initiate closure of the inactive CCR surface impoundment pursuant to § 257.106(i)(1); and

(iii) The owner or operator must have placed on its CCR website by January 19, 2016, the notification of intent to initiate closure of the inactive CCR surface impoundment pursuant to § 257.107(i)(1).

(2) *Location restrictions.* (i) No later than April 16, 2020, the owner or operator of the inactive CCR surface impoundment must:

(A) Complete the demonstration for placement above the uppermost aquifer as set forth by § 257.60(a), (b), and (c)(3);

(B) Complete the demonstration for wetlands as set forth by § 257.61(a), (b), and (c)(3);

(C) Complete the demonstration for fault areas as set forth by § 257.62(a), (b), and (c)(3);

(D) Complete the demonstration for seismic impact zones as set forth by § 257.63(a), (b), and (c)(3); and

(E) Complete the demonstration for unstable areas as set forth by § 257.64(a), (b), (c), and (d)(3).

(ii) An owner or operator of an inactive CCR surface impoundment who fails to demonstrate compliance with the requirements of paragraph (e)(2)(i) of this section is subject to the closure requirements of § 257.101(b)(1).

(3) *Design criteria.* The owner or operator of the inactive CCR surface impoundment must:

(i) No later than April 17, 2018, complete the documentation of liner type as set forth by § 257.71(a) and (b).

(ii) No later than June 16, 2017, place on or immediately adjacent to the CCR unit the permanent identification marker as set forth by § 257.73(a)(1).

(iii) No later than October 16, 2018, prepare and maintain an Emergency

Action Plan as set forth by § 257.73(a)(3).

(iv) No later than April 17, 2018, compile a history of construction as set forth by § 257.73(b) and (c).

(v) No later than April 17, 2018, complete the initial hazard potential classification, structural stability, and safety factor assessments as set forth by § 257.73(a)(2), (b), (d), (e), and (f).

(4) *Operating criteria.* The owner or operator of the inactive CCR surface impoundment must:

(i) No later than April 18, 2017, prepare the initial CCR fugitive dust control plan as set forth in § 257.80(b).

(ii) No later than April 17, 2018, prepare the initial inflow design flood control system plan as set forth in § 257.82(c).

(iii) No later than April 18, 2017, initiate the inspections by a qualified person as set forth by § 257.83(a).

(iv) No later than July 19, 2017, complete the initial annual inspection by a qualified professional engineer as set forth by § 257.83(b).

(5) *Groundwater monitoring and corrective action.* The owner or operator of the inactive CCR surface impoundment must:

(i) No later than April 17, 2019, comply with groundwater monitoring requirements set forth in §§ 257.90(b) and 257.94(b); and

(ii) No later than August 1, 2019, prepare the initial groundwater monitoring and corrective action report as set forth in § 257.90(e).

(6) *Closure and post-closure care.* The owner or operator of the inactive CCR surface impoundment must:

(i) No later than April 17, 2018, prepare an initial written closure plan as set forth in § 257.102(b); and

(ii) No later than April 17, 2018, prepare an initial written post-closure care plan as set forth in § 257.104(d).

(f) *Timeframes for legacy CCR surface impoundments.* Owners and operators of legacy CCR surface impoundments are subject to the requirements of paragraphs (f)(1) through (5) of this section, except as provided in paragraphs (g) through (i) of this section.

(1) *Legacy CCR surface impoundment applicability report.* (i) Except as provided in paragraph (f)(1)(iii) of this section, owners and operators of legacy CCR surface impoundments must prepare a report for each legacy CCR surface impoundment no later than Friday, November 8, 2024. The owner or operator has prepared the applicability report when the report has been placed in the facility's operating record as required by § 257.105(k)(1). At a minimum, the report for each legacy

CCR surface impoundment must contain:

(A) The name and address of the person(s) owning and operating the legacy CCR surface impoundment with their business phone number and email address.

(B) The name associated with the legacy CCR surface impoundment.

(C) Information to identify the legacy CCR surface impoundment, including a figure of the facility and where the unit is located at the facility, facility address, and the latitude and longitude of the facility.

(D) The identification number of the legacy CCR surface impoundment if one has been assigned by the state. (E) A description of the current site conditions, including the current use of the inactive facility.

(ii) (A) The owner or operator of any legacy CCR surface impoundment must certify the applicability report required by paragraph (f)(1)(i) of this section with the following statement signed by the owner or operator or an authorized representative:

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this demonstration and all attached documents, and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

(B) The owner or operator must notify the Agency of the establishment of the facility's CCR website and the applicability of the rule, using the procedures in § 257.107(a) via the "contact us" form on EPA's CCR website.

(iii) (A) Notwithstanding the deadline to complete the applicability report under paragraph (f)(1)(i) of this section, an owner or operator may secure additional time to complete the report for the sole reason of determining through a field investigation whether the unit contains both CCR and liquids. The amount of additional time that can be secured is limited as specified in paragraph (f)(1)(iii)(B) of this section. For owners and operators following the procedures of this paragraph (f)(1)(iii), the compliance timeframes for the requirements specified under paragraphs (f)(2) through (5) of this section are adjusted by the length of the extension(s) justified under this paragraph (f)(1)(iii). To qualify for additional time, the owner or operator must prepare an applicability extension report consisting of the following:

(1) The information specified in paragraph (f)(1)(i)(A) through (C) of this section;

(2) A statement by the owner or operator that to the best of their knowledge or belief, existing and available information does not provide a sufficient basis to determine that the unit contained free liquids on or after October 19, 2015; and

(3) The details of a written field investigation work plan, including of the following:

(i) A detailed description of the approach to characterize the physical, topographic, geologic, hydrogeologic, and hydraulic properties of the CCR in the unit and native geologic materials beneath and surrounding the unit, and how those properties will be used to investigate for the presence of free liquids in the CCR unit.

(ii) A detailed description of the methods and tools that will be employed to determine whether the unit contains free liquids, the rationale for choosing these methods and tools, how these methods and tools will be implemented, and at what level of spatial resolution at the CCR unit to identify and monitor for the presence of free liquids.

(iii) A detailed description of how groundwater elevations will be determined, and at what level of spatial resolution, in relation to the sides and bottom of the CCR unit and how any intersection of the groundwater table with the CCR unit will be evaluated, and at what level of spatial resolution.

(iv) A plan for evaluating stormwater flow over the surface of the unit, stormwater drainage from the unit, and stormwater infiltration into the unit and how those processes may result in the formation of free liquids in the CCR unit. This plan must include a current topographic map showing surface water flow and any pertinent natural or man-made features present relevant to stormwater drainage, infiltration and related processes.

(v) An estimated timeline to complete the workplan and make a determination if the CCR unit contains free liquids.

(vi) A narrative discussion of how the results from implementing the workplan will determine whether the unit contains free liquids specified.

(vii) A narrative discussion describing any anticipated problems that may be encountered during implementation of the workplan and what actions will be taken to resolve the problems, and anticipated timeframes necessary for such a contingency.

(viii) The owner or operator of the CCR unit must obtain a written certification from a qualified

professional engineer stating that the field investigation work plan meets the requirements of paragraph (f)(1)(iii)(A)(3) of this section.

(B) The maximum amount of additional time that can be secured under paragraph (f)(1)(iii) of this section is 18 months, secured in 6-month increments, provided each 6-month increment is supported by an applicability extension report.

(C) Owners and operator must prepare the initial applicability extension report no later than Friday, November 8, 2024. Subsequent applicability extension reports must be prepared no later than 6 months after completing the preceding applicability extension report. The owner or operator has prepared the applicability extension report when the report is placed in the facility's operating record as required by § 257.105(k)(2).

(D) No later than Friday, November 8, 2024, the owner or operator must notify the Agency of the establishment of a CCR website using the procedures in § 257.107(a) via the "contact us" form on EPA's CCR website.

(E) If the owner or operator determines that the unit contains free liquids during implementation of the written field investigation workplan, the owner or operator must cease operating under these extension provisions and prepare the applicability report required by paragraph (f)(1) of this section within 14 days of determining that the unit contains free liquids. The owner or operator must comply with the requirements specified under paragraphs (f)(2) through (5) of this section under new timeframes. The new timeframes are determined by adding the total length of the extension(s) justified under paragraph (f)(1)(iii) of this section to each of the deadlines specified under paragraphs (f)(2) through (5) of this section.

(F) If the owner or operator determines that the unit does not contain both CCR and liquids during implementation of the written field investigation work plan, the owner or operator must prepare a notification stating that the field investigation has concluded and that the owner or operator has determined that the unit does not contain both CCR and liquids and does not meet the definition of a legacy CCR surface impoundment. The owner or operator has prepared the notification when the report is placed in the facility's operating record as required by § 257.105(k)(3).

(G) If the owner or operator does not complete the field investigation work within the timeframes specified in paragraph (f)(1)(iii)(B) of this section,

the unit shall be considered a legacy CCR surface impoundment and must comply with the requirements under paragraphs (f)(2) through (5) of this section pursuant to the timeframes specified under paragraph (f)(1)(iii)(E) of this section.

(2) *Design criteria.* The owner or operator of a legacy CCR surface impoundment must:

(i) Except for legacy CCR surface impoundments that are incised, no later than Wednesday, January 8, 2025, place on or immediately adjacent to the CCR unit the permanent identification marker as set forth by § 257.73(a)(1).

(ii) Except for legacy CCR surface impoundments that do not exceed the height and/or storage volume thresholds under § 257.73(b), no later than Monday, February 9, 2026, compile a history of construction as set forth by § 257.73(c).

(iii) Except for legacy CCR surface impoundments that are incised, no later than Friday, May 8, 2026, complete the initial hazard potential classification assessment as set forth by § 257.73(a)(2) and (f).

(iv) Except for legacy CCR surface impoundments that do not exceed the height and/or storage volume thresholds under § 257.73(b), no later than Friday, May 8, 2026, complete the structural stability and safety factor assessments as set forth by § 257.73(d), (e), and (f).

(v) Except for legacy CCR surface impoundments that are incised, no later than Friday, May 8, 2026, prepare and maintain an Emergency Action Plan as set forth by § 257.73(a)(3).

(3) *Operating criteria.* The owner or operator of the legacy CCR surface impoundment must:

(i) No later than Friday, November 8, 2024, prepare the initial CCR fugitive dust control plan as set forth in § 257.80(b).

(ii) No later than Friday, November 8, 2024, prevent the unknowing entry, and minimize the possibility for the unauthorized entry, of persons or livestock onto the legacy CCR surface impoundment.

(iii) No later than Friday, November 8, 2024, initiate the inspections by a qualified person as set forth by § 257.83(a).

(iv) No later than Monday, February 10, 2025, complete the initial annual inspection by a qualified professional engineer as set forth by § 257.83(b).

(v) No later than Friday, May 8, 2026, prepare the initial inflow design flood control system plan as set forth in § 257.82(c).

(vi) No later than Thursday, January 8, 2026, prepare the initial annual fugitive

dust control report as set forth in § 257.80(c).

(4) *Groundwater monitoring and corrective action.* No later than Monday, May 10, 2027, the owner or operator of the legacy CCR surface impoundment must:

(i) Install the groundwater monitoring system as required by § 257.91.

(ii) Develop the groundwater sampling and analysis program, including the selection of the statistical procedures, that will be used for evaluating groundwater monitoring data as required by § 257.93.

(iii) Be in compliance with the following groundwater monitoring requirements:

(A) Initiate the detection monitoring program to include obtaining a minimum of eight independent samples for each background and downgradient well, as required by § 257.94(b).

(B) Begin evaluating the groundwater monitoring data for statistically significant increases over background levels for the constituents listed in appendix III of this part, as required by § 257.94.

(C) Begin evaluating the groundwater monitoring data for statistically significant levels over groundwater protection standards for the constituents listed in appendix IV of this part as required by § 257.95.

(iv) No later than January 31, 2027, prepare the initial groundwater monitoring and corrective action report as set forth in § 257.90(e).

(5) *Closure and post-closure care.* Except as provided in § 257.102(g), the owner or operator of the legacy CCR surface impoundment must:

(i) No later than Monday, November 8, 2027, prepare an initial written closure plan as set forth in § 257.102(b); and

(ii) No later than Monday, November 8, 2027, prepare an initial written post-closure care plan as set forth in § 257.104(d).

(g) For owners and operators of legacy CCR surface impoundments that completed closure of the CCR unit by removal of waste prior to Friday, November 8, 2024, no later than Friday, November 8, 2024, complete a closure certification that includes the following supporting information:

(1) The type and volume of CCR and all other materials in the unit prior to closure;

(2) The methods used to verify complete removal of all CCR and other contaminated materials from the unit, including any post-removal sampling and analysis;

(3) Documentation that all CCR and other contaminated materials were

removed from the unit, including, the results of any post-removal sampling and analysis that was conducted;

(4) The methods used to verify complete decontamination of all areas affected by releases from the unit, including but not limited to post-decontamination sampling and analysis;

(5) Documentation that all areas affected by releases from the unit were decontaminated and that all groundwater affected by releases has achieved groundwater protection standards; and

(6) Document that groundwater monitoring concentrations do not exceed the groundwater protection standards established pursuant to § 257.95(h) for constituents listed in appendix IV to this part. The documentation must also include a demonstration that the groundwater monitoring system has met all of the following:

(i) Was capable of accurately representing background water quality unaffected by a CCR unit;

(ii) Was capable of accurately representing the quality of water passing the waste boundary of the unit;

(iii) Was capable of detecting contamination in the uppermost aquifer;

(iv) Monitored all potential contaminant pathways;

(v) Established groundwater background concentrations for appendix IV constituents and compared samples to those background concentrations;

(vi) Monitoring wells must have been cased in a manner that maintains the integrity of the monitoring well borehole. This casing must have been screened or perforated and packed with gravel or sand, where necessary, to enable collection of groundwater samples. The annular space (*i.e.*, the space between the borehole and well casing) above the sampling depth must have been sealed to prevent contamination of samples and the groundwater; and

(vii) The last groundwater monitoring sample used to document that the standard in paragraph (g)(3) of this section has been met must have been collected no earlier than one year prior to the initiation of closure.

(h) If the owner or operator of a legacy CCR surface impoundment is unable to complete the closure by removal certification by the date listed in paragraph (f)(1)(i) of this section, they may elect to conduct groundwater monitoring in accordance with §§ 257.90 through 257.95 to demonstrate there are no exceedances of the groundwater protection standards. If the owner or operator meets all the requirements of paragraph (h)(1) of this

section, no further requirements under this subpart apply. If the owner or operator does not meet the requirements of paragraph (h)(1) of this section by Monday, May 8, 2028 or if one or more constituents in appendix IV to this part are detected at statistically significant levels above the groundwater protection standard established under § 257.95(h), they must proceed in accordance with paragraph (h)(2) of this section.

(1) In order to comply with this paragraph (h)(1), the owner or operator must complete all of the following:

(i) Prepare a notification of intent to certify closure no later than Friday, November 8, 2024. The owner or operator has prepared the notification when the report is placed in the facility's operating record as required by § 257.105(k)(4).

(ii) Conduct groundwater monitoring in accordance with §§ 257.90–257.95 for at least two consecutive sampling events to demonstrate that all constituents in appendix IV of this part have concentrations that do not exceed the groundwater protection standards listed in § 257.95(h).

(iii) Complete a closure by removal certification documenting compliance with paragraphs (g)(1) through (5) and (h)(1)(ii) of this section no later than Monday, May 8, 2028.

(2) If the owner or operator does not meet the requirements of paragraph (h)(1) of this section (*e.g.*, by the date or they detect an SSL of an appendix IV constituent), they must comply with all of the following:

(i) If a statistically significant level is detected, the corrective action provisions and proceed in accordance with § 257.102(c)(2).

(ii) The permanent marker requirements in § 257.73(a)(1) no later than 8 months from the date they became subject to this requirement.

(iii) The applicability report requirements of paragraph (f)(1)(i) of this section no later than 6 months from the date they became subject to this requirement.

(iv) The facility evaluation provisions for CCR management units under § 257.75 no later than 33 months from the date they became subject to this requirement.

(v) If any CCR management unit is discovered after completing the facility evaluation report, the fugitive dust requirements of § 257.80(b) no later than 6 months from the date of the facility evaluation report.

(vi) The groundwater monitoring requirements for CCR management units under § 257.90(b)(3)(i) through (iv) no later than 48 months from the date they became subject to this requirement.

(vii) The requirement to prepare an initial written closure plan for CCR management units consistent with the requirements specified in § 257.102(b)(1) no later than 54 months from the date they became subject to this requirement.

(viii) The requirement to prepare an initial post-closure plan for CCR management units consistent with the requirements specified in § 257.104(d)(2)(iii) no later than 54 months from the date they became subject to this requirement.

(ix) The requirement to initiate the closure of CCR management units in accordance with the requirements of § 257.102 no later than 60 months from the date they became subject to this requirement.

(i) Owners and operators of legacy CCR surface impoundments that completed closure of the unit in accordance with § 257.102(d) or that meet the requirements in § 257.101(g) prior to Friday, November 8, 2024 must only:

(1) Prepare the applicability report as set forth by § 257.100(f)(1);

(2) Prevent the unknowing entry, and minimize the possibility for the unauthorized entry, of persons or livestock onto the legacy CCR surface impoundment as set forth in § 257.100(f)(3)(ii);

(3) Place on or immediately adjacent to the unit the permanent identification marker as set forth by § 257.73(a)(1);

(4) Compile a history of construction as set forth by § 257.73(c);

(5) Prepare the initial CCR fugitive dust control plan as set forth in § 257.80(b);

(6) Prepare the initial annual fugitive dust control report as set forth in § 257.80(c);

(7) (i) Install the groundwater monitoring system as required by § 257.91;

(ii) Develop the groundwater sampling and analysis program, including the selection of the statistical procedures, that will be used for evaluating groundwater monitoring data as required by § 257.93;

(iii) Be in compliance with the following groundwater monitoring requirements:

(A) Initiate the detection monitoring program to include obtaining a minimum of eight independent samples for each background and downgradient well, as required by § 257.94(b);

(B) Begin evaluating the groundwater monitoring data for statistically significant increases over background levels for the constituents listed in appendix III of this part, as required by § 257.94;

(C) Begin evaluating the groundwater monitoring data for statistically significant levels over groundwater protection standards for the constituents listed in appendix IV of this part as required by § 257.95;

(8) Include in the applicability report specified in § 257.100(f)(1) information on the completed closure, along with supporting documentation to demonstrate that the closure meets the performance standards in § 257.102(d) or the standards specified in § 257.101(g);

(9) Prepare an initial written post-closure care plan as set forth in § 257.104(d);

(10) Conduct post-closure care as set forth in § 257.104(b); and

(11) Comply with applicable recordkeeping, notification, and website posting requirements as set forth by §§ 257.105 through 257.107.

(j) The owner or operator of the legacy CCR surface impoundment must comply with the recordkeeping requirements specified in § 257.105(k), the notification requirements specified in § 257.106(k), and the internet requirements specified in § 257.107(k).

■ 19. Amend § 257.101 by adding paragraphs (e), (f), (g) and (h) to read as follows:

§ 257.101 Closure or retrofit of CCR units.

* * * * *

(e) Except as provided in paragraph (g) of this section, the owner or operator of a legacy CCR surface impoundment is subject to the requirements of paragraphs (e)(1) and (2) of this section.

(1) No later than Monday, May 8, 2028, an owner or operator of a legacy CCR surface impoundment must initiate the closure of the legacy CCR surface impoundment in accordance with the requirements of § 257.102.

(2) An owner or operator of a legacy CCR surface impoundment that closes in accordance with paragraph (e)(1) of this section must include a statement in the notification required under § 257.102(g) that the legacy CCR surface impoundment is closing under the requirement of paragraph (e)(1) of this section.

(f) Except as provided in paragraphs (g) and (h) of this section, the owner or operator of a CCR management unit must comply with the requirements of paragraphs (f)(1) and (2) of this section.

(1) No later than Tuesday, May 8, 2029, an owner or operator of a CCR management unit must initiate the closure of the CCR management unit in accordance with the requirements of § 257.102.

(2) An owner or operator of a CCR management unit that closes in

accordance with paragraph (f)(1) of this section must include a statement in the notification required under § 257.102(g) that the CCR management unit is closing under the requirements of paragraph (f)(1) of this section.

(g) Deferral to permitting for closures conducted under substantially equivalent regulatory authority. Notwithstanding the provisions of paragraphs (e) and (f) of this section, the owner or operator of a CCR management unit or a legacy CCR surface impoundment need not demonstrate compliance with the performance standards in § 257.102(c) or (d) provided they demonstrate that the closure of the CCR unit met the standards specified in paragraphs (g)(1) through (g)(6) of this section.

(1) The owner or operator of the CCR unit must document that a regulatory authority played an active role in overseeing and approving the closure and any necessary corrective action, pursuant to an enforceable requirement. This includes a State or Federal permit, an administrative order, or consent order issued after 2015 under CERCLA or by an EPA-approved RCRA State program.

(2) The owner or operator of the CCR unit must document that the regulatory authority required or conducted a site-specific risk assessment prior to (or as part of) approving the closure and any necessary corrective action.

(3) The owner or operator of the CCR unit must document that it installed a groundwater monitoring system and performed groundwater monitoring that meets all of the following:

- (i) Was capable of accurately representing background water quality;
- (ii) Was capable of accurately representing the quality of water passing the waste boundary;
- (iii) Was capable of detecting contamination in the uppermost aquifer; and
- (iv) Monitored all potential contaminant pathways.

(4) Must document that the closed unit meets either:

- (i) The performance standard in § 257.60; or
- (ii) The performance standard in § 257.102(d)(2)(i).

(5) The owner or operator must include the following statement, signed by the owner or operator or an authorized representative, in the facility evaluation report for CCR management units specified in § 257.75 or applicability report for legacy CCR surface impoundments specified in § 257.100(f)(1) along with all information required by paragraphs (g)(1) through (4) of the section:

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this demonstration and all attached documents, and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

(6) Closure equivalency determination at permitting. The owner or operator must submit the following documentation to the permit authority.

(i) A permit application that contains sufficient information, including data on contaminant levels in groundwater, to demonstrate that the applicable § 257.102 standards have been met.

(ii) EPA will review the information to determine whether the “equivalency” of the closure has been successfully demonstrated. If EPA or a Participating State Director determines that the closure has met the appropriate part 257 closure standard, EPA or a Participating State Director will issue a permit to require compliance with applicable post-closure requirements. If EPA or a Participating State Director determines that the closure does not meet the part 257 standards, the owner or operator will be required to submit a complete permit application and obtain a permit that contains the specific requirements necessary for the closed unit to achieve compliance with § 257.102.

(h) Deferral for CCR management units under critical infrastructure. Notwithstanding the provisions of paragraph (f)(1) of this section, the owner or operator of a CCR management unit located beneath critical infrastructure need not initiate closure until the infrastructure is no longer needed, EPA or a Participating State Director determines closure is necessary to ensure that there is no reasonable probability of adverse effects on human health or the environment, or the closure or decommissioning of the facility, whichever occurs first. Owners and operators of CCR management units under active disposal units must meet either:

(1) Demonstrate that the CCR management unit complies with the performance standard in § 257.60; or

(2) Demonstrate that the CCR management unit complies with the performance standard in § 257.102(d)(2)(i).

■ 20. Revise and republish § 257.102 to read as follows:

§ 257.102 Criteria for conducting the closure or retrofit of CCR units and closure of CCR management units.

(a) *General.* Closure of a CCR unit must be completed either by leaving the CCR in place and installing a final cover system or through removal of the CCR and decontamination of the CCR unit, as described in paragraphs (b) through (j) of this section. Retrofit of a CCR surface impoundment must be completed in accordance with the requirements in paragraph (k) of this section.

(b) *Written closure plan—(1) Content of the plan.* The owner or operator of a CCR unit must prepare a written closure plan that describes the steps necessary to close the CCR unit at any point during the active life of the CCR unit consistent with recognized and generally accepted good engineering practices. The written closure plan must include, at a minimum, the information specified in paragraphs (b)(1)(i) through (vi) of this section.

(i) A narrative description of how the CCR unit will be closed in accordance with this section.

(ii) If closure of the CCR unit will be accomplished through removal of CCR from the CCR unit, a description of the procedures to remove the CCR and decontaminate the CCR unit in accordance with paragraph (c) of this section.

(iii) If closure of the CCR unit will be accomplished by leaving CCR in place, a description of the final cover system, designed in accordance with paragraph (d) of this section, and the methods and procedures to be used to install the final cover. The closure plan must also discuss how the final cover system will achieve the performance standards specified in paragraph (d) of this section.

(iv) An estimate of the maximum inventory of CCR ever on-site over the active life of the CCR unit.

(v) An estimate of the largest area of the CCR unit ever requiring a final cover as required by paragraph (d) of this section at any time during the CCR unit's active life.

(vi) A schedule for completing all activities necessary to satisfy the closure criteria in this section, including an estimate of the year in which all closure activities for the CCR unit will be completed. The schedule should provide sufficient information to describe the sequential steps that will be taken to close the CCR unit, including identification of major milestones such as coordinating with and obtaining necessary approvals and permits from other agencies, the dewatering and stabilization phases of CCR surface impoundment closure, or installation of

the final cover system, and the estimated timeframes to complete each step or phase of CCR unit closure. When preparing the written closure plan, if the owner or operator of a CCR unit estimates that the time required to complete closure will exceed the timeframes specified in paragraph (f)(1) of this section, the written closure plan must include the site-specific information, factors and considerations that would support any time extension sought under paragraph (f)(2) of this section.

(2) *Timeframes for preparing the initial written closure plan*—(i) *Existing CCR landfills and existing CCR surface impoundments.* No later than October 17, 2016, the owner or operator of the CCR unit must prepare an initial written closure plan consistent with the requirements specified in paragraph (b)(1) of this section.

(ii) *New CCR landfills and new CCR surface impoundments, and any lateral expansion of a CCR unit.* No later than the date of the initial receipt of CCR in the CCR unit, the owner or operator must prepare an initial written closure plan consistent with the requirements specified in paragraph (b)(1) of this section.

(iii) *CCR management units.* Except as provided for in paragraph (b)(2)(v) of this section, no later than November 8, 2028, the owner or operator of the CCR management unit must prepare an initial written closure plan consistent with the requirements specified in paragraph (b)(1) of this section.

(iv) *Recordkeeping.* The owner or operator has completed the written closure plan when the plan, including the certification required by paragraph (b)(4) of this section, has been placed in the facility's operating record as required by § 257.105(i)(4).

(v) *Closure documentation for certain CCR management units.* Owners and operators of a CCR management unit that completed closure of the unit in accordance with § 257.102(d) prior to Friday, November 8, 2024 or that meet the requirements in § 257.101(g) must include in the facility evaluation report specified in § 257.75 information on the completed closure, along with supporting documentation to demonstrate that the closure meets the performance standards in § 257.102(d) or the standards specified in § 257.101(g).

(3) *Amendment of a written closure plan.* (i) The owner or operator may amend the initial or any subsequent written closure plan developed pursuant to paragraph (b)(1) of this section at any time.

(ii) The owner or operator must amend the written closure plan whenever:

(A) There is a change in the operation of the CCR unit that would substantially affect the written closure plan in effect; or

(B) Before or after closure activities have commenced, unanticipated events necessitate a revision of the written closure plan.

(iii) The owner or operator must amend the closure plan at least 60 days prior to a planned change in the operation of the facility or CCR unit, or no later than 60 days after an unanticipated event requires the need to revise an existing written closure plan. If a written closure plan is revised after closure activities have commenced for a CCR unit, the owner or operator must amend the current closure plan no later than 30 days following the triggering event.

(4) *Certification or approval.* The owner or operator of the CCR unit must obtain a written certification from a qualified professional engineer or approval from the Participating State Director or approval from EPA where EPA is the permitting authority that the initial and any amendment of the written closure plan meets the requirements of this section.

(c) *Closure by removal of CCR.* An owner or operator that elects to close a CCR unit by removal of CCR must follow the procedures specified in either paragraph (c)(1) or (2) of this section. Closure by removal is complete when CCR has been removed; any areas affected by releases from the CCR unit have been removed or decontaminated; and groundwater monitoring concentrations of the constituents listed in appendix IV to this part do not exceed groundwater protection standards established pursuant to § 257.95(h). Removal and decontamination activities include removing all CCR from the unit, CCR mixed with soils, and CCR included in berms, liners or other unit structures, and removing or decontaminating all areas affected by releases from the CCR unit.

(1) *Complete all removal and decontamination activities during the active life of the CCR unit.* Within the timeframes specified in paragraph (f) of this section the owner or operator must do all of the following:

(i) Complete removal of CCR and decontamination of all areas affected by releases from the CCR unit;

(ii) Document that the standards in paragraph (c) of this section have been met. Documentation that groundwater protection standards have been met for

the constituents listed in appendix IV to this part must consist of groundwater monitoring results that show no constituents were detected at statistically significant levels above the groundwater protection standards for either:

(A) Two consecutive monitoring events; or

(B) Three years, in accordance with § 257.98(c); and

(iii) Obtain the completion of closure certification or approval required by paragraph (f)(3) of this section.

(2) *Complete removal and decontamination activities during the active life and post-closure care period of the CCR unit.* The owner or operator may close a CCR unit by completing all removal and decontamination activities, except for groundwater corrective action, during the active life of the CCR unit and by completing groundwater corrective action during the post-closure care period pursuant to the following procedures:

(i) Within the timeframes specified in paragraph (f) of this section, document that CCR has been removed from the unit and any areas affected by releases from the CCR unit have been removed or decontaminated;

(ii) Within the timeframes specified in paragraph (f) of this section, begin implementation of the remedy selected in accordance with § 257.97 such that all components of the remedy are constructed, or otherwise in place, and operating as intended unless the owner or operator documents both that:

(A) All applicable requirements in §§ 257.96 through 257.98 have been met; and

(B) The active life of the unit could not be extended until implementation of the remedy consistent with § 257.102(f);

(iii) Complete groundwater corrective action as a post-closure care requirement as specified in § 257.104(g);

(iv) Amend the written closure plan required by paragraph (b) of this section and the written post-closure care plan required by § 257.104(d);

(v) Within the timeframes specified in paragraph (f) of this section, obtain the completion of closure certification or approval required by paragraph (f)(3) of this section; and

(vi) Within the timeframes specified in paragraph (f) of this section, record the notation on the deed to the property required by paragraph (i) of this section.

(d) *Closure performance standard when leaving CCR in place—*

(1) *General performance standard.* The owner or operator of a CCR unit must ensure that, at a minimum, the CCR unit is closed in a manner that will:

(i) Control, minimize or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste and releases of CCR, leachate, or contaminated run-off to the ground or surface waters or to the atmosphere;

(ii) Preclude the probability of future impoundment of water, sediment, or slurry;

(iii) Include measures that provide for major slope stability to prevent the sloughing or movement of the final cover system during the closure and post-closure care period;

(iv) Minimize the need for further maintenance of the CCR unit; and

(v) Be completed in the shortest amount of time consistent with recognized and generally accepted good engineering practices.

(2) *Drainage and stabilization of CCR units.* The owner or operator of any CCR unit must meet the requirements of paragraphs (d)(2)(i) and (ii) of this section prior to installing the final cover system required under paragraph (d)(3) of this section.

(i) Free liquids must be eliminated by removing liquid wastes or solidifying the remaining wastes and waste residues.

(ii) Remaining wastes must be stabilized sufficient to support the final cover system.

(3) *Final cover system.* If a CCR unit is closed by leaving CCR in place, the owner or operator must install a final cover system that is designed to minimize infiltration and erosion, and at a minimum, meets the requirements of paragraph (d)(3)(i) of this section, or the requirements of the alternative final cover system specified in paragraph (d)(3)(ii) of this section.

(i) The final cover system must be designed and constructed to meet the criteria in paragraphs (d)(3)(i)(A) through (D) of this section. The design of the final cover system must be included in the written closure plan required by paragraph (b) of this section.

(A) The permeability of the final cover system must be less than or equal to the permeability of any bottom liner system or natural subsoils present, or a permeability no greater than 1×10^{-5} cm/sec, whichever is less.

(B) The infiltration of liquids through the closed CCR unit must be minimized by the use of an infiltration layer that contains a minimum of 18 inches of earthen material.

(C) The erosion of the final cover system must be minimized by the use of an erosion layer that contains a minimum of six inches of earthen material that is capable of sustaining native plant growth.

(D) The disruption of the integrity of the final cover system must be minimized through a design that accommodates settling and subsidence.

(ii) The owner or operator may select an alternative final cover system design, provided the alternative final cover system is designed and constructed to meet the criteria in paragraphs (d)(3)(i)(A) through (C) of this section. The design of the final cover system must be included in the written closure plan required by paragraph (b) of this section.

(A) The design of the final cover system must include an infiltration layer that achieves an equivalent reduction in infiltration as the infiltration layer specified in paragraphs (d)(3)(i)(A) and (B) of this section.

(B) The design of the final cover system must include an erosion layer that provides equivalent protection from wind or water erosion as the erosion layer specified in paragraph (d)(3)(i)(C) of this section.

(C) The disruption of the integrity of the final cover system must be minimized through a design that accommodates settling and subsidence.

(iii) The owner or operator of the CCR unit must obtain a written certification from a qualified professional engineer or approval from the Participating State Director or approval from EPA where EPA is the permitting authority that the design of the final cover system meets the requirements of this section.

(e) *Initiation of closure activities.* Except as provided for in paragraph (e)(4) of this section and § 257.103, the owner or operator of a CCR unit must commence closure of the CCR unit no later than the applicable timeframes specified in either paragraph (e)(1) or (2) of this section.

(1) The owner or operator must commence closure of the CCR unit no later than 30 days after the date on which the CCR unit either:

(i) Receives the known final receipt of waste, either CCR or any non-CCR waste stream; or

(ii) Removes the known final volume of CCR from the CCR unit for the purpose of beneficial use of CCR.

(2)(i) Except as provided by paragraph (e)(2)(ii) of this section, the owner or operator must commence closure of a CCR unit that has not received CCR or any non-CCR waste stream or is no longer removing CCR for the purpose of beneficial use within two years of the last receipt of waste or within two years of the last removal of CCR material for the purpose of beneficial use.

(ii) Notwithstanding paragraph (e)(2)(i) of this section, the owner or operator of the CCR unit may secure an

additional two years to initiate closure of the idle unit provided the owner or operator provides written documentation that the CCR unit will continue to accept wastes or will start removing CCR for the purpose of beneficial use. The documentation must be supported by, at a minimum, the information specified in paragraphs (e)(2)(ii)(A) and (B) of this section. The owner or operator may obtain two-year extensions provided the owner or operator continues to be able to demonstrate that there is reasonable likelihood that the CCR unit will accept wastes in the foreseeable future or will remove CCR from the unit for the purpose of beneficial use. The owner or operator must place each completed demonstration, if more than one time extension is sought, in the facility's operating record as required by § 257.105(i)(5) prior to the end of any two-year period.

(A) Information documenting that the CCR unit has remaining storage or disposal capacity or that the CCR unit can have CCR removed for the purpose of beneficial use; and

(B) Information demonstrating that there is a reasonable likelihood that the CCR unit will resume receiving CCR or non-CCR waste streams in the foreseeable future or that CCR can be removed for the purpose of beneficial use. The narrative must include a best estimate as to when the CCR unit will resume receiving CCR or non-CCR waste streams. The situations listed in paragraphs (e)(2)(ii)(B)(1) through (4) of this section are examples of situations that would support a determination that the CCR unit will resume receiving CCR or non-CCR waste streams in the foreseeable future.

(1) Normal plant operations include periods during which the CCR unit does not receive CCR or non-CCR waste streams, such as the alternating use of two or more CCR units whereby at any point in time one CCR unit is receiving CCR while CCR is being removed from a second CCR unit after its dewatering.

(2) The CCR unit is dedicated to a coal-fired boiler unit that is temporarily idled (*e.g.*, CCR is not being generated) and there is a reasonable likelihood that the coal-fired boiler will resume operations in the future.

(3) The CCR unit is dedicated to an operating coal-fired boiler (*i.e.*, CCR is being generated); however, no CCR are being placed in the CCR unit because the CCR are being entirely diverted to beneficial uses, but there is a reasonable likelihood that the CCR unit will again be used in the foreseeable future.

(4) The CCR unit currently receives only non-CCR waste streams and those

non-CCR waste streams are not generated for an extended period of time, but there is a reasonable likelihood that the CCR unit will again receive non-CCR waste streams in the future.

(iii) In order to obtain additional time extension(s) to initiate closure of a CCR unit beyond the two years provided by paragraph (e)(2)(i) of this section, the owner or operator of the CCR unit must include with the demonstration required by paragraph (e)(2)(ii) of this section the following statement signed by the owner or operator or an authorized representative:

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this demonstration and all attached documents, and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

(3) For purposes of this subpart, closure of the CCR unit has commenced if the owner or operator has ceased placing waste and completes any of the following actions or activities:

(i) Taken any steps necessary to implement the written closure plan required by paragraph (b) of this section;

(ii) Submitted a completed application for any required state or agency permit or permit modification; or

(iii) Taken any steps necessary to comply with any state or other agency standards that are a prerequisite, or are otherwise applicable, to initiating or completing the closure of a CCR unit.

(4) The timeframes specified in paragraphs (e)(1) and (2) of this section do not apply to any of the following owners or operators:

(i) [Reserved]

(ii) An owner or operator of an existing unlined CCR surface impoundment closing the CCR unit as required by § 257.101(a);

(iii) An owner or operator of an existing CCR surface impoundment closing the CCR unit as required by § 257.101(b);

(iv) An owner or operator of a new CCR surface impoundment closing the CCR unit as required by § 257.101(c); or

(v) An owner or operator of an existing CCR landfill closing the CCR unit as required by § 257.101(d).

(f) *Completion of closure activities.*

(1) Except as provided for in paragraph (f)(2) of this section, the owner or operator must complete closure of the CCR unit:

(i) For existing and new CCR landfills and any lateral expansion of a CCR landfill, within six months of commencing closure activities.

(ii) For existing and new CCR surface impoundments and any lateral expansion of a CCR surface impoundment, within five years of commencing closure activities.

(iii) For CCR management units, within five years of commencing closure activities.

(2)(i) *Extensions of closure timeframes.* The timeframes for completing closure of a CCR unit specified under paragraphs (f)(1) of this section may be extended if the owner or operator can demonstrate that it was not feasible to complete closure of the CCR unit within the required timeframes due to factors beyond the facility's control. If the owner or operator is seeking a time extension beyond the time specified in the written closure plan as required by paragraph (b)(1) of this section, the demonstration must include a narrative discussion providing the basis for additional time beyond that specified in the closure plan. The owner or operator must place each completed demonstration, if more than one time extension is sought, in the facility's operating record as required by § 257.105(i)(6) prior to the end of any two-year period. Factors that may support such a demonstration include:

(A) Complications stemming from the climate and weather, such as unusual amounts of precipitation or a significantly shortened construction season;

(B) Time required to dewater a CCR unit due to the volume of CCR contained in the CCR unit or the characteristics of the CCR in the unit;

(C) The geology and terrain surrounding the CCR unit will affect the amount of material needed to close the CCR unit; or

(D) Time required or delays caused by the need to coordinate with and obtain necessary approvals and permits from a state or other agency.

(ii) *Maximum time extensions.* (A) CCR surface impoundments of 40 acres or smaller may extend the time to complete closure by no longer than two years.

(B) CCR surface impoundments larger than 40 acres may extend the timeframe to complete closure of the CCR unit multiple times, in two-year increments. For each two-year extension sought, the owner or operator must substantiate the factual circumstances demonstrating the need for the extension. No more than a total of five two-year extensions may be obtained for any CCR surface impoundment.

(C) Except as provided in paragraph (f)(2)(ii)(D) of this section, CCR landfills may extend the timeframe to complete closure of the CCR unit multiple times, in one-year increments. For each one-year extension sought, the owner or operator must substantiate the factual circumstances demonstrating the need for the extension. No more than a total of two one-year extensions may be obtained for any CCR landfill.

(D) CCR landfills that intersect with groundwater are eligible for the time extensions available to CCR units in paragraph (f)(2)(ii)(B) of this section, provided the owner or operator documents that groundwater intersects the CCR unit in the closure plan.

(E) CCR management units of 40 acres or smaller may extend the time to complete closure by no longer than two years.

(F) CCR management units larger than 40 acres may extend the timeframe to complete closure of the CCR management unit multiple times, in two-year increments. For each two-year extension sought, the owner or operator must substantiate the factual circumstances demonstrating the need for the extension. No more than a total of five two-year extensions may be obtained for any CCR management unit.

(iii) In order to obtain additional time extension(s) to complete closure of a CCR unit beyond the times provided by paragraph (f)(1) of this section, the owner or operator of the CCR unit must include with the demonstration required by paragraph (f)(2)(i) of this section the following statement signed by the owner or operator or an authorized representative:

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this demonstration and all attached documents, and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

(3) Upon completion, the owner or operator of the CCR unit must obtain a certification from a qualified professional engineer or approval from the Participating State Director or approval from EPA where EPA is the permitting authority verifying that closure has been completed in accordance with the closure plan specified in paragraph (b) of this section and the requirements of this section.

(g) *Notification of intent to close.* No later than the date the owner or operator initiates closure of a CCR unit, the

owner or operator must prepare a notification of intent to close a CCR unit. The notification must include the certification by a qualified professional engineer or the approval from the Participating State Director or the approval from EPA where EPA is the permitting authority for the design of the final cover system as required by § 257.102(d)(3)(iii), if applicable. The owner or operator has completed the notification when it has been placed in the facility's operating record as required by § 257.105(i)(7).

(h) *Notification of completion of closure.* Within 30 days of completion of closure of the CCR unit, the owner or operator must prepare a notification of closure of a CCR unit. The notification must include the certification by a qualified professional engineer or the approval from the Participating State Director or the approval from EPA where EPA is the permitting authority as required by § 257.102(f)(3). The owner or operator has completed the notification when it has been placed in the facility's operating record as required by § 257.105(i)(8).

(i) *Deed notations.* (1) Except as provided by paragraph (i)(4) of this section, following closure of a CCR unit, the owner or operator must record a notation on the deed to the property, or some other instrument that is normally examined during title search.

(2) The notation on the deed must in perpetuity notify any potential purchaser of the property that:

- (i) The land has been used as a CCR unit; and
- (ii) Its use is restricted under the post-closure care requirements as provided by § 257.104(d)(1)(iii).

(3) Within 30 days of recording a notation on the deed to the property, the owner or operator must prepare a notification stating that the notation has been recorded. The owner or operator has completed the notification when it has been placed in the facility's operating record as required by § 257.105(i)(9).

(4) An owner or operator that closes a CCR unit in accordance with paragraph (c)(1) of this section is not subject to the requirements of paragraphs (i)(1) through (3) of this section.

(j) *Recordkeeping, notification, and internet requirements.* The owner or operator of the CCR unit must comply with the closure recordkeeping requirements specified in § 257.105(i), the closure notification requirements specified in § 257.106(i), and the closure internet requirements specified in § 257.107(i).

(k) *Criteria to retrofit an existing CCR surface impoundment.* (1) To retrofit an existing CCR surface impoundment, the owner or operator must:

- (i) First remove all CCR, including any contaminated soils and sediments from the CCR unit; and
- (ii) Comply with the requirements in § 257.72.
- (iii) A CCR surface impoundment undergoing a retrofit remains subject to all other requirements of this subpart, including the requirement to conduct any necessary corrective action.

(2) *Written retrofit plan—(i) Content of the plan.* The owner or operator must prepare a written retrofit plan that describes the steps necessary to retrofit the CCR unit consistent with recognized and generally accepted good engineering practices. The written retrofit plan must include, at a minimum, all of the following information:

(A) A narrative description of the specific measures that will be taken to retrofit the CCR unit in accordance with this section.

(B) A description of the procedures to remove all CCR and contaminated soils and sediments from the CCR unit.

(C) An estimate of the maximum amount of CCR that will be removed as part of the retrofit operation.

(D) An estimate of the largest area of the CCR unit that will be affected by the retrofit operation.

(E) A schedule for completing all activities necessary to satisfy the retrofit criteria in this section, including an estimate of the year in which retrofit activities of the CCR unit will be completed.

(ii) *Timeframes for preparing the initial written retrofit plan.* (A) No later than 60 days prior to date of initiating retrofit activities, the owner or operator must prepare an initial written retrofit plan consistent with the requirements specified in paragraph (k)(2) of this section. For purposes of this subpart, initiation of retrofit activities has commenced if the owner or operator has ceased placing waste in the unit and completes any of the following actions or activities:

- (1) Taken any steps necessary to implement the written retrofit plan;
- (2) Submitted a completed application for any required state or agency permit or permit modification; or
- (3) Taken any steps necessary to comply with any state or other agency standards that are a prerequisite, or are otherwise applicable, to initiating or completing the retrofit of a CCR unit.

(B) The owner or operator has completed the written retrofit plan when the plan, including the

certification required by paragraph (k)(2)(iv) of this section, has been placed in the facility's operating record as required by § 257.105(j)(1).

(iii) *Amendment of a written retrofit plan.* (A) The owner or operator may amend the initial or any subsequent written retrofit plan at any time.

(B) The owner or operator must amend the written retrofit plan whenever:

(1) There is a change in the operation of the CCR unit that would substantially affect the written retrofit plan in effect; or

(2) Before or after retrofit activities have commenced, unanticipated events necessitate a revision of the written retrofit plan.

(C) The owner or operator must amend the retrofit plan at least 60 days prior to a planned change in the operation of the facility or CCR unit, or no later than 60 days after an unanticipated event requires the revision of an existing written retrofit plan. If a written retrofit plan is revised after retrofit activities have commenced for a CCR unit, the owner or operator must amend the current retrofit plan no later than 30 days following the triggering event.

(iv) *Certification or approval.* The owner or operator of the CCR unit must obtain a written certification from a qualified professional engineer or an approval from the Participating State Director or an approval from EPA where EPA is the permitting authority that the activities outlined in the written retrofit plan, including any amendment of the plan, meet the requirements of this section.

(3) *Deadline for completion of activities related to the retrofit of a CCR unit.* Any CCR surface impoundment that is being retrofitted must complete all retrofit activities within the same time frames and procedures specified for the closure of a CCR surface impoundment in § 257.102(f) or, where applicable, § 257.103.

(4) *Certification or approval.* Upon completion, the owner or operator must obtain a written certification from a qualified professional engineer or an approval from the Participating State Director or an approval from EPA where EPA is the permitting authority verifying that the retrofit activities have been completed in accordance with the retrofit plan specified in paragraph (k)(2) of this section and the requirements of this section.

(5) *Notification of intent to retrofit.* No later than the date the owner or operator initiates the retrofit of a CCR unit, the owner or operator must prepare a notification of intent to retrofit a CCR

unit. The owner or operator has completed the notification when it has been placed in the facility's operating record as required by § 257.105(j)(5).

(6) *Notification of completion of retrofit activities.* Within 30 days of completing the retrofit activities specified in paragraph (k)(1) of this section, the owner or operator must prepare a notification of completion of retrofit activities. The notification must include the certification from a qualified professional engineer or an approval from the Participating State Director or an approval from EPA where EPA is the permitting authority has is required by paragraph (k)(4) of this section. The owner or operator has completed the notification when it has been placed in the facility's operating record as required by § 257.105(j)(6).

(7) *Cease retrofit and initiation of closure.* At any time after the initiation of a CCR unit retrofit, the owner or operator may cease the retrofit and initiate closure of the CCR unit in accordance with the requirements of § 257.102.

(8) *Recordkeeping, notification, and internet requirements.* The owner or operator of the CCR unit must comply with the retrofit recordkeeping requirements specified in § 257.105(j), the retrofit notification requirements specified in § 257.106(j), and the retrofit internet requirements specified in § 257.107(j).

- 21. Amend § 257.104 by:
- a. Revising paragraphs (a) and (c)(1);
- b. Adding paragraph (c)(3);
- c. Revising paragraph (d)(2); and
- d. Adding paragraph (g).

The additions and revisions read as follows:

§ 257.104 Post-closure care requirements.

(a) *Applicability.* (1) Except as provided by paragraph (a)(2) of this section, § 257.104 applies to the owners or operators of CCR units that are subject to the closure criteria under § 257.102.

(2) An owner or operator of a CCR unit that elects to close a CCR unit by removing CCR as provided by § 257.102(c)(1) is not subject to the post-closure care criteria under this section.

* * * * *

(c) * * *

(1) Except as provided by paragraph (c)(2) and (3) of this section, the owner or operator of the CCR unit must conduct post-closure care for 30 years.

* * * * *

(3) An owner or operator closing a unit pursuant to § 257.102(c)(2) must complete groundwater corrective action in accordance with § 257.98(c).

(d) * * *

(2) *Deadline to prepare the initial written post-closure plan—(i) Existing CCR landfills and existing CCR surface impoundments.* No later than October 17, 2016, the owner or operator of the CCR unit must prepare an initial written post-closure plan consistent with the requirements specified in paragraph (d)(1) of this section.

(ii) *New CCR landfills, new CCR surface impoundments, and any lateral expansion of a CCR unit.* No later than the date of the initial receipt of CCR in the CCR unit, the owner or operator must prepare an initial written post-closure plan consistent with the requirements specified in paragraph (d)(1) of this section.

(iii) *CCR management units.* No later than Wednesday, November 8, 2028, the owner or operator of a CCR management unit must prepare an initial written post-closure care plan as set forth in paragraph (d)(1) of this section.

(iv) *Recordkeeping.* The owner or operator has completed the written post-closure plan when the plan, including the certification required by paragraph (d)(4) of this section, has been placed in the facility's operating record as required by § 257.105(i)(4).

* * * * *

(g) *Removal of a deed notation.* The owner or operator of a CCR unit closed pursuant to §§ 257.102(c)(2) and 257.104 may remove the notation from the deed specified in § 257.102(i) upon:

(1) Completion of groundwater corrective action demonstrating that any areas affected by releases from the CCR unit do not exceed the groundwater protection standards established pursuant to § 257.95(h) for constituents listed in appendix IV to this part; and

(2) Completion of the notification of completion of post-closure care period required by paragraph (e) of this section.

* * * * *

- 22. Revise § 257.105 to read as follows:

§ 257.105 Recordkeeping requirements.

(a) *Operating Record.* Each owner or operator of a CCR unit subject to the requirements of this subpart must date and maintain files of all information required by this section in a written operating record at their facility. Each file must indicate the date the file was placed in the operating record.

(b) *Document Retention.* Unless specified otherwise, each file must be retained for at least five years following the date of each occurrence, measurement, maintenance, corrective action, report, record, or study.

(c) *Recordkeeping for multiple CCR units.* An owner or operator of more

than one CCR unit subject to the provisions of this subpart may comply with the requirements of this section in one recordkeeping system provided the system identifies each file by the name of each CCR unit. The files may be maintained on microfilm, on a computer, on computer disks, on a storage system accessible by a computer, on magnetic tape disks, or on microfiche.

(d) *State Director and/or appropriate Tribal authority notification.* The owner or operator of a CCR unit must submit to the State Director and/or appropriate Tribal authority any demonstration or documentation required by this subpart, if requested, when such information is not otherwise available on the owner or operator's CCR website.

(e) *Location restrictions.* The owner or operator of a CCR unit subject to this subpart must place the demonstrations documenting whether or not the CCR unit is in compliance with the requirements under §§ 257.60(a), 257.61(a), 257.62(a), 257.63(a), and 257.64(a), as it becomes available, in the facility's operating record, except each location restrictions demonstration must be maintained for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g).

(f) *Design criteria.* The owner or operator of a CCR unit subject to this subpart must place the following information, as it becomes available, in the facility's operating record:

(1) The design and construction certifications as required by § 257.70(e) and (f), except each certification must be maintained for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(2) The documentation of liner type as required by § 257.71(a), except each liner type documentation must be maintained for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(3) The design and construction certifications as required by § 257.72(c) and (d), except each certification must be maintained for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in

accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(4) Documentation prepared by the owner or operator stating that the permanent identification marker was installed as required by §§ 257.73(a)(1) and 257.74(a)(1), except each document must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or until completion of post-closure care in accordance with § 257.104(e) irrespective of the time requirement specified in paragraph (b) of this section.

(5) The initial and periodic hazard potential classification assessments as required by §§ 257.73(a)(2) and 257.74(a)(2), except each hazard potential classification must be maintained for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(6) The emergency action plan (EAP), and any amendment of the EAP, as required by §§ 257.73(a)(3) and 257.74(a)(3), except each EAP must be maintained for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(7) Documentation prepared by the owner or operator recording the annual face-to-face meeting or exercise between representatives of the owner or operator of the CCR unit and the local emergency responders as required by §§ 257.73(a)(3)(i)(E) and 257.74(a)(3)(i)(E), except each document must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(8) Documentation prepared by the owner or operator recording all activations of the emergency action plan as required by §§ 257.73(a)(3)(v) and 257.74(a)(3)(v), except each documentation of EAP activations must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g)

irrespective of the time requirement specified in paragraph (b) of this section.

(9) The history of construction, and any revisions of it, as required by § 257.73(c), except each history of construction must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(10) The initial and periodic structural stability assessments as required by §§ 257.73(d) and 257.74(d), except each structural stability assessment must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(11) Documentation detailing the corrective measures taken to remedy the deficiency or release as required by §§ 257.73(d)(2) and 257.74(d)(2), except each document must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(12) The initial and periodic safety factor assessments as required by §§ 257.73(e) and 257.74(e), except each safety factor assessment must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(13) The design and construction plans, and any revisions of it, as required by § 257.74(c), except the design and construction plans must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(14) The application and any supplemental materials submitted in support of the application as required by § 257.71(d)(1)(i)(E), except each application and supplemental materials must be maintained for five years after completion of closure by removal in

accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(15) The alternative liner demonstration as required by § 257.71(d)(1)(ii)(D).

(16) The alternative liner demonstration extension request as required by § 257.71(d)(2)(ii)(D).

(17) The documentation prepared for the preliminary demonstration as required by § 257.71(d)(2)(ii)(E).

(18) The notification of an incomplete application as required by § 257.71(d)(2)(iii)(B).

(19) The decision on the application as required by § 257.71(d)(2)(iii)(F), except each decision must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(20) The final decision on the alternative liner demonstration as required by § 257.71(d)(2)(vii).

(21) The alternative source demonstration as required under § 257.71(d)(2)(ix)(A)(4).

(22) The final decision on the alternative source demonstration as required under § 257.71(d)(2)(ix)(A)(5).

(23) The final decision on the trend analysis as required under § 257.71(d)(2)(ix)(B)(3).

(24) The decision that the alternative source demonstration has been withdrawn as required under § 257.71(d)(2)(ix)(C).

(25) The facility evaluation report part 1 as required by § 257.75(c), except the facility evaluation report part 1 must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(26) The facility evaluation report part 2 as required by § 257.75(d), except the facility evaluation report part 2 must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(g) *Operating criteria.* The owner or operator of a CCR unit subject to this

subpart must place the following information, as it becomes available, in the facility's operating record:

(1) The CCR fugitive dust control plan, and any subsequent amendment of the plan, required by § 257.80(b), except each fugitive dust control plan must be maintained for five years after closure by removal in accordance with § 257.102(c)(1) or (2) or completes post-closure care in accordance with § 257.104(e) or (g) is completed at the last CCR unit at the facility irrespective of the time requirement specified in paragraph (b) of this section.

(2) The annual CCR fugitive dust control report required by § 257.80(c), except each fugitive dust control report must be maintained for five years after closure by removal in accordance with § 257.102(c)(1) or (2) or post-closure care in accordance with § 257.104(e) or (g) is completed at the last CCR unit at the facility irrespective of the time requirement specified in paragraph (b) of this section.

(3) The initial and periodic run-on and run-off control system plans as required by § 257.81(c), except each plan must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(4) The initial and periodic inflow design flood control system plan as required by § 257.82(c), except each plan must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(5) Documentation recording the results of each inspection and instrumentation monitoring by a qualified person as required by § 257.83(a), except each document must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(6) The periodic inspection report as required by § 257.83(b)(2), except each inspection report must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the

time requirement specified in paragraph (b) of this section.

(7) Documentation detailing the corrective measures taken to remedy the deficiency or release as required by §§ 257.83(b)(5) and 257.84(b)(5), except each document must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(8) Documentation recording the results of the weekly inspection by a qualified person as required by § 257.84(a), except each inspection report must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(9) The periodic inspection report as required by § 257.84(b)(2), except each inspection report must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(h) *Groundwater monitoring and corrective action.* The owner or operator of a CCR unit subject to this subpart must place the following information, as it becomes available, in the facility's operating record:

(1) The annual groundwater monitoring and corrective action report as required by § 257.90(e), except each annual groundwater monitoring and corrective action report must be maintained for five years after the last CCR unit at the facility either completes closure by removal in accordance with § 257.102(c)(1) or completes post-closure care in accordance with § 257.104(e) irrespective of the time requirement specified in paragraph (b) of this section.

(2) Documentation of the design, installation, development, and decommissioning of any monitoring wells, piezometers and other measurement, sampling, and analytical devices as required by § 257.91(e)(1), except each document must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or completion of post-closure care in accordance with § 257.104(e) irrespective of the time requirement

specified in paragraph (b) of this section.

(3) The groundwater monitoring system certification as required by § 257.91(f), except each certification must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or completion of post-closure care in accordance with § 257.104(e) irrespective of the time requirement specified in paragraph (b) of this section.

(4) The selection of a statistical method certification as required by § 257.93(f)(6), except each certification must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or completion of post-closure care in accordance with § 257.104(e) irrespective of the time requirement specified in paragraph (b) of this section.

(5) Within 30 days of establishing an assessment monitoring program, the notification as required by § 257.94(e)(3).

(6) The results of appendices III and IV to this part constituent concentrations measured as required by § 257.95(d)(1).

(7) Within 30 days of returning to a detection monitoring program, the notification as required by § 257.95(e).

(8) Within 30 days of detecting one or more constituents in appendix IV to this part at statistically significant levels above the groundwater protection standard, the notifications as required by § 257.95(g).

(9) Within 30 days of initiating the assessment of corrective measures requirements, the notification as required by § 257.95(g)(5).

(10) The completed assessment of corrective measures as required by § 257.96(d), except each certification must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or completion of post-closure care in accordance with § 257.104(e) irrespective of the time requirement specified in paragraph (b) of this section.

(11) Documentation prepared by the owner or operator recording the public meeting for the corrective measures assessment as required by § 257.96(e), except each certification must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or completion of post-closure care in accordance with § 257.104(e) irrespective of the time requirement specified in paragraph (b) of this section.

(12) The semiannual report describing the progress in selecting and designing the remedy and the selection of remedy report as required by § 257.97(a), except that the selection of remedy report must be maintained until the remedy has been completed.

(13) Within 30 days of completing the remedy, the notification as required by § 257.98(e), except each notification must be maintained for five years after completion of the remedy selected pursuant to § 257.97 irrespective of the time requirement specified in paragraph (b) of this section.

(14) The demonstration, including long-term performance data, supporting the suspension of groundwater monitoring requirements as required by § 257.90(g), except each document must be maintained for five years after the last unit at the facility completes post-closure care in accordance with § 257.104(e) irrespective of the time requirement specified in paragraph (b) of this section.

(i) *Closure and post-closure care.* The owner or operator of a CCR unit subject to this subpart must place the following information, as it becomes available, in the facility's operating record:

(1) The notification of intent to initiate closure of the CCR unit as required by § 257.100(c)(1).

(2) The annual progress reports of closure implementation as required by § 257.100(c)(2)(i) and (ii).

(3) The notification of closure completion as required by § 257.100(c)(3).

(4) The written closure plan, and any amendment of the plan, as required by § 257.102(b), except that only the most recent closure plan must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or completion of post-closure care in accordance with § 257.104(e) irrespective of the time requirement specified in paragraph (b) of this section.

(5) The written demonstration(s), including the certification required by § 257.102(e)(2)(iii), for a time extension for initiating closure as required by § 257.102(e)(2)(ii), except each demonstration must be maintained until notice of completion of closure is placed in the operating record in accordance with § 257.102(h) irrespective of the time requirement specified in paragraph (b) of this section.

(6) The written demonstration(s), including the certification required by § 257.102(f)(2)(iii), for a time extension for completing closure as required by § 257.102(f)(2)(i), except each demonstration must be maintained for five years after completion of closure in

accordance with § 257.102(c) or (d) irrespective of the time requirement specified in paragraph (b) of this section.

(7) The notification of intent to close a CCR unit as required by § 257.102(g), except each notification must be maintained for five years after completion of closure in accordance with § 257.102(c) or (d) irrespective of the time requirement specified in paragraph (b) of this section.

(8) The notification of completion of closure of a CCR unit as required by § 257.102(h), except each notification must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or completion of post-closure care in accordance with § 257.104(e) irrespective of the time requirement specified in paragraph (b) of this section.

(9) The notification recording a notation on the deed as required by § 257.102(i), except each notification must be maintained for five years after completion of post-closure care in accordance with § 257.104(e) irrespective of the time requirement specified in paragraph (b) of this section.

(10) The notification of intent to comply with the alternative closure requirements as required by § 257.103(c)(1), except each notification must be maintained for five years after completion of closure in accordance with § 257.102(c) or (d) irrespective of the time requirement specified in paragraph (b) of this section.

(11) The annual progress reports under the alternative closure requirements as required by § 257.103(c)(2), except each report must be maintained for five years after completion of closure in accordance with § 257.102(c) or (d) irrespective of the time requirement specified in paragraph (b) of this section.

(12) The written post-closure plan, and any amendment of the plan, as required by § 257.104(d), except that only the most recent post-closure plan must be maintained for five years after completion of post-closure care in accordance with § 257.104(e) irrespective of the time requirement specified in paragraph (b) of this section.

(13) The notification of completion of post-closure care period as required by § 257.104(e), except each notification must be maintained for five years after completion of post-closure care in accordance with § 257.104(e) irrespective of the time requirement specified in paragraph (b) of this section.

(14) The notification of intent to comply with the site-specific alternative to initiation of closure due to development of alternative capacity infeasible as required by § 257.103(f)(1)(ix)(A), except each notification must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(15) The approved or denied demonstration for the site-specific alternative to initiation of closure due to development of alternative capacity infeasible as required by § 257.103(f)(1)(ix)(B), except each approval or denial must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(16) The notification for requesting additional time to the alternative cease receipt of waste deadline as required by § 257.103(f)(1)(ix)(C), except each notification must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(17) The semi-annual progress reports for the site-specific alternative to initiation of closure due to development of alternative capacity being infeasible as required by § 257.103(f)(1)(xi), except each semi-annual progress report must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(18) The notification of intent to comply with the site-specific alternative to initiation of closure due to permanent cessation of a coal-fired boiler(s) by a date certain as required by § 257.103(f)(2)(viii), except each notification must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(19) The approved or denied demonstration for the site-specific alternative to initiation of closure due to permanent cessation of a coal-fired boiler(s) by a date certain as required by § 257.103(f)(2)(ix), except each demonstration must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(20) The annual progress report for the site-specific alternative to initiation of closure due to permanent cessation of a coal-fired boiler(s) by a date certain as required by § 257.103(f)(2)(x), except each annual progress report must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or (2) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(k) *Legacy CCR surface impoundments.* In addition to the information specified in paragraphs (e) through (j) of this section, the owner or operator of a legacy CCR surface impoundment subject to this subpart must place the following information, as it becomes available, in the facility's operating record:

(1) The applicability report required by § 257.100(f)(1), including the certification required by § 257.100(f)(1)(i), except each report must be maintained for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(2) The applicability extension reports required by § 257.100(f)(1)(iii)(C), except each report must be maintained for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (b) of this section.

(3) The notification of field investigation conclusion required by § 257.100(f)(1)(iii)(F), except the notification must be maintained for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement

specified in paragraph (b) of this section.

(4) The notification of intent to certify closure required by § 257.100(h)(1)(i), except the notification must be maintained for five years after completion of closure by removal in accordance with § 257.100(h)(1) or § 257.102(c)(2) irrespective of the time requirement specified in paragraph (b) of this section.

■ 23. Amend § 257.106 by:

■ a. Revising paragraphs (a), (b), (c), and (d);

■ b. Adding paragraphs (f)(24) and (25) and (k).

The revisions and additions read as follows:

§ 257.106 Notification requirements.

(a) *Deadline to submit notification to the relevant State Director and/or appropriate Tribal authority.* The notifications required under paragraphs (e) through (i) of this section must be sent to the relevant State Director and/or appropriate Tribal authority before the close of business on the day the notification is required to be completed. For purposes of this section, *before the close of business* means the notification must be postmarked or sent by electronic mail (email). If a notification deadline falls on a weekend or federal holiday, the notification deadline is automatically extended to the next business day.

(b) *Notifications to Tribal authority.* If any CCR unit is located in its entirety within Indian Country, the notifications of this section must be sent to the appropriate Tribal authority. If any CCR unit is located in part within Indian Country, the notifications of this section must be sent both to the appropriate State Director and Tribal authority.

(c) *Combining notifications.* Notifications may be combined as long as the deadline requirement for each notification is met.

(d) *Notification deadline after placement in operating record.* Unless otherwise required in this section, the notifications specified in this section must be sent to the State Director and/or appropriate Tribal authority within 30 days of placing in the operating record the information required by § 257.105.

* * * * *

(f) * * *

(24) Provide notification of the availability of the facility evaluation report part 1 as specified by § 257.105(f)(25).

(25) Provide notification of the availability of the facility evaluation

report part 2 as specified by § 257.105(f)(26).

* * * * *

(k) *Legacy CCR surface impoundments.* In addition to the information specified in paragraphs (e) through (j) of this section, the owner or operator of a legacy CCR surface impoundment subject to this subpart must notify the State Director and/or appropriate Tribal authority when information has been placed in the operating record and on the owner or operator's publicly accessible internet site. The owner or operator must:

(1) Provide notification of the availability of the applicability documentation as specified under § 257.105(k)(1).

(2) Provide notification of the availability of the applicability extension report as specified under § 257.105(k)(2).

(3) Provide notification of the availability of the notification as specified under § 257.105(k)(3).

(4) Provide notification of the availability of the intent to certify closure by removal certification as specified under § 257.105(k)(4).

■ 24. Revise and republish § 257.107 to read as follows:

§ 257.107 Publicly accessible internet site requirements.

(a) *CCR website requirement.* Each owner or operator of a CCR unit subject to the requirements of this subpart must maintain a publicly accessible internet site (CCR website) containing the information specified in this section. The owner or operator's website must be titled "CCR Rule Compliance Data and Information." The website must ensure that all information required to be posted is immediately available to anyone visiting the site, without requiring any prerequisite, such as registration or a requirement to submit a document request. All required information must be clearly identifiable and must be able to be immediately printed and downloaded by anyone accessing the site. If the owner/operator changes the web address (*i.e.*, Uniform Resource Locator (URL)) at any point, they must notify EPA via the "contact us" form on EPA's CCR website and the state director within 14 days of making the change. The facility's CCR website must also have a "contact us" form or a specific email address posted on the website for the public to use to submit questions and issues relating to the availability of information on the website.

(b) *CCR website for multiple CCR units or combined websites for multiple regulatory programs.*

(1) An owner or operator of more than one CCR unit subject to the provisions of this subpart may comply with the requirements of this section by using the same internet site for multiple CCR units provided the CCR website clearly delineates information by the name or identification number of each unit.

(2) An owner or operator may maintain one website combining the postings required under this subpart with the postings required by other regulatory programs (e.g., the “ELG Rule Compliance Data and Information” website required pursuant to § 423.19 of this chapter), provided the postings required for each regulatory program are delineated under a separate heading on the website.

(c) *Document retention on a CCR website.* Unless otherwise required in this section, the information required to be posted to the CCR website must be made available to the public for at least five years following the date on which the information was first posted to the CCR website.

(d) *Website posting deadline after placement in operating record.* Unless otherwise required in this section, the information must be posted to the CCR website within 30 days of placing the pertinent information required by § 257.105 in the operating record.

(e) *Location restrictions.* The owner or operator of a CCR unit subject to this subpart must place each demonstration specified under § 257.105(e) on the owner or operator’s CCR website except each location restrictions demonstration must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) irrespective of the time requirement specified in paragraph (c) of this section.

(f) *Design criteria.* The owner or operator of a CCR unit subject to this subpart must place the following information on the owner or operator’s CCR website:

(1) Within 60 days of commencing construction of a new unit, the design certification specified under § 257.105(f)(1) or (3), except each certification must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(2) No later than the date of initial receipt of CCR by a new CCR unit, the construction certification specified under § 257.105(f)(1) or (3), except each

certification must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g), or until the liner is removed irrespective of the time requirement specified in paragraph (c) of this section, whichever is later.

(3) The documentation of liner type specified under § 257.105(f)(2), except each document must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g), or until the liner is removed irrespective of the time requirement specified in paragraph (c) of this section, whichever is later.

(4) The initial and periodic hazard potential classification assessments specified under § 257.105(f)(5), except only the two most recent hazard potential classification assessments must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(5) The emergency action plan (EAP) specified under § 257.105(f)(6), except that only the most recent EAP must be maintained on the CCR website irrespective of the time requirement specified in paragraph (c) of this section.

(6) Documentation prepared by the owner or operator recording the annual face-to-face meeting or exercise between representatives of the owner or operator of the CCR unit and the local emergency responders specified under § 257.105(f)(7), except only the most recent documentation must be posted on the CCR website irrespective of the time requirement specified in paragraph (c) of this section.

(7) Documentation prepared by the owner or operator recording any activation of the emergency action plan specified under § 257.105(f)(8); if no activation in the last five years, documentation that includes that information irrespective of the time requirement specified in paragraph (c) of this section.

(8) The history of construction, and any revisions of it, specified under § 257.105(f)(9), except the history of constructions, and any revisions of it, must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g)

irrespective of the time requirement specified in paragraph (c) of this section.

(9) The initial and periodic structural stability assessments specified under § 257.105(f)(10), except only the two most recent structural stability assessments must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(10) The documentation detailing the corrective measures taken to remedy the deficiency or release specified under § 257.105(f)(11), except each document must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(11) The initial and periodic safety factor assessments specified under § 257.105(f)(12), except only the two most recent safety factor assessments must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(12) The design and construction plans, and any revisions of them, specified under § 257.105(f)(13), except each plan must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(13) The application and any supplemental materials submitted in support of the application specified under § 257.105(f)(14), except each application must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(14) The alternative liner demonstration specified under § 257.105(f)(15).

(15) The alternative liner demonstration specified under § 257.105(f)(16).

(16) The documentation prepared for the preliminary demonstration specified under § 257.105(f)(17).

(17) The notification of an incomplete application specified under § 257.105(f)(18).

(18) The decision on the application specified under § 257.105(f)(19), except each decision must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(19) The final decision on the alternative liner demonstration specified under § 257.105(f)(20).

(20) The alternative source demonstration specified under § 257.105(f)(21).

(21) The final decision on the alternative source demonstration specified under § 257.105(f)(22).

(22) The final decision on the trend analysis specified under § 257.105(f)(23).

(23) The decision that the alternative source demonstration has been withdrawn specified under § 257.105(f)(24).

(24) The facility evaluation report part 1 as specified under § 257.105(f)(25), except each report must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(25) The facility evaluation report part 2 as specified under § 257.105(f)(26), except each report must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(g) *Operating criteria.* The owner or operator of a CCR unit subject to this subpart must place the following information on the owner or operator's CCR website:

(1) The CCR fugitive dust control plan, or any subsequent amendment of the plan, specified under § 257.105(g)(1) except that only the most recent plan must be maintained on the CCR website irrespective of the time requirement specified in paragraph (c) of this section until the last CCR unit at the facility completes closure by removal in accordance with § 257.102(c) or completes post-closure care in accordance with § 257.104(e) or (g)

irrespective of the time requirement specified in paragraph (c) of this section.

(2) The annual CCR fugitive dust control report specified under § 257.105(g)(2). Each report must be posted for the duration specified in paragraph (c) of this section, except that the final report must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(3) The initial and periodic run-on and run-off control system plans specified under § 257.105(g)(3), except each plan must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(4) The initial and periodic inflow design flood control system plans specified under § 257.105(g)(4), except each plan must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(5) The periodic inspection reports specified under § 257.105(g)(6). Each report must be posted for the duration specified in paragraph (c) of this section, except that the final report must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(6) The documentation detailing the corrective measures taken to remedy the deficiency or release specified under § 257.105(g)(7). Each report must be posted for the duration specified in paragraph (c) of this section, except that the final documentation must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(7) The periodic inspection reports specified under § 257.105(g)(9). Each report must be posted for the duration specified in paragraph (c) of this section, except that the final report must

be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(h) *Groundwater monitoring and corrective action.* The owner or operator of a CCR unit subject to this subpart must place the following information on the owner or operator's CCR website:

(1) The annual groundwater monitoring and corrective action report specified under § 257.105(h)(1). Each report must be posted for the duration specified in paragraph (c) of this section, except that the final report must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(2) The groundwater monitoring system certification specified under § 257.105(h)(3), except each certification must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(3) The selection of a statistical method certification specified under § 257.105(h)(4), except each certification must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(4) The notification that an assessment monitoring programs has been established specified under § 257.105(h)(5).

(5) The notification that the CCR unit is returning to a detection monitoring program specified under § 257.105(h)(7).

(6) The notification that one or more constituents in appendix IV to this part have been detected at statistically significant levels above the groundwater protection standard and the notifications to land owners specified under § 257.105(h)(8).

(7) The notification that an assessment of corrective measures has been initiated specified under § 257.105(h)(9).

(8) The assessment of corrective measures specified under § 257.105(h)(10), except each assessment must be posted for five years

after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(9) The semiannual reports describing the progress in selecting and designing remedy and the selection of remedy report specified under § 257.105(h)(12), except that the selection of the remedy report must be maintained until the remedy has been completed.

(10) The notification that the remedy has been completed specified under § 257.105(h)(13), except each notification must be posted for five years after completion of the remedy selected pursuant to in § 257.97 irrespective of the time requirement specified in paragraph (c) of this section.

(11) The demonstration supporting the suspension of groundwater monitoring requirements specified under § 257.105(h)(14), except each demonstration must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(i) *Closure and post-closure care.* The owner or operator of a CCR unit subject to this subpart must place the following information on the owner or operator's CCR website:

(1) The notification of intent to initiate closure of the CCR unit specified under § 257.105(i)(1).

(2) The annual progress reports of closure implementation specified under § 257.105(i)(2).

(3) The notification of closure completion specified under § 257.105(i)(3).

(4) The written closure plan, and any amendment of the plan, specified under § 257.105(i)(4), except that only the most recent closure plan must be posted on the CCR website irrespective of the time requirement specified in paragraph (c) of this section and each closure plan must be maintained for five years after completion of closure by removal in accordance with § 257.102(c)(1) or completion of post-closure care in accordance with § 257.104(e) irrespective of the time requirement specified in paragraph (c) of this section.

(5) The demonstration(s) for a time extension for initiating closure specified under § 257.105(i)(5), except each demonstration must be posted until notice of completion of closure is placed

in the operating record in accordance with § 257.102(h) irrespective of the time requirement specified in paragraph (c) of this section.

(6) The demonstration(s) for a time extension for completing closure specified under § 257.105(i)(6), except each demonstration must be posted for five years after completion of closure in accordance with § 257.102(c) or (d) irrespective of the time requirement specified in paragraph (c) of this section.

(7) The notification of intent to close a CCR unit specified under § 257.105(i)(7), except each notification must be posted for five years after completion of closure in accordance with § 257.102(c) or (d) irrespective of the time requirement specified in paragraph (c) of this section.

(8) The notification of completion of closure of a CCR unit specified under § 257.105(i)(8), except each notification must be posted for five years after completion of closure by removal in accordance with § 257.102(c)(1) or completion of post-closure care in accordance with § 257.104(e) irrespective of the time requirement specified in paragraph (c) of this section.

(9) The notification recording a notation on the deed as required by § 257.105(i)(9), except each notification must be posted for five years after completion of post-closure care in accordance with § 257.104(e) irrespective of the time requirement specified in paragraph (c) of this section.

(10) The notification of intent to comply with the alternative closure requirements as required by § 257.105(i)(10), except the notification must be posted for five years after completion of closure in accordance with § 257.102(c) or (d) irrespective of the time requirement specified in paragraph (c) of this section.

(11) The annual progress reports under the alternative closure requirements as required by § 257.105(i)(11), except the notification must be posted for five years after completion of closure in accordance with § 257.102(c) or (d) irrespective of the time requirement specified in paragraph (c) of this section.

(12) The written post-closure plan, and any amendment of the plan, specified under § 257.105(i)(12), except that only the most recent post-closure plan must be maintained for five years after completion of post-closure care in accordance with § 257.104(e) irrespective of the time requirement specified in paragraph (c) of this section.

(13) The notification of completion of post-closure care specified under § 257.105(i)(13), except that only the most recent post-closure plan must be maintained for five years after completion of post-closure care in accordance with § 257.104(e) irrespective of the time requirement specified in paragraph (c) of this section.

(14) The notification of intent to comply with the site-specific alternative to initiation of closure due to development of alternative capacity infeasible as specified under § 257.105(i)(14), except each notification must be posted for five years after completion of closure by removal in accordance with § 257.102(c)(1) or completion of post-closure care in accordance with § 257.104(e) irrespective of the time requirement specified in paragraph (c) of this section.

(15) The approved or denied demonstration for the site-specific alternative to initiation of closure due to development of alternative capacity infeasible as required by as specified under § 257.105(i)(15), except each approval or denial must be maintained for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(16) The notification for requesting additional time to the alternative cease receipt of waste deadline as required by § 257.105(i)(16), except the notification must be maintained for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(17) The semi-annual progress reports for the site-specific alternative to initiation of closure due to development of alternative capacity infeasible as specified under § 257.105(i)(17), except the progress report must be maintained for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(18) The notification of intent to comply with the site-specific alternative to initiation of closure due to permanent cessation of a coal-fired boiler(s) by a date certain as specified under § 257.105(i)(18), except the notification

must be maintained for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(19) The approved or denied demonstration for the site-specific alternative to initiation of closure due to permanent cessation of a coal-fired boiler(s) by a date certain as required by § 257.105(i)(19), except the approval or denial must be maintained for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(20) The annual progress report for the site-specific alternative to initiation of closure due to permanent cessation of a coal-fired boiler(s) by a date certain as required by § 257.105(i)(20), except the progress reports must be maintained for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(j) *Retrofit criteria.* The owner or operator of a CCR unit subject to this

subpart must place the following information on the owner or operator's CCR website:

(1) The written retrofit plan, and any amendment of the plan, specified under § 257.105(j)(1).

(2) The notification of intent to comply with the alternative retrofit requirements as required by § 257.105(j)(2).

(3) The annual progress reports under the alternative retrofit requirements as required by § 257.105(j)(3).

(4) The demonstration(s) for a time extension for completing retrofit activities specified under § 257.105(j)(4).

(5) The notification of intent to retrofit a CCR unit specified under § 257.105(j)(5).

(6) The notification of completion of retrofit activities specified under § 257.105(j)(6).

(k) *Legacy CCR surface impoundments.* In addition to the information specified in paragraphs (e) through (j) of this section, the owner or operator of a legacy CCR surface impoundment subject to this subpart must place the following information on the owner or operator's CCR website:

(1) The applicability report as specified under § 257.105(k)(1), except each report must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement

specified in paragraph (c) of this section.

(2) The applicability extension reports as specified under § 257.105(k)(2), except each report must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(3) The notification of field investigation conclusion as specified under § 257.105(k)(3), except each notification must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

(4) The notification of intent to certify closure as specified under § 257.105(k)(4), except each notification must be posted for five years after completion of closure by removal in accordance with § 257.102(c) or until completion of post-closure care in accordance with § 257.104(e) or (g) irrespective of the time requirement specified in paragraph (c) of this section.

[FR Doc. 2024–09157 Filed 5–7–24; 8:45 am]

BILLING CODE 6560–50–P



FEDERAL REGISTER

Vol. 89

Wednesday,

No. 90

May 8, 2024

Part III

Environmental Protection Agency

40 CFR Part 302

Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 302

[EPA–HQ–OLEM–2019–0341; FRL–7204–03–OLEM]

RIN 2050–AH09

Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA” or “Superfund”), the Environmental Protection Agency (EPA) is designating two per- and polyfluoroalkyl substances (PFAS)—perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), including their salts and structural isomers—as hazardous substances. The Agency reached this decision after evaluating the available scientific and technical information about PFOA and PFOS and determining that they may present a substantial danger to the public health or welfare or the environment when released. The Agency also determined that designation is warranted based on a totality of the circumstances analysis, including an analysis of the advantages and disadvantages of designation.

DATES: Effective July 8, 2024.

ADDRESSES: EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OLEM–2019–0341. All documents in the docket are listed in <https://www.regulations.gov/>. Although listed, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy. With the exception of such material, publicly available docket materials are available electronically in <https://www.regulations.gov/>.

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SUPPLEMENTARY INFORMATION: *Acronyms and Abbreviations:* We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of the preamble and for reference purposes, EPA defines the following terms and acronyms here:

AFFF Aqueous film-forming foam
ARARs Applicable or Relevant and Appropriate Requirements
ATSDR Agency for Toxic Substances and Disease Registry
CDC Centers for Disease Control and Prevention
CASRN Chemical Abstracts Service Registry Number
COC Contaminant of Concern
CDR Chemical Data Reporting
CERCLA Comprehensive Environmental Response, Compensation, and Liability Act
CFR Code of Federal Regulations
DoD Department of Defense
DOE Department of Energy
EA Economic Analysis
ECF Electrochemical fluorination
EJ Environmental justice
EPA Environmental Protection Agency
EPCRA Emergency Planning and Community Right-to-Know Act
EU European Union
FAA Federal Aviation Administration
FDA Food and Drug Administration
FR Federal Register
ICR Information Collection Request
LEPC Local Emergency Planning Committee
MCL Maximum contaminant level
MCLG Maximum Contaminant Level Goals (MCLGs)
NAICS North American Industrial Classification System
NCP National Oil and Hazardous Substances Pollution Contingency Plan
NECI National Enforcement Compliance Initiative
NHANES National Health and Nutrition Examination Survey
NPDWR National Primary Drinking Water Regulation
NPL National Priorities List
NRC National Response Center
OMB Office of Management and Budget
PCBs Polychlorinated biphenyls
PFAS Per- and polyfluoroalkyl substances
PFOA Perfluorooctanoic acid
PFOS Perfluorooctanesulfonic acid
PFOSA Perfluorooctanesulfonamide
PHGs Public health goals
ppt parts per trillion
PRG Preliminary remediation goal
PRP Potentially responsible party
PRSC Post-Removal Site Control
PWS Public water system
RCRA Resource Conservation and Recovery Act
RFA Regulatory Flexibility Act
RfD Reference dose
RQ Reportable quantity
SAB Science Advisory Board
SDWA Safe Drinking Water Act
SERC State Emergency Response Commission

SNURs Significant New Use Rules
TEPC Tribal Emergency Planning Committee
TERC Tribal Emergency Response Commission
TRI Toxic Release Inventory
TSCA Toxic Substances Control Act
UCMR Unregulated Contaminant Monitoring Rule
UMRA Unfunded Mandates Reform Act
U.S. United States
WWTP Wastewater treatment plant

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References

I. Executive Summary

A. Overview

Pursuant to section 102(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), EPA is designating perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), including their salts and structural isomers, as hazardous substances.¹ Each of the actions adding PFOA, PFOS, and their salts and structural isomers, to CERCLA's hazardous substances list is independent, and severable from the others. The Agency evaluated the available scientific and technical information about those substances and concluded that designation of each substance is warranted under the criteria in section 102(a) because both PFOA and PFOS, and their salts and isomers, may present substantial danger to public health or welfare or the environment. Exercising its discretion with respect to when to make a finding under section 102(a), EPA as part of its decision-making process went beyond considering whether PFOA and PFOS “may present a substantial danger to public health welfare or the environment” within the meaning of section 102(a), and also performed an additional analysis that weighed the advantages and disadvantages of designation, including quantitative and qualitative benefits and costs. As part of that additional discretionary analysis, EPA determined that the advantages of designation outweigh the disadvantages. Among other advantages, designation

best serves CERCLA's two primary objectives—the timely cleanup of contaminated sites and holding polluters accountable for contamination they caused (*i.e.*, the “Polluter Pays” principle). Designation provides necessary tools to address the challenge of PFOA and PFOS contamination in the environment. Designation will allow EPA to utilize all CERCLA's authorities, which will enable EPA to address more sites, take earlier action, and to expedite eventual cleanup. Designating PFOA and PFOS as CERCLA hazardous substances is thus critical to addressing PFOA and PFOS releases in the environment and to protecting public health.

B. “May Present Substantial Danger to Public Health or Welfare or the Environment”

EPA is taking final action on the proposed finding that both PFOA and PFOS “may present substantial danger to public health or welfare or the environment” when released into the environment after considering the available scientific and technical information and after considering comments on the proposed determination. Available information indicates that human exposure to PFOA and/or PFOS is linked to a broad range of adverse health effects, including developmental effects to fetuses during pregnancy or to infants (*e.g.*, low birth weight, accelerated puberty, skeletal variations), liver effects (*e.g.*, tissue damage), immune effects (*e.g.*, antibody production and immunity), and other effects (*e.g.*, cholesterol changes). Both PFOA and PFOS are known to be transmitted to the fetus via the placenta and to the newborn, infant, and child via breast milk.

In addition, toxicity assessments in support of EPA's 2024 National Primary Drinking Water Regulation for PFAS (2024a) indicate that PFOA and PFOS may cause carcinogenic effects in humans and animals (*Barry et al., 2013; Bartell & Vieira, 2021; Goodrich et al., 2022; Shearer et al., 2021; Vieira et al., 2013*). In the final toxicity assessments, EPA assessed the weight of the evidence for the available cancer data and determined that PFOA and PFOS are *Likely to Be Carcinogenic to Humans* consistent with the Guidelines for Carcinogen Risk Assessment (*U.S. EPA, 2005, 2024b, 2024c, 2024d*). Additionally, in November 2023, the International Agency for Research on Cancer (IARC) evaluated the carcinogenicity of PFOA and PFOS and classified PFOA as carcinogenic to humans (Group 1) and PFOS as possibly

¹ PFOA and PFOS are part of a group of human-made chemicals known as per- and polyfluoroalkyl substances (PFAS). All references to PFOA and PFOS in this notice include their salts and structural isomers.

carcinogenic to humans (Group 2b) (Zahm, et al., 2023).

The potential for adverse health effects is exacerbated by the fact that PFOA and PFOS are persistent in the environment, which can cause long-term exposure. PFAS, including PFOA and PFOS, are sometimes referred to as “forever” chemicals because of their strong carbon-fluorine bonds in the “tail group” that cause them to be extremely resistant to degradation and to remain in the environment for long periods of time. This means that the potential for human exposure continues long after an immediate release has ended. PFOA and PFOS are also highly mobile in the environment and can migrate away from the point of initial release. Studies also show that PFOA and PFOS persist in humans and animals (*i.e.*, bioaccumulate) with estimated elimination half-lives² in humans ranging from about two to three years for PFOA to four or five years for PFOS³ (ATSDR, 2021). Because PFOA and PFOS can remain in the human body for these long durations, individuals who have consistent ongoing exposures to elevated concentrations of PFOA and PFOS (*e.g.*, individuals exposed by drinking contaminated well water) can have elevated concentrations of these compounds in their bodies which may contribute to adverse health effects (Hall et al., 2023; Hoffman et al., 2011; Kotlarz et al., 2020; Steenland et al., 2009).

PFOA and PFOS are prevalent in the environment and can be found in surface water, groundwater, soil, and air. PFOA and PFOS are prevalent because they have been produced and used since the 1940s, were among the most widely used of the PFAS constituents and persist in the environment for a long time. PFOA and PFOS have historically been used in a wide range of consumer products including carpets, clothing, fabrics for furniture, packaging for food and cookware, and firefighting foam, in addition to being used in a wide range of industrial processes. See Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 FR 54415, 54417 (proposed Sept. 6, 2022) (hereinafter “Proposed Rule” or

“Proposal”) (providing a brief history of PFOA and PFOS production and use). Domestic production and import of PFOA has been phased out by the companies participating in the 2010/2015 PFOA Stewardship Program (*U.S. EPA, 2023c*). Some uses of PFOS are ongoing. The sustained and broad use of PFOA and PFOS by industries means that many sites may be contaminated with high levels of PFOA and PFOS. Furthermore, these substances may still be released into the environment through use and disposal of legacy products and through limited ongoing uses.

PFOA and PFOS have been detected in the drinking water of millions of Americans and are widely detected in surface water samples collected from various rivers, lakes, and streams in the United States (ATSDR, 2021; Cadwallader et al., 2022; U.S. EPA, 2017, 2024a). This exposure potential is exacerbated by their persistence and mobility in the environment (Langenbach & Wilson, 2021). The prevalence of PFOA and PFOS is further demonstrated by the fact that these chemicals were detected in the blood of nearly all of the participants in the latest U.S. Centers for Disease Control and Prevention’s (CDC) National Health and Nutrition Examination Survey (NHANES) for which data is available from 2017–2018. (CDC, 2022). This information indicates widespread though generally declining exposure to PFOA and PFOS in the U.S. population. From 1999–2000 to 2017–2018, blood PFOS levels declined by more than 85%. From 1999–2000 to 2017–2018, blood PFOA levels declined by more than 70%. While serum concentrations of PFOA and PFOS in the general population are declining, there is evidence that PFOA and PFOS releases continue to result in elevated environmental concentrations and the potential for human exposure. For example, under the 2018–2019 National Rivers and Streams Assessment (NRSA) PFOS was detected in 91% of the 290 fish fillet composite samples analyzed, corresponding to PFOS being detected in 92% of the sampled population of 41,099 river miles (a statistically significant decrease of 6.7% from NRSA 2013–14) (U.S. EPA, 2023i).

In consideration of the evidence of adverse effects to human health and the environment from PFOA and PFOS exposure, their persistence and mobility in the environment, and the significant potential for human exposure due to their prevalence in the environment, EPA concludes that PFOA and PFOS may present a substantial danger to public health or welfare or the

environment when released into the environment. EPA further finds that populations located near highly contaminated sites are of particular concern because they are at risk of a disproportionately high potential of repeat exposure to PFOA and PFOS as compared to the general population and across demographic characteristics and repeated exposures increase the likelihood of adverse health effects, as discussed further in the Preamble, Section VI.A.2. d. For these reasons, designation of PFOA and PFOS as hazardous substances is warranted.

C. “Totality of the Circumstances” Analysis

Along with concluding that PFOA and PFOS each, when released, “may present a substantial danger” to public health or welfare or the environment and therefore meet the statutory designation criteria, EPA also exercised discretion to conduct an additional totality of the circumstances analysis. The analysis looks to CERCLA section 102(a), and its broader context, to help identify the information to weigh and how to balance multiple considerations. In conducting the analysis as to PFOA and PFOS, EPA identified and weighed the advantages and disadvantages of designation relative to CERCLA’s purpose alongside the formal benefit-cost analysis, including quantitative and qualitative benefits and costs, provided in the Regulatory Impact Analysis⁴ accompanying this final rule. That “totality of the circumstances” analysis confirmed EPA’s conclusion that designation is warranted because the advantages of designation outweigh the disadvantages.

EPA considered how designation supports CERCLA’s primary objectives to clean up contaminated sites and ensure the “Polluter Pays.” EPA concluded that designation best serves those objectives and that CERCLA is the best tool to address the legacy of sites contaminated with these substances and to address additional releases of these chemicals in the future. EPA considered that designation would allow EPA to deploy the full suite of CERCLA tools to identify, characterize, and clean up the most contaminated sites expeditiously. It allows EPA to ensure that those parties responsible for significant

² Elimination half-life is the length of time required for the concentration of a particular substance to decrease to half of its starting dose in the body.

³ Data from two studies in Table 3–5 of ATSDR 2021 (Seals et al., 2011 and Zang et al., 2013) were not included in EPA’s estimate of elimination half-life because their findings were significantly different for the other studies, and may not be the most representative.

⁴ The RIA was conducted in a consistent manner with economic principles and governmental guidance documents for economic analysis (*e.g.*, OMB Circular A–4 and EPA’s Guidelines for Preparing Economic Analyses) and summarized monetized costs and benefits. The RIA is a neutral analysis tool that allows the federal government to consider potential benefits and costs that may result from designation. It does not consider whether designation is warranted.

contamination bear the costs of cleaning it up. The use of these authorities will allow EPA to address more sites and to do so earlier in time than it otherwise could in the absence of designation. The ability to address more contaminated sites will provide meaningful health benefits to the communities near these sites by reducing the risk of exposure and the potential adverse health and environmental effects associated with such exposure. EPA expects these cleanups will have meaningful health benefits similar to health benefits typically associated with CERCLA actions. EPA also considered the potential quantifiable and qualitative costs and benefits of designation and the comments expressing concerns about widespread liability and litigation after designation. As explained below, EPA finds that the advantages of designation outweigh the disadvantages and that designation is warranted.

EPA's totality of the circumstances analysis considered the adverse health impacts and environmental challenges posed by PFOA and PFOS contamination. PFAS, including PFOA and PFOS, are a nationwide concern because exposure to these chemicals is linked to significant adverse human health impacts, they were in wide use, and they persist and are mobile once released into the environment. CERCLA provides the tools for addressing such contamination and provides a framework to allow EPA, and other delegated Federal agencies,⁵ to make site-specific determinations and response decisions to address instances of PFOA and PFOS releases that pose unacceptable risk. Specifically, CERCLA provides authority to respond to releases of hazardous substances (including legacy releases). CERCLA's cleanup process is comprehensive in that it can address contamination to air, water, groundwater, and soil. EPA's CERCLA response authority also extends from initial investigations to cleanup. No other statute that EPA administers provides the breadth of authority to fully address highly contaminated sites. Thus, CERCLA is the best authority to address existing contamination to mitigate the disproportionate risk borne by communities impacted by those sites. Furthermore, CERCLA is a liability statute. The CERCLA cost recovery and

enforcement provisions ensure that those parties responsible for significant contamination can be held accountable to pay for or conduct clean up. Designation is the best way for EPA to effectuate CERCLA's objectives with respect to releases of PFOA and PFOS.

EPA also considered whether designation is warranted considering EPA's existing CERCLA authority, which allows the Agency to address PFOA and PFOS as "pollutants or contaminants." CERCLA's authority to address pollutants or contaminants is much more circumscribed than the authority to address hazardous substances. Specifically, CERCLA's notification requirements for releases do not attach to pollutants or contaminants; EPA cannot address a release of pollutants or contaminants unless the Agency demonstrates that the release may present an "imminent and substantial danger"; CERCLA does not provide cost recovery authority for actions taken solely in response to releases or threats of releases of pollutants or contaminants; and CERCLA authority to compel potentially responsible parties (PRPs) to conduct or pay for response work does not extend to pollutants or contaminants. Designating PFOA and PFOS as CERCLA hazardous substances eliminates those limitations. Elimination of those limitations provides meaningful advantages.

EPA also considered the advantages of designation. The most significant direct costs associated with designation stem from the requirement for facilities to report releases of PFOA and PFOS that occur after designation. EPA determined these costs were fairly minimal and reasonable in light of the benefits of release notifications. Notification ensures transparency about new releases of PFOA and PFOS, and it allows EPA and affected States and communities to immediately evaluate a release and quickly respond, as necessary, to address risks to human health or the environment. Without notice, EPA is less able to obtain key information to help protect affected communities. Thus, the notification requirement is an advantage that is necessary to adequately protect the public from future releases. Designation also allows EPA to streamline the Federal government's response authority to address releases of PFOA and PFOS, which will allow EPA to take action sooner. EPA can also begin the lengthy process of identifying, characterizing, and cleaning up the most contaminated sites without delay, either through enforcement or EPA-funded action.

Another key advantage to designation is that it best effectuates the Polluter Pays principle underpinning CERCLA. Designation improves equities by transferring costs of cleaning up PFOA and PFOS from the Superfund ("the Fund"),⁶ which has been historically funded by taxpayer dollars, to those responsible for contamination. Absent designation, costs incurred for addressing PFOA and PFOS as pollutants or contaminants are paid for by the Fund, rather than responsible parties. Preservation of the Superfund is critical because the monies in it are insufficient to clean up all the existing contamination across the country from the more than 800 CERCLA hazardous substances as well as additional/emerging pollutants and contaminants. The ability to require PRPs to pay for PFOA and PFOS response costs means that more money will be available in the Fund to address a multitude of priorities, particularly at those sites where there is no viable PRP. It also allows EPA to address more releases earlier than it otherwise could absent designation. Further, cleanup to address PFOA/PFOS supported by designation may allow for incidental cleanup of co-contaminants, including other types of PFAS, which would also benefit human and environmental health. Because contaminated sites often have multiple contaminants of concern ("COCs"), the benefits from addressing co-contaminants may be substantial for some sites to the extent this occurs. It is critical to initiate more CERCLA actions to address PFOA and PFOS contamination now because the process from investigations to cleanups can take many years, if not decades. And, because PFOA and PFOS are persistent in the environment and highly mobile, further delay increases the extent of contamination, potentially increasing the number of individuals exposed to these substances, and also potentially increasing costs associated with cleanup.

EPA's ability to address PFOA and PFOS contamination through enforcement and EPA-funded action means more communities will be protected from disproportionate and unacceptable health risks, including communities with environmental justice

⁵ Executive Order 12580 (Jan. 23, 1987, as amended) delegates CERCLA response authority to EPA, as well as the Secretaries of Defense, Interior, Agriculture, Commerce, and Energy with respect to releases from a facility or vessel under their jurisdiction, custody or control and to the U.S. Coast Guard with respect to releases involving the coastal zone, Great Lakes waters, ports, and harbors.

⁶ Congress established the Hazardous Substances Trust Fund, otherwise known as the Superfund, to provide funding to address contamination. CERCLA also established liability for parties that contributed to releases of hazardous substances, CERCLA section 107(a), which allows EPA to shift costs from the Fund to PRPs.

(EJ) concerns. Published literature⁷ supports the conclusion that certain communities with EJ concerns have a higher likelihood of exposure to PFAS, including PFOA/PFOS. For more information, see RIA Section 6.3 *Impacts on Communities with EJ concerns: Analysis*. Cleaning up more sites with PFOA and PFOS contamination will help to decrease their exposure to PFOA and PFOS, thus reducing their risk of detrimental health effects, such as decreased immune response to vaccination, decreased birthweight, increased total cholesterol, and cancer. Cleaning up sites also promotes economic benefits, such as improved property values and making land available for reuse. Improving environmental quality can improve local economies by supporting local business, such as recreation companies or industries that rely on natural products like agriculture. Improved quality of natural resources can also contribute to ecosystem services.⁸

EPA also considered the quantitative and qualitative direct and indirect costs and benefits evaluated in the RIA as part of its totality of the circumstances analysis.⁹ EPA recognizes that

designation will lead to both direct and indirect costs. The only quantifiable direct cost associated with designation is the notification requirement, for releases of PFOA and PFOS at or above 1 pound within a 24-hour period. EPA estimates that the notification requirement will cost \$2,658 per release and that the total cost of the notification requirement is not anticipated to exceed \$1,630,000 per year.¹⁰ Notification is critical to ensuring that new releases are identified, evaluated, and addressed to the extent necessary to protect human health and the environment. EPA considers both the individual and total notification costs to be generally reasonable because of the value notification provides to impacted communities and regulatory agencies. Notification can avoid delays in evaluation of a new release. This is particularly important for persistent and mobile substances like PFOA and PFOS because early evaluation can determine whether the release poses an unacceptable risk that requires a response before PFOA and PFOA migrate away from the release. Such migration without intervention can lead to an increase in both the scope of the contamination and the costs necessary to address any identifiable risks.

With respect to indirect costs, EPA considered the costs associated with responding to releases of PFOA and PFOS at contaminated sites and with responding to future releases, either through direct EPA action with cost recovery or through enforcement. As stated above, EPA considers the ability to use the full suite of CERCLA authorities—including cost recovery and enforcement—to be an advantage of the rule. Designation eliminates current barriers to timely cleanup of contaminated sites and enables EPA to pursue parties responsible for significant contamination, these are the parties that should bear the costs of cleaning it up. When parties responsible for contamination are required to bear the cost of cleanup, more resources are made available to address additional cleanups. For example, EPA can compel a PRP to take action to address PFOA and PFOS pursuant to CERCLA section 106(a), which will then allow EPA to use Superfund monies and human

resources to address other releases at other sites. Further, every contaminated site that is addressed can reduce the disproportionate burden borne by some of the communities at risk of exposure to PFOA and PFOS from the contamination. EPA's totality of the circumstances analysis included an evaluation of the benefit-cost analysis in the RIA (including indirect costs) as well as additional qualitative considerations related to designation, such as how CERCLA functions.

EPA is required to take a measured approach in responding to contamination. For instance, CERCLA ensures that costs are considered when determining the remedy. In addition, EPA, as well as other Federal agencies, have resource constraints that require CERCLA response actions to be prioritized to address the most urgent and highest risks as specified by the National Priorities List (NPL). The NPL is the list of sites of national priority among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States and its territories. It is intended primarily to guide EPA in determining which sites warrant further investigation. Eligibility for the NPL includes identifying priority sites based upon relative risk or danger that may be posed to public health or welfare or the environment, considering the population, the hazard potential of the hazardous substances at issue, the potential for contamination of drinking water supplies, the potential for direct human contact, the potential for destruction of sensitive ecosystems, and the damages to natural resources that may affect the human food chain when determining priority. Thus, CERCLA provides EPA with the ability to identify the sites with the highest human health and environmental risks and address those sites first, and the costs of addressing contamination are considered relative to the risks the contamination poses before a remedy is selected. before a remedy is selected.

Between FY 2003 and FY 2022, only about four percent of all contaminated sites added to EPA's Active Site Inventory were placed on the NPL. Since 2013, EPA has, on average, added 11 sites¹¹ per year to the NPL, and EPA

⁷ Northeastern University—The PFAS Project Lab, "PFAS Contamination Is an Equity Issue, and President Trump's EPA Is Failing to Fix It" October 31, 2019. Available at: <https://pfasproject.com/2019/10/31/pfas-contamination-is-an-equity-issue-and-president-trumps-epa-is-failing-to-fix-it/>.

Lee, Susan, Avinash Kar, and Dr. Anna Reade, *Dirty Water: Toxic "Forever" PFAS Chemicals are Prevalent in the Drinking Water of Environmental Justice Communities*. Natural Resources Defense Council, New York. 2021. <https://www.nrdc.org/sites/default/files/dirty-water-pfas-ej-communities-report.pdf>

Stoiber, T., Evans, S., & Naidenko, O.V. (2020). Disposal of products and materials containing per- and polyfluoroalkyl substances (PFAS): A cyclical problem. *Chemosphere* 260, Accessed at: <https://doi.org/10.1016/j.chemosphere.2020.127659>.

⁸ Ecosystem services produce the life-sustaining benefits we receive from nature—clean air and water, fertile soil for crop production, pollination, and flood control.

⁹ The terms "direct" and "indirect" as used to describe potential impacts of this rule are based on established definitions used for analyses under the Regulatory Flexibility Act (RFA). EPA is aware that "direct" and "indirect" costs have distinct definitions for CERCLA purposes; those CERCLA-specific definitions were not used for estimating costs for the purpose of designation. Both EPA and SBA have applicable RFA guidance documents that were considered in developing this rule. For this rule, reporting requirements are direct effects because upon designation of PFOA and PFOS as hazardous substances, entities that release a reportable quantity within a 24-hour period are required to use established procedures to report the release immediately by telephone and provide a follow-up written report. Potential liability for response costs for addressing PFOA and PFOS releases or threatened releases is an indirect effect of designation. This is because CERCLA response actions are not required by this rule, and are discretionary and contingent upon a series of many site-specific determinations. See RIA Section 1.4

Scope of Analysis and RIA Section 6.2 *Small Entity Analysis* for more detail.

¹⁰ The designation may also result in minimal costs to federal agencies associated with CERCLA section 120(h) notice requirements when selling or transferring federally owned real property where PFOA/PFOS may be present. Future federal property sales and transfers involving property where PFOA and/or PFOS may be present is unknowable and therefore such costs are unquantifiable.

¹¹ This estimate is based on data from EPA's SEMS database with respect to non-federal NPL sites. EPA determined that it was appropriate to assess the designation's impact with respect to non-federal NPL sites only, because federal sites are generally expected to address PFOA and PFOS in the absence of designation consistent with CERCLA section 104. As discussed in Chapter 2 of the RIA, federal sites are addressing PFAS in the baseline as authorized by CERCLA section 104 and corresponding Executive Orders, as required by the

does not expect the rate at which annual additions to the NPL occur to increase as a result of this rule. Moreover, NPL listing does not trigger any immediate actions, liability, or requirements for the site.¹²

CERCLA ensures that the most significant releases that pose the most risks to human health and the environment are prioritized, and designation will allow EPA to ensure more sites are evaluated sooner, thereby protecting more communities from PFOA and PFOS contamination. In Chapter 5 of the Regulatory Impact Analysis (RIA) for this rulemaking, EPA presents quantified potential response costs¹³ that may occur after designation despite the uncertainty of future response actions. Every site is unique and the extent of action necessary to mitigate risks depends on many factors, which leads to uncertainties regarding response activities and associated costs. Notwithstanding these uncertainties, EPA used existing data to estimate response costs for PFOA and PFOS. Specifically, EPA used response costs data for EPA-lead response actions, potential costs associated with cleanup methods and technologies available to address PFOA and PFOS, and information about conditions at contaminated sites. EPA then used that data to assess the incremental costs of cleanup associated with addressing PFOA/PFOS contamination. Data available to EPA demonstrates that PFOA and PFOS generally are not found in isolation; rather, those substances are typically co-located or commingled with other “contaminants of concern” that on their own support a remedy. The

NDAA, and consistent with federal facilities agreements under CERCLA section 102(a). Therefore, EPA expects that federal sites will address PFOA and PFOS contamination in the absence of the final rule. With federal sites taking action to address PFAS in the baseline, indirect impacts of the final rule will likely be related to actions taken at non-federal sites. For additional context, since FY 2000 EPA has added 8 federal sites to the NPL.

¹² EPA considered the portion of non-federal NPL sites that may be impacted by designation depending on site-specific circumstances. Of final, proposed, or deleted non-federal NPL sites that have been tested for PFOA and/or PFOS, an estimated 33.1% of NPL sites have detectable levels of PFOA and/or PFOS. See Section 3.3 of the RIA for more details about this estimate. In evaluating the designation’s impact on non-federal NPL sites, this estimate is instructive and serves as a benchmark for assessing designation’s potential impact to those sites. There are currently 5 sites where either PFOA or PFOS contributed to NPL listing.

¹³ The term “response” may include actions including but not limited to: site assessment, investigation, remedial action, and removal action. See CERCLA section 101(25). For a description of details on the differences between remedial and removal actions and other response activities under CERCLA, please see Section 2.1 of the RIA.

estimated incremental costs to address PFOS and/or PFOA releases at NPL sites are those that the Agency believes it would incur absent the designation, which can be transferred to viable, liable parties as a result of designation. As EPA’s funds would then be used for additional fund-led efforts to address contamination not addressed under the baseline, there will be a net increase in spending on response activities. This ability to transfer costs enables EPA to investigate and clean up additional NPL sites to address potential risks posed by any of the more than 800 hazardous substances, including PFOA and PFOS. EPA estimated the potential transfer of response costs associated with NPL sites range from \$10.3M to \$51.7M per year (at a 2% discount rate), depending on the cost premium associated with the response work to address PFOA and/or PFOS in addition to other Contaminants of Concern (COCs)¹⁴ at a given NPL site. Because EPA would use these funds for additional fund-led efforts to address contamination not addressed under the baseline, the transfer of \$10.3M to \$51.7M would result in additional costs of this same amount. Additionally, indirect costs associated with potential enforcement actions that may result in additional response activities for PFOA and PFOS at non-NPL sites are estimated to range from \$327,000 to \$18,100,000 per year (at the 2% discount rate), depending on the type of response actions taken at a given site. See RIA Section.

5.1 Indirect Costs and Transfers

EPA expects response costs to address PFOA and PFOS to represent an incremental increase above the cost of addressing other substances at NPL sites because, more often than not, PFOA and PFOS are likely to be co-located with or commingled with other substances. EPA also expects that costs to address PFOA and PFOS will fall within typical response cost ranges for actions to address other hazardous substances. This is because many of the same response and cleanup methods available, as noted in the *Interim Guidance on the Destruction and Disposal of Perfluoroalkyl and Polyfluoroalkyl Substances and Materials Containing Perfluoroalkyl and Polyfluoroalkyl Substances—Version 2 (2024)*,¹⁵ to address other hazardous

¹⁴ Contaminants of Concern (COCs) are chemicals identified during in-depth site studies (Remedial Investigation/Feasibility Study) that need to be addressed by a cleanup action because they pose a potential threat to human health or the environment.

¹⁵ *Interim PFAS Destruction and Disposal Guidance; Notice of Availability for Public*

substances can be used to address PFOA and PFOS (e.g., dig and haul for soil and granulated activated carbon for water). Moreover, EPA expects that response and cleanup costs may decrease over time as associated methods improve. Finally, by addressing PFOA and PFOS releases earlier, EPA can mitigate the spread of contamination, which likely mitigates the costs of an otherwise more wide-spread cleanup.

EPA also considered liability and litigation that may arise after designation. CERCLA is designed to ensure that those responsible for contamination pay to clean it up. For PRPs that have significantly contributed to contamination, imposing CERCLA liability is wholly consistent with CERCLA and necessary to address the public health threat posed by PFOA and PFOS. However, EPA also gave serious consideration to potential liability for parties that have not played a significant role in contamination. Those parties include entities that did not generate PFOA- or PFOS-contaminated materials. EPA evaluated CERCLA liability limitations, EPA’s enforcement policies, settlement protections for settling and non-settling parties, and parameters for CERCLA lawsuits to resolve who should pay and how much. Those mechanisms, combined with decades of historical practice, show that CERCLA liability is not unlimited; enforcement is targeted; and parties’ ability to recover costs from other PRPs is constrained.

Although CERCLA’s liability structure is broad, both the statute and EPA enforcement discretion policies may constrain a party’s ability to secure reimbursement of response costs.¹⁶ CERCLA includes liability exemptions as well as affirmative defenses against liability. See, e.g., CERCLA section 101(10), 107(b), (d), (k). Parties must incur response costs before they can recover those costs from other viable, liable parties. And parties must prove that response costs incurred are consistent with the National Contingency Plan, CERCLA’s implementing regulations. *Id.* section 107(a)(4)(B). EPA’s enforcement authorities and policies can serve as a deterrent for responsible parties to pursue entities that did not contribute

Comment was published in the **Federal Register** on April 16, 2024 (89 FR 26879) <https://www.govinfo.gov/content/pkg/FR-2024-04-16/pdf/2024-08064.pdf>.

¹⁶ Other Federal agencies including DOD, DOE, USDA, and DOI have delegated CERCLA authority. EPA’s policies apply only to EPA and its exercise of enforcement discretion. Please note that EPA’s policies are not regulations and do not create new legal obligations or limit or expand obligations under any Federal, State, Tribal or local law.

significantly to contamination.¹⁷ EPA has a well-proven track record of developing enforcement discretion policies that have been effective and well-received.¹⁸ EPA's enforcement policies, such as its policy regarding de minimis or de micromis parties and innocent landowner policies, have proven to be useful tools in convincing responsible parties not to pursue entities covered by these enforcement discretion policies. Finally, the statute provides that a party that resolves its potential liability with the United States or a State in a judicially approved settlement is entitled to contribution protection—the ability to block third-party claims for matters addressed in the settlement. These liability limitations and mitigation tools are

¹⁷ CERCLA is designed to achieve the cleanup of contaminated sites by ensuring that those responsible for the contamination pay to clean it up, which EPA supports through its longstanding “enforcement first” policy. (“*Guidelines for Using the Imminent Hazard, Enforcement and Emergency Response Authorities of Superfund and Other Statutes*,” 1982.) Furthermore, CERCLA's settlement provisions are designed to support and achieve those outcomes by making it efficient for EPA to secure clean up from those that have significantly contributed to contamination. See, e.g. Section 122(a) (“Whenever practical and in the public interest, . . . [EPA] shall act to facilitate agreements . . . that are in the public interest and minimize litigation.”); Section 122(g)(1) (allowing for “expedited” *de minimis* settlements for “minor portions of the response costs”). In practice, CERCLA's settlement parameters incentivize PRPs that likely bare a large share of responsibility to settle with EPA, which in turn can deter those same parties from pursuing other PRPs. Ultimately, settlement is generally less expensive than litigation and can serve as an effective mechanism for achieving the true goal of CERCLA—that the parties most responsible for contamination pay to clean it up.

¹⁸ While EPA's enforcement discretion policies themselves are not regulations and do not create new legal obligations or limit or expand obligations under any federal, state, tribal or local law, such policies have influenced Congress to create new laws that have been upheld by courts. The Small Business Liability Relief and Brownfields Revitalization Act of 2002 (“Brownfields Amendments”) illustrate how EPA's policies have influenced Congressional action. The Brownfields Amendments amended CERCLA and promoted the cleanup, reuse, and redevelopment of sites by addressing potential liability concerns associated with contaminated, potentially contaminated, and formerly contaminated properties. The Brownfields Amendments provided important self-implementing liability limitations for certain categories of landowners, enabling private parties to save time and costs, in part, by reducing EPA involvement in most private party transactions. EPA launched the Brownfields Initiative in the 1990s and developed guidance and tools to help further the Initiative's goals to empower states, communities, and other stakeholders to assess, safely clean up, sustainably reuse, and prevent future brownfield sites. EPA's Brownfields Initiative established a number of practices, policies, and guidances to support cleanup and reuse at contaminated property. In 2002, many elements of EPA's Brownfields Initiative were codified into CERCLA by the Brownfields Amendments.

more fully discussion in Section VI.B.2. EPA concludes that designation is not expected to result in excessive litigation and that CERCLA will continue to operate as it has for decades. Indeed, CERCLA's liability framework, coupled with EPA enforcement policies, has operated in a rational way for the more than 800 CERCLA hazardous substances already within its purview, some of which are similar to PFOA and PFOS in terms of ubiquity, mobility, and persistence. Heavy metals, such as arsenic and chromium, are persistent, and in at least some places, prevalent in the environment. Although EPA understands that designation will result in new litigation regarding PFOA and PFOS releases for responsible parties, forty years of CERCLA experience indicates that designation should not result in unusual CERCLA liability or litigation outcomes for parties who did not significantly contribute to the contamination as a result of this designation, and, therefore, the potential for litigation should not be a barrier to designation.

EPA aims to further support reasonable liability and litigation outcomes through the implementation of its CERCLA enforcement program. EPA will continue to implement its “Enforcement First” policy (“*Guidelines for Using the Imminent Hazard, Enforcement and Emergency Response Authorities of Superfund and Other Statutes*,” 1982)—in which EPA aims to compel viable PRPs to conduct and pay for investigation and cleanup before resorting to the Fund—which supports the Polluter Pays principle. EPA has a proven track record of developing and applying enforcement discretion policies that are effective and well-received by the public and interested parties, and courts have sanctioned this approach. Enforcement discretion policies historically have given EPA the needed flexibility to offer liability comfort or protections when circumstances warrant. For example, for more than 30 years, EPA has maintained its “Policy Towards Owners of Residential Property at Superfund Sites,” which generally provides that EPA will not take action against residential property owners provided their own actions do not cause a release that requires a response action.

Although EPA believes existing limitations in CERCLA coupled with existing CERCLA enforcement policies mitigate concerns about liability that may arise after designation, EPA recognizes that some parties that do not bear primary responsibility for litigation may be sued and face uncertain litigation costs as a consequence. EPA

believes that the statutory safeguards described above will likely limit this type of litigation, or at a minimum, limit adverse outcomes. Even if litigation costs are incurred by parties that do not bear primary responsibility, EPA does not believe that these potential costs will outweigh the substantial advantages from the rule.

While some commenters shared concerns that these mechanisms may not mitigate concerns, these commenters did not support their concerns with any specific data or evidence. Generally, in enforcement matters, the facts, circumstances, and equities of a case help dictate which parties the Agency will pursue. EPA, intends to develop a policy, consistent with those limitations and policies, that explains EPA's priorities for enforcement in the context of PFOA and PFOS releases.¹⁹ As EPA states in the FY 2024–2027 National Enforcement and Compliance Initiatives (NECI), the Agency expects to “focus on implementing EPA's PFAS Strategic Roadmap and holding responsible those who significantly contribute to the release of PFAS into the environment . . . much as [EPA] exercises CERCLA enforcement discretion in other areas.”²⁰ Available at <https://www.epa.gov/system/files/documents/2023-08/fy2024-27necis.pdf>.

In sum, EPA's additional “totality of the circumstances” analysis affirms that designation is warranted. The totality of the circumstances analysis gave particular weight to the scientific basis for designation—that PFOA and PFOS may present substantial danger when released into the environment. EPA also concluded that designation best addresses the problem posed by PFOA and PFOS in the environment, particularly for those communities living in and around highly contaminated sites, and that designation meaningfully furthers CERCLA's purposes. Designation ensures that EPA has the full suite of CERCLA tools necessary to address contamination and that EPA is able to take more timely response actions, including those necessary to address immediate risks. EPA's analysis shows that designation results in quantitative and qualitative benefits, including significant health

¹⁹ EPA received valuable public input that EPA is considering in drafting a CERCLA PFAS enforcement discretion policy. EPA held two public listening sessions in March 2023 and several stakeholder meetings in 2023 with the agriculture sector, water sector, pulp and paper sector, solid waste management sector, and NGOs to hear stakeholder concerns regarding potential CERCLA PFAS enforcement concerns.

²⁰ <https://www.epa.gov/enforcement/national-enforcement-and-compliance-initiatives>.

benefits. EPA's analysis accounts for potential direct and indirect costs that may result from designation. Direct costs, particularly for release notifications, are minimal and reasonable in light of the substantial benefits notification provides. EPA assessed the potential for litigation and liability costs, particularly for parties that have not significantly contributed to contamination. EPA was unable to quantify those costs with reasonable certainty but conducted a qualitative assessment of CERCLA's liability provisions and enforcement policies to assess the potential magnitude of such costs. EPA's analysis shows that designation should not result in excessive or unreasonable liability and litigation outcomes. Rather, CERCLA will continue to operate as it has for decades. EPA concludes that the substantial advantages of designation outweigh potential disadvantages, and that designation is warranted based on its additional totality of the circumstances analysis.

D. Conclusion

EPA concludes that designation is warranted based solely on its finding that PFOA and PFOS may present a substantial danger to the public health or welfare or the environment when released into the environment. Additionally, EPA believes designation is warranted based on its totality of the circumstances analysis. The latest science is clear: human exposure to PFOA and PFOS is linked to significant health risks. CERCLA provides the tools necessary to address those risks posed by significant contamination of PFOA and PFOS in the environment. CERCLA is designed to target and prioritize sites that present unreasonable risk to human health and the environment and serves those communities that are most vulnerable to potential adverse health risks from exposure. Designation eliminates barriers to cleanup and enables EPA to secure more timely actions. It streamlines response authority, provides a mechanism for parties to recover response costs from PRPs, and makes available CERCLA enforcement authority to compel PRPs to conduct or pay for cleanup. Designation also requires facilities to notify Federal, State, local, and Tribal authorities, as well as potentially injured parties, of significant releases. EPA considered the potential costs that may arise after designation, including both quantified and unquantified costs, and finds that they are outweighed by the substantial advantages of designation. Further delay in accessing CERCLA's complete suite of tools to

address contamination will allow PFOA and PFOS more time to migrate within the environment and exacerbate existing contamination. Thus, designation best achieves CERCLA's primary objectives—the timely cleanup of contaminated sites and ensuring that those responsible for contamination pay to clean it up. Designation will help protect communities near contaminated sites from potential health risks. For all these reasons, discussed in detail below, EPA concludes that designation of both PFOA and PFOS as CERCLA hazardous substances is warranted under the statute.

II. General Information

A. What action is the Agency taking?

As proposed on September 6, 2022, EPA is designating PFOA and PFOS, including their salts and structural isomers, as hazardous substances under section 102(a) of CERCLA. See *Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances*, 87 FR 54415 (Sept. 6, 2022). The list of hazardous substances in Table 302.4 of 40 CFR part 302 is amended to include PFOA, PFOS and their salts and structural isomers. (*Note: EPA's CompTox Chemicals Dashboard* (<https://comptox.epa.gov/dashboard/>) is a resource that can be used to identify salts and structural isomers of PFOA and PFOS. EPA periodically updates the *CompTox Chemicals Dashboard* to include new information on PFAS, including PFOA and PFOS.)

B. What are the direct effects of this Action?

The designation of PFOA and PFOS, including their salts and structural isomers, as hazardous substances, can trigger the applicability of release reporting requirements under CERCLA sections 103 and 111(g), and accompanying regulations, and section 304 of the Emergency Planning and Community Right-to-Know Act (EPCRA). Facilities must report releases of hazardous substances at or above the reportable quantity (RQ) within a 24-hour period. For PFOA and PFOS, a default²¹ reportable quantity (RQ) of one pound is assigned to these substances pursuant to CERCLA section 102(b). Therefore, consistent with CERCLA section 103(a), any person in charge of a vessel or facility is required, as soon as they have knowledge of any release (other than a federally permitted release) of any PFOA, PFOS, their salts

or structural isomers from such vessel or facility in quantities equal to or greater than the RQ of one pound or more within a 24-hour period, to immediately notify the National Response Center (NRC) of such a release. The reporting requirements are further codified in 40 CFR 302.6(a). <https://www.ecfr.gov/current/title-40/chapter-I/subchapter-I/part-302/section-302.6>.

In addition to CERCLA 103(a), EPCRA section 304 requires facility owners or operators to immediately notify their community emergency coordinator for local emergency planning committee (LEPC) (or Tribal emergency planning committee (TEPC)), if established, for any area likely to be affected by the release and to notify the State Emergency Response Commission (SERC) (or Tribal Emergency Response Commission (TERC)) of any State or Tribal region likely to be affected by the release of these substances. These entities may have specific release reporting requirements under the State, Tribal, and local EPCRA program. <https://www.epa.gov/epcra/state-contact-information-epcra-section-304-emergency-release-notification>.

EPCRA section 304 also requires facilities to submit a follow-up written report to their SERC (or TERC) and the LEPC (or TEPC) as soon as practicable after the release. EPCRA section 304 requirements are codified in 40 CFR 355.30 to 355.43. <https://www.ecfr.gov/current/title-40/chapter-I/subchapter-I/part-355/subpart-C>.

CERCLA section 111(g) requires that owners or operators of any vessel or facility “provide reasonable notice to potential injured parties by publication in local newspapers serving the affected area” of any release of these substances.

CERCLA section 120(h) requires Federal agencies that sell or transfer real property to provide notice of the presence of hazardous substances in certain circumstances. CERCLA section 120(h) also requires Federal agencies to provide a covenant warranting that “all remedial action necessary to protect human health and the environment with respect to any [hazardous substances] remaining on the property has been taken before the date of such transfer, and any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States.”

As provided by CERCLA section 306, the Department of Transportation (DOT) is required to regulate any substance added to the CERCLA list as hazardous materials in accordance with the Hazardous Materials Transportation Act (HMTA).

²¹ 42 U.S.C. 9602(b). <https://www.govinfo.gov/content/pkg/USCODE-2021-title42/pdf/USCODE-2021-title42-chap103-subchapI-sec9601.pdf>.

While these are the only direct, automatic requirements of designating PFOA and PFOS as CERCLA hazardous substances, EPA has also considered other, indirect impacts in the *Regulatory Impact Analysis (RIA) of the Final Rulemaking to Designate Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances*, available in the docket, including those that are expected to facilitate cleanups and reduce human and environmental exposure to these hazardous substances.

C. Does this Action apply to me?

The seven broad categories of entities that may potentially be affected by this

action include, but are not limited to: (1) PFOA and/or PFOS manufacturers (including importers and importers of articles that contain these substances); (2) PFOA and/or PFOS processors; (3) manufacturers of products containing PFOA and/or PFOS; (4) downstream users of PFOA and PFOS; (5) downstream users of PFOA and/or PFOS products; (6) waste management facilities; and (7) wastewater treatment facilities.²² (*Note: PFOA and PFOS*

²² The proposed rule listed 5 broad categories of entities potentially affected by this designation. This action separated two of these categories to be clearer. Entities listed as downstream product manufacturers and users of PFOA and/or PFOS products in the proposed rule are split into two

noted here include their salts and structural isomers.) The following list of North American Industrial Classification System (NAICS) codes identifies entities that may be directly or indirectly affected by this action. It is not intended to be exhaustive, but rather a guide to help readers determine whether this action applies to them. Potentially affected entities may include:

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separate categories in the final rule (see (4) and (5)). Entities listed as waste management and wastewater treatment facilities in the proposed rule are split into two categories in the final rule (see (6) and (7)).

Sector	Industry Group	6-Digit NAICS	6-Digit NAICS Description
Oil and Gas Extraction	Oil and Gas Extraction	211120	Crude Petroleum Extraction
		211130	Natural Gas Extraction
Mining (except Oil and Gas)	Metal Ore Mining	212221	Gold Ore Mining
		212230	Copper, Nickel, Lead, and Zinc Mining
		212291	Uranium-Radium-Vanadium Ore Mining
Utilities	Water, Sewage and Other Systems	221320	Sewage Treatment Facilities
Textile Mills	Fiber, Yarn, and Thread Mills	313110	Fiber, Yarn, and Thread Mills
	Fabric Mills	313210	Broad Woven Fabric Mills
		313220	Narrow Fabric Mills and Schiffli Machine Embroidery
		313230	Nonwoven Fabric Mills
		313240	Knit Fabric Mills
	Textile and Fabric Finishing and Fabric Coating Mills	313310	Textile and Fabric Finishing Mills
		313320	Fabric Coating Mills
Textile Product Mills	Textile Furnishings Mills	314110	Carpet and Rug Mills
	Other Textile Product Mills	314910	Textile Bag and Canvas Mills
		314999	All Other Miscellaneous Textile Product Mills
Leather and Allied Product Manufacturing	Leather and Hide Tanning and Finishing	316110	Leather and Hide Tanning and Finishing
	Other Leather and Allied Product Manufacturing	316998	All Other Leather Good and Allied Product Manufacturing
Paper Manufacturing	Pulp, Paper, and Paperboard Mills	322121	Paper (except Newsprint) Mills
		322130	Paperboard Mills
	Converted Paper Product Manufacturing	322219	Other Paperboard Container Manufacturing
		322220	Paper Bag and Coated and Treated Paper Manufacturing
Printing and Related Support Activities	Printing and Related Support Activities	323111	Commercial Printing (except Screen and Books)
		323120	Support Activities for Printing
Petroleum and Coal Products Manufacturing	Petroleum and Coal Products Manufacturing	324110	Petroleum Refineries
		324191	Petroleum Lubricating Oil and Grease Manufacturing

Sector	Industry Group	6-Digit NAICS	6-Digit NAICS Description
Chemical Manufacturing	Basic Chemical Manufacturing	325110	Petrochemical Manufacturing
		325120	Industrial Gas Manufacturing
		325130	Synthetic Dye and Pigment Manufacturing
		325180	Other Basic Inorganic Chemical Manufacturing
		325193	Ethyl Alcohol Manufacturing
		325199	All Other Basic Organic Chemical Manufacturing
	Resin, Synthetic Rubber, and Artificial and Synthetic Fibers and Filaments Manufacturing	325211	Plastics Material and Resin Manufacturing
		325212	Synthetic Rubber Manufacturing
		325220	Artificial and Synthetic Fibers and Filaments Manufacturing
	Pesticide, Fertilizer, and Other Agricultural Chemical Manufacturing	325320	Pesticide and Other Agricultural Chemical Manufacturing
	Pharmaceutical and Medicine Manufacturing	325411	Medicinal and Botanical Manufacturing
	Paint, Coating, and Adhesive Manufacturing	325510	Paint and Coating Manufacturing
	Soap, Cleaning Compound, and Toilet Preparation Manufacturing	325611	Soap and Other Detergent Manufacturing
		325612	Polish and Other Sanitation Good Manufacturing
		325613	Surface Active Agent Manufacturing
	Other Chemical Product and Preparation Manufacturing	325910	Printing Ink Manufacturing
		325992	Photographic Film, Paper, Plate, and Chemical Manufacturing
		325998	All Other Miscellaneous Chemical Product and Preparation Manufacturing
Plastics and Rubber Products Manufacturing	Plastics Product Manufacturing	326112	Plastics Packaging Film and Sheet (including Laminated) Manufacturing
		326113	Unlaminated Plastics Film and Sheet (except Packaging) Manufacturing
		326121	Unlaminated Plastics Profile Shape Manufacturing
		326130	Laminated Plastics Plate, Sheet (except Packaging), and Shape Manufacturing

Sector	Industry Group	6-Digit NAICS	6-Digit NAICS Description
	Rubber Product Manufacturing	326211	Tire Manufacturing (except Retreading)
Nonmetallic Mineral Product Manufacturing	Glass and Glass Product Manufacturing	327215	Glass Product Manufacturing Made of Purchased Glass
	Cement and Concrete Product Manufacturing	327310	Cement Manufacturing
	Other Nonmetallic Mineral Product Manufacturing	327999	All Other Miscellaneous Nonmetallic Mineral Product Manufacturing
Primary Metal Manufacturing	Steel Product Manufacturing from Purchased Steel	331221	Rolled Steel Shape Manufacturing
	Alumina and Aluminum Production and Processing	331313	Alumina Refining and Primary Aluminum Production
Fabricated Metal Product Manufacturing	Coating, Engraving, Heat Treating, and Allied Activities	332812	Metal Coating, Engraving (except Jewelry and Silverware), and Allied Services to Manufacturers
		332813	Electroplating, Plating, Polishing, Anodizing, and Coloring
	Other Fabricated Metal Product Manufacturing	332999	All Other Miscellaneous Fabricated Metal Product Manufacturing
Machinery Manufacturing	Industrial Machinery Manufacturing	333249	Other Industrial Machinery Manufacturing
	Commercial and Service Industry Machinery Manufacturing	333316	Photographic and Photocopying Equipment Manufacturing
		333318	Other Commercial and Service Industry Machinery Manufacturing
Computer and Electronic Product Manufacturing	Communications Equipment Manufacturing	334220	Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing
	Audio and Video Equipment Manufacturing	334310	Audio and Video Equipment Manufacturing
	Semiconductor and Other Electronic Component Manufacturing	334412	Bare Printed Circuit Board Manufacturing
		334413	Semiconductor and Related Device Manufacturing
		334418	Printed Circuit Assembly (Electronic Assembly) Manufacturing
		334419	Other Electronic Component Manufacturing
Electrical Equipment,	Other Electrical Equipment and	335931	Current-Carrying Wiring Device Manufacturing

Sector	Industry Group	6-Digit NAICS	6-Digit NAICS Description
Appliance, and Component Manufacturing	Component Manufacturing	335999	All Other Miscellaneous Electrical Equipment and Component Manufacturing
Transportation Equipment Manufacturing	Motor Vehicle Parts Manufacturing	336399	All Other Motor Vehicle Parts Manufacturing
Miscellaneous Manufacturing	Medical Equipment and Supplies Manufacturing	339112	Surgical and Medical Instrument Manufacturing
Merchant Wholesalers, Nondurable Goods	Chemical and Allied Products Merchant Wholesalers	424690	Other Chemical and Allied Products Merchant Wholesalers
	Petroleum and Petroleum Products Merchant Wholesalers	424710	Petroleum Bulk Stations and Terminals
Furniture and Home Furnishings Stores	Home Furnishings Stores	442291	Window Treatment Stores
Rail Transportation	Rail Transportation	482111	Freight Rail
Truck Transportation	General Freight Trucking	484110	Truck Freight
Support Activities for Transportation	Support Activities for Air Transportation	488119	Other Airport Operations
	Support Activities for Water Transportation	488310	Port and Harbor Operators
Administrative and Support Services	Services to Buildings and Dwellings	561740	Carpet and Upholstery Cleaning Services
Waste Management and Remediation Services	Waste Collection	562112	Hazardous Waste Collection
	Waste Treatment and Disposal	562211	Hazardous Waste Treatment and Disposal
		562212	Solid Waste Landfill
		562213	Solid Waste Combustors and Incinerators
		562219	Other Nonhazardous Waste Treatment and Disposal
Repair and Maintenance	Automotive Repair and Maintenance	811192	Car Washes
	Personal and Household Goods Repair and Maintenance	811420	Reupholstery and Furniture Repair
Personal and Laundry Services	Drycleaning and Laundry Services	812300	Dry Cleaner and Laundry Operators

Sector	Industry Group	6-Digit NAICS	6-Digit NAICS Description
Justice, Public Order, and Safety Activities	Justice, Public Order, and Safety Activities	922160	Fire Protection
National Security and International Affairs	National Security and International Affairs	928110	National Security

BILLING CODE 6560–50–C*D. What is the Agency's authority for taking this action?*

CERCLA section 102(a) authorizes the EPA Administrator to “promulgate and revise as may be appropriate, regulations designating as hazardous substances, . . . such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment[.]” CERCLA section 102(b) establishes a default RQ of one pound for releases of designated hazardous substances. *See Section IV of this document for additional details on EPA's authority, including statutory criteria.*

E. What are CERCLA's primary objectives, and how does it operate to protect human health and the environment?

CERCLA establishes broad Federal authority to address past, current, and future releases or threat of releases of hazardous substances and pollutants or contaminants. The statute's primary objectives are to promote the timely cleanup of contaminated sites and to ensure parties responsible for contamination bear site cleanup costs. CERCLA is unlike traditional environmental statutes that prospectively regulate, among other things, how facilities operate and provide limitations on discharges, emissions, releases, or disposal of certain chemicals into water, air, or land. Instead, CERCLA is designed to address contamination already in the environment on a site-specific basis, which includes evaluating the nature, extent, and risk to human health and/or the environment from the release. CERCLA affords EPA broad discretion as to whether or how to respond to a release. It includes cost-shifting mechanisms and liability provisions that support PRP cleanups rather than relying on the Fund.

1. How does CERCLA authority and causes of action differ in key respects between “hazardous substances” and “pollutants or contaminants”?

For hazardous substances,²³ CERCLA section 103(a) requires reporting of releases. CERCLA requires any person in charge of a vessel or facility to immediately notify the NRC when there is a release of a hazardous substance in an amount equal to or greater than the RQ for that substance. Notice given to the NRC under CERCLA serves to inform the Federal Government of a release so that Federal personnel can evaluate the need for a response pursuant to CERCLA and its accompanying regulations, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). (40 CFR part 300).

CERCLA response authorities apply to releases or the threat of releases into the environment of “hazardous substances” and/or “pollutants or contaminants”²⁴; however, the CERCLA authorities available to address each type of release differs. With respect to *hazardous substances*, the Agency can conduct response actions if there is a release or threatened release; however, for pollutants or contaminants, EPA can only respond if it establishes that the release may present an imminent and substantial danger. (CERCLA section 104(a)).

In addition, CERCLA's cost recovery and some specific enforcement authorities extend to hazardous substances but not pollutants or

contaminants. (CERCLA section 107(a), 106(a)). For hazardous substances, EPA can recover all response costs (e.g., investigation and cleanup costs) from PRPs the Agency incurs that are not inconsistent with the NCP and require PRPs to conduct the response. CERCLA also authorizes non-governmental entities (including private parties) who conduct cleanup activities related to hazardous substance releases to recover response costs from liable parties provided the costs incurred are consistent with the NCP.

2. What response actions does CERCLA authorize?

CERCLA authorizes two types of response actions—removal and remedial. (CERCLA section 101(25)). Removals include “such actions as may be necessary taken in the event of the threat of release,” including those “necessary to prevent, minimize, or mitigate damage to the public health or welfare or the environment.” (CERCLA section 101(23)). Removals are typically short-term response actions that may be taken to address releases or threatened releases requiring prompt action; they are limited in cost and duration unless specific criteria are met. (CERCLA section 104(c)(1)). Remedial includes those actions consistent with “permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment” (CERCLA section 101(24)). Remedial actions (RAs) entail longer-term and more complex cleanup actions designed to provide permanent solutions to mitigate risks typically associated with chronic exposures often not immediately life-threatening.

²³ CERCLA defines “hazardous substance” primarily by reference to other environmental statutes (i.e., the Clean Water Act, Solid Waste Disposal Act, Clean Air Act and the Toxic Substances Control Act) and includes substances designated as hazardous under CERCLA section 102. (CERCLA section 101(14)).

²⁴ CERCLA defines the term “pollutant or contaminant” to include, “but not be limited to, any element, substance, compound, or mixture . . . which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism . . . will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions . . . or physical deformations.” (CERCLA 104).

3. What discretionary authority does CERCLA provide and how does CERCLA prioritize cleanup actions?

EPA has broad discretionary authority to decide on a site-specific basis whether to respond to a release or threat of release and to prioritize the order in which it undertakes response actions determined to be necessary. (CERCLA section 105(a)(8)(A)). Site-specific decisions take into consideration factors such as relative risk, hazard potential, population at risk and the potential for drinking water contamination. Those considerations are embodied in the NCP. (*See, e.g.*, 40 CFR 300.410, 300.415, 300.430).

4. What is the CERCLA cleanup process and what role does the National Priorities List (NPL) play in it?

Before identifying an appropriate response action—removal or remedial—EPA or another lead agency, may first identify a release, investigate its scope and extent, and evaluate its potential risk to human health and the environment. Superfund cleanups typically begin with a preliminary assessment/site inspection, which includes reviews of historical information and site visits to evaluate the potential for a release of hazardous substances (CERCLA section 104(b); 40 CFR 300.410, 300.430(b)). After an initial investigation, EPA has several options, including determining a release does not pose sufficient risk to warrant further action and deciding that the release warrants a CERCLA response action. EPA may also defer the site to the State where it is located.

The NCP provides guidance on the process to determine whether to undertake a removal or a remedial action. For removal actions, the NCP provides that the lead agency may take such an action when it has determined “that there is a threat to public health or welfare” based on a set of factors such as actual or potential exposure to drinking water supplies, the potential for hazardous substances to migrate, and the availability of other appropriate Federal or State response mechanisms to address the release. (40 CFR 300.415(b)). For remedial actions, EPA first evaluates a site for consideration as an NPL site, (40 CFR part 300 App. A); only sites added to the NPL are eligible for Superfund monies to conduct remedial actions.

A site’s addition to the NPL does not trigger any immediate action but represents an initial step towards a site’s

potential long-term remedy; NPL sites are among the Nation’s worst contaminated sites. EPA has placed on the NPL only about 3 percent of the 53,400 sites assessed since the program’s beginning in 1980.

5. What is the process for identifying and selecting remedial actions under CERCLA?

EPA can only begin the process to identify potential remedial actions after completing the careful and deliberate process to add a site to the NPL. CERCLA and the NCP together prescribe a comprehensive and detailed process for evaluating, selecting, and implementing remedies, which includes State and community roles. (40 CFR 300.430). The process’ first step is conducting a remedial investigation and feasibility study (RI/FS) to assess site conditions and to evaluate the remedial alternatives identified. (40 CFR 300.430(a)(2)). Next, the NCP mandates consideration of several factors by which to evaluate remedial alternatives. (40 CFR 300.430(e)(9)). At a minimum, all eligible remedies must be protective of human health and the environment and comply with all applicable or relevant and appropriate requirements (ARARs).²⁵ (CERCLA section 121(a), (d); 40 CFR 300.430(f)(1)(i)(A)). The alternatives satisfying these two threshold criteria are then further evaluated against one another using balancing criteria, including factors such as long-term effectiveness and permanence; toxicity, mobility or volume reduction; implementability; cost; and finally modifying criteria of State acceptance; and community acceptance. (40 CFR 300.430(e)(9), (f)).

A remedial action’s selection must include public review and comment on the lead agency’s preferred alternative as presented in a proposed plan. (CERCLA section 117; 40 CFR 300.430(f)(2)). EPA documents its selection of a remedy in a record of decision. (40 CFR 300.430(f)(1)(ii)). A site’s selected remedy then enters the remedial design (RD)/remedial action (RA) stage in which the remedy is designed and constructed, followed in some instances by an Operation & Maintenance (O&M) period.²⁶ (40 CFR

²⁵ ARARs may be waived under certain circumstances. (CERCLA section 121(d)(4)).

²⁶ O&M is an important component of a Superfund response, ensuring that the remedy continues to perform as intended and remains protective of human health and the environment. O&M activities may include remedy operation,

300.435(a), (f)). Five-year reviews (FYR)²⁷ are required at sites where completed remedial actions result in any hazardous substances, pollutants, or contaminants remaining onsite. (CERCLA section 121(c)). They also must be conducted where remedial actions result in any hazardous substances, pollutants, or contaminants remaining at the site above levels that allow for unlimited use and unrestricted exposure after the initiation of the selected remedial action. (40 CFR 300.430(f)(4)(ii)).

6. How does CERCLA’s framework ensure that those responsible for contamination pay for cleanup?

A critical CERCLA component is holding those responsible for the contamination accountable to perform or pay for its cleanup. EPA’s preference, and one of CERCLA’s main goals, is to have PRPs be responsible for the cleanup of releases of hazardous substances. EPA can compel a PRP to take action pursuant to a CERCLA enforcement instrument. (CERCLA section 106). EPA can also perform the response action using Fund money and then seek reimbursement of costs incurred from liable parties in litigation, (CERCLA section 107(a)), or subsequent cost recovery settlement (CERCLA section 122(a)). Under CERCLA, potentially liable parties include: (1) current owners and operators of facilities, (2) past owners and facility operators in place at the time of hazardous substance disposal, (3) any person who “arranged for disposal” of that facility’s hazardous substances, and (4) any person that accepts hazardous substances for “transport to disposal or treatment facilities.” (CERCLA section 107(a)(1)–(4)). If found liable under the statute, a PRP is financially responsible for the government’s response costs incurred not inconsistent with the NCP in addition to other categories of costs. (CERCLA section 107(4)(A)–(D)).

maintenance and monitoring, as well as monitoring of impacted media and monitoring and maintenance of implemented Institutional Controls (ICs). ICs are non-engineered instruments, such as administrative and/or legal controls, that help minimize the potential for human exposure to contamination and/or protect the integrity of a remedy by limiting land or resource use. Examples include fishing restrictions, deed restrictions, and the posting of warning signs outside of a contaminated site.

²⁷ Five-year reviews evaluate the implementation and performance of a remedy to determine whether it remains protective.

7. What enforcement discretion is available when exercising CERCLA authority?

EPA has a proven track record of developing and applying enforcement discretion policies that are effective and well-received, and courts have sanctioned this approach. CERCLA's limitations and EPA's enforcement discretion policies historically have given EPA the needed flexibility to provide assurances when circumstances warrant. Although CERCLA's liability scheme is broad, the statutory affirmative defenses and EPA's enforcement discretion policies provide mechanisms to narrow the scope of liability and focus on the significant contributors to contamination.

Both the statute and EPA enforcement discretion policies may constrain a party's ability to secure reimbursement of response costs. CERCLA itself includes liability exemptions as well as affirmative defenses against liability. *See, e.g.*, CERCLA section 101(10), 107(b), (d), (k). Additionally, parties must prove that response costs incurred are consistent with the National Contingency Plan, CERCLA's implementing regulations. *Id.* section 107(a)(4)(B). Parties must also incur response costs before they can recover those costs from other viable, liable parties. EPA's enforcement authorities and policies can serve as a deterrent for responsible parties to pursue parties that did not contribute significantly to contamination. EPA has a well-proven track record of developing enforcement discretion policies that have been effective and well-received by stakeholders. EPA's enforcement policies, such as its policy regarding de minimis or de micromis parties and innocent landowner policies, have proven to be useful tools in convincing responsible parties not to pursue parties covered by these enforcement discretion policies. Finally, the statute provides that a party that resolves its potential liability with the United States or a State in a judicially approved settlement is entitled to contribution protection—the ability to block third-party claims for matters addressed in the settlement. These liability limitations and mitigation tools are more fully discussed in Section VI.B.2.

8. Why is understanding CERCLA's overarching provisions critical to understanding the importance of this rulemaking to EPA's ability to protect human health and the environment?

Understanding CERCLA's basic concepts, particularly its liability scheme and CERCLA's authority to

address hazardous substances (versus its authorities to respond to pollutants or contaminants) are essential to understanding this regulatory action's importance in protecting human health and the environment. Designating PFOA and PFOS as hazardous substances is an important step for EPA to take because it makes available the full suite of CERCLA tools to address releases of these substances. Designation provides a more streamlined path to respond to PFOA and PFOS releases. It also makes available CERCLA enforcement authority that EPA can use to compel PRPs to pay for or conduct CERCLA response actions, rather than EPA using the Fund to clean up. Designation is expected to expediate PFOA and PFOS cleanups, and in turn, mitigate risks to public health and the environment from these substances.

III. Background for This Rulemaking

A. Summary of Proposed Designation

On September 6, 2022 (87 FR 54415), EPA proposed to find that PFOA and PFOS and their salts and structural isomers warrant designation as hazardous substances pursuant to CERCLA section 102(a). EPA concluded that significant evidence indicates that PFOA and PFOS may present a substantial danger to public health or welfare or the environment when released. (87 FR 54417, 54423). In reaching the proposed conclusion, the Agency relied on a significant body of evidence showing that PFOA and PFOS are persistent and mobile in the environment and that exposure to such substances may lead to adverse health effects.

The Agency primarily relied on evidence concerning the hazard and fate and transport, as well as other information that may be relevant to whether the statutory criteria are met. EPA looked at scientific and technical data regarding toxicity and toxicokinetics, chemical and physical characteristics, and environmental prevalence of PFOA and PFOS to support the proposed finding that these chemicals may present substantial danger when released into the environment. *See* Proposed Rule, 87 FR at 54423–29. In short, the evidence related to the chemical and physical characteristics indicated that PFOA and PFOS are persistent in the environment and that they bioaccumulate in both humans and wildlife. The evidence also showed that PFOA and PFOS are distinct from many other bioaccumulative chemicals because their water solubility allows PFOA and PFOS to more readily migrate from soil

to groundwater; thus, their release into the environment has the potential to contaminate both surface water and groundwater used as drinking water sources.

Concerning the toxicity and toxicokinetics, both human and animal studies supported a conclusion that exposure to PFOA and PFOS may cause adverse health effects, including effects on the immune system, the cardiovascular system, fetus development, and cancer. The evidence also showed that PFOA and PFOS are prevalent in the environment because they have been produced and used since the 1940s and are resistant to degradation. The evidence showed that PFOA and PFOS are not only prevalent in humans, but also prevalent in environmental media, wild animals, livestock, and plants. EPA concluded that the prevalence of these substances impacts the environment directly and increases the likelihood of exposures that may lead to additional human exposure.

The adverse human health effects, mobility, persistence, prevalence, and other information about PFOA and PFOS combined to support EPA's proposed finding that these chemicals may present a substantial danger to public health or welfare or the environment when released such that designation of PFOA and PFOS as CERCLA hazardous substances is warranted.

B. PFOA and PFOS Production and Use

PFOA and PFOS are part of a large family of human-made chemicals known as PFAS that have been in use in the U.S. since the 1940s. PFAS, including PFOA and PFOS, are used in industry and consumer products because of their useful properties, including their resistance to water, grease, and stains. These substances have been found in or used in making a wide range of consumer products including carpets, clothing, fabrics for furniture, and packaging for food and cookware that are resistant to water, grease, or stains. They have also been used for firefighting and various industrial processes. In terms of their chemistry, they exist as linear and branched isomers, depending on the methods by which they are produced. Both PFOA and PFOS have been manufactured in numerous salt forms. Once dissolved in water, the salt and the acid forms will dissociate into the respective ions. *See* Proposed Rule, 87 FR at 54417 (providing a brief history of PFOA and PFOS production and use).

Production and use of these chemicals have resulted in releases into the

environment for many decades. Historic releases of PFOA and PFOS are significant sources of environmental contamination and present ongoing hazards to human health and the environment. Precursors of PFOA and PFOS can be converted to PFOA and PFOS by microbes in soil, sludge, and wastewater and through abiotic chemical reactions. PFOA and PFOS that are deposited or created by the degradation of their precursors in industrial and consumer waste or in a landfill without environmental controls can discharge via leachates, groundwater pollution/migration, and atmospheric releases.

PFAS have been detected in the ambient environment, in wildlife, and in humans around the globe, and PFOA and PFOS were among the most used PFAS from the beginning of their development in the 1940s (*Blake & Fenton, 2020; Calafat et al., 2007; Domingo & Nadal, 2019; Hanssen et al., 2013; Olsen et al., 2017*). The potential health risks associated with PFAS were first recognized in occupationally exposed workers in the 1980s and community level exposure concerns were first raised in 1998. Since that time, the U.S. government, including EPA, and many other environmental and human health organizations both within the U.S. and internationally have researched PFAS to determine the risks posed by exposure to such chemicals. The additional evaluation since the late 1990s has added support for early concerns that exposure to PFAS may present a risk and that exposure to long chain PFAS, such as PFOA and PFOS, are of particular concern because of, among other things, their prevalence in the environment, mobility, and resistance to degradation.

In response to the growing body of evidence concerning the potential risks, Federal, State, and international agencies have taken steps to mitigate exposure to PFOA and PFOS. For example, in 2016, the FDA revoked a regulation that allowed the use of long chain PFAS in food contact applications in the U.S.; the DoD added PFOA and PFOS to its list of emerging chemicals of concern and is in the process of requiring any of its new firefighting foam it purchases to be made without PFAS per a January 2023 military specification; several States have established groundwater cleanup standards for PFOA and/or PFOS; and PFAS, including PFOA and PFOS, are addressed in several international treaties.²⁸

Domestic production and import of PFOA has been phased out in the United States by the companies participating in the 2010/2015 PFOA Stewardship Program (*U.S. EPA, 2023c, 2023d*). Small quantities of PFOA may be produced, imported, and used by companies not participating in the PFOA Stewardship Program and some uses of PFOS are ongoing (*U.S. EPA, 2023a*). The EPA Chemical Data Reporting (CDR) rule (*see 40 CFR 721.9582*) under TSCA requires manufacturers (including importers) to report certain data about chemicals in commerce in the United States, including information on PFOA and PFOS (subject to a 2,500-pound reporting threshold at a single site). The last time PFOA and PFOS manufacturing information was reported to EPA pursuant to CDR was in 2013 and 2002, respectively. The reports showed that these chemicals were still being produced or used in those reporting years, however manufacturers did not report PFOA and PFOS in excess of the reporting limit in subsequent reporting cycles. However, 2020–2022 Toxic Release Inventory (TRI) data show that PFOA and PFOS continue to be released into the environment, which means that there are on-going uses of these substances. Pursuant to TRI reporting requirements, regulated facilities must report annually on releases and other waste management of toxic chemicals that they manufacture, process, or otherwise use above certain threshold quantities. The TRI reporting threshold for PFOA and PFOS is 100 pounds. Between 2020 and 2022, TRI data on releases²⁹ of PFOA, PFOS, and their salts³⁰ reported by 21 facilities amount to 71,411 lbs. In 2020, TRI data on releases of PFOA, PFOS, and their salts reported by nine facilities totaled 1,706 lbs. In 2021 and 2022, reported releases increased to 24,351 lbs. and 45,384 lbs., respectively.³¹ PFOA is not produced domestically or imported by the companies participating in the 2010/

related actions at EPA, other Federal Agencies, states, and international agencies).

²⁹ Facilities are required to report total releases per year of listed toxic chemicals into the environment (e.g., releases to land on-site, discharges to receiving streams or water bodies, etc.). [https://www.ecfr.gov/current/title-40/part-372/subpart-E#p-372.85\(b\)\(14\)](https://www.ecfr.gov/current/title-40/part-372/subpart-E#p-372.85(b)(14)) (40 CFR 372.85(b)(14)).

³⁰ As of November 2023, the list of toxic chemicals under the TRI program include 8 salts, as well as PFOA and PFOS, that are also listed as CERCLA HSs in this final action.

³¹ In addition to these releases, the TRI also includes data on PFOA and PFOS production-related waste. See U.S. Environmental Protection Agency, Toxic Release Inventory (TRI) Search. Available at: <https://www.epa.gov/enviro/tri-search>.

2015 PFOA Stewardship Program. However, based on the TRI report, it is possible that PFOA may still be produced domestically or imported by companies that did not participate in the PFOA Stewardship Program and that PFOS may be as well.

Environmental contamination and resulting human exposure to PFOA and PFOS are anticipated to continue for the foreseeable future due to their past wide-scale manufacture and use, environmental persistence, formation from precursor compounds, and continued limited domestic production and use. Although PFOA and PFOS levels have been decreasing in human serum samples since the phase out, they are still detected in a high percentage of the U.S. population (NHANES). This indicates humans are still being exposed to PFOA and PFOS.

C. EPA's PFAS Strategic Roadmap

EPA issued the PFAS Strategic Roadmap (Roadmap) in October 2021, wherein the Agency recognized the potential dangers posed by exposure to PFAS and committed to a comprehensive whole-of-Agency plan to address PFAS (*U.S. EPA, 2021a*). EPA's integrated approach to PFAS is focused on three central directives: (1) *Research*. Invest in research, development, and innovation to increase understanding of PFAS exposures and toxicities, human health and ecological effects, and effective interventions that incorporate the best available science; (2) *Restrict*. Pursue a comprehensive approach to proactively prevent PFAS from entering air, land, and water at levels that can adversely impact human health and the environment; and (3) *Remediate*. Broaden and accelerate the cleanup of PFAS contamination to protect human health and ecological systems. The Roadmap committed to an Agency-wide approach, in which EPA would utilize the tools at its disposal to urgently address PFAS and bring tangible health benefits to communities impacted by PFAS. EPA identified a variety of authorities to address PFAS, including the TSCA, the Safe Drinking Water Act (SDWA), CWA, and RCRA, in addition to CERCLA. The Agency recognized that each authority has a unique set of tools to address discrete and specific environmental challenges posed by PFAS. Since 2021, EPA has taken several actions to address PFAS contamination under the Agency's various regulatory programs. Visit *Agency's website at* <https://www.epa.gov/pfas/key-epa-actions-address-pfas>.

²⁸ See Proposed Rule, 87 FR at 54429–39 (providing a list of regulatory and other PFAS

IV. Legal Authority

A. CERCLA Section 102(a) Designation Considerations

In this action, the Administrator is exercising his authority to designate PFOA and PFOS as hazardous substances pursuant to CERCLA section 102(a). CERCLA's definition of "hazardous substances" includes any substance designated pursuant to specified provisions in select environmental statutes (CWA, RCRA, CAA, and TSCA) and "any element, compound, mixture, solution, or substance designation pursuant to [CERCLA section 102]. CERCLA section 101(14).³² Section 102(a), in turn, provides clear authority to designate hazardous substances in addition to substances designated automatically through the operation of CERCLA section 101(14). In relevant part, section 102(a) provides that, "[t]he Administrator shall promulgate and revise as may be appropriate, regulations designating as hazardous substances, in addition to those referred to in section 101(14), such elements, compounds, mixtures, solutions, and substances, which when released into the environment, may present substantial danger to the public health or welfare or the environment. . . ." The statutory language delegates to EPA the authority to identify and weigh the scientific, technical, and other factual information relevant to determining whether a substance "may present a substantial danger," and then determine whether to promulgate regulations designating such substances.

Reading Section 102(a) in context, including the broader context of

CERCLA as a whole, EPA affirms the factors it proposed to evaluate for determining what constitutes "substantial danger" and designating hazardous substances under CERCLA section 102(a). 87 FR at 54421. To inform its decision whether a substance, when released, may present "substantial danger" pursuant to CERCLA section 102(a), EPA considers two primary factors: the potential harm to humans or the environment from exposure to the substance (*i.e.*, hazard), and how the substance potentially moves, persists and/or changes when in the environment (*i.e.*, environmental fate and transport). EPA will then weigh this information in deciding whether the substance, when released, may present a substantial danger.

In deciding whether a substance presents potential harm to humans or the environment from exposure to the substance (hazard), EPA may consider such information as human health toxicity, including carcinogenicity, neurotoxicity, developmental toxicity, reproductive toxicity, and other adverse health effects. EPA may also consider toxicity or adverse impacts to non-human organisms or ecosystems, such as adverse effects to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas. Additionally, EPA may consider chemical properties such as combustibility, flammability, reactivity, or corrosiveness. Regarding the environmental fate and transport of a substance, EPA may consider whether a substance moves readily through the environment, and whether it persists and/or changes in the environment.

In weighing this information, EPA will consider the degree or magnitude of the danger posed based on the substance's hazard and environmental fate and transport characteristics. The hazard that a substance presents can be shown in a variety of ways. For example, it could be toxic to humans or other organisms in the environment, or it could exhibit a more physical hazard, such as corrosivity or explosivity.

In assessing a substance's hazard if based on toxicity, EPA could consider whether the substance may be acutely toxic (and thus lead to an immediate health problem or even death) or may have chronic toxicity (and thus lead to detrimental health effects after long-term exposure). For example, there could be a substance that is acutely toxic but does not move far from the point of release. This substance might pose substantial danger due to its ability

to immediately harm people and other organisms at the point of release. As another example, there may be a substance that exhibits chronic toxicity and is very persistent. In this case, the substance might also pose substantial danger when released because people and other organisms near the point of release could be exposed to the substance over a long period of time, potentially leading to adverse health effects. Designation may be appropriate if the hazard and fate and transport, when taken together, demonstrate there may be danger and the danger is substantial.

Hazard and environmental fate and transport are the primary factors EPA will assess in evaluating whether to designate a substance under section 102(a). However, EPA may also consider additional information that could inform the degree of danger a substance may pose when released. This includes, but is not limited to, information such as frequency, nature, and geographic scope of releases (*e.g.*, prevalence) and likelihood of human exposure. For example, the Agency may review accident history or other release data (*e.g.*, TRI, UCMR) to determine how frequently a substance is released or found in the environment, and how or if the substance has caused any adverse health effects to the public or the environment. Together with hazard and environmental fate and transport, this additional information will inform EPA's conclusion on whether a substance, when released, may present a substantial danger to public health or welfare or the environment.

EPA interprets section 102(a) as requiring that, at a minimum, there is a possibility the substance, when released into the environment, presents substantial danger. EPA need not have certainty that the substance poses a substantial danger or require proof of actual harm when released into the environment. This reading of CERCLA section 102(a) is consistent with the ordinary meaning of "may" which is defined as a term "used to indicate possibility or probability." Merriam-Webster (<https://www.merriam-webster.com/dictionary/may>). It is also consistent with the caselaw interpreting the term "may" in the phrase "may present an imminent and substantial endangerment" under RCRA, which has been construed as not requiring certainty. *See ME. People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 288 (1st Cir. 2006) (noting that "at least four of our sister circuits have construed [section 7002(a)(1)(B)] expansively" and that "all four courts have emphasized the preeminence of the word 'may' in

³² The complete definition of "hazardous substances" is: "(A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act [33 U.S.C. 1321(b)(2)(A)], (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. 6901 *et seq.*] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act [33 U.S.C. 1317(a)], (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act [15 U.S.C. 2606]. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas)."

defining the degree of risk needed to support [section 7002(a)(1)(B)'s] liability standard" and that certainty of harm is not required); *Price v. United States Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994) (reasoning that the term "may" "implies that there must be a threat which is present now, although the impact of the threat may not be felt until later").

The information that EPA may consider in determining whether the release of a substance may present a substantial danger is consistent with the criteria that the Agency uses in implementing CERCLA through the Hazard Ranking System (HRS) (*U.S. EPA, 2023b*). CERCLA section 105(a)(8)(A) requires EPA to set criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial and removal action, to the extent practicable taking into account the potential urgency of such action. The statute directs EPA to develop criteria based upon relative risk or danger to public health or welfare or the environment, taking into account to the extent possible the population at risk, the hazard potential of the hazardous substances at such facilities, the potential for contamination of drinking water supplies, the potential for direct human contact, the potential for destruction of sensitive ecosystems, the damage to natural resources which may affect the human food chain and which is associated with any release or threatened release, and the contamination or potential contamination of the ambient air which is associated with the release or threatened release. EPA's regulations establishing criteria for placing sites on the National Priorities List are codified in EPA's Hazard Ranking System (HRS), 40 CFR part 300 App. A. Ultimately, the HRS factors are consistent with the information EPA considered in designating PFOA and PFOS under CERCLA section 102(a).

The standard that EPA has adopted for CERCLA section 102(a) is also consistent with EPA's interpretation of similar statutory language. *See, e.g.,* CERCLA section 104(a) (allowing for response to pollutants or contaminants that "may present an imminent and substantial danger") and CERCLA section 106(a) (granting enforcement authority "when there may be an imminent and substantial endangerment").³³ For example,

CERCLA section 106(a) provides EPA with enforcement authority when "there may be an imminent and substantial endangerment." EPA guidance provides that EPA should rely on "scientific evidence and documentation" to determine if conditions may present an imminent and substantial endangerment (*Breen et al., 2001*). This may include an evaluation of site-specific conditions that provide a "reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or a threatened release of a hazardous substance." *B.F. Goodrich Co. v. Murtha*, 697 F. Supp. 89, 96 (D. Conn. 1988). "Hazard" and "fate and transport" are inherently a part of that analysis, and courts have long examined such considerations under CERCLA section 106(a). *See, e.g., United States v. Northeastern Pharmaceutical and Chemical Co., Inc.*, 579 F. Supp. 823, 832 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986) (examining toxicological properties, hazard, fate and transport, as well as likelihood of exposure in determining whether substances posed an "imminent and substantial endangerment"); *United States v. E.I. du Pont de Nemours & Co., Inc.*, 341 F.Supp.2d 215, 247 (W.D.N.Y. 2004) (collecting cases and concluding endangerment exists where, examining all impacts, "there is reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or a threatened release"); *see also Cox v. City of Dallas, Tex.*, 256 F.3d 281, 300 (5th Cir. 2001) (examining hazard and fate and transport posed from dangerous gases in concluding that old landfill "may present an imminent and substantial endangerment" under RCRA).³⁴

B. Consistency With Other Methodologies for Identifying CERCLA Hazardous Substances

The two central factors that EPA considers in the context of CERCLA section 102(a)—hazard, as well as fate and transport—are consistent with other

those other authorities. That purpose is distinct from the purpose of CERCLA section 102(a), which requires a more generalized, non-site-specific evaluation.

³⁴ CERCLA section 106 sets forth a site-specific standard, which differs from the general applicability of CERCLA section 102(a). The language between each section also slightly differs. The phrase "imminent and substantial endangerment" in section 106 is different from the phrase "may present a substantial danger" in section 102. However, given the similar language, the factors that courts have considered in analyzing whether a substance poses a threat under section 106 are instructive to determining whether a substance "may pose a substantial danger" under section 102.

methodologies used for identifying CERCLA hazardous substances. CERCLA's list of "hazardous substances" includes more than 800 substances identified as hazardous or toxic by Congress or EPA under the following specified environmental statutes:

- Clean Water Act section 311(b)(2)(A) hazardous substances;
- Resource Conservation and Recovery Act section 3001 hazardous wastes;
- Clean Water Act section 307(a) toxic pollutants;
- Clean Air Act section 112 hazardous air pollutants; and
- Toxic Substances Control Act section 7 imminently hazardous chemicals.

See 40 CFR Table 302.4 (list of hazardous substances).

EPA has applied these authorities in a manner similar to how EPA is interpreting and applying its authority under CERCLA section 102(a) in this action. For this designation, under section 102(a), EPA evaluated toxicity data to assess "hazard" from exposure to PFOA and PFOS. Similarly, the statutes cited in CERCLA's definition of hazardous substance consider toxicity in some fashion in their listing or identification decisions. *See* RCRA section 3001 (providing that EPA's criteria for listing RCRA regulated hazardous wastes take into account "toxicity," along with other factors); CWA section 311(b)(2)(A) and 42 FR 10474, 10475 (March 13, 1978) (describing "toxicological selection criteria" for hazardous substances designated under the CWA section 311); CWA section 307(a) (providing CWA authority to list "toxic pollutants" taking into account "toxicity of the pollutant"); CAA section 112(b)(2) (providing CAA authority to identify air toxics which "present, or may present . . . a threat of adverse human health effects (including . . . substances which are known to be, or may reasonably be anticipated to be . . . acutely or chronically toxic)"); TSCA section 7 (providing TSCA authority to identify a chemical substance or mixture as imminently hazardous when it "presents an imminent and unreasonable risk of serious or widespread injury to health or the environment, without consideration of costs or other non-risk factors.").

EPA also evaluated data regarding the fate and transport of PFOA and PFOS in the environment. This analysis focused primarily on the chemical and physical characteristics of PFOA and PFOS, including mobility, resistance to degradation, and persistence in the

³³ These provisions concern enforcement and response actions and apply to and require analysis of narrow, site-specific circumstances relevant to a particular facility or person, and to a specific event. As a result, the Agency conducts an assessment of the particular situation at each site when it invokes

environment. Similarly, the CWA, RCRA, and CAA provisions referenced in CERCLA, also consider persistence and resistance to degradation in their listing and identification decisions. *See* CWA section 307(a) (providing that EPA may list toxic pollutants under the CWA that take into account “persistence and degradability,” alongside toxicity); RCRA section 3001 (providing that EPA’s criteria for listing RCRA regulated hazardous wastes take into account “persistence and degradability in nature,” along with other factors); CAA section 112(b)(2) (identifying “bioaccumulation” as a consideration for evaluating whether a pollutant may be identified as a hazardous air pollutant under CAA).

C. CERCLA Section 102(a) and Cost Considerations

EPA proposed interpreting CERCLA section 102(a) as precluding the consideration of cost in designating CERCLA hazardous substances. EPA recognizes that, as a general matter, a statutory assessment of health- and environmental-based criteria like the criteria in section 102 does not typically allow for consideration of costs. *See, e.g., Whitman v. American Trucking*, 531 U.S. 457, 471 (2001) (finding that public health criteria provided in the Clean Air Act, interpreted in its statutory and historical context and with appreciation for its importance to the CAA as a whole, unambiguously bars cost considerations.”). EPA is not resolving in this final action whether section 102 is best construed as precluding or requiring consideration of costs in designating a hazardous substance. It need not resolve this question here because designation is appropriate under either construction. Specifically, as discussed in Section V, examining only whether PFOA and PFOS may present a substantial danger to public health or welfare or the environment, without considering costs and benefits, EPA has concluded that designation is warranted. In addition to the analysis of the health- and environmental-based criteria, EPA also conducted a totality-of-the-circumstances analysis, including an evaluation of quantitative and qualitative benefits and costs of designation. This additional analysis confirmed that designation is appropriate. In sum, designation is warranted either by examining the health- and environmental-based criteria alone or by examining these criteria along with the broader totality of the circumstances.

V. PFOA and PFOS May Present a Substantial Danger to the Public Health or Welfare or the Environment When Released Into the Environment

In evaluating hazard with respect to PFOA and PFOS, EPA considered the substantial evidence, based on epidemiological and toxicological studies, indicating that human exposure to PFOA or PFOS is linked to adverse human health effects. Regarding environmental fate and transport, EPA considered evidence that PFOA and PFOS migrate through the environment from the point of release, that they persist in the environment for long durations, and that they bioaccumulate in humans and other organisms.

For PFOA and PFOS, EPA considered other relevant information about the frequency, nature, and geographic scope of releases of the substances (*i.e.*, prevalence) demonstrating that these substances have been widely detected in drinking water, surface water, wild animals, and humans in the United States. This other information about the prevalence of PFOA and PFOS is relevant to EPA’s designation decision because widespread detections of these substances in the environment and people demonstrates a greater potential for communities to be exposed to the substances at concentrations that could result in adverse health effects. EPA weighed all of this information—hazard, environmental fate and transport, prevalence—in evaluating the degree or magnitude of danger posed. EPA concluded that PFOA and PFOS may present a substantial danger when released because of the potential for harm to human health, evidence of persistence and bioaccumulation, and high likelihood of exposure.

A. PFOA and PFOS Pose a Hazard

EPA is confirming the proposed finding that exposure to PFOA and PFOS may pose a hazard, after evaluating the available scientific and technical information as well as public comments. There is evidence from both epidemiological and animal toxicological studies that oral exposure to either PFOA or PFOS has been associated with various adverse health effects across many health outcomes. Numerous health studies support a finding that PFOA and PFOS exposure can lead to adverse human health effects, including cancer (testicular and kidney for PFOA, liver cancer for PFOS), pregnancy-induced hypertension and preeclampsia, and decreased immune response to vaccination (*ATSDR*, 2021). Toxicology studies suggest that PFOA and PFOS

exposure is associated with decreases in serum thyroid hormone levels³⁵ and adverse effects to the endocrine system (*ATSDR*, 2021; *USEPA*, 2024b; 2024c).

Based on studies of PFOA and PFOS, in 2021, EPA found that PFOA and PFOS may have adverse effects on public health (“*Announcement of the Final Regulatory Determinations for Contaminants on the Fourth Drinking Water Contaminant Candidate List*,” 2021). EPA determined that studies indicate human exposure to PFOA and/or PFOS is linked to a broad range of adverse health effects, including developmental effects to fetuses during pregnancy or to infants (*e.g.*, low birth weight, accelerated puberty, skeletal variations), liver effects (*e.g.*, tissue damage), immune effects (*e.g.*, antibody production and immunity), and other effects (*e.g.*, cholesterol changes). Both PFOA and PFOS are known to be transmitted to the fetus via the placenta and to the newborn, infant, and child via breast milk or formula made with contaminated water. Both compounds were also associated with carcinogenic effects in human epidemiological and long-term animal studies (*NTP*, 2020; *U.S. EPA*, 2016a, 2016b). In November 2023, the International Agency for Research on Cancer (IARC) evaluated the carcinogenicity of PFOA and PFOS and classified PFOA as carcinogenic to humans (Group 1) and PFOS as possibly carcinogenic to humans (Group 2b) (Zahm, et al., 2023).

These adverse health effects of PFOA and PFOS were further described in the final toxicity assessments and Final Maximum Contaminant Level Goals (MCLGs³⁶) for Perfluorooctanoic Acid (PFOA) and Perfluorooctane Sulfonic Acid (PFOS) in Drinking Water (*U.S. EPA*, 2024b, 2024c, 2024d). These toxicity assessments indicate that PFOA and PFOS are associated with adverse health effects at lower levels than previously recognized. In the final toxicity assessments, EPA assessed the weight of the evidence for the available cancer data and determined that PFOA and PFOS are *Likely to Be Carcinogenic to Humans* consistent with the Guidelines for Carcinogen Risk Assessment (*U.S. EPA*, 2005). For PFOA, this determination is based on

³⁵ Decreased thyroid hormone levels are associated with effects such as changes in thyroid and adrenal gland weight, hormone fluctuations, and organ histopathology (*ATSDR*, 2021; *USEPA*, 2024b; *USEPA*, 2024c).

³⁶ Maximum Contaminant Level Goal (MCLG)—the maximum level of a contaminant in drinking water at which no known or anticipated adverse effect on the health of persons would occur, allowing an adequate margin of safety. (<https://www.epa.gov/sdwa/how-epa-regulates-drinking-water-contaminants>.)

the evidence of kidney and testicular cancer in humans and Leydig cell tumors, pancreatic acinar cell tumors, and hepatocellular adenomas in rats. (U.S. EPA, 2024c, 2024d). For PFOS, this determination is based on the evidence of hepatocellular tumors in humans and rats, pancreatic islet cell carcinomas in male rats, and mixed but plausible evidence of bladder, prostate, kidney, and breast cancers in humans as described by U.S. EPA (2024b, 2024d).

The EPA's 2024 PFOA and PFOS toxicity assessments prioritized the following five health endpoint categories with the strongest weight of evidence and indicating that oral PFOA and PFOS exposure is associated with adverse health effects: immunological, hepatic, developmental, cardiovascular, and cancer effects. This prioritization was based on findings from conducting systematic review (including the study quality evaluation, evidence synthesis and evidence integration) on the available and relevant human epidemiological and animal toxicity studies (U.S. EPA, 2024b, U.S. EPA, 2024c). EPA evaluated sixteen non-cancer health outcomes as part of the 2024 toxicity assessments and, in accordance with recommendations from the SAB {U.S. EPA, 2022, 10476098} and the IRIS Handbook {U.S. EPA, 2022, 10367891}, EPA's toxicity assessments prioritized the five categories of health outcomes above with either *evidence demonstrating* or *evidence indicating* associations between PFOA and PFOS exposure and adverse health effects. Accordingly, to support EPA's finding in this final rule that both PFOA and PFOS each individually pose a human health hazard, EPA gave weight to immunological, hepatic, developmental, cardiovascular, and cancer effects.

For this final rule, EPA considered a wide range of potential health effects associated with exposure to PFOA and PFOS using five comprehensive peer-reviewed Federal government documents that summarize the recent literature on PFAS (mainly PFOA and PFOS) exposure and its health impacts: (1) EPA's 2016 Health Effects Support Documents for PFOA (U.S. EPA, 2016c); (2) EPA's 2016 Health Effects Support Documents for PFOS (U.S. EPA, 2016d); (3) U.S. Department of Health and Human Services Agency for Toxic Substances and Disease Registry's (ATSDR) 2021 Toxicological Profile for Perfluoroalkyls (ATSDR, 2021); (4) EPA's 2024 Final Human Health Toxicity Assessment for Perfluorooctanoic Acid (PFOA) (U.S. EPA, 2024b); and (5) EPA's 2024 Final Human Health Toxicity Assessment for

Perfluorooctane Sulfonic Acid (PFOS), (U.S. EPA, 2024c). Each source presents comprehensive, systematic reviews of relevant, peer-reviewed literature on adverse health effects associated with PFOA and PFOS. The EPA assessments were prepared by the Office of Water.

Data from human and animal studies indicate that PFOA and PFOS are well absorbed in the human body after being ingested and are distributed throughout the body by binding to proteins. PFOA and PFOS bioaccumulate in the human body as evidenced by the elimination half-lives from about two to three years for PFOA and four to five years for PFOS (ATSDR, 2021). There is no evidence that humans or animals are able to break down these substances, and they can be distributed to tissues throughout the human body and are not readily eliminated, resulting in long elimination half-lives in the human body and bioaccumulation. Available evidence supports urine as the primary route of excretion in most species, though fecal elimination is prominent in rats. In rats, hair is another route of elimination in both males and females. In females, elimination pathways include menstruation, pregnancy (cord blood, placenta, amniotic fluid, and fetal tissues) and lactation (breast milk) (PFOA Toxicity Assessment 2024, PFOS Toxicity Assessment 2024). Thus, PFOA and PFOS remain in the body after exposure has ended and can potentially cause detrimental health effects even after an initial exposure has ceased. Continued exposures to PFOA and PFOS can lead to significantly elevated concentrations in the human body and result in adverse health effects due to this bioaccumulation (Ballesteros et al., 2017; Barry et al., 2014; Dhingra et al., 2016; Frisbee et al., 2010; Gallo V et al., 2012; Hall et al., 2023; Hoffman et al., 2011; Kotlarz et al., 2020; Savitz et al., 2012; Steenland et al., 2009; Steenland et al., 2018a; Steenland et al., 2018b).

EPA's 2024 Final Human Health Toxicity Assessments for PFOA and PFOS integrated the available data on absorption, distribution, metabolism and elimination into the derivation of reference values for PFOA and PFOS. Collectively the adverse health effects evidence demonstrates that each PFOA and PFOS individually pose a human health hazard, and the substantial body of evidence for several individual adverse health effects also supports EPA's human health hazard finding for each of these substances. A discussion of some of the detrimental health effects follows.

Developmental Effects: Adverse developmental effects can increase the likelihood of difficulties during labor

through post-delivery. Evidence indicates that exposure to PFOA and PFOS is likely associated with developmental effects such as lower infant birth weight, lower birth length, smaller head circumference at birth, and other effects (Verner et al., 2015; U.S. EPA, 2016e; U.S. EPA, 2016f; Negri et al., 2017; ATSDR, 2018; Waterfield et al., 2020; U.S. EPA, 2023b; U.S. EPA, 2024c). Research suggests that exposure to PFOA and PFOS is associated with developmental effects, including decreased infant birth weight (ATSDR, 2021; Negri et al., 2017; U.S. EPA, 2016c, 2016d, 2024b, 2024c; Verner et al., 2015; Waterfield et al., 2020). Low birth weight is linked to a number of health effects that may be a source of economic burden to society in the form of medical costs, infant mortality, parental and caregiver costs, labor market productivity loss, and education costs (Behrman & Rosenzweig, 2004; Chaikind & Corman, 1991; Colaizy et al., 2016; Institute of Medicine, 2007; Joyce et al., 2012; Klein & Lynch, 2018; Kowlessar et al., 2013; Nicoletti et al., 2018).

Toxicity studies conducted in laboratory animal models demonstrate that the developing fetus is particularly sensitive to PFOA- and PFOS-induced toxicity. Some studies in laboratory animals indicate that gestation and/or lactation periods are critical exposure windows that may lead to developmental health effects including decreased offspring survival, low birth weight, accelerated puberty and skeletal variations (ATSDR, 2021; U.S. EPA, 2016c, 2016d). The embryo and fetus are exposed prenatally to PFOA and PFOS through maternal blood via the placenta (ATSDR, 2021). Several epidemiological studies of the association between maternal serum PFOA/PFOS and birth weight have found evidence for decreased body weight of infants exposed in utero (Chu et al., 2020; Darrow et al., 2013; Dzierlenga et al., 2020; Govarts et al., 2016; Negri et al., 2017; Sagiv et al., 2018; Starling et al., 2017; Verner et al., 2015; Wikstrom et al., 2020; Yao et al., 2021). Other developmental associations with PFOA and PFOS include small for gestational age (SGA), decreased birth length, decreased head circumference at birth, and other effects (ATSDR, 2021; Negri et al., 2017; U.S. EPA, 2016c, 2016d, 2024b, 2024c; Verner et al., 2015; Waterfield et al., 2020). Epidemiology evidence for SGA related to PFOA/PFOS exposure was mixed; some studies reported increased risk of SGA with PFOA/PFOS exposure, while other studies observed null results (USEPA,

2024b; USEPA, 2024c). SGA is a developmental health outcome of interest when studying potential effects of PFOA/PFOS exposure because SGA infants have increased health risks during pregnancy and delivery as well as post-delivery (Osuchukwu & Reed, 2022).

Cardiovascular Effects:

Cardiovascular Disease (CVD) is one of the leading causes of premature mortality in the United States (D'Agostino et al., 2008; Goff et al., 2014; Lloyd-Jones et al., 2017). Changes in total cholesterol and blood pressure are associated with changes in incidence of CVD events such as myocardial infarction (i.e., heart attack), ischemic stroke, and cardiovascular mortality occurring in populations without prior CVD event experience (D'Agostino et al., 2008; Goff et al., 2014; Lloyd-Jones et al., 2017). Evidence indicates that exposure to PFOA and PFOS is likely associated with increased low-density lipoprotein cholesterol (LDLC), total cholesterol, and high-density lipoprotein cholesterol (ATSDR, 2021; U.S. EPA, 2024b, 2024c). High levels of LDLC lead to the buildup of cholesterol in the arteries, which can raise the risk of heart disease and stroke. Epidemiology studies showed a positive association between PFOA or PFOS exposure and LDLC or total cholesterol levels in children (U.S. EPA, 2024b, 2024c). In particular, the evidence suggested positive associations between serum PFOA and PFOS levels and LDLC levels in adolescents ages 12–18, while positive associations between serum levels and LDLC levels in younger children were observed only for PFOA (ATSDR, 2021). Other epidemiology studies have generally found a positive association between increasing serum PFOA and total cholesterol levels (ATSDR, 2021).

Cancer Effects: PFOA and PFOS are Consistent with the Guidelines for Carcinogen Risk Assessment (U.S. EPA, 2005), EPA determined that both PFOA and PFOS are *Likely to Be Carcinogenic to Humans* based on sufficient evidence of carcinogenicity in humans and animals (U.S. EPA, 2024b, USEPA 2024c). Additionally, in November 2023, the International Agency for Research on Cancer (IARC) evaluated the carcinogenicity of PFOA and PFOS and classified PFOA as carcinogenic to humans (Group 1) and PFOS as possibly carcinogenic to humans (Group 2b) (Zahm, et al., 2023). For PFOA, cancer evidence in epidemiological studies is primarily based on the incidence of kidney and testicular cancer, as well as some evidence of breast cancer, which is most consistent in genetically

susceptible subpopulations or for particular breast cancer types (U.S. EPA, 2024c). Epidemiology studies indicated that exposure to PFOA was associated with an increased risk of renal cell carcinoma (RCC) (ATSDR, 2021; California EPA, 2021; U.S. EPA, 2016d, 2024d). For PFOS, the available epidemiology studies report elevated risk of liver cancer, consistent with increased incidence of liver tumors reported in long-term rat exposure studies. There is also mixed but plausible evidence of bladder, prostate, kidney, and breast cancers in humans after chronic exposure and evidence of pancreatic islet cell tumors in rats (U.S. EPA, 2024b).

Liver Effects: High levels of the enzyme alanine transaminase (ALT) in the bloodstream may indicate liver damage. Evidence indicates that exposure to PFOS and PFOA is associated with increased liver enzymes (U.S. EPA, 2024b; 2024c). Epidemiology data provides evidence of a positive association between PFOS/PFOA exposure and ALT levels in adults (ATSDR, 2021; U.S. EPA, 2024b, 2024c). Studies of adults showed consistent evidence of a positive association between PFOA exposure and elevated ALT levels at both high exposure levels and exposure levels typical of the general population (U.S. EPA, 2024c). Associations between increasing serum PFOA concentrations and elevations in different serum enzyme levels were consistently observed in occupational cohorts, high-exposure communities and the U.S. general population that could indicate the potential for PFOA to affect liver function (ATSDR, 2021). There is also consistent epidemiology evidence of associations between PFOS and elevated ALT levels. A limited number of studies reported inconsistent evidence on whether PFOA/PFOS exposure is associated with increased risk of liver disease (U.S. EPA, 2024b). Results reported in animal toxicological studies are consistent with the observed elevated ALT indicative of hepatic damage in epidemiological studies. Specifically, studies in rodents found that oral PFOA or PFOS treatment resulted in biologically significant alterations in levels of at least one serum biomarker of liver injury (e.g., ALT) and evidence of histopathological alterations including hepatocyte degenerative or necrotic changes.

Immune Effects: Proper antibody response helps maintain the immune system by recognizing and responding to antigens. Evidence indicates that exposure to PFOS and PFOA is associated with immunosuppression; (U.S. EPA, 2024b; U.S. EPA, 2024c);

epidemiology studies showed suppression of at least one measure of the antibody response for tetanus and diphtheria among people with higher prenatal, childhood, and adult serum concentrations of PFOA (U.S. EPA, 2024c). Data reporting associations between PFOA exposure and antibody response to vaccinations other than tetanus and diphtheria are limited (ATSDR, 2021; USEPA, 2024c). Several epidemiological studies have shown a relationship between increased PFOA and PFOS serum concentrations and decreased response to vaccinations in children (Budtz-Jorgensen & Grandjean, 2018; Grandjean et al., 2012; Grandjean, Heilmann, Weihe, Nielsen, Mogensen, & Budtz-Jorgensen, 2017; Grandjean, Heilmann, Weihe, Nielsen, Mogensen, Timmermann, et al., 2017; Timmermann et al., 2022; Zhang et al., 2023). Epidemiology evidence suggests that children with preexisting immunological conditions are particularly susceptible to immunosuppression associated with PFOA exposure (U.S. EPA, 2024c). Available studies supported an association between PFOS exposure and immunosuppression in children, where increased PFOS serum levels were associated with decreased antibody production (U.S. EPA, 2024b). Studies reporting associations between PFOA or PFOS and immunosuppression in adults are less consistent; there is a lack of high confidence data. (U.S. EPA, 2024b).

In addition to the adverse health effects listed above, there was suggestive evidence that exposure to PFOS and PFOA is associated with the additional health effects summarized below.

Endocrine Effects: Elevated thyroid hormone levels can accelerate metabolism and cause irregular heartbeat; low levels of thyroid hormone can cause neurodevelopmental effects, tiredness, weight gain, and increased susceptibility to the common cold. There is suggestive evidence of a positive association between PFOA/PFOS exposure and thyroid hormone disruption (ATSDR, 2021; U.S. EPA, 2024b, 2024c). Toxicology studies in animals indicated that PFOA and PFOS exposure can affect thyroid function³⁷ (ATSDR, 2021; U.S. EPA, 2024b, 2024c). Changes to serum thyroid hormone levels in animals lead to adverse effects to the endocrine system (U.S. EPA, 2024b, 2024c). Despite uncertainty around the applicability of animal studies in this area, changes in serum

³⁷ Decreased thyroid hormone levels are associated with effects such as changes in thyroid and adrenal gland weight, hormone fluctuations, and organ histopathology (ATSDR, 2021; U.S. EPA, 2024b, 2024c).

thyroid hormone levels in animals did indicate adverse effects after PFOS and PFOA exposure that is relevant to humans (U.S. EPA, 2024b; 2024c).

Metabolic Effects: Leptin is a hormone that controls hunger, and high leptin levels are associated with obesity, overeating, and inflammation (e.g., of adipose tissue, the hypothalamus, blood vessels, and other areas). Animal studies showed increases in serum leptin levels in mice that were exposed to low levels of PFOA (ATSDR, 2021). Based on a review of 69 human epidemiology studies, evidence of associations between PFOS and metabolic outcomes appears inconsistent, but in some studies, suggestive evidence was observed between PFOS exposure and leptin levels (U.S. EPA, 2024b).

Reproductive Effects: Studies of the reproductive effects from PFOA/PFOS exposure have focused on associations between exposure to these pollutants and increased risk of gestational hypertension and preeclampsia in pregnant women (ATSDR, 2021; U.S. EPA, 2024b, 2024c). Gestational hypertension (high blood pressure during pregnancy) can lead to fetal health outcomes such as poor growth and stillbirth. Preeclampsia—instances of gestational hypertension where the mother also has increased levels of protein in her urine—can similarly lead to fetal problems and maternal complications. The epidemiology evidence yields mixed (positive and non-significant) associations, with some suggestive evidence supporting positive associations between PFOA/PFOS exposure and both preeclampsia and gestational hypertension (ATSDR, 2021; U.S. EPA, 2024b, 2024c). A study of a community with high exposure to PFOA observed an association between serum PFOA and risk of pregnancy-related hypertension or preeclampsia, conditions that are related to renal function during pregnancy (U.S. EPA, 2016d).

Musculoskeletal effects: Adverse musculoskeletal effects such as osteoarthritis and decreased bone mineral density impact bone integrity and cause bones to become brittle and more prone to fracture. There is limited evidence from studies pointing to effects of PFOS on skeletal size (height), lean body mass, and osteoarthritis (U.S. EPA, 2024b). Epidemiology evidence suggested that PFOA exposure may be linked to decreased bone mineral density, bone mineral density relative to bone area, height in adolescence, osteoporosis, and osteoarthritis (ATSDR, 2021; U.S. EPA, 2024c). Evidence from four PFOS studies suggests that PFOS exposure has a harmful effect on bone

health, particularly measures of bone mineral density, with greater statistical significance of effects occurring among females (U.S. EPA, 2024b).

Taken together, the technical/scientific information above demonstrate that both PFOA and PFOS individually are each associated with considerable and varied adverse health effects.

EPA also considered potential effects on children's health. EPA's Policy on Children's Health requires the Agency to consider early life exposures (from conception, infancy, early childhood and through adolescence until 21 years of age) and lifelong health consistently and explicitly in all human health decisions through identifying and integrating children's health data and information. As described throughout this section, information on PFOA and PFOS shows exposure to PFOA and/or PFOS is linked to adverse health effects relevant to children. These adverse health effects include developmental effects to fetuses during pregnancy or to infants, cardiovascular effects and immune effects in children and endocrine and reproductive effects that impact development. Suggestive evidence of associations found in human epidemiological studies between PFOA and PFOS and adverse development effects of include decreased infant birth weight (ATSDR, 2021; Negri et al., 2017; U.S. EPA, 2016c, 2016d, 2024b, 2024c; Verner et al., 2015; Waterfield et al., 2020). Animal studies have shown developmental health effects including associations with decreased offspring survival, low birth weight, accelerated puberty and skeletal variations (ATSDR, 2021; U.S. EPA, 2016c, 2016d). Cardiovascular effects include positive associations between serum PFOA and PFOS levels and LDLC levels in adolescents ages 12–18 (ATSDR, 2021). Several epidemiological studies have shown a relationship between increased PFOA and PFOS serum concentrations and decreased response to vaccinations in children (Budtz-Jorgensen & Grandjean, 2018; Grandjean et al., 2012; Grandjean, Heilmann, Weihe, Nielsen, Mogensén, & Budtz-Jorgensen, 2017; Grandjean, Heilmann, Weihe, Nielsen, Mogensén, Timmermann, et al., 2017; Timmermann et al., 2022). There is suggestive evidence of a positive association between PFOA and/or PFOS exposure and thyroid hormone disruption (ATSDR, 2021; U.S. EPA, 2024b, 2024c). The epidemiology evidence yields mixed (positive and non-significant) associations, with some evidence suggesting positive

associations between PFOA and/or PFOS exposure and both preeclampsia and gestational hypertension which can lead to fetal health outcomes such as poor growth, stillbirth and maternal complications (ATSDR, 2021; U.S. EPA, 2024b, 2024c).

EPA also considered the hazards associated with salts and structural isomers of PFOA and PFOS. The hazards associated with PFOA and PFOS can be associated with their respective salts and both their linear and branched isomers. Salts are deemed to have the same toxicity as the commonly referenced acid versions because, once put in water (and likewise when in the human body), the acid and salt forms will dissociate to the ionic form. Further, many toxicity studies on PFAS were often performed using the salt form. For example, while Emmett et al. (2006) toxicity studies were performed on the acid version of PFOA, Butenhoff et al. (2012) used the ammonium salt of PFOA. The potassium salt of PFOS was generally used in animal toxicity studies such as Ankley et al. (2004).

Additionally, PFOA and PFOS exist as linear and branched isomers, and the linear and branched isomers have been found in environmental media and in human sera. For example, in the last NHANES for which results are available (2017–2018), branched PFOS was detected in 99% of those sampled, while branched PFOA was found in 10%. Most animal toxicity studies using isomeric mixtures do not state the ratio of linear and branched isomers in the test material, and, therefore, it is not feasible to distinguish the toxicity of the individual isomers. However, in a few studies, including Butenhoff et al. (2012), Lau et al. (2006), and Lou et al. (2009) for PFOA, and Ankley et al. (2004) for PFOS, the authors stated that the PFAS test substance was not 100% linear, and thus, any effects indicated in these studies can only be associated with the isomeric mixture of linear and branched and not specifically with linear isomers or branched isomers. Further, Loveless et al. (2006) compared the toxicity of linear ammonium PFOA, branched ammonium PFOA, and a mixture of linear and branched ammonium PFOA in rodents and demonstrated that both linear and branched isomers exhibit similar types of toxicity.

B. Information About the Fate and Transport of PFOA and PFOS Demonstrate That They Are Persistent and Mobile in the Environment

Available information about the fate and transport of PFOA and PFOS

support EPA's conclusions that these substances remain in the environment for many years (*i.e.*, persistency) and that they can move through air, land, and water (*i.e.*, mobility) after release. Both PFOA and PFOS are considered surfactants due to their chemical structures that consists of a hydrophobic perfluorinated alkyl "tail group" and a hydrophilic carboxylate (for PFOA) or sulfonate (for PFOS) "head group." Surfactants decrease the surface tension between two liquids (*i.e.*, oil and water), a gas and a liquid, or a solid and a liquid. This attribute means they increase mixing and transport between soil and groundwater or air and water, and thus PFOA and PFOS move between environmental media more easily.

These chemicals are sometimes referred to as "forever" chemicals because of their strong carbon-fluorine bonds in the "tail group" that cause PFOA and PFOS to be extremely resistant to degradation through biological degradation and also through chemical degradation (*i.e.*, photooxidation and hydrolysis). Photooxidation describes the process of oxidation through light exposure and hydrolysis describes the chemical breakdown of compound due to reaction with water. Degradation data from 3M for PFOA states "Hydrolysis half-life >92 years @ pH 7 & 25 °C (ammonium salt tested); Photolysis in water: half-life > 342 days; neither direct nor indirect photolysis in water observed based on loss of PFOA; Biodegradation-OECD 301C, 28 days, 5% BOD/ThOD; Biodegradation-Aerobic sludge, 18 days, no degradation observed (ammonium salt tested); Biodegradation-Anaerobic sludge, 94 days, no degradation observed." Degradation data from 3M for PFOS states "Biodegradation-Anaerobic sludge, 105 days, no degradation observed; Biodegradation-OECD 301C (MITI-I), 28 days, 0% BOD/ThOD (3M 2021)." The resistance to degradation causes PFOA and PFOS to remain in the environment for long periods of time. This means that the potential for human exposure continues long after a release has ended.

PFAS are mobile in the environment and have been found in remote locations, indicating they are widespread in the environment (Giesy & Kannan, 2001). PFAS have been found in outdoor air at locations in the United States, Europe, Japan, and over the Atlantic Ocean (ATSDR, 2021). PFOA and PFOS are water soluble and thus may be found in groundwater and surface water (U.S. EPA 2024a). Further, PFOA and PFOS have water-soil/sediment partition coefficients of 15–

708 L/kg and 7–120 L/kg, respectively (3M, 2021). These values are on the order of many metals, indicating that PFOA and PFOS are fairly mobile and will move from soil and sediment to water. Experimental data indicates in the marine environment, where suspended solid concentrations are generally low, PFOA and PFOS are mainly transported in the dissolved phase rather than being adsorbed to suspended solids (Ahrens *et al.*, 2011). Their presence in the water column means that they will be transported further and are available for long range transport and bioaccumulation (Ahrens *et al.*, 2011).

In a 2001 study investigating the global distribution of PFAS, wildlife samples were collected on four continents including North America and Antarctica and PFAS was found to be widely distributed on a global scale.^{38 39} Over 30 different species had measurable levels of PFOS (European Food Safety Authority, 2008; Giesy & Kannan, 2001). PFOA and PFOS have been shown to persist in humans and animals, with estimated half-lives in humans ranging from about two to three years for PFOA to four or five years for PFOS (ATSDR, 2021). Organisms that are exposed to PFOA and PFOS cannot break them down inside the body and excrete very little. Because PFOA and PFOS can remain in human and animal bodies for long durations, individuals with consistent ongoing exposures to PFOA and PFOS (*e.g.*, individuals consistently exposed by drinking contaminated water or eating contaminated food) can have elevated concentrations of these substances in their bodies (Bangma *et al.*, 2017; Burkhard, 2021; Ng & Hungerbühler, 2014).

C. Other Information Considered

Other information that EPA considered includes, the frequency, nature, and geographic scope of releases of these substances. This information demonstrates that PFOA and PFOS are prevalent, including in the U.S., and there is likelihood of exposure to humans and the environment. PFOA and PFOS are prevalent throughout the environment because of their widespread use since the 1940s in a wide range of commercial and consumer products and because of their

persistence. Currently, the public can be exposed to PFOA and PFOS through a variety of sources, including water, food, and environmental media. See *Proposed Rule, 87 FR at 54418–19* (Discussion on the uses of PFOA and PFOS).

Major causes of PFOA and PFOS environmental contamination include historical uses, limited ongoing uses, and ongoing uses of precursors. These activities include past direct industrial discharges of PFOA and PFOS to soil, air, and water and disposal of these substances or products that contain these substances. Precursor chemicals can also degrade to PFOA and/or PFOS (*e.g.*, *perfluorooctanesulfonamide (PFOSA) can be transformed to PFOS in the environment*). PFOA and PFOS precursors can be converted to PFOA and PFOS, respectively, by microbes in soil, sludge, and wastewater and through abiotic chemical reactions. See *Proposed Rule, 87 FR at 54426* (providing a brief history of sources of PFOA and PFOS to the environment).

PFOA and PFOS have been detected in groundwater in monitoring wells, private drinking water wells, and public drinking water systems across the country. The most vulnerable drinking water systems are those in close proximity to sites contaminated with PFOA and PFOS (ATSDR, 2021). Under the third Unregulated Contaminant Monitoring Rule (UCMR), EPA worked with the States and local communities to monitor for six PFAS, including PFOA and PFOS, to understand the nationwide occurrence of these chemicals in the U.S. drinking water provided by public water systems (PWSs). Of the 4,920 PWSs with results for PFOA and PFOS, PFOA was detected above the minimum reporting level (minimum reporting level = 20 nanogram/liter (ng/L)) in 379 samples in 117 PWSs serving a population of approximately 7.6 million people located in 28 States, Tribes, or U.S. territories. PFOS was found in 292 samples at 95 systems above the UCMR 3 MRL (40 ppt). These systems serve a population of approximately 10.4 million people located in 28 States, Tribes, or U.S. territories (U.S. EPA, 2017).

More recent available data collected by States show continued occurrence of PFOA and PFOS in drinking water supplies in multiple geographic locations throughout the country, as well as occurrences at lower concentrations and significantly greater frequencies than were measured under the UCMR3 ("PFAS National," 2023). PFOA and PFOS are also widely detected in surface water samples

³⁸ Global Distribution of Perfluorooctane Sulfonate in Wildlife; John P. Giesy and Kurunthachalam Kannan; Department of Zoology, National Food Safety and Toxicology Center, Institute for Environmental Toxicology; Michigan State University.

³⁹ <https://www.efsa.europa.eu/en/efsajournal/pub/653>.

collected from various rivers, lakes, and streams in the United States. Municipalities and other entities may use surface water sources for drinking water and that creates an additional potential exposure pathway to PFOA and PFOS.

PFOA and PFOS can reach soil due to atmospheric transport and wet/dry deposition (ATSDR, 2021). These substances have been found in outdoor air at locations across the globe around PFAS production facilities and facilities that use PFAS. PFOA and PFOS have been detected in surface and subsurface soils. Levels of PFOA and PFOS generally increased with increasing depth at sampled locations (PFAS manufacturing facilities), suggesting a downward movement of the contaminants and the potential to contaminate groundwater (ATSDR, 2021).

PFOA and PFOS can be taken up by plants, as evidenced by their presence in produce analyzed by the U.S. Food and Drug Administration (2021). PFOA and PFOS have also been found in wild and domestic animals such as fish, shellfish, alligators, deer, and avian eggs and in humans (ATSDR, 2021). For example, PFOA has been found in snack foods, vegetables, meat dairy products and fish, and PFOS has been found in eggs, milk, meat, fish and root vegetables (Bangma et al., 2017; Falk et al., 2012; Gewurtz et al., 2016; Holmstrom et al., 2005; Michigan PFAS Action Response Team, 2021; Morganti et al., 2021; U.S. EPA, 2016a, 2016b; Wang et al., 2008; Wisconsin DNR, 2020).

There is a significant potential for human exposure to PFOA or PFOS because of their persistence, mobility, and prevalence in the environment (Langenbach & Wilson, 2021). PFOA and PFOS contamination in the environment can lead to human exposure through ingestion of contaminated water, plants, wild animals, and livestock. PFOA and PFOS enter the drinking water supply from contamination in groundwater and surface water sources for drinking water. Contaminated drinking water or groundwater can also be used to irrigate or wash home-grown foods or farm-grown foods, thereby providing another means for human exposure. Human exposure can occur through the consumption of wild animals that have been contaminated by environmental exposure. Several States have issued advisories recommending that hunters and fishers avoid eating deer, turkey, or fish due to high levels of PFOS detected in the animals (MDIFW, 2023; Michigan PFAS Action Response Team, 2023;

NCDHHS, 2023). Contaminated water also results in the contamination of livestock such as beef, pork, poultry, etc. Susceptible populations, such as women of reproductive age, pregnant and breastfeeding women, and young children who eat fish may have increased exposure to PFOA and PFOS due to bioaccumulation in fish (Christensen et al., 2017; FDA, 2021; U.S. EPA, 2019b). Food can also be contaminated through food packaging made with these chemicals. However, in 2016, the Food and Drug Administration revoked the regulations authorizing the remaining uses of long-chain PFAS in food packaging (see 81 FR 5, January 4, 2016, and 81 FR 83672, November 22, 2016). Therefore, PFOA and PFOS should not be in food packaging now. Humans can also be exposed through incidental ingestion of contaminated soil and dust. Numerous studies have shown that PFOA and PFOS can be found in residences, offices, and other workplaces, and in consumer goods (Gaines, 2023; Hall et al., 2020; Strynar & Lindstrom, 2008).

PFOA and PFOS have been detected in nearly all of the blood of the participants in the NHANES. This indicates widespread exposure to these PFAS in the U.S. population (CDC, 2022). As part of the continuous NHANES, PFOA and PFOS were measured in the serum of a representative sample of the U.S. population ages 12 years and older in each two-year cycle of NHANES since 1999–2000, with the exception of 2001–2002. PFOA and PFOS have been detected in 99% of those surveyed in each NHANES cycle. As of the 2017–2018 data, PFOA and PFOS were still detectable in 99% of the population, although the mean concentrations of PFOA and PFOS in the serum have been steadily decreasing since 1999–2000 (CDC, 2021; U.S. EPA, 2019a).

Communities drinking water or eating food contaminated with PFAS can have significantly elevated blood levels of PFAS compared to national average concentrations (Graber et al., 2019; Kotlarz et al., 2020). Because PFOA and PFOS can remain in the human body and for long durations, individuals who have consistent ongoing exposures to PFOA and PFOS (e.g., those exposed by drinking contaminated water or eating contaminated food) can have high concentrations of these compounds in their bodies. Epidemiological studies measuring PFAS levels in humans have noted that people living near contaminated sites have higher concentrations of these chemicals than the general population and that drinking

water is an important contributor to exposure (Emmett et al., 2006).

Conclusion

In light of the evidence regarding hazard and the fate and transport of these chemicals, and consideration of the degree or magnitude of danger posed, EPA concludes for several reasons described above that PFOA and PFOS each may present a substantial danger when released into the environment.⁴⁰ Furthermore, the other information EPA considered, such as environmental prevalence and the likelihood of exposure, reinforce its conclusion. Individuals living in communities located near sites with high levels of PFOA and PFOS (e.g., sites where PFOA and PFOS were manufactured or used in the manufacture of products) are the populations (i.e., non-occupationally exposed populations) most likely to be exposed to PFOA or PFOS and are thus more likely to experience associated adverse health effects.

At the same time, the mobility of PFOA and PFOS means that these substances have the potential to migrate away from a highly contaminated site into sources of drinking water, both groundwater and surface water. And the mobility and persistence combine to create an ever-expanding area of contamination if it is not contained and/or cleaned up. The persistence, mobility, and prevalence of PFOA and PFOS create more opportunities for exposure to humans and the environment, thereby increasing the likelihood of adverse health effects and adverse ecological burdens stemming from the toxicity of these compounds. See *Proposed Rule*, 87 FR 54415. In sum, communities located near sites with the highest concentrations of PFOA and PFOS are subject to a disproportionately higher risk of exposure to those substances as compared to the general population.

For all these reasons, EPA finds that both PFOA and PFOS, and their salts and isomers, each may present a substantial danger to the public health, or welfare, or the environment when released.

⁴⁰ EPA need only determine that PFOA and PFOS “may present” a substantial danger to designate as hazardous substances pursuant to CERCLA. CERCLA section 102(a). Other actions taken by EPA, pursuant to other statutory authorities, may require a different or more stringent finding. The scientific and technical data that EPA is relying on in this action may be relevant to those determinations and may support a finding under a more stringent standard.

VI. The Totality of the Circumstances Confirms That Designation of PFOA and PFOS as Hazardous Substances Is Warranted

Along with concluding that both PFOA and PFOS “may present a substantial danger,” EPA also independently exercised its discretion and conducted an additional “totality of the circumstances” analysis to evaluate whether designation was warranted. The analysis looks to the evidence showing that PFOA and PFOS “may present a substantial danger” along with CERCLA section 102(a) and its broader context. CERCLA section 102(a) and its broader context help identify the information to weigh and how to balance multiple considerations. In conducting the analysis as to PFOA and PFOS, EPA identified and weighed the advantages and disadvantages of designation. This analysis included consideration of the formal benefit-cost analysis, including quantitative and qualitative benefits and costs provided in the Regulatory Impact Analysis accompanying this final rule.

The totality of the circumstances analysis first considered the evidence that both PFOA and PFOS may present a substantial danger to public health or welfare or the environment when released, *see* CERCLA section 102(a). Specifically, EPA examined the scientific basis for designation. EPA gave the scientific evidence considerable weight. As discussed in Section V above, PFOA and PFOS exposure has been connected to a wide range of adverse human health and environmental effects. PFOA and PFOS bioaccumulate in humans and animals, including the fish and other wild animals we eat. And PFOA and PFOS are persistent and mobile in the environment. If not addressed, PFOA and PFOS will continue to migrate, further exacerbating exposure risk and potential cleanup costs.

EPA then evaluated CERCLA section 102(a) in the broader context of CERCLA. Section 102(a) provides EPA with health- and environmental-based criteria to evaluate whether a substance can be designated as hazardous. A hazardous substance designation, in turn, makes available the full suite of CERCLA authorities. EPA examined the ways in which designation serves CERCLA’s express purposes and functions: ensuring that the “Polluter Pays” for cleanup (CERCLA sections 107(a), 106(a)); allowing for timely cleanup of contaminated sites (CERCLA sections 104, 106, 121); and authorizing response that protects human health

and the environment (CERCLA sections 104, 106, 121).

With these statutory purposes in mind, EPA considered the core problem posed by PFOA and PFOS in the environment and whether designating PFOA and PFOS as hazardous substances would meaningfully improve EPA’s ability to address the problem. EPA believes that the likelihood of the public being exposed to PFOA and PFOS is high. The science demonstrates that human exposure to these chemicals is linked to a broad range of adverse health effects. These concerns apply particularly to those communities living near former manufacturing sites, where PFOA and PFOS were produced (and then widely used) since the 1940s. As a result, communities may be exposed to existing contamination at and near sites where those substances were manufactured and used for decades. These contaminated sites have the potential to disproportionately harm nearby communities and ecosystems. Because of this potential risk, such sites need to be investigated, evaluated for risk to human health and the environment, and cleaned up as appropriate. EPA concluded that CERCLA is best suited to address the problem posed by legacy PFOA and PFOS contamination.

EPA next considered whether the hazardous substances designation is warranted considering EPA’s existing authority that allows the Agency to address PFOA and PFOS as CERCLA “pollutants and contaminants.” EPA weighed how designation may promote cleanups that might otherwise be delayed or not occur. EPA’s current authority to is limited in meaningful ways.⁴¹ This rule, however, will allow EPA to utilize the full suite of CERCLA authorities and enable EPA to address more sites, allow for earlier action, and expedite eventual cleanup. This is, in large part, because EPA will be able to employ CERCLA’s liability and enforcement provisions to require parties responsible for significant pollution to address existing contamination. As a consequence, designation greatly expands societal

⁴¹ As described in Section II.E., CERCLA authority differs with respect to “hazardous substances” and “pollutants or contaminants.” Designation of PFOA and PFOS as “hazardous substances” streamlines response authority, makes available cost recovery authorities allowing parties to recover response costs from PRPs, and makes available CERCLA enforcement authority to compel PRPs to conduct or pay for cleanup. *See* CERCLA sections 104(a), 106(a), 107(a). Designation also requires facilities to notify federal, state, local, and tribal authorities, as well as potentially injured parties, of significant releases. *See* CERCLA sections 103(a), 111(g); EPCRA section 304.

resources available (both financial and human capital) for investigation and cleanup that would not be available absent designation.

EPA also weighed the quantitative and qualitative costs and benefits evaluated in the RIA.⁴² EPA considered the estimated direct and indirect monetized costs. These costs include direct costs to comply with release notification requirements and indirect costs for response actions, including potential costs for existing and future NPL sites as well as potential costs that may arise from enforcement actions taken at non-NPL sites. EPA also considered qualitative costs, which are those that EPA could not quantify with reasonable certainty. Qualitative costs encompass the potential costs of litigation and liability. Although EPA was unable to quantify these potential costs, EPA evaluated how designation may affect CERCLA liability and litigation. EPA analyzed whether CERCLA’s statutory provisions (e.g., liability limitations, cost recovery provisions and settlement authorities) and existing enforcement discretion policies could mitigate those potential costs. Next, in evaluating benefits, EPA considered the quantified baseline benefits associated with transferring response costs from EPA to PRPs as well as quantified health benefits that may result from the designation. These health effects include those associated with birth weight, cardiovascular disease (CVD) and renal cell carcinoma (RCC)-avoided morbidity and mortality associated with reductions in PFOA and/or PFOS. Unquantified health benefits include health effects such as immune, liver, endocrine, metabolic, reproductive, musculoskeletal, as well as certain cancers such as combined hepatocellular adenomas and carcinomas.

EPA also considered the ways in which the accompanying RIA does not fully capture the quantitative costs or benefits of the rule due to data limitations. As discussed throughout this preamble, CERCLA response actions are discretionary, contingent, and site-specific determinations. Whether it is appropriate to take any action—such as through CERCLA

⁴² EPA conducted a Regulatory Impact Analysis (RIA) consistent with E.O. 12866. The E.O. requires, among other things, that the Agency quantify costs and benefits to the extent possible and that it qualitatively address the costs and benefits that cannot be quantified. The analyses required under the E.O. do not determine the appropriate consideration of advantages and disadvantages for EPA final actions. Instead, the EPA statute, in this case CERCLA, must be evaluated to determine the intended benefits of the statute as determined by it terms.

response authority under section 104 or CERCLA enforcement authority under section 106—is based on a myriad of factors and most importantly whether the releases at the site pose unacceptable risk. Because EPA cannot fully assess and characterize the magnitude and number of instances where the rule would reduce impacts associated with PFOA or PFOS exposure, the benefits are difficult to fully ascertain and estimate with certainty. In addition, there is considerable uncertainty regarding the cost of health burdens that may result from exposure to PFOA or PFOS, and associated cost savings from reducing the incidence of these burdens because of designation.

Relatedly, future response costs are also difficult to quantify due to the site-specific nature of CERCLA. Unlike with benefits, though, EPA concluded that it has sufficient information to reasonably estimate anticipated future costs for NPL and non-NPL sites. EPA was able to utilize existing data to estimate a high and low range for response costs at these sites. As explained in Section VI.A, the investigative and remedial technologies available to address PFOA and PFOS are, in large part, the same remedial technologies used to address other hazardous substances (e.g., the costs to pump and treat groundwater; to dig and haul contaminated soil; or to provide alternative drinking water). Therefore, EPA can use historic response cost information to reasonably assess PFOA and PFOS response costs. EPA acknowledges, however, that there remains uncertainty concerning the location and number of sites that will be identified as needing remediation and the extent of contamination at those sites. There is also uncertainty regarding the potential incremental increase in cost (if any) of addressing PFOA or PFOS at a site along with other COCs present.⁴³

EPA concluded that a “totality of the circumstances” analysis is a useful benchmark for assessing whether action is warranted under a unique statute like CERCLA. Unlike other environmental statutes which are premised on “command and control” regulation, CERCLA is a remedial statute. It does not set prospective limits on the amount of permissible contamination. Instead, CERCLA imposes financial liability on those responsible for existing contamination that presents

unacceptable risk to public health and the environment. In many instances (e.g., at NPL sites) cost considerations are evaluated on a site-specific basis. A totality of the circumstances analysis best reflects the advantages and disadvantages of designation and allows for a more holistic assessment of designation.

The totality of the circumstances analysis is provided below. Section VI.A discusses the numerous advantages of designation. Designation allows EPA to deploy the full suite of CERCLA tools to identify, characterize, and cleanup the most contaminated sites expeditiously. It also allows EPA to hold responsible those parties that have contributed to significant contamination so that they bear the costs of cleaning it up. This, in turn, makes more resources available, allowing for additional and/or earlier cleanups relative to what could occur absent designation. These additional, earlier cleanups will protect vulnerable populations and communities living near contaminated sites. Further, these cleanups will have meaningful health benefits similar to other CERCLA actions by reducing a broad range of potential adverse human health effects. Thus, cleaning up PFOA and PFOS contamination that is posing unacceptable risk to human health, or the environment will improve quality of life and reduce health care expenditures for the communities living in and around PFOA and PFOS contaminated sites.

Section VI.B evaluates the disadvantages of designation such as direct costs of the rule, the potential for the rule to create hardship for parties that did not significantly contribute to contamination, and the potential for uncertainty for PRPs. EPA estimates that direct costs, particularly release notification costs, are fairly minimal. EPA recognizes that some parties that do not bear primary responsibility for contamination may be sued and face uncertain litigation costs. EPA believes that CERCLA’s liability limitations, coupled with EPA enforcement discretion policies, should operate to minimize hardship for parties that did not significantly contribute to contamination. EPA expects that designation should not change CERCLA’s liability framework and that CERCLA will continue to operate as it has for decades (with respect to the more than 800 existing hazardous substances) to resolve who should pay for the cleanup and how much.

In Section VI.C, EPA explains the results of the totality of the circumstances analysis to demonstrate that potential costs and disadvantages

are not unreasonable when weighed against the numerous advantages of designation.

A. Advantages of Designation

EPA examined the advantages of designation, including its positive impacts on public health, the Superfund program, local economies and ecosystems, and the importance of shifting response costs to parties responsible for significant contamination. Unlike other environmental statutes which are premised on “command and control” regulation, CERCLA is a remedial statute. It does not set prospective limits on the amount of permissible contamination. Instead, CERCLA imposes financial liability on those responsible for existing contamination that presents unacceptable risk to public health and the environment. As a consequence, benefits of the designation flow from CERCLA’s liability framework—which leads to more cleanups of existing contaminated sites—rather than the prospective regulation of releases at regulated sources.

Designating PFOA and PFOS as CERCLA hazardous substances eliminates barriers to timely cleanup of contaminated sites, enables EPA to shift responsibility for cleaning up certain sites from the Fund to PRPs, and allows EPA to compel PRPs to address additional contaminated sites. Ensuring the timely cleanup of sites, and that the parties responsible for significant contamination bear the costs of cleaning it up, are the primary objectives of CERCLA. EPA gave significant weight to these considerations because, absent designation, the cleanup of PFOA and PFOS contamination would be significantly hampered. PFOA and PFOS contamination is widespread, and EPA’s current authority is limited.

Earlier and more timely responses at contaminated sites will better address the urgent public health issue of PFOA and PFOS contamination. As discussed above in Section V, the latest science is clear: human exposure to PFOA and PFOS is linked to a broad range of adverse health effects. EPA gave significant weight to its finding that both PFOA and PFOS may present substantial danger. The potential for harm to public health is unabated if PFOA and PFOS remain in the environment, and designation is necessary to facilitate swift action. EPA also gave significant weight to the substantial health benefits—realized by communities nationwide—that are expected to result from designation. Earlier, expeditious response to PFOA

⁴³ Designation does not require any specific response actions or confer liability. Whether response costs will be incurred is wholly dependent on site-specific discretionary decisions. Before taking any action, EPA evaluates the level of risk posed by any given release.

and PFOS releases will reduce exposure to PFOA and PFOS across the country and will minimize the likelihood of adverse health effects, particularly for sensitive groups such as pregnant woman and children. As discussed *supra* in Section V, PFOA and PFOS exposure is linked to serious health conditions, including cancer and cardiovascular disease. Reducing PFOA and PFOS exposures can improve community health while potentially saving Americans billions of dollars in health care and other expenses. PFOA exposure alone has been estimated to have caused billions of dollars of health care and other economic costs (*Malits et al., 2018*). EPA also quantified certain potential health benefits associated with reducing PFOA and PFOS exposure in private drinking water wells. Designation allows for earlier, and additional, CERCLA response activities to address areas with high levels of PFOA and PFOS contamination, which translates to lower risk of adverse health effects for the most exposed communities. Ensuring that EPA can utilize CERCLA to the fullest extent is critical to address this serious public health issue.

1. Designation Enables Earlier, Broader, and More Effective Cleanups of Contaminated Sites

Designation of PFOA and PFOS as hazardous substances is critical to EPA's ability to address the public health threats posed by PFOA and PFOS in the environment. CERCLA imposes notification requirements and potential liability on those that release hazardous substances and makes available authorities that promote timely cleanup of hazardous substances. This includes release notification under CERCLA section 103, response authority under CERCLA section 104, enforcement authority under CERCLA section 106, and cost recovery under CERCLA section 107. Thus, designation allows EPA to employ a broader suite of CERCLA authorities to address contamination, which in turn allows EPA to address more sites, enables earlier and more expeditious responses to PFOA and PFOS releases, and makes available additional resources allowing for cleanup of other COCs at NPL sites. It also provides EPA with authority to pursue those responsible for the most significant contamination so that they bear the financial responsibility for cleaning it up.

a. Designation Opens Up CERCLA's Notification, Response, Enforcement and Cost Recovery Authorities, Which Allows EPA to More Timely Address Contaminated Sites

This action will make PFOA and PFOS subject to CERCLA's notification, response, enforcement, and cost recovery authorities. This is because those authorities either do not apply, or are limited, with respect to pollutants or contaminants (which PFOA and PFOS are currently).

A direct consequence of designating PFOA and PFOS as hazardous substances is that, once designated, entities that release PFOA and PFOS at or above the reportable quantity must provide notification of the release. The requirements include notification to the National Response Center for releases that meet or exceed the reportable quantity, CERCLA section 103; newspaper notice to parties potentially injured by a release, CERCLA section 111(g); and State, local, and Tribal notice, as appropriate, for reportable releases, EPCRA section 304. These notifications allow EPA to assess whether CERCLA response actions are necessary to mitigate risks to public health and the environment and to respond promptly where response actions are necessary. Swift action to address harmful releases can prevent further migration of PFOA and PFOS from the source of the release and reduce the need for more expensive, more expansive cleanup in the future.

Designation also allows EPA to streamline the Federal government's response authority under CERCLA section 104 to address releases or threatened releases using removal or remedial authority. Absent designation, EPA (and other Federal agencies) can only address PFOA and PFOS as pollutants or contaminants. This means that, for each individual response, EPA (or another agency) needs to find that a release, or threat of release, "may present an imminent and substantial danger to the public health or welfare." 42 U.S.C. 9604(a)(1). After designation, agencies will be able to respond to a release or threatened release without first making this determination, allowing for action sooner.

Designation also makes CERCLA's enforcement and cost recovery authorities available for PFOA and PFOS. In the absence of designation, CERCLA authority to compel PRPs to conduct or pay for response work does not extend to "pollutants or contaminants" and CERCLA does not provide cost recovery for actions taken solely in response to releases or threats

of releases of "pollutants or contaminants." Having access to these authorities will allow EPA to hold PRPs responsible for addressing PFOA/PFOS contamination, which can lead to the timely cleanup of more contaminated sites.

Designation will allow EPA to take enforcement actions against PRPs under CERCLA section 106(a) when there may be an imminent and substantial endangerment from an actual or threatened release of PFOA or PFOS. EPA will be able to use CERCLA section 106(a) to compel PRPs to take immediate action to start the time-consuming process of investigating, scoping, and cleaning up PFOA and PFOS releases. This authority also helps to ensure that PRPs are financially accountable for releases of PFOA and PFOS by enabling EPA to compel PRPs to undertake response action. This, in turn, enables earlier and more EPA response work by diversifying EPA's options. Enforcement actions are also complementary to Fund-financed response activities ("*Guidelines for Using the Imminent Hazard, Enforcement and Emergency Response Authorities of Superfund and Other Statutes*," 1982). EPA aims, whenever possible, to seek cleanup by responsible parties prior to recourse to either the Fund or litigation. This allows EPA to preserve the valuable resources of the Fund to address as many priorities as possible.

Enforcement authority contributes to timely response actions at the most contaminated sites. Because PRPs, rather than EPA, are best positioned to know the location and extent of potential contamination at and from their facilities, PRP-led cleanups can be more efficient. PRP-led cleanups can also be faster because EPA need not secure access orders with PRPs if the PRP is conducting the response actions. Also, EPA generally takes enforcement actions to address sites that pose the highest relative risks; therefore, making enforcement authority available supports EPA's ability to target and prioritize existing sites where PFOA and PFOS releases pose substantial risk to public health and the environment.

Additionally, designation will allow EPA to use CERCLA section 107 to recover costs expended by EPA to clean up PFOA and PFOS contamination. CERCLA section 107 provides that liable parties are responsible for the costs associated with responding to hazardous substances. Liable parties under CERCLA include: (1) Current owners and operators of facilities, (2) past owners and facility operators in place at the time of hazardous substance

disposal, (3) any person who “arranged for disposal” of that facility’s hazardous substances, and (4) any person that accepts hazardous substances for “transport to disposal or treatment facilities.” (CERCLA section 107(a)). If a person is liable for a release of hazardous substances, that person may be responsible to pay for response costs, natural resource damages, and assessment costs, and costs pertaining to certain health assessment or health effects studies. CERCLA section 107(a)(4)(A)–(D).

b. The Availability of CERCLA Enforcement and Cost Recovery Authority Ensures That Polluters Are Financially Responsible, Which Is Consistent With CERCLA

This action will allow EPA to hold polluters responsible for addressing significant contamination. After designation, EPA will have authority under CERCLA section 106 to compel PRPs to take response actions at their facilities. This may allow EPA to reach more sites more quickly. After designation, EPA can also rely on authority under CERCLA section 107 to recover costs expended by EPA to clean up PFOA and PFOS contamination.

The availability of CERCLA enforcement authority to address PFOA and PFOS releases aligns with the Polluter Pays principle, a central objective of CERCLA, and is an important advantage of the rule. CERCLA is specifically designed to hold responsible those parties that contributed to dangers to human health and the environment by releasing hazardous chemicals into the environment. *See* H.R. Rep. No. 99–253, pt. 3, at 15 (1985), *as reprinted in* 1978 U.S.C.C.A.N. 3038, 3038 (stating that a goal of CERCLA is “to hold responsible parties liable” for cleanup costs); H.R. Rep. No. 96–1016, pt 1, at 1 (1980) (acknowledging that CERCLA establishes “strict liability to enable the Administrator to pursue rapid recovery of costs . . . and to induce [liable parties] voluntarily to pursue appropriate environmental response actions . . .”). The ability to require liable parties to pay for cleanup is the cornerstone of ensuring that sites are cleaned up to protect public health from “one of the most pressing environmental problems.” *See* H.R. Rep. No. 99–253, pt 1, at 54 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 2835, 2836. In reauthorizing CERCLA, Congress acknowledged that, “[I]t is clear from the accumulating data on waste sites that EPA will never have adequate monies or manpower to address the problem itself. As a result,

an underlying principle . . . is that Congress must facilitate cleanups of hazardous substances by the responsible parties . . .” H.R. Rep. No. 99–253 at 55. Consistent with these legislative goals, this rule enables EPA to hold PRPs, particularly those that have contributed significantly to PFOA and PFOS contamination, financially responsible for addressing such contamination. Designation also signals to the market that there is value in the prevention of releases and mitigation of existing releases.

EPA considered the additional costs that PRPs may face and concluded that these potential costs do not outweigh the advantages of designating PFOA and PFOS. Potential costs associated with CERCLA enforcement actions that may occur after designation are difficult to assess. Nonetheless, EPA used historical cost data to assess the potential for additional costs to PRPs associated with response work at non-NPL sites that may result from enforcement actions, *see Chapter 5 of the RIA for more detail*. EPA cannot ascertain with certainty the number of sites that may be subject to a CERCLA enforcement action over the next several years. Depending on the circumstances, EPA may determine that authority provided under a different statute, such as RCRA, SDWA, CWA, or TSCA, may be best suited to address the environmental harm. In addition, the site could be referred to the State for further action rather than EPA; or site activity could be Fund-lead, which may occur when there is no viable PRP or when immediate action is required. Should EPA proceed using CERCLA enforcement, the scope of the enforcement action—including the response activities required and the amount of time it may take to implement them—is also difficult to estimate absent a preliminary assessment of the scope of contamination at a specific site.

Ensuring that the PRPs responsible for significant contamination bear the costs of cleanup is one of the express purposes of CERCLA and can only be realized through designation. This is an important advantage of designation. Bringing PFOA and PFOS into CERCLA’s liability framework is a critical and essential advantage of designation, considering that PFOA and PFOS are prevalent in the environment, threaten communities across the country, and PRPs are best situated to address releases from their facilities. And while it cannot be determined with specificity where or when enforcement and response actions will occur, EPA attempted to estimate anticipated expenditures to the best of its ability.

Considering all of this together, EPA concluded that designation achieves a principal objective of CERCLA—the polluter pays. The payment of these costs by those responsible for significant contamination represents an improvement in social welfare as a result of the rule.

c. EPA Expects Designation Will Increase Emergency Response and Removal Actions for PFOA/PFOS

EPA expects that designation will result in more removal actions, including emergency actions, to address PFOA and PFOS releases, which in turn may increase health benefits. These removal actions can be taken by EPA (*i.e.*, Fund-lead actions) or a PRP (*i.e.*, PRP-lead actions).⁴⁴ Additional removal actions are expected to occur because EPA prioritizes responses to hazardous substances and in particular those with the greatest threat to human health, and EPA expects an increase in State referrals, each of which are explained in turn.

After designation, EPA expects to take more Fund-lead removal actions for PFOA and PFOS contamination because existing limitations on response authority and cost recovery will no longer apply. EPA’s removal program, although not limited to responses to hazardous substance releases, prioritizes responses to hazardous substance releases. This is in part because the removal budget is limited, and the administrative burden for addressing hazardous substances is reduced relative to addressing PFOA/PFOS as pollutants or contaminants. Absent designation, to respond to PFOA or PFOS contamination utilizing CERCLA section 104(a), the statute requires EPA to determine the release or threat of release may pose an imminent and substantial endangerment. The statute also does not allow EPA to cost recover for actions exclusive to pollutants or contaminants. A hazardous substance designation removes those statutory limitations, as EPA need not demonstrate on a case-by-case basis that releases of hazardous substances may pose an “imminent and substantial endangerment.” Designation thus enables additional Fund-lead removal actions to address immediate risks.⁴⁵

⁴⁴ This section only discusses designation impacts on Fund-lead removals. Designation impacts pertaining to PRP-lead actions, including removal orders, are discussed in section VI.1.b.

⁴⁵ When a removal action is appropriate, EPA should take action “as soon as possible,” (40 CFR 300.415(b)(3)), and may often choose to take a Fund-lead removal rather than pursuing a PRP-lead action through use of CERCLA enforcement authority. Negotiating an enforcement order can be a time-consuming effort, which can in turn delay

EPA can then later recover costs for cleanup of these substances. Recovered costs for each removal action that EPA takes to address sites contaminated with PFOA and/or PFOS are costs that would be shifted from taxpayers to PRPs.

Removal actions to address PFOA and PFOS releases may also increase as a result of State referrals, which often trigger a Fund-lead removal action. States refer sites to EPA when they do not have the capacity, technical expertise, or funding to take action under their own authorities. EPA expects an increase in State referrals to EPA for PFOA and PFOS removal actions because State budgets are limited. And because State budgets are limited, Federal involvement may be the only financially viable path toward responding to PFOA and PFOS releases. EPA is not required to initiate a removal in response to referrals; however, EPA must evaluate the need for removal actions as promptly as possible after receiving the notification and determine the appropriate response. (40 CFR 300.405(f)(1), 300.410(b)). EPA may determine that a Fund-lead removal is the appropriate response or, if not, EPA may continue monitoring the situation should EPA involvement be appropriate at a later point in time.

EPA expects that removal costs for addressing PFOA and PFOS releases will likely be roughly similar to removal costs for other substances. The same response methods that exist for addressing other hazardous substances are available for PFOA and PFOS. As one example, in cases where PFOA and PFOS are contaminating drinking water, removal actions would primarily focus on risk reduction for exposure to contaminated drinking water. Methods of addressing exposure may include granulated activated carbon, ion exchange, connecting customers to the nearest public water system, and/or temporarily providing bottled water. Any contamination left in place would be managed using post-removal site controls⁴⁶ or referred to a cleanup program (e.g., State, local, or the Superfund remedial program),⁴⁷

a response. When immediate action is required, EPA will use Fund dollars to initiate a removal and later cost recover.

⁴⁶ Post-removal site control (PRSC) means “those activities that are necessary to sustain the integrity of a Fund-financed removal action following its conclusion.” (40 CFR 300.5). This may include, for example, replacing water treatment system filters or collecting leachate. Once field actions end, and all EPA resources are demobilized, any additional actions required are PRSCs. PRSCs continue until they are no longer necessary or until such time as a PRP, state or local government, or EPA’s remedial program implements a remedy. (40 CFR 300.415(l)).

⁴⁷ After EPA takes a removal action, it may be appropriate to refer the site back to the state to

dependent on relative risk. EPA expects that Fund-led removal actions to address PFOA and PFOS releases may range from \$160,000 to \$503,000 per site. *See RIA Chapter 5.* Where PFOA and/or PFOS are the sole driver for initiating a removal action, the cost estimate above represents the estimated cost of the action. Where EPA may be responding to multiple COCs, the cost of addressing PFOA/PFOS would represent an incremental increase to the overall cost of response in addition to those other COCs.

An increase in removal actions for PFOA and PFOS releases is expected to produce meaningful health benefits. Fund-lead removal actions are the fastest way for EPA to respond to the most urgent situations. Removal actions are typically quick responses to immediate threats to eliminate or mitigate a threat to the public. Thus, EPA is able to initiate a removal action more quickly than it can remedial action—actions which often take decades to develop and implement. Through removal actions, EPA can more quickly eliminate or mitigate exposure pathways. For example, if it becomes known to EPA that a resident’s drinking water is contaminated with PFOA and PFOS above risk-based levels, EPA can take action to eliminate that exposure pathway by providing alternative drinking water or connecting the resident to an alternative water source. Such actions mitigate the risk of adverse health outcomes associated with chronic and cumulative exposures to PFOA and PFOS. *See Section VI.A.2 of this document, discussion of health benefits.*

d. EPA Expects That Shifting Costs to PRPs To Address PFOA/PFOS Contamination at NPL Sites Will Make Fund Money Available for Other Response Work

Through this action, EPA may compel viable PRPs to clean up PFOA/PFOS contamination. EPA may thus conserve use of the Fund for addressing other COCs or sites where there are no viable PRPs, expanding EPA’s ability to provide meaningful benefits for public health and the environment across the country. Absent designation, EPA would continue to spend Fund resources to clean up PFOA and PFOS releases at non-Federal facility NPL sites

maintain PRSCs. The NCP provides that EPA should provide for PRSC, to the extent practicable, before the removal action begins. (40 CFR 300.415(l)). EPA often coordinates with states to obtain a commitment that the state will maintain PRSCs after the removal ends. States may not have funding to undertake the initial removal action, but often are able to budget PRSC costs.

under EPA’s authority to address PFOA and PFOS as “pollutants or contaminants.” Prior to this rule, EPA evaluated PFOA and PFOS releases as pollutants and contaminants as part of its process to identify potential NPL sites, in its selection of a remedy, and in evaluation of the remedy. *See supra*—Section II.E.4, 5. After designation, EPA will continue to evaluate PFOA and PFOS releases as part of the Superfund process, but now EPA can transfer these costs to PRPs—the entities responsible for the contamination and associated hazards to human health and the environment.⁴⁸ Designation or not, EPA has been and will continue to evaluate hazardous substances, pollutants or contaminants, at NPL sites and, if necessary, address releases that present unacceptable risk to human health or the environment. A major difference this designation makes for NPL sites is who bears responsibility.

After designation, parties responsible for significant contamination may bear liability. As discussed in Section VI.A.1.b., the transfer of costs from EPA to PRPs directly advances CERCLA’s objective that those that contributed to contamination bear the cost of cleaning it up. While these cost transfers at NPL sites are an important outcome of the designation, the designation itself does not lead to greater response costs at particular NPL sites. Absent designation, EPA would incur these costs, which would be paid by the Superfund. After designation, EPA can transfer these costs to viable PRPs by compelling PRPs to implement response actions at NPL sites or through cost recovery.

The transfer of costs to viable PRPs leads to more total resources available for cleanups. Superfund resources that otherwise would have been used for PFOA and PFOS response actions can now be available for other priorities. Such monies could be made available for additional Superfund response activities at NPL sites to be spent addressing any of the more than 800 hazardous substances, including PFOA and PFOS, as well as other pollutants and contaminants. EPA estimates that this will result in \$10.3M to \$51.7M (at a 2% discount rate) of Fund resources available each year for NPL response work because of designation. While EPA cannot fully quantify the benefits attributable to funds being available for more response work at NPL sites, EPA

⁴⁸ As detailed in the RIA accompanying this rule, these “cost transfers” from EPA to the PRP do not result in a net increase in economic costs—rather, they just change “who pays” for these cleanup costs.

believes these benefits will be meaningful. More money for NPL response work means that EPA will be able to better address threats to public health and our natural environment from contamination.

Addressing PFOA and PFOS contamination may lead to an incremental increase in the costs associated with addressing NPL sites depending on what other COCs are located at a given site. It is unusual for a remedy to address a sole “contaminant of concern,” many of which are hazardous substances. Typically, remedial actions address a number of COCs at once. In some cases, the remedy for other COCs will also address PFOA and PFOS contamination; in other cases, there will need to be additional work to address PFOA and PFOS contamination. For instance, if PFOA and PFOS are not already part of a remedy for the site, adding them to the remedy would then have the potential to incrementally increase the overall cost of the remedy (e.g., by increasing the frequency of GAC replacement). Any costs of cleaning up PFOA and PFOS contamination could then be transferred to PRPs, instead of borne by the Fund. EPA estimates that the incremental cost for addressing PFOA and PFOS releases at NPL sites may range from \$10.3 million annually to \$51.7 million annually (at a 2% discount rate). *See RIA Chapter 5.* These represent estimated response costs that the Fund would incur absent designation; designation is not expected to result in an overall increase in cost to EPA to address NPL sites. However, the recovery of \$10.3M to \$51.7M (at a 2% discount rate) of Fund resources each year because of designation will result in EPA continuing to spend that same amount on other Superfund response activities. This represents an increase in resources expended on Superfund response as EPA continues to spend as before and parties responsible for PFOA and PFOS contamination also must spend to address contamination at NPL sites. This represents an indirect incremental cost of the rule.

In sum, EPA concludes that significant advantages of designation are that it will enable earlier, broader, and more effective cleanups of contaminated sites. Designation will provide additional or enhanced notification, response, liability, and enforcement authority under CERCLA. This enhanced authority may allow EPA to address more contaminated sites more quickly. Designation will also ensure that polluters pay for cleaning up contamination that poses unacceptable risks to human health and the

environment, which is consistent with CERCLA’s objectives. EPA expects to conduct more removal and emergency response actions and that more resources will be available for NPL site response actions. These are significant advantages of the rule because it effectuates the two primary objectives of CERCLA’s statutory framework—timely cleanup of contaminated sites and polluter pays—by bringing widespread, persistent chemicals—PFOA and PFOS—under the umbrella of CERCLA’s liability framework, which in turn makes more resources available to address this widespread public health threat.

2. Designation Brings Broad Health Benefits

EPA also weighed the health benefits that may indirectly result from designation. EPA considered quantified and unquantified health benefits associated with reducing exposure to PFOA and PFOS, as well as from additional response work at NPL sites. While it is hard to determine with certainty the nature and scope of future response actions, EPA expects that reducing PFOA and PFOS exposure will reduce the risk of adverse health effects, as detailed below.

a. Qualitative Potential Benefits From Decreased Exposure After Addressing PFOA/PFOS Contamination

EPA weighed the indirect potential health benefits associated with removing PFOA and PFOS from the environment. When exposure pathways are mitigated or eliminated, communities living around contaminated sites would be expected to have lower rates of adverse health effects because they are exposed to less PFOA and PFOS. Historical data, such as NPL sites with soil lead contamination and cleanups, demonstrates improved health outcomes after Superfund cleanups.⁴⁹ So here, one advantage from designation is that EPA expects overall reductions of adverse health outcomes for exposed communities to occur sooner, in addition to wholly avoided exposure in some instances. EPA expects that additional response actions to address PFOA/PFOS at non-NPL sites resulting from more removals and enforcement actions will reduce or in some cases eliminate exposure to PFOA and PFOS from contaminated sites, resulting in

several categories of non-quantified health benefits realized as avoided adverse health effects. As described in section V.A. of this document, PFOA and PFOS exposure can be associated with the following adverse health outcomes:

- Developmental birth effects such as low infant birth weight, birth length, and head circumference
- cardiovascular effects such as changes in cholesterol and blood pressure
- cancer, including renal cell carcinoma
- changes in liver enzymes
- decreased immune response to vaccination
- endocrine effects, including thyroid disorders
- reproductive effects (for PFOA)
- nervous system effects (for PFOS).

Designation provides a robust mechanism to minimize the potential for these adverse health effects from PFOA and PFOS exposure. To the extent that adverse health effects are reduced or avoided, healthcare expenditures to address these outcomes could be reduced, and worker productivity and overall quality of life would be enhanced due to reduced illness and chronic health conditions.

Given that PFOA and PFOS are often expected to be co-located and/or commingled with other chemicals, cleanup at non-NPL sites because of enforcement actions may simultaneously clean up co-contaminants other than PFOA and PFOS that would otherwise go unaddressed, potentially including other types of PFAS. This may include cleanup of co-contaminants from private drinking water wells as well as the source water used for public water supply (to the extent contamination entered source waters and will be cleaned up as a result of this rule). As a result, addressing these co-contaminants has the potential to result in additional health and ecological benefits.

Despite the array of adverse health and environmental risks associated with exposure to PFOA and PFOS, it is technically challenging to quantitatively estimate adverse effects from exposure that will occur absent the designation of PFOA and PFOS as hazardous substances. Furthermore, it is challenging to quantitatively estimate the benefits that may result from designation. In fact, many important benefits (including those associated with possible immune, hepatic, endocrine, metabolic, reproductive, musculoskeletal outcomes) of cleaning up PFOA and PFOS can only be

⁴⁹ Heather Klemick, Henry Mason, and Karen Sullivan. 2020. “Superfund Cleanups and Children’s Lead Exposure,” *Journal of Environmental Management*, 100. doi: 10.1016/j.jeem.2019.102289. For more information: <https://www.epa.gov/superfund/lead-superfund-sites#sites>.

described in qualitative terms due to the lack of robust data. They cannot be quantified or monetized due to data gaps, and due to uncertainty regarding where and when cleanups will occur. But that does not mean that these benefits are small, insignificant, or nonexistent, particularly to the communities CERCLA exists to protect. Quantifying benefits from cleanup of PFOA and PFOS requires data to characterize the risk and quantify the magnitude of expected (cancer and noncancer) health outcomes. Generally, robust data needed to quantify the magnitude of expected adverse noncancer impacts are unavailable, and full quantification of these benefits is made even more challenging by the overlap of effects from PFOA and PFOS exposure. For these reasons, EPA was able to estimate only a few of the many potential benefits from reduced exposure to PFOA and PFOS. The quantified illustrative benefits of addressing PFOA/PFOS contamination discussed below are in addition to the potential qualitative benefits discussed above. EPA believes that the advantages of this action outweigh the disadvantages even without consideration of quantified benefits. The quantified benefits account for only a portion of the overall benefits from the designation of PFOA and PFOS as hazardous substances. That is, addressing PFOA and PFOS contamination in private drinking water wells also results in additional health benefits for additional health endpoints that cannot be quantified, and addressing PFOA/PFOS contamination more broadly brings health and ecological benefits well beyond private drinking water wells. The quantitative benefits described below, however, make clear the meaningful health benefits achieved from reduced exposure to PFOA and PFOS.

b. Quantifiable Health Benefits of PFOA and PFOS Exposure Reduction

In the RIA supporting this final regulation, EPA performed an illustrative estimate of benefits calculated using monetized health benefits estimates per unit reduction of PFOA and PFOS derived for 2024 National Primary Drinking Water Regulation (*U.S. EPA, 2024a*). The estimated benefits attributable to this rule due to reduced PFOA and PFOS levels in private wells (which are not subject to the PFAS NPDWR) are distinct from those attributable to the PFAS NPDWR from reduced PFOA and PFOS in public and community water systems. A portion of benefits from this rule derive from reduced PFOA and

PFOS in private wells used for drinking water that may result from addressing contaminated sites, both in the baseline (at NPL sites) and under this final rule (at non-NPL sites). The benefits estimation methodology and results are discussed here. Quantified benefits in the PFAS NPDWR were assessed as avoided cases of illness and deaths (or morbidity and mortality, respectively) associated with exposure to PFOA and PFOS. The PFAS NPDWR provided a quantitative estimate of birth weight and cardiovascular disease (CVD)—avoided morbidity and mortality associated with reductions in PFOA and PFOS. A quantitative estimate of renal cell carcinoma (RCC)—avoided morbidity and mortality for reductions in PFOA was also developed. EPA was not able to quantify or monetize other health benefits, including those related to other reported health effects including immune, liver, endocrine, metabolic, reproductive, musculoskeletal, as well as certain cancers such as combined hepatocellular adenomas and carcinomas. EPA assesses potential benefits quantitatively if evidence of exposure and health effects is likely, it is possible to link the outcome to risk of a health effect, and there is no overlap in effect with another quantified endpoint in the same outcome group. Particularly, the most consistent epidemiological associations with PFOA and PFOS include decreased immune system response, decreased birthweight, increased serum lipids, and increased liver enzymes (particularly Alanine Transaminase (ALT)). The available evidence indicates effects across immune, developmental, cardiovascular, and hepatic organ systems at the same or approximately the same level of exposure.

i. Quantified Developmental Effects

Research indicates that exposure to PFOA and PFOS is associated with developmental effects, including infant birth weight (*ATSDR, 2021; Negri et al., 2017; U.S. EPA, 2016c, 2016d, 2022b, 2024c; Verner et al., 2015; Waterfield et al., 2020*). The route through which the embryo and fetus are exposed prenatally to PFOA and PFOS is maternal blood serum via the placenta. Most studies of the association between maternal serum PFOA/PFOS and birth weight report negative relationships (*Dzierlenga et al., 2020; Negri et al., 2017; Verner et al., 2015*). EPA quantified and valued changes in birth weight-related risks associated with reductions in exposure to PFOA and PFOS in drinking water.

Low birth weight is linked to a number of health effects that may be a source of economic burden to society in

the form of medical costs, infant mortality, parental and caregiver costs, labor market productivity loss, and education costs (*Behrman & Rosenzweig, 2004; Chaikind & Corman, 1991; Colaizy et al., 2016; Institute of Medicine, 2007; Joyce et al., 2012; Klein & Lynch, 2018; Kowlessar et al., 2013; Nicoletti et al., 2018*). Recent literature also linked low birth weight to educational attainment and required remediation to improve students' outcomes, childhood disability, and future earnings (*Chatterji et al., 2014; Dobson et al., 2018; Elder et al., 2020; Hines et al., 2020; Jelenkovic et al., 2018; Temple et al., 2010*).

EPA's analysis focuses on two categories of birth weight impacts that are amenable to monetization associated with incremental changes in birth weight: (1) medical costs associated with changes in infant birth weight and (2) the value of avoiding infant mortality at various birth weights.

ii. Quantified Cardiovascular Effects

Cardiovascular Disease (CVD) is one of the leading causes of premature mortality in the United States (*D'Agostino et al., 2008; Goff et al., 2014; Lloyd-Jones et al., 2017*). As discussed in Section V.A above, exposure to PFOA and PFOS is associated with increased serum PFOA and PFOS concentrations and potentially elevated levels of total cholesterol and elevated levels of systolic blood pressure (*U.S. EPA, 2024b; U.S. EPA, 2024c*). Changes in total cholesterol and blood pressure are associated with changes in incidence of CVD events such as myocardial infarction (*i.e.*, heart attack), ischemic stroke, and cardiovascular mortality occurring in populations without prior CVD event experience (*D'Agostino et al., 2008; Goff et al., 2014; Lloyd-Jones et al., 2017*).

iii. Quantified Kidney Cancer Effects

The strongest evidence of an association between PFOA exposure and cancer in human populations is from studies of kidney cancer (*e.g.*, renal cell carcinoma (RCC)). Epidemiology studies indicated that exposure to PFOA was associated with an increased risk of kidney cancer (*ATSDR, 2021; California EPA, 2021; U.S. EPA, 2016d, 2024c, U.S. EPA 2024d*). The C8 Science Panel (2012) characterized the evidence for PFOA effects on kidney cancer as "probable" based on two occupational population studies (*Raleigh et al., 2014; Steenland & Woskie, 2012*) and two high-exposure community studies (*Barry et al., 2013; Vieira et al., 2013*). A recent study of the relationship

between PFOA and RCC in U.S. general populations found a statistically significant positive exposure-response association between prediagnostic serum PFOA concentrations and subsequent risk of RCC within a population-based US prospective cohort (*Shearer et al., 2021*). This study also observed associations with RCC for PFOS and PFHxS in models unadjusted for other PFAS. However, after mutual adjustment for these 3 chemicals, only the association with PFOA remained statistically significant. As such, EPA selected RCC as a key outcome when assessing the health impacts of reduced PFOA exposures.

In the PFAS NPDWR, EPA quantified and valued the changes in RCC risk associated with reductions in serum PFOA levels that are in turn associated with reductions in drinking water PFOA concentrations. For more details regarding the quantification of benefits from potential reduced developmental, CVD, and RCC impacts, as well as key limitations and uncertainties in that analysis, *See Chapter 6 of the EA for the*

2024 NPDWR Final Rule. (U.S. EPA, 2024a).

2. Estimated Health Benefits of PFOA and PFOS Exposure Reduction

For this final CERCLA rule, the quantitative benefit estimates from reducing the adverse health effects described throughout this rule are characterized as illustrative because, in addition to several uncertainties regarding potential cleanups at these sites, it is not possible to estimate the precise magnitude of potential health-related benefits from reducing PFOA/PFOS at these sites. Chapter 3 of the RIA supporting this final rule describes other limitations of the benefits-estimate transfer approach adopted from the PFAS NPDWR, including the simplifying assumption of combining PFOA and PFOS concentrations into one metric and the assumption that benefits per person are linear per PFOA and PFOS part per trillion (ppt) removed.⁵⁰

For context of baseline benefits associated with addressing PFOA/PFOS

at NPL sites, the low-end annualized baseline benefits under the assumption 10% of wells within one mile of NPL sites are impacted with 10 ppt reduction in PFOA/PFOS exposure are \$430,000 (2% discount rate). The high-end annualized baseline benefits under the assumption 30% of wells near NPL sites are impacted with 200 ppt reduction in PFOA/PFOS exposure are \$25,800,000 (2% discount rate). Exhibit 1 shows the results of the illustrative baseline benefits estimates under the scenarios analyzed. Note that these estimates are associated with potential cost transfers as described in Section VI.A.1.d. above and are expected to occur in the baseline (absence of the designation), therefore they are not a result of designation. However, these and other health benefits are expected to be conferred earlier than without designation because designation as hazardous substances reduce the administrative burden on the Agency and makes available enforcement authorities that allow EPA to address PFOA/PFOS contamination sooner.

Exhibit 1. Estimated Illustrative Range of Baseline Annualized Human Health Benefits as a Result of Addressing PFOA/PFOS Contamination at NPL sites (2022\$)

% of wells with PFOA/PFOS detections	2% Discount Rate Estimates		
	10 ppt reduction	50 ppt reduction	200 ppt reduction
10% of wells	\$430,000	\$2,150,000	\$8,5900,000
20% of wells	\$859,000	\$4,300,000	\$17,200,000
30% of wells	\$1,290,000	\$6,440,000	\$25,800,000
Notes: 1. Values rounded to three significant digits. 2. Results reflect PFOA/PFOS addressed at final, proposed, deleted, and future NPL sites. 3. Benefits estimated are associated with reduced incidence of developmental effects, cardiovascular effects, and renal cell carcinoma for populations served by private drinking water wells.			

As noted previously, the final rule is likely to result in enforcement actions brought by EPA to address PFOA and PFOS releases at non-NPL sites, which are expected to reduce exposure thereby mitigating or eliminating adverse health

effects for nearby communities. Due to uncertainties regarding the level of contamination at affected sites, the level of exposure avoided, populations near these sites of concern, and response actions taken, it is not possible to

estimate the precise magnitude of potential health-related benefits from reducing PFOA/PFOS at these sites. Given this uncertainty, EPA presents a range of *illustrative* potential health benefits associated with this

⁵⁰ The extent to which PFOA or PFOS or both will be reduced at any given site where EPA may implement CERCLA response action is unknown at this time. While PFOA and PFOS are typically found together, to the extent that any CERCLA

response action only reduces PFOS concentrations and not PFOA concentrations, the potential health benefits associated with reducing renal cell carcinoma presented here would be overestimated because RCC is associated with PFOA exposure and

not PFOS. Further limitations and potential bias are described in more detail in Section 3.5 of the accompanying RIA.

designation. Consistent with the assessment of baseline benefits at NPL sites presented above, the analysis presented here is limited to benefits related to reductions in PFOA/PFOS concentrations in private wells that lead to a reduced incidence of developmental effects, cardiovascular effects, and renal cell carcinoma. This analysis focuses on sites where EPA may address PFOA/PFOS contamination at non-NPL sites using enforcement authorities made available

by designation. These sites may include those that are owned/operated by plastics material and resin manufacturing firms identified as having produced PFOS/PFOA,⁵¹ and sites owned/operated by companies reporting PFOS/PFOA releases (including PFOA/PFOS salts) to EPA's TRI.^{52 53}

Under the low-end assumptions, estimated annualized benefits range from as low as \$8,990 to as high as \$539,000. These low-end values reflect an assumption that clean up actions are

completed in year 19 for each group of sites analyzed. The corresponding range based on the high-end assumptions is \$13,000 to \$779,000. These high-end values reflect the assumption that response actions are completed in year 1 for each group of sites. Exhibit 2 below shows the results of the illustrative range of benefits estimates under the low-end and high-end scenarios analyzed. For more information about this analysis, see *Section 5.2.2 of the RIA*.

Exhibit 2. Estimated Illustrative Range of Annualized Human Health Benefits as a Result of Addressing PFOA/PFOS Contamination at non-NPL Sites (2022\$)

% of wells with PFOA/PFOS detections	Low-End Estimates			High-End Estimates		
	10 ppt reduction	50 ppt reduction	200 ppt reduction	10 ppt reduction	50 ppt reduction	200 ppt reduction
10% of wells	\$8,990	\$44,900	\$180,000	\$13,000	\$64,900	\$260,000
20% of wells	\$18,000	\$89,900	\$360,000	\$26,000	\$130,000	\$519,000
30% of wells	\$27,000	\$135,000	\$539,000	\$39,000	\$195,000	\$779,000

Notes:

1. Values rounded to three significant digits and reflect a 2% discount rate.
2. Results reflect PFOA/PFOS addressed at certain sites where EPA may use enforcement authorities.
3. Benefits estimated are associated with reduced incidence of developmental effects, cardiovascular effects, and renal cell carcinoma for populations served by private drinking water wells.
4. Benefits realized over a period of 77 years.

c. Cost Estimates of Burden of PFAS-Related Disease

EPA also considered the potential for designation to contribute to reduction in the burden of PFAS-related disease by looking at published studies related to PFAS disease burden. Expanding upon the exposure-response literature for PFAS, a recent study published by *Obsekov et al. (2023)* estimated a total United States disease burden of \$5.52 billion related to PFOA and PFOS in the U.S. in 2018. Based on PFAS exposure data from the NHANES, the study stratified the population into percentile groups according to PFAS concentrations. The incidence of five adverse health effects was then

estimated for each group based on exposure-response relationships from the literature. These health effects include: (1) Low birth weight, (2) Childhood obesity, (3) Kidney cancer, (4) Testicular cancer, and (5) Hypothyroidism in women. These health effects were chosen based on the existence of statistically significant associations for each effect derived from published meta-analyses of epidemiological studies. To value the economic costs associated with these health effects, the study relies on a combination of cost-of-illness data (e.g., the costs of hospitalization), human capital-based metrics (e.g., reduction in lifetime income associated with lost IQ

points related to low birth weight), and the value of disability-adjusted life years (related to kidney cancer). The study also includes a sensitivity analysis that expands the scope of health effects examined to include health conditions for which relationships with PFAS had been identified in the literature but had not been meta-analyzed. These additional health effects include adult obesity, type 2 diabetes in females, gestational diabetes due to exposure during pregnancy, endometriosis, polycystic ovarian syndrome, couple infertility, female breast cancer, and pneumonia. With these health effects added, the sensitivity analysis in *Obsekov et al. (2023)* estimates a PFOS-

⁵¹ Data acquired from: Environmental Protection Agency, "Enforcement and Compliance History Online (ECHO)." Because not all plastic material and resin manufacturers use PFAS, only a fraction of the facilities reported in ECHO as plastics material and resin manufacturers were used in this analysis. To filter facilities involved in the use or manufacture of PFAS, this RIA uses proxy sites

identified using sites owned/operated by companies that participated in EPA's PFOA Stewardship Program, under the assumption that the likelihood of PFOA/PFOS contamination is potentially high at these sites.

⁵² Environmental Protection Agency, "Toxics Release Inventory (TRI) Program, 2022 TRI

Preliminary Dataset: Basic Data Files," July 2023. Accessed at: <https://www.epa.gov/toxics-release-inventory-tri-program/2022-tri-preliminary-dataset-basic-data-files>.

⁵³ TRI reporting is not currently required for isomers of PFOA and PFOS.

and PFOA-related disease burden of \$62.6 billion in 2018. However, the authors recognize “that some studies for each of the included outcomes might have reported null findings, [and that] the lower bound of economic cost added for this group of outcomes is zero.” (*Id.*)

e. Environmental Justice (EJ) Analysis

EPA believes that the human health and environmental conditions that exist prior to this action result in or have the potential to result in disproportionate and adverse human health or environmental effects on communities with EJ concerns. The demographic analysis of plastics manufacturers, facilities reporting to the Toxic Release Inventory (TRI), and U.S. airports found that people of color and low-income populations are disproportionately represented (except near small/medium airports). In particular, these sites have higher rates of Black, Asian, and Hispanic people surrounding them relative to the national average. This finding holds whether focusing on all such populations within one or three miles of these sites or only such populations served by private wells.

Consequently, EPA believes that this action is likely to reduce existing disproportionate and adverse effects on communities with EJ concerns. To the extent that the final rule leads to additional response actions to mitigate or eliminate exposure to PFOA/PFOS, or to actions that mitigate exposure earlier, health risks for populations living near sites where releases occur may decline. Based on the detailed analysis found in *Section 6.3 of the RIA*, the proportion of the population near these sites identified potential communities with EJ concerns, or (in some cases) people living in structures with a higher probability of containing lead paint (built before 1960) exceeds the national average. Thus, EPA expects that the final rule will at least partially mitigate the existing burden of PFOS/PFOA exposure that falls disproportionately on communities with EJ concerns.

As further context for EJ effects potentially associated with the final rule, published literature concludes that communities with potential EJ concerns, and other socio-economic burdens, have a higher likelihood of exposure to PFAS, including PFOA/PFOS. For instance, reported data from Northeastern University’s Social Science Environmental Health Institute published in 2019 show that people of color and low-income populations are disproportionately exposed to PFAS as nearly 39,000 more low-income households (15% more than the

expected based on U.S. census data) and approximately 295,000 more people of color (22% more than expected) live within five miles of a site contaminated with PFAS (*PFAS Project Lab, 2019*). In addition, information on the broader links between PFAS exposure and communities with EJ concerns continues to emerge. An August 2021 Natural Resources Defense Council (NRDC) report examined exposure to PFAS in drinking water in California and found that at least 69 percent of State-identified disadvantaged communities have PFAS contamination in their public water systems, and a number of these communities have levels of PFAS contamination that are higher than the State average PFAS concentrations. In their report, NRDC examined the relationship between the PFAS results and California’s CalEnviroScreen 3.0 (CES) scores, which measure the environmental burden at the census-tract level. CES identifies communities that are disproportionately burdened by and vulnerable to multiple sources of pollution. The top 25 percent most impacted communities are identified as “disadvantaged communities” for the purpose of allocating funds from the State’s cap-and-trade climate program (Senate Bill 535). By examining the overlap of CES scores and PFAS results at the census level, NRDC identified census tracts that may be the most vulnerable to PFAS contaminated drinking water. (*Lee, Susan, Avinash Kar, and Dr. Anna Reade, Dirty Water: Toxic “Forever” PFAS Chemicals are Prevalent in the Drinking Water of Environmental Justice Communities*. Natural Resources Defense Council, New York. 2021). Therefore, this final rulemaking may improve conditions for exposed populations and communities, including communities with EJ concerns that may have greater PFAS exposure than the general population. Designation of PFOA and PFOS as hazardous substances would allow EPA to address more sites and to implement response actions earlier in time at sites contaminated with PFOA/PFOS, including those near exposed populations and communities, than the Agency could otherwise address in the absence of designation.

f. Summary of Potential Health Benefits Resulting From the Designation

EPA estimates that a portion of potential health benefits associated with reduced exposure resulting from addressing PFOA and PFOS contamination in private drinking water around non-NPL sites that may result from EPA exercising enforcement

authorities range from \$8,900 to \$779,000 (2% discount rate) per year, depending on the percentage of private wells impacted, the reduced level of PFOA/PFOS exposure at each well, and when the cleanup is expected to occur. Note that additional health benefits could also arise through other routes of exposure and for other health effects and non-health effects related to PFOA and PFOS that did not have adequate information for monetization in the PFAS NPDWR, which was used to develop estimates of potential indirect benefits of this designation. Remediation of PFOA and PFOS contaminated sites under CERCLA, including sites with contaminated sediment in water bodies, may reduce the transport of these substances to waters that can be sources of water to public water systems (PWS). There are potential health benefits to customers of public PWSs if source waters are cleaned up to levels below the PFAS NPDWR MCLs⁵⁴ or are cleaned up before the PWSs take action to comply with the PFAS NPDWR; EPA cannot quantify these potential benefits.

EPA expects that health benefits that would accrue absent this designation through addressing PFOA and PFOS as pollutants or contaminants under CERCLA, and the additional health benefits due to a potential increase in enforcement actions and removal actions, will be realized sooner rather than later because of this designation. Low-end annualized estimated baseline benefits associated with addressing PFOA/PFOS as pollutants or contaminants at NPL sites under the assumption 10% of wells near NPL sites are impacted with 10 ppt reduction in PFOA/PFOS exposure are \$430,000 (2% discount rate). The high-end annualized baseline benefits under the assumption that 30% of wells near NPL sites are impacted with 200 ppt reduction in PFOA/PFOS exposure are \$25,800,000 (2% discount rate). Designation is expected to result in earlier response actions because the rule will make EPA aware of PFOA/PFOS contamination earlier than in the baseline (at both NPL and non-NPL sites). As described previously, designation allows EPA access to enforcement authorities to investigate potential releases and compel PRPs to address releases and requires notification of releases above the RQ. These factors may allow for

⁵⁴ MCL—Once the MCLG is determined, EPA sets an enforceable standard. In most cases, the standard is a maximum contaminant level (MCL). The MCL is the maximum level allowed of a contaminant in water which is delivered to any user of a public water system. (<https://www.epa.gov/sdwa/how-epa-regulates-drinking-water-contaminants>.)

timelier cleanup relative to a world without the rule. EPA also expects that industry may improve best practices and handling procedures to prevent or mitigate releases of PFOA and PFOS that, in turn, could result in less expensive cleanups over the long run.

3. Property Reuse and Social, Economic, and Ecological Benefits That May Result From Designation

Superfund cleanups have a proven track record of contributing to social, economic, and ecological benefits. EPA expects similar benefits to accrue as a result of more PFOA and PFOS cleanups that will occur after designation. As a first step, EPA considered studies that evaluated property value trends for communities living around contaminated sites that were cleaned up. Some studies evaluated communities surrounding Superfund sites and other RCRA facilities. RCRA studies examining the effects of remediating hazardous waste sites are also illustrative of how cleanups can improve property values for nearby communities. Thus, EPA considered both sets of studies in evaluating how designation may contribute to increased property values.

Many studies demonstrate that cleaning up contaminated sites can positively improve property values. Residential property values within 3 miles (4.8 kilometers) of Superfund sites may increase as much as 18.7 to 24.4 percent when sites are cleaned up and deleted from the NPL. Research specific to RCRA cleanups also suggest that property values may improve from cleanup, perhaps as much as five percent (*Taylor et al., 2016*). Improved property values also have social equity and environmental justice benefits. Communities near Superfund sites tend to be more disadvantaged than those living farther from the sites, and so increased housing values may provide the most benefit to the poorest segments of the population as opposed to other population groups. Cleanup may help correct sociodemographic disparities in access to a clean and safe environment.

EPA also considered the potential for designation to support returning property to beneficial use. Superfund cleanups also make property usable for various purposes. Many Superfund sites—often vacant and underused areas—can become valuable local assets after cleanup. Many once-blighted properties across the country are now in use for a wide range of purposes, including shopping centers, offices, public parks, recreational fields, wildlife habitat, neighborhoods, and renewable energy facilities. Cleanups

can also deter blight, vandalism and trespassing. https://www.epa.gov/superfund/superfund-program-protecting-healthy-communities-advancing-environmental-protection#community_anchor.

Sites in reuse and continued use can revitalize a local economy with economic benefits such as jobs, new businesses, tax revenues, and local spending. As of FY 2022, more than 1,040 Federal and non-federal⁵⁵ NPL sites support new and ongoing uses. EPA has collected data on more than 10,250 businesses at 671 non-Federal NPL sites. In FY 2022, these businesses generated \$74.1 billion in sales and employed more than 236,802 people who earned a combined income of more than \$18.6 billion. Over the last 12 years (2011–2022), these businesses' ongoing operations have generated over \$589 billion (inflation adjusted) in sales. <https://www.epa.gov/superfund/superfund-remedial-annual-accomplishments-metrics#redevelopment>.

EPA considered the potential for designation to contribute to ecological benefits, such as ecological reuse and ecosystem services. Superfund cleanups can reduce or reverse damage to ecosystems and generate ecological or recreational reuse activities. These improvements can contribute to a thriving local community and spark local investment, which can improve local well-being, quality of life, employment rates, property values, and tax revenue generation. While the exact monetary value of ecosystem services and ecological reuse can be challenging to measure, historical evidence shows they provide meaningful benefits to communities. Ecosystem services support all facets of human systems, providing trillions of dollars in amenities and important natural capital. New or restored ecosystems as a result of Superfund actions can generate important economic benefits. See EPA document on the Agency's website, *Ecosystems at Superfund Sites, Reuse and the Benefit to Community*. <https://semspub.epa.gov/work/HQ/100003256.pdf>. Cleanups can produce a range of ecosystem services—timber, purification of surface water and recreation opportunities, habitat to use for new hives to support pollinators, and enhance flora and fauna, among others. It can lead to ecological and recreational reuse activities, which include waterbodies, wildlife sanctuaries, nature

preserves, wetlands, pollinator habitats, forests, grasslands, beaches, and forests. Recreational reuse can also include the installation of athletic fields, parks, playgrounds, and trails. Now there are nearly 2,000 ecological and recreational reuse activities at about 460 Superfund sites. EPA expects that PFOA and PFOS cleanups can contribute to similar benefits.

In summary, past experience shows that cleaning up Superfund sites can restore ecosystems, allow for beneficial reuses of the sites (*e.g.*, shopping centers, parks, ecological or wildlife sanctuaries) spurring and revitalizing local community economies, increase property values and tax revenues, create jobs, and improve the quality of life and well-being those living on or near sites. *EPA expects similar benefits to accrue from designation*. EPA expects, as a result of designation, that these economic, social, and ecological benefits will also be realized sooner rather than later. Designation will bring PFOA/PFOS entirely into the Superfund program, including investigation, cleanup, enforcement, and liability.

4. Some Facilities May Adopt or Improve Best Practices To Prevent Future Releases of PFOA and PFOS

To the extent they have not done so already, some facilities that use or have legacy stocks of PFOA and PFOS and products that contain these substances may adopt best practices to prevent any future releases and adopt best practices to manage waste that contains these substances and products. Other facilities, such as landfills, firefighting training facilities, metal plating facilities and textile coating operations—may improve their best practices as a result of designation.

Congress considered this benefit when enacting CERCLA: “Expenditures to prevent a threatened release, discharge, or disposal may be necessary if damages are to be avoided while also providing considerable savings when compared to the costs of removal after a release, discharge or disposal has occurred.” S. Rep. No. 96–848, at 51 (1980). Better waste management practices could result in fewer releases and in cost-savings.

B. Potential Disadvantages of Designation

EPA assessed potential disadvantages of designation and weighed those against the advantages. The disadvantages include direct costs, indirect costs associated with potential response activities, and the potential for uncertainty. For indirect costs, at the outset, EPA acknowledges that there is

⁵⁵ While all NPL sites are overseen by the federal government, the term non-federal NPL sites is used in this context to refer to sites that are not federally owned.

uncertainty associated with both quantified and unquantified potential costs; including response costs, costs that may arise from a judgment of liability, and litigation costs. The magnitude of costs arising from liability and litigation are linked to response costs, and future response costs that may arise after designation are uncertain. Additionally, CERCLA is a discretionary statute and decisions are made on a site-by-site basis. Response actions are contingent, discretionary, and site-specific decisions made after a hazardous substance release or threatened release. They are contingent upon a series of separate, discretionary actions and meeting certain statutory and regulatory requirements, as described below. In addition, future discretionary decisions about cleanup and response are difficult to quantify due to numerous uncertainties such as: (1) how many sites have PFOA or PFOS contamination at a level that warrants a cleanup action; (2) the extent and type of PFOA and PFOS contamination at/near sites; (3) the extent and type of other contamination at/near sites; (4) the incremental cost of assessing and remediating the PFOA and/or PFOS contamination at/near these sites; and (5) the cleanup level required for these substances at each individual site. Designation alone does not require EPA to take response actions, does not require any response action by a private party, and does not determine liability. As such, none of the indirect costs associated with response, liability, or litigation that EPA estimates are costs that are certain to be incurred after designation.

EPA also considered potential liability, including the risk of a judgment of liability and associated litigation costs, that may arise after designation. EPA was unable to quantify these costs. Liability and litigation are directly tied to response actions taken for any given release, and as explained, future response costs are uncertain. EPA assessed data that may inform potential liability and litigation costs, but ultimately determined that such data was insufficient to quantify these costs given the number of variables that inform potential liability and litigation. Nonetheless, EPA gave careful consideration to CERCLA's liability scheme, and the impact designation may have on CERCLA liability. EPA concludes that designation will not change CERCLA's liability framework. Designation does not automatically confer liability, nor does it alter CERCLA's statutory or regulatory framework for liability. This conclusion

is supported by an analysis of CERCLA's statutory limitations, EPA's existing enforcement discretion policies, CERCLA settlement authorities, and CERCLA's parameters for cost recovery and contribution actions.

The disadvantages from designation are discussed in turn.

1. Direct Costs

EPA evaluated direct costs that may result from designation and determined that there are three categories of direct effects that result from designation: notification and reporting requirements pursuant to CERCLA section 103(a) and section 111(g), as well as EPCRA section 304(a); Federal property sale and transfer requirements pursuant to CERCLA section 120(h); and designation of these substances as hazardous materials under the HMTA, see CERCLA section 306(a). EPA analyzed direct costs that may arise from those requirements, as explained below.

Direct costs that may result from designation are limited to costs associated with notification requirements and are expected to not exceed \$1,630,000 in annualized costs. EPA estimated potential notification costs for facilities that must comply with CERCLA section 103(a), CERCLA section 111(g), and EPCRA section 304. Reporting and notification requirements are only triggered in the event of a PFOA or PFOS release that meet or exceed the reportable quantity. Per release, the estimated cost for a facility is expected to be no more than \$2,658. This is a minimal financial burden compared to the benefit of having more immediate information about significant releases of PFOA and PFOS. Reporting will result in increased transparency about releases of PFOA and PFOS, which will inform our understanding of these substances in the environment and allow EPA to respond as necessary. In addition, State, Tribal and local officials will receive immediate notification of these releases so these entities can take actions to protect the community where release occurs.

EPA also considered direct costs that may be associated with DOT regulations under CERCLA section 306 and Federal property sales and transfers under CERCLA section 120(h). EPA has not estimated the cost to DOT to implement this requirement but expects it to be minimal; additionally, EPA estimates the subsequent indirect incremental costs to shippers as zero or negligible. The number and magnitude of future Federal property sales and transfers involving property contaminated with PFOA and/or PFOS is highly uncertain and cannot be known at this time. Due

to this uncertainty, EPA does not attempt to quantify these costs.

2. Potential Hardship for Parties That Did Not Contribute Significantly to Contamination

EPA also considered how designation may impact CERCLA liability for PRPs. As discussed in Section VI.A, as an advantage of designation, it ensures that parties that contributed to releases of PFOA and PFOS are responsible for response costs necessary to cleanup those releases. For PRPs that have significantly contributed to PFOA and PFOS contamination, imposing liability is appropriate and necessary to address this public health threat. However, EPA also gave serious consideration to potential liability for parties that have not played a significant role in contamination, such as parties that did not generate PFOA- or PFOS-contaminated waste.

For those parties that have not played a significant role in contamination, EPA examined the role of CERCLA's liability limitations and protections in safeguarding against liability. EPA also considered how EPA's existing CERCLA enforcement discretion and settlement policies may offer protection from litigation in some situations that may arise after designation. EPA also considered the role that CERCLA settlements may play in resolving potential liability and limiting litigation risk. Taken together, EPA expects that designation should not change CERCLA's liability framework and that CERCLA will continue to operate as it has for decades to resolve who should pay for the cleanup and how much. EPA expects that those parties that are primarily responsible for contamination will bear the brunt of costs to address PFOA and PFOS releases while parties that are not primarily responsible can rely on statutory protections to limit liability, settlement with EPA to secure contribution protection, and EPA enforcement discretion to provide additional comfort. Indeed, this is how CERCLA has operated for decades with respect to the more than 800 hazardous substances already covered by CERCLA. Below, EPA examines CERCLA's liability framework, including CERCLA's limiting provisions, EPA's enforcement discretion policies, and relief available under CERCLA's primary causes of action.

CERCLA includes a number of provisions that may limit liability or the financial impact of liability. These include:

- *De minimis or de micromis parties:* CERCLA provides EPA the ability to settle with parties whose contribution is

minimal in comparison to other parties and provides a statutory exemption to de micromis parties. CERCLA section 107(o).

- *Third-Party Defense*: Parties may have a defense to liability if they can show that the contamination was solely caused by acts or omissions of a third party. CERCLA section 107(b)(3).

- *Residential, small business and non-profit generators of municipal solid waste (MSW) Exemption*: This exemption provides an equitable methodology for resolving CERCLA liability of certain MSW generators and transporters. CERCLA section 107(p).

- *Bona Fide Prospective Purchasers (BFPP)*: Parties that meet the threshold criteria and continuing obligations for a BFPP are provided with CERCLA liability protection. CERCLA section 101(40).

- *Innocent Landowners (ILO)*: Certain entities that acquire contaminated property with no knowledge of the contamination at the time of purchase may be protected from CERCLA liability. CERCLA section 101(35).

- *Contiguous Property Owners (CPO)*: This provision protects parties that are victims of contamination caused by a neighbor's action. CERCLA section 101(q).

- *Permit Shield Defense*: CERCLA liability is limited for certain releases that fall within the federally permitted release provision of CERCLA. CERCLA section 101(10).

- *Normal Application of Fertilizer*: CERCLA provides that the "normal application of fertilizer" does not constitute a release and, therefore, does not trigger liability under the statute. CERCLA section 101(22).

EPA also considered the Agency's existing CERCLA enforcement policies that may mitigate liability concerns and litigation risks. EPA will continue to follow its "Enforcement First" policy, which provides that EPA will aim to compel viable PRPs to conduct and pay for cleanup before resorting to the Fund. EPA's existing enforcement discretion policies generally reflect EPA's interest in pursuing major PRPs over minor PRPs. For example, EPA's "Policy Towards Owners of Residential Properties at Superfund Sites" (*U.S. EPA, 1991*) is designed to relieve residential owners of the fear that they might be subject to an enforcement action involving contaminated property, even though they had not caused the contamination of the property. EPA's "Final Policy Toward Owners of Property Containing Contaminated Aquifers" (*U.S. EPA, 1995*) similarly provides assurance to certain property owners that EPA will not take

enforcement actions against them when the landowner did not cause, contribute or exacerbate release of the hazardous substances.

CERCLA's limiting provisions and EPA's enforcement policies work together to support equitable outcomes. Residential landowner PRPs provide a helpful example of how these provisions may work together. Residential landowners may avail themselves of statutory protections such as those available to Bona Fide Prospective Purchasers, Contiguous Property Owners, or "innocent landowners." These protections are self-implementing, which means the protections provided under the statute are automatic, and all a landowner must do to be protected is comply with the requirements of the statute. EPA also has policies in place that provide further comfort to residential landowners, such as the residential landowner policy mentioned above.

Existing limitations in CERCLA coupled with existing CERCLA enforcement policies are sufficient to mitigate concerns about liability that may arise after designation. No additional action is necessary to ensure that those limitations and policies continue to operate as they have for decades. Nonetheless, although unnecessary to justify designating PFOA and PFOS as hazardous substances, EPA intends to develop a policy, consistent with those limitations and policies, that explains EPA's priorities for CERCLA enforcement in the context of PFOA and PFOS releases.⁵⁶ As EPA states in the FY 2024–2027 National Enforcement and Compliance Initiatives (NECI) (*August 17, 2023*) (*Uhlmann, 2023*), the Agency expects to "focus on implementing EPA's PFAS Strategic Roadmap and holding responsible those who significantly contribute to the release of PFAS into the environment" The NECI also clarifies that EPA "does not intend to pursue entities where equitable factors do not support CERCLA responsibility, such as farmers, water utilities, airports, or local fire departments, much as [EPA] exercises CERCLA enforcement discretion in other areas." EPA may exercise enforcement discretion on a site-by-site

⁵⁶ To help EPA develop a CERCLA PFAS enforcement discretion and settlement policy, EPA held two public listening sessions to solicit individual public input on CERCLA PFAS enforcement concerns. The input received will be reviewed and considered by EPA in drafting the policy. EPA's CERCLA PFAS enforcement discretion and settlement policy is aimed at addressing stakeholder concerns and reducing uncertainties by clarifying when EPA intends to use its CERCLA enforcement authorities or its CERCLA enforcement discretion.

basis informed by site-specific circumstances.

CERCLA has additional mechanisms that may operate to temper financial responsibility if a party is potentially liable to equitably resolve how much each party should pay for the costs of cleanup. Under CERCLA section 113(f), liable parties that believe they paid more than their fair share of response costs at a site may, in certain circumstances, seek contribution from other liable parties. In resolving contribution claims, courts consider equitable factors. *See infra-Section VI.B.3.* CERCLA settlements can also operate to balance equities. CERCLA settlements include protection from CERCLA contribution claims by other PRPs related to the matters addressed in the settlement. CERCLA section 122(h)(4), which should help limit litigation and associated costs. In addition, EPA settlements with major PRPs may provide contribution protection for non-settling parties. For example, if EPA settles with a PFAS manufacturer, EPA may secure a waiver of rights providing that the PFAS manufacturer cannot pursue contribution against certain non-settling parties to that settlement. The waiver of rights helps provide some protection to parties that EPA does not intend to pursue from both the costs of litigation and the costs of cleanup. Without such a waiver, settling major PRPs could pursue contribution under CERCLA from those parties for a portion of the CERCLA cleanup.

CERCLA has several mechanisms that can operate to mitigate liability concerns and temper CERCLA's liability scheme. EPA expects these mechanisms to continue to operate as they have for decades to ensure that designation does not result in inequitable outcomes. This conclusion is supported by the fact that PFOA and PFOS are similar to other hazardous substances, and CERCLA's liability scheme has functioned in a rational way as to these hazardous substances. Specifically, several designated hazardous substances have a similar fate and transport to PFOA and PFOS and are similarly ubiquitous. *See* 40 CFR 302.4. CERCLA hazardous substances, such as the chlorinated solvents trichloroethene (TCE) and tetrachloroethene (PCE), as well as heavy metals like mercury and arsenic are prevalent in the environment. TCE and PCE, for example have been found at over 800 NPL sites as well other contaminated sites from their use as industrial solvents including TCE's use for degreasing manufactured metal parts and PCE's use for dry cleaning. Heavy metals, like mercury and arsenic, are

commonly found in soil and groundwater. Arsenic has been found at over 1100 NPL sites and mercury at over 600 sites. Some municipalities also encounter these substances on a regular basis from industrial wastewater discharges. Property owners may also handle these substances as a result of home renovations or gardening or normal activities. For example, TCE can be found in some cleaners sold for household use, including paint removers, glue, spot and stain removers, carpet spot removers, metal cleaners, and gun cleaners. Mercury is found in fluorescent light bulbs and is also found in some water bodies as a consequence of pollution from industrial and mining wastes, powerplant emissions, and other sources. This mercury contamination in turn affects fish and those that consume these fish (*U.S. EPA, 2023f*). In addition, americium, a radioactive element that is on the hazardous substances list is found in household smoke detectors. Similarly, PFOA and PFOS were historically manufactured on a broad scale, have past and continued releases to the environment (e.g., through legacy disposal, release of precursors, or manufacture as a byproduct), and are detected widely in multiple environmental media, including groundwater, surface water, wild animals, livestock, and plants. Despite the fact that people come into contact with these hazardous substances on a regular basis, CERCLA has continued to operate in a rational way, generally protecting those that have played little to no role in significant environmental contamination from liability.

3. Potential Litigation, Liability, and Uncertainty

EPA considered the potential for litigation costs, such as attorney's fees and costs associated with negotiating settlements, following the designation. EPA was unable to quantify these costs given the number of variables that inform potential litigation. In addition to threshold issues associated with liability considerations described previously, variables that inform litigation may include, among others: whether EPA takes a response action; whether there are viable PRPs; the number of parties involved in the litigation; whether it is cost effective for a party to pursue litigation; and whether litigation results in settlement or goes to trial. There also remains an open question of how many actions are taken pursuant to CERCLA or taken pursuant to a State Superfund law. Whether an action is taken pursuant to CERCLA or State law creates an additional level of uncertainty that makes it difficult for

EPA to fully evaluate and quantify the potential litigation costs associated with designation.

CERCLA is, in part, a liability statute and is designed to ensure that those responsible for the contamination pay to clean it up. Some amount of litigation to resolve "who should pay" is an expected, and intended, aspect of CERCLA, and this is true in the context of actions to address PFOA and PFOS releases as well as the more than 800 hazardous substances that are already within CERCLA's scope. EPA considered how CERCLA may operate to minimize the risks posed by litigation. EPA evaluated how CERCLA's primary causes of action—cost recovery and contribution—operate to resolve liability. EPA also considered the role that CERCLA settlements may play in minimizing risks posed by litigation. EPA weighed these considerations against CERCLA's objective of ensuring the polluter pays.

EPA determined that CERCLA cost recovery and contribution provide parameters that safeguard against excessive litigation, and furthermore, that CERCLA settlements may further mitigate future litigation. The presence of a hazardous substance does not create liability under CERCLA. Under section 107, there must be a "release" or "threat of release" of a hazardous substance and the entity must fall within one of the categories of liable parties. CERCLA section 107(a)(1)–(4). In addition, an entity can only recover response costs that are "consistent with the NCP." Section 107(a)(4)(B). Further, a party's potential liability may be limited as a result of contribution or settlement, CERCLA section 113(f). The statute provides that a party that resolves its potential liability with the United States or a State in a judicially approved settlement is entitled contribution protection—the ability to block third-party claims for matters addressed in the settlement.

In addition to CERCLA's limiting provisions, litigation may also be constrained by the relief available. Private party CERCLA cost recovery actions are limited to relief associated with certain costs and damages. Most notably is the relief permitted for response costs, which is limited to costs incurred "consistent with the NCP." The NCP provides a technical and detailed process for implementing response actions and creates benchmarks that may limit actions that have no discernible human health, welfare, or environmental benefit. Parties also may only receive reimbursement for response costs incurred, and so a party would need to

have the financial means to conduct a cleanup before obtaining any recovery. Those parameters may operate to limit frivolous lawsuits or excessive litigation.

Courts' assessment of equitable factors in allocating cleanup costs can also serve as an important limitation on liability. In resolving contribution claims, courts typically allocate a particular party's share of costs based on equitable factors. As a result, courts aim to resolve claims in an equitable manner, which generally results in those that contributed significantly to contamination bearing the most liability; those that did not will bear only a small percentage of response costs, if any. The equitable factors that courts generally apply include: the volume and toxicity of the hazardous substances and their wastes contributed to the contamination by each party; the degree of involvement in generating the hazardous substances or wastes released/deposited; the degree of care exercised in handling the hazardous substances; and the degree of cooperation by the parties with government officials in preventing further harm to public health or the environment.⁵⁷ These factors are designed to ensure that those who have contributed significantly to contamination bear financial responsibility for cleanup. Given the information before the Agency, including the comments on the proposal, EPA does not believe that designation is going to result in widespread, significant liability consequences for parties that lack meaningful responsibility for the contamination at issue.

Contribution claims are further limited by CERCLA settlements that provide contribution protection, and such settlements may serve to prevent contribution lawsuits against settling parties. A party that resolves its liability through a CERCLA settlement with the United States will not be liable for third-party contribution claims related to the matters addressed in the settlement. This means that PRPs will not be able to pursue the settling parties for

⁵⁷ See, e.g., *United States v. A&F Materials Co.*, 578 F. Supp. 1249, 1256 (S.D. Ill. 1984) (establishing equitable factors for apportioning financial responsibility (i.e., the "Gore Factors")); see also *In re Bell Petroleum Services, Inc.*, 3 F.3d 889, 894 (5th Cir. 1993) (discussing considerations for apportioning liability among contributors); *Waste Mgmt. of Alameda County, Inc. v. East Bay Reg'l Park*, 135 F. Supp. 2d 1071, 1089–90 (N.D. Cal. 2001) (in exercising its discretion on allocation, court does not need to limit itself to any particular set of factors, courts may consider factors appropriate to balance the equities in the totality of circumstances).

contribution costs under CERCLA related to the settlement, thus minimizing litigation costs and discouraging third-party litigation. In certain situations, parties may qualify for *de minimis* or *de micromis* settlements under the terms of the Agency's 2002 enforcement discretion/settlement policy. On a case-by-case basis, EPA may enter into limited "ability to pay" settlements with parties to resolve CERCLA response costs, where payment could result in undue financial hardship for the PRP. Further, parties may also be asked to perform actions such as in-kind services, including PFAS monitoring activities and implementing institutional controls.

EPA also considered the potential for CERCLA litigation that may arise as the result of "voluntary" private-party cleanup or as the result of cleanup conducted or ordered pursuant to a State program. The safeguards and limitations on CERCLA liability discussed in this section are equally applicable in the context of CERCLA litigation arising from voluntary or state-led cleanups. Such litigation is subject to the same paradigms as litigation that arises out of a Federal-led CERCLA action.

EPA acknowledges though that some parties that do not bear primary responsibility for contamination may be sued and face litigation costs as a consequence. These costs cannot be known at this juncture with reasonable certainty. Notwithstanding this, EPA believes that statutory safeguards described above will likely limit this type of litigation or adverse outcomes. Even if litigation costs are incurred by parties that do not bear primary responsibility, EPA does not believe that the potential for such costs will outweigh the substantial advantages of designation discussed above.

C. Results of Totality of the Circumstances Analysis

Taken together, weighing the advantages and disadvantages of the designation alongside EPA's determination that both PFOA and PFOS may present a "substantial danger," EPA concludes that designation of PFOA and PFOS as hazardous substances is warranted. First, the scientific evidence establishes that PFOA and PFOS releases into the environment pose diverse and serious health hazards to exposed populations. The full scope of the hazards from PFOA and PFOS is not yet known, and scientists continue to gain greater understanding of the effects of these human-made chemicals on public health and the environment. Among

other things, the current body of scientific and technical literature establishes that PFOA and PFOS exposure are associated with adverse impacts on pregnant women and developing fetuses, such as an increased likelihood of pregnant women getting preeclampsia and hypertension or that babies will be born with a lower birth weight and smaller head circumference. PFOA and PFOS exposure are associated with increased risk for renal cell carcinoma, a type of kidney cancer. Exposure is associated with an increased risk for many other adverse health effects including cardiovascular effects, such as changes to blood pressure and cholesterol, and thyroid disorders, which in turn can impact heart rate, mood, energy level, metabolism, bone health, pregnancy, and many other functions. [See section V.A.] PFOA and PFOS exposure are also associated with decrease immune response to vaccinations, in turn leaving vaccinated individuals more vulnerable to harmful disease. These health risks are documented in an extensive body of scientific and technical literature that is continuing to develop as more is learned about the widespread adverse impacts of PFOA and PFOS exposure.

In addition to the serious potential health hazards posed by these substances, available information about the fate and transport of PFOA and PFOS support EPA's conclusions that these substances remain in the environment for many years (*i.e.*, persistence) and that they can move through air, land, and water (*i.e.*, mobility) after release. These chemicals are sometimes referred to as "forever" chemicals because of their strong carbon-fluorine bonds in the "tail group" that cause PFOA and PFOS to be extremely resistant to degradation through biological degradation and also through chemical degradation (*i.e.*, photooxidation and hydrolysis).

Other information that EPA considered demonstrates that PFOA and PFOS are prevalent and there is a likelihood of exposure to humans and the environment. PFOA and PFOS are prevalent throughout the environment because they are persistent and have been widely used since the 1940s in a wide range of commercial and consumer products. Currently, the public can be exposed to PFOA and PFOS through a variety of sources, including drinking water, food, and environmental media. PFOA and PFOS have been detected in the drinking water of millions of Americans and are widely detected in surface water samples collected from various rivers, lakes, and streams in the United States (ATSDR, 2021;

Cadwallader *et al.*, 2022; U.S. EPA, 2017, 2024a). The prevalence of PFOA and PFOS is further demonstrated by the fact that these chemicals were detected in the blood of nearly all of the participants in NHANES. This information indicates widespread exposure to PFOA and PFOS in the U.S. population.

Addressing PFOA and PFOS contamination, including cleaning up contaminated soils and water supplies, can reduce PFOA and PFOS exposure to affected communities, and bring substantial benefits. In particular, individuals living near heavily contaminated sites—that is, those sites that are most likely to be targeted for EPA enforcement action, removal action, or designation on the NPL list for more complex cleanup—often include communities with EJ concerns. These communities are at particular risk from adverse health impacts from PFOA and PFOS exposure as well and so are vulnerable to further cumulative harm.

Designation of PFOA and PFOS as hazardous substances under CERCLA section 102(a) will have concrete, on the ground impact, and reduce serious harm. CERCLA's scheme gives EPA authority to cleanup both pollutants and contaminants (which PFOA and PFOS have long been considered) and hazardous substances. But only once a chemical is designated as a hazardous substance, can EPA employ the full suite of CERCLA authorities. These include: the requirement that authorities be notified of certain releases; the authority to compel PRPs to investigate and cleanup contamination where there may be an imminent and substantial endangerment; and the authority to recover response costs where EPA takes Fund-lead actions. These authorities are critical to addressing existing and future PFOA and PFOS contamination and reducing risk of ongoing exposure to these harmful chemicals.

EPA's analysis shows that designation of PFOA and PFOS as hazardous substances will allow EPA to address more sites and to implement response actions earlier in time than it otherwise could in the absence of designation. This is because designation allows EPA to complement Fund-lead actions with PRP-lead actions. Shifting costs to PRPs to address PFOA and PFOS contamination at NPL sites will make Fund money available for cleanup work at Superfund sites. More cleanups promote economic benefits, such as improved property values and making land available for reuse, which can revitalize a local economy with economic benefits such as jobs, new businesses, tax revenues and local

spending. Designation also removes barriers to taking removal actions, which is expected to result in more short-term actions to address immediate risks. Collectively, these actions are expected to have meaningful benefits to human health and the environment, limit further exposure to PFOA and PFOS, and reduce the spread of PFOA and PFOS contamination. Expeditious response to mitigate PFOA and PFOS releases is particularly important given the chemical properties of these substances which make them persistent and mobile in the environment. While the full extent of health, social, economic, and ecological benefits of the designation cannot be quantified, such benefits are expected to be substantial, bringing particular benefit to vulnerable populations.

Designation also serves CERCLA's key purpose of ensuring that those entities that are primarily responsible for contamination bear the economic burden of cleaning it up. Without designation, EPA actions to address PFOA and PFOS are more limited, and response costs may only be paid for through the Fund. After designation, EPA will have authority to compel action by and recover costs from PRPs, which effectively places financial responsibility on those entities responsible for contamination. When EPA is able to transfer NPL site costs addressing PFOA and PFOS contamination, as described previously, it improves societal equity by ensuring that the Polluter Pays for cleanup rather than relying exclusively on Fund resources. Further upholding the Polluter Pays principle of CERCLA, designation allows EPA to compel PRPs to address PFOA and PFOS contamination at sites outside of the NPL. This means that additional sites can be addressed, and contamination can be addressed earlier. "Polluter pays" is a central objective of CERCLA as a liability statute. Response costs at NPL sites enabled by transfers from EPA to PRPs are estimated to be \$10.3 million annually to \$51.7 million annually (2% discount rate). Indirect costs associated with response work at non-NPL sites compelled through enforcement actions is estimated to be \$327,000 to \$18,100,000 annually (2% discount rate). (See *RIA Chapter 5*). EPA recognizes that designation will result in economic costs borne by PRPs. While CERCLA's primary aim is to ensure that PRPs bear cleanup costs, EPA acknowledges that the costs parties expend to clean up PFOA and PFOS is a burden for them. Notwithstanding this, EPA views the cleanup monies spent by PRPs as an advantage of the

rule for the reasons stated above. In addition, EPA believes that these cleanup costs will substantially reduce the hazards posed by exposure to PFOA and PFOS, providing significant health benefits (particularly to sensitive populations) that justify the costs.

EPA recognizes that, under CERCLA, a PRP—including those parties that significantly contributed to contamination and those that did not—may be jointly and severally liable to the government for the entire amount of response costs unless it proves that the harm from the release of hazardous substances is divisible. This is true of all listed hazardous substances. EPA's experience over the past four decades administering CERCLA shows that the statute, combined with EPA's existing enforcement discretion policies, ensure that CERCLA will continue to function in a rational manner, with those primarily responsible for pollution bearing the costs of cleanup.

The decision to designate PFOA and PFOS as CERCLA hazardous substances is supported by CERCLA's legislative aims underpinning CERCLA's enactment. CERCLA was enacted to promote the timely cleanup of contaminated sites and to ensure that those responsible for contamination pay to clean it up. H.R. Rep. No. 99-253, pt. 3, at 15 (1985); *Burlington Northern and Santa Fe Railroad Co. v. U.S.*, 556 U.S. 599, 602 (2009) ("The Act was designed to promote the 'cleanup of hazardous waste sites' and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination."). Designation ensures that CERCLA activities to address PFOA and PFOS contamination conforms to those objectives. Moreover, CERCLA was enacted to address the challenge of community exposure to hazardous chemicals, like PFOA and PFOS, released into the environment.⁵⁸ EPA's decision to designate aligns with Congress's vision for CERCLA as an important Federal tool in removing chemicals from the environment that have the potential to pose serious risks to human health and the environment. Indeed, CERCLA designation is necessary to adequately tackle the threat

⁵⁸ Congress enacted CERCLA to address contaminated sites across the nation, which was considered one of "the most serious health and environmental challenge[s] of the decade." S. Rep. No. 96-848, at 2 (1980). Congress acknowledged that "the potential impact of toxic chemicals on the general public and environment through unsound hazardous disposal sites and other releases of chemicals is tremendous." *Id.* And in fact, expert testimony solicited by Congress stated that the breadth and scope of the effect of exposure to hazardous chemicals nearly "extend[ed] to the entire population of the United States." *Id.*

posed by PFOA and PFOS contamination to communities across the country.

CERCLA authority provides EPA with tools to address immediate and long-term needs for mitigating and eliminating PFOA and PFOS exposures that present unreasonable risk. CERCLA's approach to identifying, investigating, and cleaning up contamination is also designed to promote response for the subset of releases that present the most urgent risks. This is evidenced through CERCLA's removal authorities, NPL listing process, the remedial process, and enforcement authority for imminent and substantial endangerments. CERCLA directs Federal agencies to assess risks by considering the population, the hazard potential of hazardous substances, the potential for drinking water contamination, the potential for direct human contact, the potential for destruction of sensitive ecosystems, and the damages to natural resources that may affect the human food chain. Indeed, with those considerations in mind, a small fraction of sites qualifies for the NPL every year.⁵⁹ CERCLA also includes safeguards against excessive cleanup costs relative to the effectiveness of a remedy, and those safeguards are reinforced by CERCLA's cost recovery mechanisms. Collectively, these tools ensure that CERCLA prioritizes and targets releases that pose the most risk to human health and the environment; ensures that EPA can respond quickly when necessary and design durable, long-term remedies that ensure protection for public health and the environment; and that site-specific remedies are cost-effective.

In conclusion, the totality of the circumstances analysis confirms that designation of PFOA and PFOS as CERCLA hazardous substances is warranted. An analysis of the advantages and disadvantages of designation, including weighing of

⁵⁹ The hazardous substance designation is not expected to change the approach EPA uses for identifying potential NPL sites. EPA already has the authority to add PFOA and PFOS releases to the NPL. EPA evaluates a number of options before determining the most effective approach for site cleanup. Alternatives to NPL listing may include: Superfund Alternative Approach, state cleanup, cleanup by other federal agencies, EPA removal, deferral to another EPA program and various enforcement mechanisms. Therefore, releases that contain PFOA or PFOS are more likely to be addressed through non-NPL mechanisms than through the NPL. Between FY 2003 and FY 2022, only about four percent of all contaminated sites evaluated by EPA for placement on the NPL were added to it. Since 2013, EPA has, on average, added 11 non-federal sites per year to the NPL and EPA does not expect the rate at which annual additions to the NPL occur to increase as a result of this rule.

quantitative and qualitative benefits and costs, demonstrates that the advantages outweigh the disadvantages. Further, designation best achieves CERCLA's dual objectives—the timely cleanup of contaminated sites and ensuring that those responsible pay for cleanup. Designation provides additional tools that allow for earlier, broader, more effective cleanups, allowing EPA to protect communities that are exposed to high concentrations of PFOA and PFOS.

VII. Summary of Public Comments and Responses

In this final action, EPA is designating PFOA and PFOS, including their salts and structural isomers, as hazardous substances pursuant to CERCLA section 102(a).

In response to the September 6, 2022, proposed rule (2022 Proposal), EPA received approximately 64,000 comments, including mass mail. EPA received comments from a variety of sources, including the regulated community, trade associations, and State, Tribal and local agencies. The Agency received comments generally supporting and opposing the designation of PFOA and PFOS as CERCLA hazardous substances. EPA also received a number of comments requesting clarity on the various issues that EPA considered in support of the 2022 Proposal. EPA has taken the submitted comments into consideration in preparing this final action. Comments have been summarized and EPA has provided detailed responses to the significant comments either here in this final action or in the *Response to Comments on the Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances*, which is available in the rulemaking docket. This section includes responses to a selection of the significant comments received on various topics addressed in the 2022 Proposal.

A. Legal Authority

1. Consideration of Cost and Section 102(a)

Comment: Several commenters assert that EPA must consider costs when designating a hazardous substance pursuant to CERCLA section 102(a). These commenters disagreed with EPA's proposed interpretation of CERCLA section 102(a) "as precluding consideration of costs in hazardous substance designations." Those commenters generally remarked that EPA's position is inconsistent with U.S. Supreme Court case law on considering costs in regulatory actions. Commenters

that disagreed with EPA's position also generally argued in the alternative that, at a minimum, EPA has discretion to consider cost. Conversely, some commenters agreed with EPA's proposed position that CERCLA section 102(a) precludes the consideration of cost.

Commenters that disagreed with EPA's position assert that CERCLA section 102(a) requires the consideration of cost. Commenters assert that the phrase "as may be appropriate" in CERCLA section 102(a) means that EPA must consider cost in considering whether to promulgate regulations to designate hazardous substances. Commenters support this interpretation by: (1) Asserting that CERCLA provides no textual basis to preclude cost citing *Michigan v. EPA*, 576 U.S. 743, 752 (2015), where the court held that the phrase "appropriate and necessary" as used in section 112(n)(1)(A) of the CAA must include some consideration of cost; and (2) distinguishing *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457 (2001), and *Utility Solid Waste Activities Group v. EPA*, 901 F.3d 414 (D.C. Cir. 2018), in which the courts upheld EPA determinations that health-based statutory provisions precluded consideration of costs. A few commenters further supported their position by asserting that CERCLA's definition of "hazardous substance," CERCLA section 101(14), incorporates by reference other environmental statutes with listing or identification criteria that include cost considerations.

These commenters also argued in the alternative that even if EPA is not required to consider cost, it at least has discretion to do so. Looking to the Court's decision in *Entergy Corp. v. Riverkeeper, Inc.*, one commenter implied that ". . . silence [as to cost] is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree." 556 U.S. 208, 222 (2009).

EPA also received comments agreeing with its proposed interpretation that CERCLA section 102(a) precludes the consideration of cost. As one commenter stated, EPA's proposed interpretation "accords with CERCLA's unambiguous text, statutory structure, and judicial interpretations of comparable provisions of other environmental laws." The commenter notes that "CERCLA's text contains a single criterion for the designation of a hazardous substance: whether the substance, 'when released into the environment[,] may present substantial danger to the public health or welfare or the environment.'" The commenter also

states that "[c]ompliance costs do not constitute 'substantial danger to the public health or the environment' and are not attributed to the 'release[]' of a hazardous substance into the environment. . . ." The commenter contrasts CERCLA section 102(a) with other CERCLA provisions that authorize or require cost considerations to conclude that Congress intended a difference in meaning. Finally, the commenter suggests that CERCLA section 102(a) is akin to other "health-focused provisions of other environmental laws" that courts have interpreted to exclude cost considerations.

Response: EPA proposed interpreting CERCLA section 102(a) as precluding the consideration of cost in designating CERCLA hazardous substances. EPA recognizes that, as a general matter, a statutory assessment of health and environmental-based criteria like the criteria in section 102 does not generally allow for consideration of costs. As discussed in Section V of this document, examining only the statutory criteria—whether PFOA or PFOS "may present a substantial danger to public health or welfare or the environment" and without considering costs and benefits—EPA has concluded that designation is warranted.

EPA considered comments supporting and disagreeing with the position that CERCLA section 102(a) precludes the consideration of cost. In taking final action, EPA decided it need not determine whether section 102(a) precludes consideration of costs and benefits because designation is warranted either by examining the health- and environmental-based criteria alone or by examining these criteria along with the broader totality of the circumstances. The Agency first evaluated the available scientific and technical information about those substances and concluded that designation of each is warranted based solely on a finding that PFOA and PFOS may present substantial danger to public health or welfare or the environment. The Agency next conducted a separate totality-of-the-circumstances analysis, which did consider costs and benefits. EPA considered the available scientific and technical information, along with the advantages and disadvantages of designation, including quantified and unquantified benefits and costs, and concluded this analysis reinforced that designation was warranted as reflected in section VI of this preamble. Because EPA's designation is warranted when considering benefits and costs as part of a totality of the circumstances analysis, EPA need not resolve whether CERCLA

section 102(a) precludes EPA from taking into account costs.

2. Interpretation of the Phrase “May Present Substantial Danger”

Comment: Commenters posit that the standard for designation proposed by EPA is overbroad, vague, and arbitrary and capricious. Some commenters argue that EPA’s alleged vague articulation of this standard provides little guidance on how or why PFOA and PFOS satisfy that standard. Commenters go on to assert that the lack of clarity regarding EPA’s proposed interpretation of “may present a substantial danger” suggests that the Agency has deprived the public of the ability to meaningfully comment on its proposed rule. Relatedly, these commenters state that EPA must clearly state the level of evidence that is sufficient to demonstrate “substantial danger” before proceeding with the designation. Commenters also asserted that EPA failed to demonstrate how PFOA and PFOS qualify as toxic, persistent, and prevalent.

Commenters also argue that EPA must address the likelihood of exposure to PFOA and PFOS in evaluating whether designation of PFOA and PFOS is consistent with section 102(a). Another commenter suggests that EPA propose a standard for designating substances consistent with 102(a) in a separate rulemaking before proceeding with designating any substances.

Commenters further claim that the standard EPA articulated makes it unclear how EPA may apply CERCLA section 102(a) in the future to designate additional substances. A commenter asserts that EPA has not identified an “intelligible principle” to apply when making listing decisions, and therefore, any level of risk is sufficient to support a listing of a chemical so long as it is also mobile, persistent, and prevalent. Commenters also argue that there should be a level of predictability for potential future designations; for example, EPA should identify a bright-line risk threshold at which a substance poses “substantial danger” for the purposes of section 102(a). One commenter suggests that EPA must explain the characteristics that a substance must exhibit to be designated as a hazardous substance under section 102(a). Another commenter stated that the criteria articulated for CERCLA section 102(a) should have a level of specificity similar to the criteria for listing decisions made under the environmental statutes incorporated by reference through CERCLA’s definition of hazardous substances.

Several commenters also suggest that EPA’s interpretation of “substantial

danger” for the purposes of CERCLA section 102(a) is inconsistent with a reading of that phrase offered by EPA in an Advanced Notice of Proposed Rulemaking released on January 14, 2021. Finally, one commenter argues that EPA should explain how “substantial danger” aligns with the NCP’s risk thresholds for cancer and noncancer risks.

Response: EPA disagrees with the commenters’ position that the information the Agency considered in proposing to designate PFOA and PFOS as hazardous substances under CERCLA section 102(a) was overbroad, vague, and arbitrary and capricious. In the final rule, EPA identified the information it considered in evaluating whether a substance satisfies CERCLA section 102(a) and described the information it considered in reaching its conclusion that PFOA and PFOS satisfy CERCLA section 102(a). Specifically, as detailed in section IV.A., the two primary factors the Agency considered in the context of CERCLA section 102(a)—hazard, and fate and transport—are consistent with other statutory methodologies used for identifying CERCLA hazardous substances. Under section 102(a) of CERCLA, EPA has been delegated the authority to identify and weigh information relevant to determining whether a substance, when released, may present a substantial danger and the approach we have adopted is reasonable and consistent with EPA’s other authorities. In the final rule, EPA also conducted an additional, discretionary analysis of the totality of the circumstances.

EPA also disagrees with commenters that EPA should identify a bright-line risk threshold at which a substance poses “substantial danger” for the purposes of section 102(a). The plain language of CERCLA section 102(a) does not require a “bright-line” risk threshold applicable to any and all substances. Further, the Agency does not know how it would establish such a line, including because exposures at different levels are associated with a variety of health effects, carcinogenic and non-carcinogenic risk are calculated separately, risk must consider, acute, sub-chronic, and chronic exposure, and risk is calculated for all site contaminants combined,⁶⁰ and the commenters do not provide suggestions for how such an approach would work. Instead, EPA is utilizing the discretion provided in CERCLA section 102(a) to

conduct individual analyses of substances that account for all of their characteristics to determine whether, when released, the substances may present substantial danger. Moreover, EPA also finds that a bright-line test is not appropriate because the plain language of CERCLA section 102(a) (“may present a substantial danger”) does not require certainty that a release of a substance in fact presents a substantial danger in any given location it is found.

EPA disputes the commenter’s position that the NCP’s risk thresholds for cancer are relevant to its interpretation of whether PFOA or PFOS may present a substantial danger to public health or the environment under section 102(a) of CERCLA. EPA’s cancer risk thresholds are used on a site-specific basis—during EPA’s remedy selection process—to take into account an individual’s lifetime cancer risk. By contrast, the analysis of whether a substance “may present a substantial danger” for the purposes of designation as a CERCLA hazardous substance does not require certainty and is not site-specific. It would be inconsistent with the plain language of section 102(a) for EPA, at this stage and for the purpose of designating hazardous substances, to evaluate the specific releases in which exposure to PFOA and PFOS pose actual risk. Those determinations are left for later stages in the CERCLA process and evaluated on a site-by-site basis.

EPA also rejects the commenter’s assertion that CERCLA section 102(a) requires the Agency to promulgate a standard for designating hazardous substances in advance of today’s action. CERCLA section 102(a) includes no such requirement, and neither do the other environmental statutes that authorize EPA to list or designate substances as hazardous. Rather, CERCLA section 102(a) provides that, “[t]he Administrator shall promulgate and revise as may be appropriate, regulations *designating . . . hazardous substances . . .*” CERCLA section 102(a) (emphasis added). This language is distinct from other places in CERCLA where Congress directed EPA to promulgate regulations or procedures for various CERCLA activities. For example, CERCLA section 112 explicitly provides that EPA shall “prescribe appropriate forms and procedures” for filing CERCLA claims. CERCLA section 112(b)(1). Likewise, CERCLA section 105 directs EPA to “establish procedures and standards for responding to releases of hazardous substances.” CERCLA section 105(a). Section 102(a) does not include similar

⁶⁰ USEPA. 1986a. *Guidelines for the Health Risk Assessment of Chemical Mixtures*. EPA 630-R-98-002. Available on the internet at: <https://www.epa.gov/risk/guidelines-health-risk-assessment-chemical-mixtures>.

language and does not require that EPA promulgate a standard for designating hazardous substances in advance of doing so. Nonetheless, EPA identified two primary factors—hazard, as well as fate and transport—relevant to the designation of hazardous substances. To further inform its decision, EPA concluded that other information may be relevant to evaluating releases of the substance, such as the frequency, nature, and geographic scope of releases of the substances and likelihood of exposure. EPA's evaluation of the scientific and technical information pertaining to those factors support the Agency's finding that both PFOA and PFOS may present substantial danger to public health and the environment.⁶¹

EPA further disagrees with the commenter's claim that Congress failed to provide an "intelligible principle" to guide EPA's authority to designate hazardous substances pursuant to section 102(a) of CERCLA. The non-delegation doctrine provides that "Congress generally cannot delegate its legislative power to another Branch." *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989). This test requires that Congress "lay down by legislative act some intelligible principle" to which the recipient must conform. *Id.* (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)). Congress's delegation of authority to EPA in the context of CERCLA section 102(a) amply satisfies the constitutional standard set forth in controlling Supreme Court precedent because Congress has clearly provided an "intelligible principle" in the provision limiting EPA's discretion in designating substances under the statute. Specifically, section 102(a) provides that the Agency may designate those substances which, "when released into the environment may present substantial danger to the public health or welfare or the environment." 42 U.S.C. 9602(a). Contrary to the commenter's claim, the authority conferred by Congress is neither open-ended nor otherwise so imprecise as to provide no principles for the Agency to apply in designating hazardous substances. Rather, CERCLA section 102(a) requires EPA to base its designation decisions on certain specified principles, including whether the substance in question poses a substantial danger to either public

health, welfare, or the environment. These considerations intelligibly confine EPA's discretion to designate substances under the statute and the Agency's listing decision is not only based upon the criteria prescribed by Congress but is firmly within the bounds of the Court's nondelegation precedents. *See, e.g., American Power & Light Co.*, 329 U.S. at 104 (upholding the authority of the Securities and Exchange Commission to modify the structure of holding company systems so as to ensure that they are not "unduly or unnecessarily complicate[d]" and do not "unfairly or inequitably distribute voting power among security holders."); *Yakus v. United States*, 321 U.S. 414, 420, 423–26 (1944) (approving the wartime conferral of agency power to fix the prices of commodities at a level that "will be generally fair and equitable and will effectuate the [in some respects conflicting] purposes of the] Act." (internal quotations omitted); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225–26 (1943) (finding an "intelligible principle" in the Federal Communication Commission's power to regulate airwaves in the "public interest.")). In sum, CERCLA section 102(a) provides an intelligible principle that guides the Agency in the exercise of its authority under section 102(a).

EPA also disagrees with the assertion that its interpretation of "substantial danger" is inconsistent with its past interpretation of this phrase or EPA's interpretation of similar phrases. In the context of CERCLA section 102(a), EPA has never authoritatively issued an interpretation of "substantial danger" prior to this designation. In 2021, EPA issued an Advanced Notice of Proposed Rulemaking (ANPRM) seeking comment and data to assist in the consideration of the development of future regulations pertaining to PFOA and PFOS. *See Addressing PFOA and PFOS in the Environment: Potential Future Regulation Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act and the Resource Conservation and Recovery Act* (Jan. 14, 2021). The ANPRM represented a preliminary effort by the Agency to obtain public input on certain issues to inform its thinking on any future proposed rulemaking regarding PFAS. EPA never received feedback on the ANPRM's discussion of "substantial danger" as the document was withdrawn shortly after it was issued and never published in the **Federal Register**. Since that time, the Agency has proposed an interpretation of section 102(a) and solicited and obtained comments through this

rulemaking process that have informed the development of EPA's final interpretation of "substantial danger."⁶²

As EPA explained in section IV.A., the Agency's interpretation of CERCLA section 102(a) is consistent with the proposed rule and in harmony with its application of similar language in site-specific provisions. Section 102(a) does not require certainty that the substance poses a substantial danger or require proof of actual harm when released into the environment.

EPA also disagrees with the commenters' assertions that the Agency failed to substantiate EPA's conclusion that PFOA and PFOS may present a substantial danger to public health and the environment. The proposed rule established, and this final action confirms that the available scientific and technical information demonstrate that both PFOA and PFOS may present substantial danger to public health and the environment. That conclusion is supported by the scientific and technical evidence of adverse effects to human health and the environment from PFOA and PFOS exposure, their persistence and mobility in the environment, and the significant potential for human exposure due to their prevalence in the environment.

3. Authority To Create Exclusions From the Designation

Comment: Several commenters suggest that section 102(a) grants EPA authority to create exclusions from designation for certain uses of or materials containing PFOA and PFOS. According to one commenter the phrase "as may be appropriate" in section 102(a) grants EPA broad authority to include and exclude substances from a designation. Commenters also argue that CERCLA's definition of "hazardous substance" in section 101(14) supports this interpretation. CERCLA section 101(14) incorporates substances or chemicals regulated under select provisions of the CWA, RCRA, CAA, and TSCA, and at least some of those statutory provisions include exclusions;

⁶¹ To support EPA's finding in this final rule that both PFOA and PFOS each individually pose a human health hazard, EPA gave weight to immunological, hepatic, developmental, cardiovascular, and cancer effects. These health outcomes had the strongest evidence of associations between PFOA and PFOS exposure and adverse health effects.

⁶² Both interpretations of 102(a)—the preliminary interpretation offered in the 2021 ANPRM and today's final rule—allow for consideration of similar information to assess whether a release into the environment may present substantial danger. Hazard can encompass "the degree of danger posed;" fate and transport can encompass temporal considerations as in whether a substance remains in the environment "more than fleeting in terms of time;" and the consideration of additional information may include a consideration of the "geographic scope" of the substance in the environment. The standard that EPA is affirming today more accurately describes the type of scientific information needed to consider whether a substance, when released in the environment, may present substantial danger.

therefore, according to commenters, Congress would have expected EPA to have the authority to create exclusions pursuant to a CERCLA 102(a) designation.

Some commenters suggested that EPA can create exclusions that mirror other exclusions or defenses in CERCLA. For example, some commenters suggested that application of biosolids should be excepted from designation consistent with CERCLA's definition of release in section 101(22), which excludes "the normal application of fertilizer." Another commenter suggested that EPA create an exclusion that reflects the liability defense in CERCLA section 107(d) for government "actions taken in response to an emergency created by the release . . . of a hazardous substance generated by or from a facility owned by another person."

Commenters requested that EPA create exclusions for: (1) paper mill residuals that are beneficially land applied as a fertilizer or soil conditioner; (2) land application of municipal biosolids; and (3) PFOA and PFOS contained in AFFF used in response to a fire or other emergency. Another commenter suggested that EPA should only designate PFOA and PFOS contained in specific mixtures or compounds generated by specific sources.

Some commenters suggest that an exclusion for certain materials or uses of PFOA and PFOS is necessary to avoid unintended consequences from the designation or over-broad impacts. For example, commenters expressed concern that designating PFOA and PFOS would result in liability for entities, such as farms applying biosolids or airports using AFFF for fire-fighting activities in emergency situations, that should not bear responsibility for generating or creating the contamination. Finally, one commenter claimed that CERCLA should not be used to designate PFOA and PFOS because designation will have the end-result of negatively impacting "good actors."

Response: EPA declines to create exclusions for certain uses of PFOA and/or PFOS in this rulemaking. EPA believes there is a strong argument that section 102(a) does not authorize exclusions for certain uses of a substance where EPA has concluded that the substance (here, PFOA and PFOS) may present substantial danger to the public health or welfare or environment, based on its review and analysis of a significant body of scientific and technical information. In this circumstance, EPA believes that section 102(a) is best read to preclude

exclusions for certain uses of PFOA and PFOS—relative to other uses—without a factual or scientific basis showing that a particular use does not meet the standard articulated by Congress. See CERCLA section 102(a) (authorizing EPA to designate substances that, when released into the environment, "may present substantial danger to the public health or welfare of the environment"). Even if EPA had authority to create exclusions for certain uses, it lacks the basis to do so here. Commenters did not provide information or data to support a conclusion that certain types of releases of PFOA and PFOS do not present a substantial danger, including an exclusion for AFFF as used for fire-fighting purposes and an exclusion for PFOA and PFOS contained in biosolids or soil amendments.⁶³ Given EPA's conclusion that PFOA and PFOS do present a substantial danger, and in the absence of evidence that certain releases of PFOA and PFOS do not present a substantial danger to public health or welfare or the environment, EPA lacks a scientific or factual basis for the exclusions requested.

Commenters also did not provide a persuasive justification for EPA to otherwise carve out specific uses of PFOA and/or PFOS from this designation irrespective of scientific or factual evidence relative to potential public health and environmental impacts. Commenters appear to be proposing that EPA create an exclusion to liability via CERCLA section 102(a); the Agency, however, does not believe that section 102 is the appropriate mechanism to establish liability exclusions, and EPA questions whether it has the authority to do so, through this provision. For example, the D.C. Circuit has held that, in enacting CERCLA, Congress reserved resolution of liability issues to the judiciary, not the Agency.⁶⁴ See *Kelley v. EPA*, 15 F.3d

⁶³ EPA received requests for exclusions from liability from specific sectors—namely, water utilities, municipal landfills, local governments, landowners or utilities that land apply biosolids or paper mill sludge, and landowners adjacent to offsite sources—for the use of certain materials (*i.e.*, biosolids), and for the disposal of particular types of waste, including landfill leachate, research waste, and medical waste. However, the commenters did not present data supporting their claims that certain releases, either from specific types of entities, uses, or kinds of waste, do not present a substantial danger to public health, welfare, or the environment.

⁶⁴ Although a court is the final arbiter of whether a party is liable under CERCLA section 107, EPA intends to develop a policy that explains the Agency's priorities for CERCLA enforcement in the context of PFOA and PFOS releases. Enforcement discretion policies are not exclusions from liability but instead describe circumstances in which the Agency may exercise its discretion to not pursue enforcement actions against certain parties that may

1100, 1108 (D.C. Cir. 1994) ("Congress . . . has designated the courts and not EPA as the adjudicator of the scope of CERCLA liability."). Congress explicitly identified CERCLA's liable parties in section 107. In fact, Congress has enumerated many exclusions to CERCLA's liability scheme over the years—and courts have regularly interpreted and applied those provisions. For example, CERCLA section 107(d) provides a mechanism to account for liability concerns arising out of an emergency response, which appears similar to one commenter's request for an exclusion for the use of AFFF in response to an emergency. See, *e.g.*, CERCLA section 107(d)(1)–(2) (providing a defense to costs and damages in the event of an incident creating danger to public health or in the event of an emergency). EPA believes this Congressionally-established framework, discussed in further detail below, is more appropriate for the type of exclusions that commenters suggest.

EPA also concludes that the commenter's request for an exclusion for the application of biosolids containing PFOA or PFOS is not appropriate for resolution in this rulemaking under section 102(a). Section 102(a) provides for designation of a substance that, when "released into the environment," may present substantial danger to the public health or welfare or environment. CERCLA section 102(a). As stated above, EPA considered a significant body of scientific and technical information in concluding that both PFOA and PFOS—irrespective of use—may present a substantial danger to public health or welfare or the environment.

Against this backdrop, EPA considered commenters' request for EPA to exclude from designation PFOA and PFOS when contained in biosolids consistent with the language in CERCLA section 101(22). EPA acknowledges that the CERCLA definition of "release" explicitly excludes the "normal application of fertilizer." CERCLA section 101(22)(D). EPA believes this language is best read as requiring a site-specific analysis and that a categorical exclusion for all contaminated biosolid application using section 102(a) risks exceeding the limits of the exclusion as envisioned by Congress. See, *e.g.*, *Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F. Supp. 2d 693, 714 (W.D. Ky. 2003) (defendant did not qualify for the normal application of fertilizer

fall within a category of liable parties under CERCLA section 107. EPA's enforcement discretion is guided by the unique circumstances of each case.

exemption because it was not applying ammonia to farm fields as fertilizer when it vented the ammonia into the atmosphere); *City of Waco v. Schouten*, 385 F. Supp. 2d 595, 602 (W.D. Tex. 2005) (defendants' agricultural practices (namely, the improper storage and maintenance of manure waste storage areas) did not fall within the "normal application of fertilizer" exclusion)). EPA also does not believe an exclusion under section 102(a) is necessary, because it would be duplicative of the exclusion in section 101(22)(D). And because liability under CERCLA section 107 is tied to a "release" or threat of a "release," any entity facing potential liability for the application of biosolids contaminated with PFOA or PFOS will have the opportunity to make site-specific arguments as to whether its actions fall within the "normal application of fertilizer" exclusion to the definition of "release."⁶⁵

EPA also rejects the commenters' assertion that creating an exclusion for this designation is necessary to address concerns regarding over-broad or unintended liability, such as for farmers or water utilities. Designation does not alter CERCLA's liability framework, which EPA expects to continue to operate as it has for decades to equitably resolve who should pay, or automatically confer liability. First, potential plaintiffs must establish a legal basis for CERCLA liability; to recover costs from the parties responsible for contamination requires a plaintiff to show that a "release" or "threatened release" of a "hazardous substance" from a "facility" has caused it to incur cleanup costs. CERCLA section 107(a). The defendant must also fall within at least one of four classes of covered persons: (1) the owner or operator of the facility, (2) the owner or operator of the facility "at the time of disposal" of hazardous substances, (3) persons who "arranged for disposal" or treatment of hazardous substances, and (4) certain transporters of hazardous substances. *Id.*

Although liability under CERCLA section 107(a) is strict, subject only to a few limited defenses specified in

section 107(b), it is not unlimited, and courts may decide to apportion costs among defendants where the harm is divisible and there is a reasonable basis for doing so. *Burlington N.*, 556 U.S. at 613–15. Further, if a defendant is found jointly and severally liable for response costs under CERCLA section 107(a), the defendant may also seek contribution from other potentially responsible parties pursuant to CERCLA section 113(f).

In addition, CERCLA provides defenses to and exemptions from Superfund liability for certain parties that are otherwise liable. For example, under CERCLA section 107(b), liability is limited in situations in which the release or threat of release of a hazardous substance was caused by an act of God, an act of war, or an act or omission of a third party (or some combination thereof). CERCLA section 107(b)(1)–(4). CERCLA also contains several statutory limitations on liability, which are more fully described in section VI.B. These include liability exemptions for contiguous property owners, innocent landowners under certain circumstances, de minimis or de micromis parties, and "federally permitted" releases, among others. And a party may not be subject to CERCLA at all if the release is considered a "normal application of fertilizer." EPA also notes that—as detailed in section VI.B.—it has well-established enforcement policies that help the Agency prioritize sites that pose the most risk.

Finally, the commenters' concerns regarding liability do not account for the intervening steps between designation and site-specific cleanup or enforcement decisions. A designation alone does not require EPA or others to take response actions, does not require any response action by a private party, and does not determine liability. Response actions are contingent, discretionary, and site-specific decisions that are made after a hazardous substance release or threatened release. Site-specific decisions are also the more appropriate opportunity to evaluate unacceptable risk posed by specific releases, rather than a blanket exclusion for certain uses or PFAS-containing materials that may not account for site-specific risk.

The first steps in the CERCLA process are to identify a release, investigate the scope and extent of such a release, and evaluate its potential risk to human health and the environment. CERCLA is a largely discretionary statute that gives EPA leeway to determine whether, after that investigatory stage, it is appropriate to move forward with a cleanup. CERCLA speaks to this evaluation of

releases and risk. For example, Congress provided that EPA shall identify "criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practical taking into account the potential urgency of such action, for the purpose of taking removal action." CERCLA section 105(a)(8)(A). CERCLA goes on to provide that "[c]riteria and priorities . . . shall be based upon relative risk or danger to public health or welfare or the environment . . . taking into account to the extent possible the population at risk, the hazard potential of the hazardous substances at such facilities, the potential for contamination of drinking water supplies, the potential for direct human contact," among other considerations embodied in the NCP. The NCP provides guidance on when it may be appropriate to cleanup releases either through a removal or remedial action. For example, for removal actions, the NCP provides that the lead agency may take action when the agency has determined "that there is a threat to public health or welfare" based on a set of factors such as actual or potential exposure to drinking water supplies, the potential for hazardous substances to migrate, and the availability of other appropriate Federal or State response mechanisms to address the release. 40 CFR 300.415(b).

Even if EPA determines that it is appropriate to move forward with a cleanup and a site is listed on the NPL, a listing does not require any immediate action. Rather, an NPL listing is the initial step towards a potential long-term remedy for a site. Listing also allows EPA to prioritize which sites warrant further investigation to better understand potential risks to human health and the environment. This process identifies less than 10% of CERCLA sites as NPL sites.

Only after those very careful and deliberative steps to investigate and prioritize sites does EPA begin the process of identifying potential cleanup actions. Because of this significant narrowing of sites that will receive EPA attention, it follows that not every instance of contamination by a hazardous substance—including a PFOA and/or PFOS release—will lead to enforcement and liability. And, as previously noted, EPA has a long history of focusing its enforcement on significant polluters, potentially further narrowing the extent of liability. While there may be independent third-party cleanups, those too are not immediately triggered by designation and just like with EPA-focused cleanups, parties

⁶⁵ Not all releases warrant response under CERCLA, and not all release lead to litigation and liability for all PRPs. Whether a party may be exposed to any liability in the first instance is ultimately a function of whether a response action is taken to address the release. As an initial matter, EPA has discretion to determine whether to respond to a release and only responds to those releases that pose unacceptable risk to human health and the environment. Even then, EPA may assess relative risk among releases to determine which releases should be prioritized for investigation and, potentially, clean up. Further, whether a PRP may be pursued for costs, found liable by a court, and required to pay some portion of costs remain uncertain for any given release.

would typically have the benefit of CERCLA's liability protections, equitable divisions of responsibility by the courts, and so forth.

EPA also notes that concerns about the cost of liability, the cost of cleanup, and the costs that certain facilities will bear managing PFOA and PFOS in waste to mitigate CERCLA liability risk are costs that Congress had front of mind in enacting CERCLA and chose to proceed anyway. The statutory language of CERCLA clearly provides interconnected response, enforcement and liability authorities that impose costs on PRPs enumerated in the statute. First, CERCLA section 104(a) authorizes EPA to respond to a release (or substantial threat of a release) of a hazardous substance into the environment, or of a pollutant or contaminant that may present an "imminent and substantial danger to the public health or welfare." CERCLA section 104(a). In addition, CERCLA section 106 gives EPA the authority to compel action by liable parties in response to a release or threatened release of a hazardous substance that may pose an "imminent and substantial endangerment" to public health or welfare or the environment. CERCLA section 106(a). Finally, under CERCLA section 107, when the United States, states, or Tribes perform cleanup work and incur costs, section 107(a) authorizes them to recover those costs from potentially responsible parties. *See* CERCLA section 107(a).

Legislative history also shows that one of Congress' aims was to incentivize better waste management practices: "In correcting the historic neglect of hazardous substances disposal, it is essential that this incentive for greater care focus on the initial generators of hazardous wastes since they are in the best position to control the risks. Generators create the hazardous wastes, they have more knowledge about the risks inherent in their wastes and how to avoid them, and they determine whether and how to dispose of these wastes." S. Rep. No. 96-848, at 14 (1980). Congress' expectation was that better waste management practices could ultimately result in cost savings by reducing the need for expensive remedies to clean up hazardous waste in the environment: "Expenditures to prevent a threatened release, discharge, or disposal may be necessary if damages are to be avoided while also providing considerable savings when compared to the costs of removal after a release, discharge or disposal has occurred." *Id.* Ultimately, Congress' calculation was that the benefit to human health and the environment to prevent exposure to

hazardous chemicals is worth the costs borne by industry to improve waste management practices, prevent releases, and minimize the costs of retroactive efforts to clean up hazardous waste.

EPA concludes that it would be inappropriate to carve out certain uses or materials containing PFOA or PFOS from the designation because any PFOA or PFOS release "may present substantial danger," and subsequent steps in the CERCLA process are more appropriate for determining whether any specific release poses risk sufficient for further investigation and, potentially, cleanup.

4. Designating PFOA and PFOS as "Hazardous Substances" Under CERCLA Section 102(a) Does Not Present a "Major Question"

Comment: Commenters contend that EPA's use of section 102(a) of CERCLA to designate PFOA and PFOS as hazardous substances—as well as the Agency's interpretation of the scope of the authority granted by this provision—run afoul of the "major questions doctrine" articulated by the Supreme Court in *West Virginia v. EPA*, 142 S.Ct. 2587 (2022). To support this assertion, the commenters argue that the designation will have a substantial "economic, social, and legal impact" and point to the fact that EPA is utilizing section 102(a) of CERCLA for the first time to contend that today's action represents a novel and transformative expansion of the Agency's regulatory authority.

Response: EPA disagrees that this rulemaking raises a major question as defined in *West Virginia v. EPA*, 142 S.Ct. 2587 (2022).

The designation of PFOA and PFOS pursuant to section 102(a) of CERCLA does not represent a radical change to CERCLA's statutory scheme. Rather, the designation is well within the statutory framework that Congress provided. CERCLA by its express terms authorizes EPA to designate hazardous substances and the designation is consonant with the Agency's longstanding practice of adding other chemicals to CERCLA's hazardous substances list through CERCLA's "automatic" designation process in section 101(14). That provision cross-references listing authorities in the CAA, CWA, RCRA, and TSCA. CERCLA's automatic designation process has resulted in the addition of more than 800 hazardous substances to the statute's list of hazardous substances through separate actions. And just like it did when making designations under those other statutes, here EPA examined scientific and technical factors, including hazard

and fate and transport, when evaluating whether PFOA and PFOS met the statutory standard and may present substantial danger to the public health or welfare or the environment. *See supra*-Section IV. Further, as discussed in Section VI.B, PFOA and PFOS are not different in kind from the other substances added to CERCLA's hazardous substance list.

While EPA's action today utilizes a different mechanism for designation than the procedure outlined in CERCLA section 101(14)—which defines the term "hazardous substance" by reference to provisions in other environmental statutes and to substances designated under CERCLA section 102—Congress specifically provided EPA with multiple pathways to address the varied threats posed by hazardous substances in various media. Although the commenters argue that EPA's approach to PFOA and PFOS represents an unprecedented expansion of EPA's authority, EPA has added similarly ubiquitous substances to CERCLA's hazardous substance list for decades. For example, polychlorinated biphenyls (PCBs) became hazardous substances when EPA initially promulgated its list of hazardous substances on April 4, 1985, *Notification Requirements; Reportable Quantity Adjustments*, 50 FR 13456, 13475 (1985), and are generally considered "ubiquitous contaminants in the environment." Rouzbeh Tehrani and Benoit Van Aken, *Hydroxylated Polychlorinated Biphenyls in the Environment: Sources, Fate, and Toxicities*, 21 Environmental Science and Pollution Research, 6334–6345 (2014); see also U.S. Dept. of Health and Human Services, *Toxicological Profile for Polychlorinated Biphenyls (PCBs)*, at 291 (November 2000) ("PCBs are ubiquitous and continuously circulating in the global environment. . . ."); U.S. Environmental Protection Agency, *Remediation of PCBs at Superfund Sites*, at 7 (2001) (noting that as of publication "[o]f the 1,229 Superfund sites currently on the NPL, PCBs have been detected at 357 sites."). PCBs, however, are far from the only highly prevalent contaminant of concern that EPA has routinely grappled with at Superfund sites for decades. In fact, at the 1,548 Superfund sites with a selected remedy, arsenic has been identified at 919 facilities, lead at 897, benzene at 885, and trichloroethene at 816. *See* U.S. Environmental Protection Agency, *Contaminant of Concern Data for Decision Documents by Media, fYs 1982–2021 (Final NPL, Deleted NPL, and Superfund Alternative Approach Sites)* (2024), available at <https://>

www.epa.gov/superfund/superfund-data-and-reports. Ultimately, EPA's decision to designate PFOA and PFOS under section 102(a) is not an expansion of the Agency's authority that would cause a "radical" or "fundamental" shift in CERCLA's statutory scheme.

For these reasons, EPA's regulatory action to designate PFOA and PFOS as CERCLA hazardous substances does not present a major question.

B. Operation of CERCLA

1. Comments Suggesting That Other Authorities Are Better Suited To Address PFAS Contamination

Comment: Several commenters argued that CERCLA is not the appropriate tool to address PFOA and PFOS in the environment. Commenters also argued that EPA already possesses the authority to protect public health, welfare, and the environment from any potential risks posed by PFOA and PFOS without designating these substances as hazardous under section 102(a). Instead, these commenters contend that EPA should utilize existing tools under SDWA, RCRA, CWA, and other laws to address PFAS-contaminated sites.

Multiple commenters also argued that EPA should not use CERCLA to designate PFOA and PFOS as hazardous substances because the Agency has not yet regulated PFOA and PFOS under other statutes (e.g., CWA, RCRA, SDWA), and accordingly—because CERCLA site cleanup standards and responsibilities are informed by other statutes' regulatory frameworks—potentially responsible parties lack the necessary structure to conduct CERCLA cleanups of PFOA and PFOS.

In arguing that CERCLA is not the appropriate tool to address the problem posed by PFOA and PFOS, one commenter also specifically claimed that the statute was designed to address only inactive hazardous waste sites and facilities impacted by groundwater plumes contaminated by specific hazardous substances, rather than "problematic class[es] of chemicals with widespread contamination across the country." Another commenter stated that it appears ARARs do not yet exist and urges EPA to delay this rulemaking until such standards are developed.

Response: EPA disagrees with the commenters' position that CERCLA is not the appropriate tool to address the challenges posed by PFOA and PFOS contamination. Congress enacted CERCLA to provide EPA with the ability to timely clean up contaminated sites that pose risk to human health and the environment. CERCLA is the right tool for addressing wide-spread, existing

PFOA and PFOS contamination, which is a nationwide concern. CERCLA includes authorities to investigate and scope releases to better understand the extent of contamination. CERCLA includes response authority to implement short-term and long-term actions to address contamination and risks to public health and the environment. CERCLA removal authority is available to address emergency situations, such as when immediate action is necessary to mitigate consumption of contaminated drinking water. It also includes authority to take remedial actions that are designed to provide a more permanent remedy to mitigate or reduce unacceptable risk from highly contaminated sites. CERCLA also provides mechanisms to ensure that those responsible for the contamination pay to clean it up rather than using Fund resources. By designating PFOA and PFOS as CERCLA hazardous substances, EPA can utilize the full suite of CERCLA tools to address contamination.

CERCLA is the best tool to address the legacy of sites contaminated with these substances and to address additional releases of these chemicals in the future. As EPA noted in its Strategic Roadmap, "[t]he risks posed by PFAS demand that the Agency attack the problem on multiple fronts at the same time. EPA must leverage the full range of statutory authorities to confront the human health and ecological risks of PFAS." The Roadmap looked at a variety of authorities to address PFAS, including TSCA, SDWA, CWA, RCRA, and CAA, and identified CERCLA as a tool to accomplish one of its three central directives: Research, Restrict, Remediate. CERCLA is applicable to address all environmental media: air, surface water, groundwater, and soils. And CERCLA can apply to any type of industrial, commercial, or noncommercial facility, regardless of whether there are specific regulations that affect that type of facility or how that facility might affect the environment.

The Agency also disputes the commenters' assertion that designation under CERCLA is premature in the absence of pre-existing regulatory standards for PFOA and PFOS. The plain language of CERCLA section 102(a) includes no such explicit limitation. The statute requires only that EPA determine that a substance "may present substantial danger to public health or welfare or the environment" to designate. Considering the significant, and growing, body of evidence that PFOA and PFOS, when released in the

environment, may present substantial danger, designation is warranted. Such a limitation also runs counter to the "automatic" designation that occurs through CERCLA section 101(14) when a substance is identified as toxic or hazardous under another statutory authority. When a substance is designated pursuant to the specified CWA, CAA, RCRA, and TSCA authorities, there aren't necessarily pre-existing regulatory standards for that substance. For example, a substance could be listed under RCRA as a regulated hazardous waste, but not be subject to regulatory standards under the Clean Water Act or the Safe Drinking Water Act. The absence of such a regulatory framework is not a bar to listing under RCRA and nor should such a limitation be read into CERCLA section 102(a).

EPA also disagrees that, at present, there is no regulatory framework in place that allows EPA to respond effectively to PFOA and PFOS releases. While it is true that PFOA and PFOS regulations, environmental standards, and remediation technologies are evolving, CERCLA and the NCP provide a process to identify cleanup standards on a site-by-site basis that ensure that a remedy is protective of human health and the environment. CERCLA section 121(a) provides that a remedial action must be "protective of human health and the environment." All remedies selected must satisfy that requirement. Cleanup standards often help define remedy protectiveness. CERCLA cleanup standards are generally those standards that are determined to be "applicable or relevant and appropriate requirements" (ARARs).⁶⁶ ARARs are Federal, or more stringent State, standards, requirements, criteria, or limitations. CERCLA section 121(d)(2)(A). ARARs apply to hazardous substances or pollutants and contaminants that remain on-site at the completion of a remedy. A final remedy must attain ARARs by the completion of the remedy, unless compliance with the ARAR is waived. CERCLA section 121(d)(2)(A), (d)(4). ARARs frequently are determinative in establishing preliminary remediation goals, which become site cleanup levels.

The current regulatory landscape for PFOA and PFOS is sufficient to inform future remedies, and regulatory actions to address PFOA and PFOS are

⁶⁶ The NCP provides that *Fund-financed* removal actions (or removals under CERCLA section 106) must comply with ARARs to the extent practicable considering the exigencies of the situation. 40 CFR 300.415. For the sake of discussion, EPA's response focuses on compliance with ARARs in the remedial context.

increasing. Currently, there are certain Federal standards that may be considered as ARARs. For example, a potential ARAR for drinking water cleanups may be the final PFOA and PFOS MCLs. For PFOA and PFOS, the MCLs are 4.0 parts per trillion (PPT) each. A number of States have also promulgated cleanup numbers for PFOA and PFOS, which may be evaluated as potential ARARs at sites. For example, Pennsylvania⁶⁷ promulgated an MCL of 14 ppt for PFOA and 18 ppt for PFOS. In addition, New Jersey⁶⁸ has adopted an MCL of 14 ppt for PFOA and 13 ppt for PFOS (*NJ DEQ, 2023*).

There are also non-chemical specific ARARs that may be relevant to a potential remedy. Those include “location-specific” and “action-specific” ARARs. Location-specific ARARs are restrictions placed on the concentration of hazardous substances or the conduct of activities solely because they are in specific locations. Some examples of specific locations include floodplains, wetlands, historic places, and sensitive ecosystem habitats. An example of a location-specific requirement is the substantive CWA section 404 prohibitions regarding unrestricted discharge of dredged or fill material into wetlands. Action-specific ARARs are usually technology- or activity-based requirements or limitations on actions taken with respect to hazardous wastes. These requirements are triggered by particular remedial activities that are selected to accomplish a remedy. Examples of action-specific ARARs include activities such as ground-water diversion, dredging, and landfill closure with waste in place.

EPA has also developed an *Interim Guidance on the Destruction and Disposal of Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS) and Materials Containing PFAS-Substances—Version 2 (2024)*, which outlines the current science on techniques and treatments that may be used to destroy or dispose of PFAS and PFAS-containing materials from non-consumer products, along with screening methods to assess vulnerable populations near destruction and disposal sites. In sum, the evolving regulatory landscape with respect to PFOA and PFOS cleanup standards is not a barrier to designation nor is it a barrier to evaluating, identifying, and selecting protective remedies. The Agency is also striving to ensure

regulatory actions do not overlap with one another and duplicate efforts. EPA also disagrees with the commenter’s claim that CERCLA is designed solely to address inactive hazardous waste sites and facilities subject to groundwater contamination from specific contaminants of concern. The commenter’s view of CERCLA runs counter to the plain language of the statute. CERCLA’s language does not include any limitation on response authority to only “inactive” waste sites. Rather, CERCLA makes clear that authority extends to inactive and active “facilities.” CERCLA defines a facility as “any building, structure, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works)” CERCLA section 101(9)(A). Moreover, CERCLA provides authority to respond to past, current, and future releases. Response authority extends to releases and the threat of release of “any hazardous substance” and “any pollutant or contaminant which may present an imminent and substantial danger to public health or welfare.” CERCLA section 104(a). CERCLA’s definition of the term “release” also makes clear that it encompasses past and current releases. See CERCLA section 101(22) (defining release to include “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles)”). This language is broad enough to encompass inactive and active sites.

Although one impetus for CERCLA was a growing concern about the public health threats posed by improperly disposed toxic waste, Congress’s interest in addressing issues associated with environmental contamination was more holistic. Addressing the challenge of widespread community exposure to hazardous chemicals such as PFOA and PFOS—when released into the environment—is the exact kind of environmental threat that Congress sought to ameliorate in enacting CERCLA. Moved to action by the Love Canal incident, Congress crafted CERCLA to address contaminated sites across the nation, which it considered one of “the most serious health and environmental challenge[s] of the decade.” S. Rep. No. 96–848, at 2 (1980). Congress acknowledged at that time that “more than 43,000 chemical substances are in commercial production and thousands of new ones are introduced each year As a

result, the potential impact of toxic chemicals on the general public and environment through unsound hazardous disposal sites and other releases of chemicals is tremendous.” *Id.* Indeed, expert testimony solicited by Congress stated that the breadth and scope of the impact of exposure to hazardous chemicals nearly “extend[ed] to the entire population of the United States.” *Id.* Designating PFOA and PFOS is wholly consistent with Congress’ vision for CERCLA as an important Federal tool in removing widespread toxic chemicals from the environment that have the potential to pose substantial danger to human health, welfare, and the environment.

2. Addressing PFOA/PFOS as “Pollutants or Contaminants”

Comment: Several commenters contend that EPA should use its existing authority to address PFOA and PFOS as pollutants or contaminants rather than designate these substances as hazardous under section 102(a) of CERCLA. One commenter also argued that PFOA and PFOS must be specifically designated as pollutants or contaminants before they are designated as hazardous substances. Finally, a commenter claimed that EPA has failed to demonstrate that PFOA and PFOS qualify as pollutants or contaminants under section 101(33) of CERCLA because the Agency has not indicated why these substances “cause or are reasonably expected to cause death, disease, physiological malfunctions, or any other conditions in the definition of ‘pollutant or contaminant’ in CERCLA [s]ection 101(33).”

Response: EPA disagrees with the commenters’ position that the Agency should treat PFOA and PFOS contamination by relying solely on its authority to address these substances as CERCLA pollutants or contaminants. See CERCLA section 101(33) (defining “pollutants or contaminants”). As EPA has explained, EPA’s authority to address “pollutants and contaminants” is limited. Designation of hazardous substances provides the Agency with a suite of tools necessary to identify, characterize, and clean up the most contaminated sites without delay, either through PRP- or Fund-lead actions.

EPA also disagrees with the commenters that the Agency must designate PFOA and PFOS as a pollutant or contaminant under section 101(33) of CERCLA before utilizing its authority under section 102(a) to designate PFOA and PFOS as hazardous substances. Section 102(a) requires only a determination that the substance “may present . . . substantial danger to the

⁶⁷ <https://www.pacodeandbulletin.gov/Display/pabull?file=/secure/pabulletin/data/vol53/53-2/46.html>.

⁶⁸ <https://dep.nj.gov/pfas/standards/>.

public health or welfare or the environment” when released into the environment. Moreover, a substance’s status as a pollutant or contaminant is determined on a site-specific basis. And, in fact, EPA has already identified and treated PFOA and PFOS as pollutants and contaminants at multiple Superfund sites, including the Saint-Gobain Performance Plastics facility in Hoosick Falls, New York, and the Blades Groundwater site in Blades, Delaware.

The Agency further disagrees that PFOA and PFOS do not qualify as pollutants or contaminants because EPA has not shown that these substances either “cause or are reasonably expected to cause” human health effects. In fact, the commenter misstates the qualifying criteria for a pollutant or contaminant.

The statute requires only that pollutants or contaminants may “reasonably be anticipated” to impact human health. In keeping with this broad standard, multiple courts have consistently reaffirmed the principle that section 101(33) “. . . refers to, basically, any substance which may reasonably be anticipated to cause harm” to human health when released into the environment. *Eagle-Picher Industries, Inc. v. EPA*, 759 F.2d 922, 931 (D.C. Cir. 1985); see also *APWU, et al. v. Potter*, 343 F.3d 619 (2d Cir. 2003) (anthrax); *Lozar v. Birds Eye, Inc.*, 678 F.Supp.2d 589 (W.D. Mich. 2009) (iron, manganese, arsenic, chloride, and sodium); *Jastram, et al. v. Phillips Petroleum Co., et al.*, 844 F. Supp. 1139 (E.D. La. 1994) (produced water). PFOA and PFOS readily meet the definition of pollutants or contaminants, particularly given the weight of scientific evidence—as discussed in section V—indicating that exposure to PFOA and PFOS is associated with a host of negative health effects. Accordingly, EPA has determined PFOA and PFOS to be pollutants or contaminants on a site-specific basis, further demonstrating that PFOA and PFOS satisfy the definition in section 101(33) of CERCLA.

3. Relationship Between SDWA and CERCLA

Comment: Commenters stated that the 2022 interim Health Advisory Levels (HALs) of 0.004 ppt for PFOA and 0.02 ppt for PFOS are below the value that laboratory methods can accurately quantify, creating uncertainties with the proposed designation. Another commenter stated that EPA should provide additional clarity as to how the Agency’s SDWA process will impact the setting of cleanup goals. A few commenters stated that while “[the

health advisories] are not regulations and should not be construed as legally enforceable Federal standards,” they do shape public perception and almost certainly influence people’s (including organizations’) behavior. Similarly, there were comments concerning whether EPA was coordinating internally on how the SDWA rule to regulate PFOA and PFOS may impact the CERCLA program.

Response: As stated in the proposed rule, EPA did not rely on the interim PFOA or PFOS HALs or draft toxicity values as support for the proposed designation decision. EPA’s 2022 interim PFOA and PFOS HALs are beyond the scope of today’s action. EPA HALs are non-enforceable advisory levels that provide information to drinking water systems and officials responsible for protecting public health when emergency spills or other contamination situations occur. Based on the record before the Agency, with today’s action EPA is designating PFOA and PFOS as hazardous substances.

EPA’s actions establishing NPDWR for PFOA, PFOS, and other PFAS, pursuant to SDWA are beyond the scope of this action. Nonetheless, EPA has closely coordinated these actions to ensure consistency. For information about EPA’s PFAS NPDWR, please see <https://www.epa.gov/sdwa/and-polyfluoroalkyl-substances-pfas>, or visit [regulations.gov](https://www.regulations.gov) under docket id EPA–HQ–OW–2022–0114. The 2024 NPDWR pursuant to the Safe Drinking Water Act, EPA established a maximum contaminant level (MCL) of 4.0 ppt for both PFOA and PFOS and a maximum contaminant level goal (MCLG) of 0 ppt for both PFOA and PFOS. Consistent with CERCLA, EPA may evaluate MCLs and non-zero MCLGs as Applicable or Relevant and Appropriate Requirements (ARARs) cleanup levels on a site-specific basis. 42 U.S.C. 9621(d).

For any Superfund site, EPA evaluates the risk and determines the appropriate cleanup level for the site, including for PFOA and PFOS. The risk is evaluated according to guidance, mainly Risk Assessment Guidance for Superfund using final toxicity information, and exposure information, and according to guidance, mainly Risk Assessment Guidance for Superfund (<https://www.epa.gov/risk/risk-assessment-guidance-superfund-rags-part>). PFOA and PFOS toxicity information used in CERCLA for any risk calculations are based on toxicity values that support EPA’s 2024 NPDWR. Once a basis for action has been determined, the risk at a site has been assessed, and the need for a response action is determined, then the MCLs for PFOA and PFOS will

potentially be considered as ARARs on a site-specific basis and documented in a decision document. While MCLs, MCLGs, and HAS are potentially appropriate to consider at CERCLA sites, other standards may be considered for other media evaluated at a site, such as soil, air, and biota such as fish.

C. Toxicity, Human Health Effects/Mobility, Persistence, Prevalence/Release Into the Environment

1. Data Supporting Designation

Comment: Several commenters argued that EPA has not presented sufficient information regarding the environmental and human health effects of PFOA and PFOS salts and structural isomers to support the designation of such substances as hazardous under CERCLA section 102(a). Multiple commenters contend that additional scientific study is needed prior to designation of PFOA and PFOS as CERCLA hazardous substances to enhance an understanding of the risks posed by these substances to human health and the environment.

Response: EPA believes that the available data clearly supports the conclusion that PFOA and PFOS, as well as their salts and structural isomers, present a hazard to human health and the environment. For further discussion of this issue, see Section V of this document, which describes the scientific and technical information supporting the Agency’s conclusion that both PFOA and PFOS may present substantial danger to public health or welfare or the environment when released into the environment.

EPA disagrees with the commenters’ position regarding the need for additional data prior to designation. As discussed in detail in Sections I and V, EPA has determined that a robust body of epidemiological and toxicological studies support the Agency’s conclusion that exposure to PFOA or PFOS are associated with serious and wide-ranging adverse health effects.

Comment: Several commenters asserted that EPA could not utilize draft toxicity assessments developed as part of the PFAS NPDWR rulemaking process (draft MCLG documents) to substantiate the designation of PFOA and PFOS as CERCLA hazardous substances (See Response to Comment Document, Section 3B). Specifically, these commenters argued that the draft MCLG documents are flawed because the Science Advisory Board identified certain methodological issues with the initial approaches the Agency used to derive PFOA and PFOS MCLGs. Relatedly, one commenter also

challenged EPA's purported reliance on interim Health Advisories (HAs) issued by the Agency in 2021, arguing that the underlying toxicity assessments supporting the interim HAs are flawed and have not been finalized by the Agency.

Finally, several commenters critiqued the reliability of several studies cited by EPA as part of this rulemaking, including certain epidemiological studies conducted in the Faroe Islands that EPA used to develop non-cancer toxicity values (reference doses) in the draft MCLG documents.

Response: As an initial matter, EPA disagrees with the commenters' characterization of the Agency's reliance on the draft MCLG documents and Interim HAs. EPA considered the peer-reviewed scientific studies underlying the toxicity assessments supporting the draft MCLG documents and the interim HAs as part of the Agency's comprehensive evaluation of available scientific information regarding the human health and environmental effects of exposure to PFOA and PFOS. To that point, as delineated in Section V, EPA considered hundreds of peer-reviewed publications in determining that exposure to PFOA or PFOS, when released into the environment, may present a substantial danger to the public health or welfare or the environment, including the 2016 EPA Health Effects Support Documents for PFOA and PFOS, the 2021 ATSDR Toxicological Profile for PFAS, and numerous peer-reviewed epidemiological and toxicological studies (ATSDR, 2021; U.S. EPA, 2016c, 2016d).

Secondarily, while beyond the scope of today's action, because these documents were finalized in 2024 as part of a separate, unrelated rulemaking after undergoing a robust peer-review and public comment process EPA rejects the commenter's assertion that the draft MCLG documents are inherently flawed because of issues identified by the Science Advisory Board (SAB). The Agency's final toxicity assessments reflect recommendations from both the Science Advisory Board (SAB) and the public comment process and address the SAB PFAS Review Panel's recommendations to improve the transparency of EPA's systematic review process. Additionally, EPA updated and expanded the protocols and methods based on SAB recommendations to improve the transparency of the process EPA used to derive the MCLGs for PFOA and PFOS and to improve consistency with the *ORD Staff Handbook for Developing IRIS Assessments* (U.S. EPA, 2022). EPA

followed this transparent systematic review process to evaluate the best available peer-reviewed science to conduct the PFOA and PFOS toxicity assessments (U.S. EPA, 2024b, 2024c, 2024d). For information on EPA's PFAS NPDWR rule, visit EPA's website at <https://www.epa.gov/sdwa/and-polyfluoroalkyl-substances-pfas>, or visit www.regulations.gov, under Docket No. EPA-HQ-OW-2022-0114.

EPA also disagrees with the commenter's claim that the Faroe Islands epidemiological studies fail to provide evidence of the impacts of PFOA and PFOS on vaccine response in children. The Faroe Islands epidemiological studies were peer-reviewed by the various scientific journals in which they were published. Additional studies, including one from a Greenland epidemiological study, provide support for associations between decreased vaccine response in children and exposure to PFOA and PFOS (Timmermann *et al.*, 2022; Zhang *et al.*, 2023). Additionally, the Science Advisory Board—in their "Review of EPA's Analyses to Support EPA's National Primary Drinking Water Rulemaking for PFAS"—agreed with the selection of the critical study, Grandjean *et al.* (2012), that identified an association between exposure to PFOA and PFOS and suppression of a vaccine response in children exposed during development, as appropriate for the derivation of chronic RfDs⁶⁹ for PFOA and PFOS.

D. Effects of Designation

1. Reporting and Notification Requirements

a. Reportable Quantity (RQ) for PFOA and PFOS Should be Set Either Higher or Lower Than 1 Pound

Comment: Some commenters stated that EPA should lower the RQ to 0.1 pound while others expressed that the RQ should be higher than one pound. A few commenters stated that EPA should consider a RQ for cumulative releases, *i.e.*, X pounds per year. One commenter argued that EPA's proposed RQ would allow companies to release massive

amounts of PFAS-containing waste before triggering any CERCLA requirements.

Response: Pursuant to CERCLA section 102, in this final rule the Agency is assigning a default RQ of one pound to PFOA and PFOS and their salts and structural isomers. The Agency believes that the statutory default RQ is appropriate in this instance because it will facilitate reliable reporting of substantial releases of PFOA or PFOS and allow government officials to evaluate and undertake timely response actions, if appropriate to do so. To ensure that it focuses its resources on those releases that threaten public health or welfare or the environment, EPA, may, however, consider adjusting the default RQ in the future if it receives data regarding the scope of releases of PFOA or PFOS indicating that one pound is not a suitable unit on which to base a notification requirement.

b. The Reportable Quantity (RQ) of One Pound Is Appropriate

Comment: A few commenters expressed support for a RQ of one pound.

Response: For the reasons provided in response to the prior comment (*see 1.a.*), the Agency agrees that it is appropriate to maintain a reportable quantity of one pound over a 24-hour period.

c. The Reportable Quantities (RQs) Should Be Chemical-Specific, Not Applied to PFAS as a Class

Comment: One commenter argued that EPA's decision to establish a RQ of one pound is indicative of the fact that the Agency lacks sufficient risk information for PFOA and PFOS to set a chemical-specific RQ, thereby demonstrating that the rulemaking is premature. Another commenter stated that there is precedent for tailoring reportable quantities to the unique characteristics of a given class of hazardous substances; specifically, the commenter pointed to the RQ approach the Agency has adopted with respect to radionuclides as support for their proposed methodology.

Response: This action is focused on designating PFOA and PFOS, and their salts and isomers as CERCLA hazardous substances. CERCLA 102(b) establishes a default of one pound and EPA has assigned 1 pound for each of these substances, including their salts and isomers. The Agency may revise the RQ in the future through notice and comment rulemaking after reviewing release information received pursuant to CERCLA 103.

On May 25, 1983, the Agency proposed to adjust the statutory default

⁶⁹ Reference Dose (RfD)—An estimate (with uncertainty spanning perhaps an order of magnitude) of a daily oral exposure to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime. It can be derived from a NOAEL, LOAEL, or benchmark dose, with uncertainty factors generally applied to reflect limitations of the data used. Generally used in EPA's noncancer health assessments. Generally used in EPA's noncancer health assessments. Durations include acute, short-term, subchronic, and chronic. (<https://www.epa.gov/iris/basic-information-about-integrated-risk-information-system>).

RQ of one pound for radionuclides. *See Notification Requirements; Reportable Quantity Adjustments*, 48 FR 23514, 23552 (May 25, 1983). EPA subsequently published a final rule and assigned a specific RQ for each radionuclide based on a methodology specific to those substances. *See Reportable Quantity Adjustment Radionuclides*, 54 FR 22405, 22524 (May 24, 1989). Similarly, with respect to PFOS and PFOA, the Agency may exercise its discretion at any time after designation to adjust the RQ if it determines that the circumstances warrant doing so.

d. Effluent That Violates NPDES Permit Limits

Comment: One commenter stated that effluent that violates any present or future NPDES permit covering PFAS needs to be reported under CERCLA to help attain the primary goal of this rulemaking: determining where releases of PFOA and PFOS occur and in what amount.

Response: Whether a particular release of PFOA or PFOS is exempt from CERCLA reporting requirements requires a case-by-case evaluation based on specific permit language or applicable control requirements. Generally, any release that violates a standard or limit specified in a facility's NPDES permit must be reported pursuant to CERCLA section 103 and EPCRA section 304. If the permit limit is below the RQ for these substances, those releases are not required to be reported.

d. The Reportable Quantity (RQ) Should Be Applied Over a Different Time Period Than 24 Hours

Comment: One commenter argued that EPA should require reporting of releases on a monthly basis rather than over a 24-hour period. To support this proposition, the commenter argued that the conditions of water-borne discharges do not change on a day-to-day basis and reporting can therefore be handled through other statutory reporting structures, specifically, under the terms of NPDES permits issued under the CWA. The commenter also argued that this designation would result in inconsistent reporting requirements as between TSCA and CERCLA. Here, the commenter stated that, under EPA's Chemical Data Reporting (CDR) rule, PFOA and PFOS are subject to a 2,500-pound reporting threshold at a single site. The commenter then noted that, regardless of TSCA stipulations, if the reporting quantity threshold is one pound in 24 hours, a site could spill 0.99 pounds per day for 365 days a year,

or nearly 360 pounds, with no reporting required. If, however, EPA imposed a weekly or monthly RQ reporting timeframe, the commenter contended that this issue would be addressed. Finally, the commenter noted that, pursuant to Toxics Release Inventory reporting requirements, facilities in regulated industry sectors must report annually on releases and the waste management of certain listed toxic chemicals that they manufacture, process, or otherwise use above certain threshold quantities (100 pounds for PFOA and PFOS).

Response: EPA declines the commenter's request to amend the timeframe it uses to determine if a reportable release has occurred. The Agency believes that a 24-hour reporting period—which it has utilized successfully for 38 years and with which the regulated community is highly familiar—best serves the primary purpose of CERCLA's notification requirements, namely, to alert government officials to releases that may require timely and proper response action to prevent or mitigate damage to public health or welfare or the environment. To the extent facilities are aware of ongoing releases of hazardous substances below the reportable quantity, the Agency believes that regulated entities will conduct due diligence by reporting any releases that may cause substantial danger to the public health, or welfare or the environment. Finally, while the commenter identifies what it regards as inconsistencies in reporting thresholds between various regulatory programs, EPA notes that statutory and regulatory programs maintain reporting thresholds that are intended for different purposes. For example, EPCRA section 313 (Toxic Release Inventory (TRI)) requires certain facilities that manufacture, process, or otherwise use listed toxic chemicals in amounts above reporting threshold levels to report their environmental releases and other waste management quantities of such chemicals annually. TRI data can, in conjunction with other information, be used as a starting point in evaluating such exposures and the risks posed by such exposures. The purpose of the Chemical Data Reporting Rule under TSCA is to provide EPA with information on the production and use of chemicals in commerce. However, release reporting requirements under CERCLA section 103 and EPCRA section 304 create a reporting process that inform government officials of releases that require immediate evaluation to determine the need for response action.

f. The Proposal Provides Little or No Guidance on How PFAS Quantities Are To Be Specifically Determined or Calculated for the Purposes of the RQ

Comment: Several commenters argued that the designation would necessitate costly daily sampling for PFOA and PFOS; relatedly, these commenters also claimed that the designation fails to provide adequate guidance regarding the appropriate methodology for sampling of PFOA and PFOS.

Response: This final designation under CERCLA does not require any testing and EPA does not intend to require any further testing beyond that which is already required by other statutes and their implementing regulations. Testing may be required on a site-specific basis, consistent with CERCLA section 104(b).

g. Reportable Quantities of PFAS May Be Difficult or Impossible To Identify Due to Being Proprietary, Being Disclosed Incompletely in Safety Data Sheets, or Not Meeting the 1 Percent Labeling Threshold

Comment: Several commenters were concerned with the identification of reportable PFAS because in some cases, PFAS chemicals in products are listed as proprietary, not by name or Chemical Abstracts Service (CAS) number. Furthermore, because not all Safety Data Sheets (SDSs) accurately disclose PFAS constituents, these commenters argue that the designation will result in constant uncertainties regarding quantities, reporting and recordkeeping, even though EPA has taken the position that SDSs and Technical Data Sheets should be considered primary sources of information in ascertaining the presence of PFAS-containing compounds. One commenter also noted that compositions of products containing PFOS or PFOA, or other PFAS, are currently not required to be communicated on Safety Data Sheets or otherwise labeled normally below one percent, questioning how EPA proposes to make determinations on volumes if percent composition is not disclosed by manufacturers. One commenter stated that the rule should clarify expectations and requirements for PFOA and/or PFOS producers regarding the communication and/or disclosure of these substances when used as ingredients. By way of example, the commenter suggested that EPA should consider whether PFOA and PFOS producer reporting requirements should be effectuated through OSHA regulations such as the Hazard Communication Standard.

One commenter noted that EPA's current proposal would designate not just PFOA and PFOS as hazardous substances with RQ requirements, but also "their salts and structural isomers" which often do not even have their own names. The commenter asserted that if a constituent has not even been named yet and/or is not currently detectable with the available sampling methods, then the regulation of that constituent is not practicably enforceable and puts regulated entities in an untenable situation.

Response: According to OSHA's Hazard Communication Standard (HCS), a manufacturer, importer, or employer may claim ingredients in their product as proprietary if they meet the requirements of 29 CFR 1910.1200(i). However, if a chemical ingredient is below the thresholds (*i.e.*, 1% or 0.1%, depending on the specific health endpoint), it is required to be listed on an SDS if the chemical can cause a health hazard below the cut-offs.⁷⁰ Downstream users of mixtures or products that contain PFOA, PFOS, or their salts and isomers are encouraged to contact their distributors as well as manufacturers to obtain (SDSs), which should include concentrations of each ingredient or constituent in a mixture or product. The specific requirements for developing SDS and its contents are regulated under OSHA HCS. *See 29 CFR 1910.1200. (Note: EPA's CompTox Chemicals Dashboard (<https://comptox.epa.gov/dashboard/>) is a resource that can be used to identify salts and structural isomers of PFOA and PFOS. EPA periodically updates the CompTox Chemicals Dashboard to include new information on PFAS, including PFOA and PFOS.)* EPA has amended Table 302.4 of 40 CFR part 302 to designate PFOA, PFOS and their salts and structural isomers and parties that use such chemicals are responsible for knowing the makeup of their products and ingredients and ensuring compliance with the CERCLA and EPCRA reporting requirements if a release occurs. The regulations at 40 CFR 302.6 (b) provides requirements for release reporting of mixtures with known and unknown constituents or their quantities. <https://www.ecfr.gov/current/title-40/chapter-I/subchapter-J/part-302/section-302.6>.

h. EPA Should Clarify That Any NPDES Permit Violation for PFOA and PFOS Would Not Constitute a "Federally Permitted Release" and Must Be Reported

Comment: One commenter argued that EPA should clarify that any releases of PFOA or PFOS in violation of the terms of a NPDES permit would not constitute a "federally permitted release" under CERCLA section 101(10)(C) and must therefore be reported in accordance with CERCLA section 103. This commenter also argued that EPA's ability to require monitoring of PFOA and PFOS through NPDES permits is limited because the Agency's April 2022 guidance—*Addressing PFAS Discharges in National Pollutant Discharge Elimination System Permits and Through the Pretreatment Program and Monitoring Programs* (Memorandum)—is directed only at federally issued NPDES permits.

Response: CERCLA requires a person in charge of a vessel or a facility to report any release (other than a federally permitted release) of a hazardous substance over a certain quantity to the National Response Center as soon as they are aware of a release. *See* 42 U.S.C. 9603(a). CERCLA section 101(10) defines the term "federally permitted release," which includes NPDES permits issued under the Clean Water Act. *See* CERCLA 101(10)(A), (B), & (C). Whether a particular release is a "federally permitted release" such that it would be exempt from CERCLA section 103 reporting requirements requires a case-by-case determination based on the specific permit language or applicable control requirement. These provisions are sufficient to inform whether a release is a federally permitted release for any hazardous substance, including releases of PFOA and PFOS. EPA also notes that on December 5, 2022, it updated the Memorandum to provide guidance to States for addressing PFAS discharges when they are authorized to administer the NPDES permitting program and/or pretreatment program. https://www.epa.gov/system/files/documents/2022-12/NPDES_PFAS_State%20Memo_December_2022.pdf.

i. Default Reportable Quantity (RQ) of 1 Pound

Comment: One commenter noted that EPA arbitrarily set the default reporting requirement at one pound, which is not supported by scientific analysis.

Response: Although one commenter argues that EPA acted "arbitrarily" in setting the reportable quantity (RQ) for

PFOA and PFOS at one pound, in fact, the Agency is setting the RQ by operation of law at the statutory default of one pound pursuant to CERCLA section 102(b). *See* 42 U.S.C. 9602(b) ("Unless and until superseded by regulations establishing a reportable quantity under subsection (a) of this section for any hazardous substance as defined in section 9601(14) of this title, (1) a quantity of one pound, or (2) for those hazardous substances for which reportable quantities have been established pursuant to section 1321(b)(4) of title 33, such reportable quantity, shall be deemed that quantity, the release of which requires notification . . .").

2. Community Notification Requirement Under CERCLA Section 111(g)

Comment: One commenter requested clarification regarding the impact of the rule on the community notification requirement of section 111(g) of CERCLA.

Response: Upon finalization of this rulemaking, the owner or operator of a facility or vessel from which PFOA or PFOS have been released will be required to "provide reasonable notice to potential injured parties by publication in local newspapers serving the affected area." CERCLA section 111(g). Note that the section 111(g) notification mechanism is independent of the reporting requirements of section 103(a). *See* Notification Requirements; Reportable Quantity Adjustments, 50 FR 13456, 13464 (Apr. 4, 1985) ("One commenter asked whether RQ notification requirements revoke section 111(g). The newspaper notification requirement established by section 111(g) of CERCLA is not affected by any of the notification requirements in today's rule.").

E. National Priorities List (NPL) Sites—Existing and Future Contamination

Comment: A number of commenters were concerned that the designation of PFOA and PFOS would result in the addition of a significant number of new sites to the NPL, thereby preventing EPA from focusing on significantly contaminated sites. One commenter noted that designation would require EPA to prioritize the cleanup of new Superfund sites, but also claimed that the Agency has not clarified how any prioritization process would occur. Another commenter noted their specific concern that the designation will result in the implication of a significant number of agricultural operations as Superfund sites.

Several commenters also argued that designation could both extend the

⁷⁰ EPA coordinated with OSHA to develop this response.

remediation timeline for existing Superfund sites and slow down the rate at which sites can be deemed “closed.” Ongoing and unmitigated releases could result in a contaminated site having to be cleaned up multiple times. Finally, multiple commenters stated that EPA has not properly accounted for and considered the additional economic burden associated with the addition of multiple new Superfund sites, reopening of sites, and corresponding cleanup obligations.

Response: EPA does not expect the number of sites on the NPL to substantially increase after designation. EPA already has the authority to list PFOA and PFOS sites to the NPL, and the rule has no impact on that authority. Indeed, EPA has already listed sites on the NPL in part due to the presence of these substances at a site, and this practice would continue. For example, Saint-Gobain Performance Plastics, Blades Groundwater, and Galey and Lord mention PFOA, PFOS, or both PFOA and PFOS, in their listing proposal. Designation does not automatically make sites eligible for placement on the NPL because of the presence of PFOA and PFOS.

Designation does not change the Hazard Ranking System (HRS), which is EPA’s primary tool for evaluating releases to determine NPL eligibility. (40 CFR part 300, Appendix A). The HRS broadly defines “hazardous substance” as including CERCLA hazardous substances, pollutants, and contaminants as defined in CERCLA section 101(14) and 101(33). Available scientific data demonstrate that PFOA and PFOS meet the definition of pollutant or contaminant, and therefore sites with PFOA and PFOS are evaluated in the NPL listing process, regardless of designation.

The HRS process considers several factors for the purpose of scoring a site and determining its eligibility for listing on the NPL. The HRS is designed to assesses the relative potential of sites to pose a threat to human health or the environment. Scores are based on three categories, including the likelihood that a site has released or has the potential to release hazardous substances and/or pollutants or contaminants into the environment; characteristics of the waste (toxicity and waste quantity); and people or sensitive environments (targets) affected by the release. These scores are calculated for one or more pathways including ground water migration, surface water migration, soil exposure and subsurface intrusion, and air migration. If the combined scores meet or exceed the threshold listing

score of 28.5, the site is eligible for the NPL.

Even when a site is eligible for the NPL, EPA may choose to not list the site and look to other options. Alternatives to NPL listing may include the Superfund Alternative Approach, State cleanup, cleanup by other Federal agencies, EPA removal action, deferral to another EPA program, or various other enforcement mechanisms. Thus, PFOA or PFOS releases may be addressed through non-NPL mechanisms even after designation.

Between FY 2003 and FY 2022, only about four percent of all contaminated sites added to EPA’s Active Site Inventory were placed on the NPL. Since 2013, EPA has, on average, added 11 non-federal sites per year to the NPL,⁷¹ and EPA does not expect the rate at which annual additions to the NPL occur to increase as a result of this rule. Moreover, NPL listing does not trigger any immediate actions, liability, or requirements for the site.⁷²

A hazardous substance designation under section 102(a) of CERCLA does not lead automatically to any response actions. Response actions, which include investigations of releases of hazardous substances and determining if removal or remedial action is necessary, are contingent, discretionary, and site-specific. EPA prioritizes the highest-risk sites under CERCLA (and that listing process is open to public comment); the process for selecting remedies includes public notice and comment; and cost considerations,

⁷¹ This estimate is based on data from EPA’s SEMS database with respect to non-federal NPL sites. EPA determined that it was appropriate to assess the designation’s impact with respect to non-federal NPL sites only, because federal sites are generally expected to address PFOA and PFOS in the absence of designation consistent with CERCLA section 104. As discussed in Chapter 2 of the RIA, federal sites are addressing PFAS in the baseline as authorized by CERCLA section 104 and corresponding Executive Orders, as required by the NDAA, and consistent with federal facilities agreements under CERCLA section 102. Therefore, EPA expects that federal sites will address PFOA and PFOS contamination in the absence of the final rule. With federal sites taking action to address PFAS in the baseline, indirect impacts of the final rule will likely be related to actions taken at non-federal sites. For additional context, since FY 2000 EPA has added 8 federal sites to the NPL.

⁷² EPA considered the portion of non-federal NPL sites that may be impacted by designation depending on site-specific circumstances. Of final, proposed, or deleted non-federal NPL sites that have been tested for PFOA and/or PFOS, an estimated 33.1% of NPL sites have detectable levels of PFOA and/or PFOS. See Section 3.3 of the RIA for more details about this estimate. In evaluating the designation’s impact on non-federal NPL sites, this estimate is instructive and serves as a benchmark for assessing designation’s potential impact to those sites. There are currently 5 sites where either PFOA or PFOS contributed to NPL listing.

among other important factors such as protectiveness, are part of CERCLA’s site-specific cleanup approach.

EPA disagrees with the commenter that designation of PFOA and PFOS will slow the Agency’s ability to remediate Superfund sites. Designation itself does not affect the length of time it may take to fully implement a remedial action. However, in some cases, there may need to be additional work to address PFOA and PFOS contamination, depending on what other contaminants of concern (COCs) are located at a site and whether the responses to those other contaminants have the co-benefit of addressing PFOA and PFOS contamination. Typically, remedial actions address a number of COCs at once. In some cases, the remedy for other COCs will also address PFOA and PFOS contamination; in other cases, additional work will be needed. For instance, if PFOA and PFOS are not part of a remedy for the site, adding them to the remedy would then have the potential to increase efforts and cost of the remedy (e.g., by increasing the frequency of GAC replacement).

In all cases, EPA should evaluate whether the remedy can mitigate any unacceptable risk from PFOA or PFOS contamination or whether additional actions may need to be taken. CERCLA section 121 provides that if an action is needed to assure protectiveness as a result of findings of a five-year review, those actions can be taken. In some cases, it may be necessary to revise or expand the previous risk assessment as part of a five-year review. For example, the risk assessment may need to be revised when there is a new exposure pathway, a new potential contaminant of concern, or an unanticipated toxic byproduct of the remedy. Five-year reviews (FYR) can also recommend further investigation to determine whether an additional response action is needed. See CERCLA section 121(c); 40 CFR 300.430(f)(4)(ii).

Additionally, several commenters stated that without first ensuring PFOA and PFOS are no longer entering the environment, ongoing and unmitigated releases could potentially cause a site to be cleaned up multiple times. First, PFOA and PFOS contamination stems largely from historic releases. Even though there will likely be future releases, the use of PFOA and PFOS has diminished, and EPA does not expect releases at particular sites to result in additional widespread, significant contamination at or from that site, in part because the designation will allow EPA to act earlier. Second, EPA notes that (as discussed in Section III.C.), it has committed to a comprehensive and

ambitious whole-of-Agency plan to address PFAS. Under this approach, EPA has identified a variety of authorities, including TSCA, SDWA, and RCRA, that it intends to use to prevent or minimize ongoing PFOA and PFOS releases into the environment. Additionally, EPA has considered the economic impacts of designation, including a consideration of potential impacts of designation on the NPL listing process. Please see chapter 5 of the RIA for this final rule.

F. Regulate PFAS as a Class

Comment: A few commenters stated that EPA should regulate PFAS as a class rather than listing chemicals one by one.

Response: PFOA and PFOS are prevalent because they have been produced and used since the 1940s, were among the most widely used of the PFAS constituents and persist in the environment for a substantial period of time. EPA considered the available scientific and technical information, and concluded each of these substances may present substantial danger to public health or welfare of the environment. EPA also evaluated the totality of the circumstances, including available scientific and technical information, and concluded that designation is warranted. The Agency also recently sought input and data regarding potential future hazardous substance designation of categories of PFAS and is still evaluating the feedback it received on this issue. See Addressing PFAS in the Environment, 88 FR 22399 (Apr. 13, 2023).

G. Phase-Out & PFOA Stewardship Program

Comment: Several commenters also argued that the production of PFOA and PFOS is being phased out, thus the value of this rulemaking is questionable.

Response: EPA disagrees with the commenter's assertion that the value of designating PFOA and PFOS is questionable since these chemicals have been phased out in many cases. First, although PFOA is not produced domestically by the companies participating in the 2010/2015 PFOA Stewardship Program, PFOA may still be produced domestically by non-participating companies. PFOS may still be produced or used domestically as well. Second, EPA has also published Significant New Use Rules (SNURs) to require notification to EPA before manufacture (including import) of certain PFAS, including PFOA and PFOS. This notification process would allow EPA the opportunity to evaluate the new use and, if necessary, take

action to prohibit or limit the activity. However, these SNURs exempted certain ongoing uses, including a few specifically limited, highly technical uses. In the absence of any notices received under these SNURs, EPA has limited sources of data regarding the ongoing use of PFOA and PFOS. Currently, the CDR generally requires manufacturers (including importers) to report for PFOA and PFOS if they meet a 2,500-pound production volume threshold at a single site. TRI reporting requires facilities to report releases of PFOA and PFOS if the facility manufacture, produce, or otherwise use at or above 100 pounds per year. Recent TRI reports indicate there maybe ongoing uses of these substances. While TRI reports show on-going uses, EPA is unable to definitively state the extent to which PFOA and PFOS are still in commerce in the United States.⁷³

Regardless of the phase-out, designation is warranted based on the scientific and technical data available, suggesting that releases into the environment pose a hazard; are persistent and mobile (fate and transport); and prevalent in the environment. EPA has existing data that suggest that, despite the phase-out, PFOA and PFOS will continue to be detected in the environment. For example, EPA has detected PFOA and PFOS at approximately 400 NPL sites. These sites are mainly locations associated with AFFF use, textile coating operations, metal plating facilities, and landfills. As appropriate, these sites, and others like them, should be investigated, and site-specific risk assessments should be performed to assess whether further response actions, if any, are necessary to protect human health and the environment. Designation will allow EPA to address the legacy of sites that are contaminated with these substances and address future releases.

H. Managing PFOA and PFOS Contaminated Waste

Comment: Several commenters claimed that the designation of PFOA and PFOS will result in a significant increase in the generation of hazardous wastes; these commenters also argued that EPA has not provided sufficient disposal capacity or storage requirement guidance to address the ramifications of the designation. Multiple commenters also stated that the Agency may not be able to satisfy the requirements of

CERCLA section 104(c)(9), which requires States to assure the availability of hazardous waste treatment or disposal facilities that have adequate capacity to manage the hazardous waste reasonably expected to be generated within the State over 20 years, prior to EPA providing funding for any remedial actions. Relatedly, some commenters noted that EPA has not disclosed whether it has entered into any agreements with States to ensure that they possess the capacity to destroy, treat, or securely dispose of material contaminated with PFOA and PFOS. Further, several commenters argued that EPA has not considered whether Subtitle C landfill capacity is available to accommodate PFOA or PFOS-contaminated hazardous waste. Some commenters also alleged that EPA has not described disposal methods for contaminated soils or other media from new Superfund sites that could be created in the wake of this rulemaking. Finally, several commenters argued that EPA must finalize its *Interim Guidance on the Destruction and Disposal of Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS) and Materials Containing PFAS-Substances* ("Interim Guidance") and estimate available waste disposal capacity before finalizing this rulemaking.

Response: Comments suggest a misunderstanding of waste disposal requirements under CERCLA. The Agency disagrees with the assumption that all waste containing PFOA and PFOS must be disposed of in Subtitle C facilities. EPA's *Interim Guidance on the Destruction and Disposal of Perfluoroalkyl and Polyfluoroalkyl Substances and Materials Containing Perfluoroalkyl and Polyfluoroalkyl Substances—Version 2 (2024)*, acknowledges that PFAS wastes could be sent to both hazardous waste and municipal solid waste landfills. For CERCLA cleanups, section 121(d)(3) of CERCLA, as implemented by 40 CFR 300.440 ("Offsite Rule"), applies to any CERCLA response action involving the off-site transfer of any hazardous substance or pollutant or contaminant (CERCLA wastes). The Offsite Rule requires that CERCLA wastes are transferred to a facility operating in compliance with applicable Federal and State requirements for the waste at issue. As such, for CERCLA cleanups, only hazardous wastes listed or identified under RCRA section 3001 (or an authorized State program) are required to be managed at RCRA Subtitle C facilities.

EPA rejects the assertion that it has not evaluated if sufficient capacity exists for disposal and storage of PFOA

⁷³ The Agency expects to receive additional information about ongoing use of PFAS as part of the TSCA section 8(a)(7) PFAS reporting rule that was finalized on October 11, 2023 (88 FR 70516).

and PFOS contaminated materials. EPA also acknowledges that CERCLA section 104(c)(9) does not allow the Agency to provide any remedial action funding to a State, unless the State first enters into a Superfund State Contract or Cooperative Agreement (CA) that assures the availability of adequate capacity to manage hazardous wastes generated in the State for 20 years following the date of the response agreement. EPA is designating PFOA and PFOS as CERCLA hazardous substances. No PFAS are currently listed, or being proposed to be listed, as hazardous wastes under RCRA.⁷⁴ However, PFOA- and PFOS-containing waste is and will likely continue to consume a fraction of hazardous waste treatment and disposal capacity. Although waste containing PFOA and PFOS is not necessarily hazardous waste (unless the particular wastes are hazardous for some other reason), some waste generators, perhaps to be cautious, have been sending PFAS-containing wastes to hazardous waste facilities. To ensure hazardous waste landfill capacity is available in the future, EPA reviews and analyzes the Biennial Hazardous Waste Report and other data to develop and then publish an assessment of national capacity for hazardous waste management. The last such capacity assessment indicated that there is adequate capacity nationwide through 2044, and it would have incorporated PFOA and PFOS as wastes in the category of “Not RCRA Federally-Defined Hazardous Wastes.” Of these wastes, no assumption regarding a certain percentage of PFOA and PFOS was made. A new assessment is currently underway to incorporate new information and extend the time horizon.⁷⁵ EPA will continue to work with States to monitor waste treatment and disposal capacity and report on the status.

The science on treating, destroying, and disposing of PFAS is evolving. The National Defense Authorization Act for Fiscal Year 2020 (FY 2020 NDAA) directed the Agency to publish interim guidance on the destruction and

disposal of PFAS and materials containing PFAS. Subsequently, on December 18, 2020, EPA developed and issued the *Interim Guidance (U.S. EPA, 2020)*, which outlines the current state of science on techniques and treatments that may be used to destroy or dispose of PFAS and PFAS-containing materials from non-consumer products. Consistent with the FY 2020 NDAA, EPA is also required to publish revisions to the interim guidance as appropriate, but not less frequently than once every three years. EPA recently posted the *Interim Guidance on the Destruction and Disposal of Perfluoroalkyl and Polyfluoroalkyl Substances and Materials Containing Perfluoroalkyl and Polyfluoroalkyl Substances—Version 2 (2024)*.

I. Comments on Economic Assessment/Regulatory Impact Analysis

Comment: Several commenters asserted that EPA must prepare and publicly issue a full economic analysis of the rulemaking. These commenters claimed that EPA’s economic assessment is insufficient for failing to provide any quantitative assessment of anticipated indirect costs, particularly those related to increased response actions. Several commenters called upon the Agency to issue a complete RIA while other commenters stated that EPA is required to prepare a regulatory cost benefit analysis consistent with Executive Order 12866. These commenters also asserted that EPA should conduct a full RIA pursuant to OMB Circular A–4 that considers the full compliance and cleanup costs, including the direct and indirect costs and benefits, associated with the designation. One commenter stated that the rulemaking cost estimates prepared by EPA do not appropriately reflect the total costs associated with the designation.

Response: With new information received during the public comment period, EPA updated its analysis of direct costs. As part of this rulemaking, EPA has expanded its economic assessment and has conducted an RIA consistent with E.O. 12866 and OMB Circular A–4 in support of designation. As required by the E.O. and Circular A–4, the RIA assesses reasonably foreseeable indirect costs, transfers, and benefits. Specifically, for costs, transfers and benefits, EPA has developed estimates under a range of scenarios based on historic information about response costs and benefits. These ranges reflect the uncertainty associated with estimating potential response costs, transfers, and benefits, as it is difficult to assess with certainty what

future actions will be taken since CERCLA decisions are made on a site-specific basis. EPA also asserts that the scope of costs counted by the Agency as direct costs—including an estimated low and high range of potential notification requirement frequencies and associated costs—is consistent with the requirements of E.O. 12866 and OMB Circular A–4. Consistent with the guidance of Office of Management and Budget’s (OMB’s) Circular A–4, this RIA includes an assessment of potential indirect costs, benefits, and transfers to provide the public with insights related to these impacts. Please see chapters 3, 4, and 5 of the RIA for more information about EPA’s methodologies and discussion of direct and indirect costs, benefits, and transfers.

1. Liability and Costs to Public Utilities

Comment: Numerous comments claim that EPA has failed to consider the potential impact of the designation on public water utilities/water systems and ratepayers with respect to potential litigation costs. These comments also argue that the designation does not account for the potential remediation costs associated with PFOA and PFOS cleanups (which the commenters assert could be passed on to local communities and public clean water utility ratepayers). These commenters also claim that local drinking water and wastewater agencies will incur substantial costs to remove PFOA and/or PFOS from water sources and propose that all such direct and indirect costs should be evaluated in a full RIA. One commenter asserted that EPA’s approach to designation could potentially harm sectors and facilities that provide essential daily functions to communities, such as wastewater treatment facilities and municipal landfills (*i.e.*, facilities that do not generate or use PFAS but that may, in the regular course of business, receive waste or wastewater containing PFAS).

Response: The Agency recognizes that certain stakeholders are concerned about CERCLA liability resulting from the designation of PFOA and PFOS as hazardous substances. The most significant direct impact of this CERCLA designation is the requirement that any person in charge of a vessel or facility report a release of PFOA and/or PFOS of one pound or more within a 24-hour period. Neither a release nor a report of a release automatically triggers cleanup action under CERCLA. EPA makes CERCLA response decisions based on site-specific information, which includes evaluating the nature, extent, and risk to human health and/or the environment from the release. In

⁷⁴ EPA has proposed to amend its RCRA regulations to add multiple PFAS compounds, including PFOA and PFOS, as hazardous constituents. These PFAS would be added to the list of substances identified for consideration in RCRA facility assessments and, where necessary, further investigation and cleanup through the corrective action process at hazardous waste treatment, storage and disposal facilities. Although this is one step toward listing a hazardous waste, it is not a regulatory hazardous waste listing.

⁷⁵ Background information and links to related documents are available at <https://www.epa.gov/hwpermitting/assessment-national-capacity-hazardous-waste-management>.

addition, designation does not automatically result in CERCLA liability for any specific release. Whether an entity may be subject to litigation or held liable under CERCLA are site-specific and fact-dependent inquiries. Likewise, CERCLA affords the EPA broad discretion as to whether or how to respond to a release. For those reasons, EPA cannot assess with reasonable certainty what liability outcomes may indirectly result from this designation since those outcomes are often linked to EPA's discretionary decisions with respect to CERCLA response actions as well as site-specific and fact-dependent court rulings. Nevertheless, EPA considered these issues in its totality of the circumstances analysis. For further information regarding the interplay between the designation and potential liability concerns please see sections VI.B.2 and VI.B.3.

Efforts to address PFAS in public drinking water and wastewater treatment have already been initiated prior to this designation, and the associated costs of those efforts are attributable to those separate efforts. In the case of drinking water utilities, EPA's 2024 NPDWR mandates that certain drinking water utilities (community water systems and nontransient, noncommunity water systems) should deliver drinking water with PFOA and PFOS concentrations below the MCLs. The costs of monitoring, treatment, administration, disposal of drinking water treatment media residuals, and other costs have been considered in the associated Economic Analysis as part of that rulemaking effort. *Please see 2024 NPDWR. <https://www.epa.gov/sdwa/and-polyfluoroalkyl-substances-pfas>, or visit www.regulations.gov, Docket No. EPA-HQ-OW-2022-0114.* For potential cleanups of private drinking water wells, EPA acknowledges it has expanded its economic assessment to estimate a subset of potential health benefits where data was available to allow quantification. This subset includes those populations who rely on private drinking water wells within one mile of sites that may have response and cleanup as a result of the final rule. Refer to RIA Chapter V.

2. Consideration of Costs for Small Entities

Comment: One commenter expressed concern that the designation may create significant costs for small entities associated with monitoring and analyzing samples for PFOA and PFOS to ensure compliance with CERCLA. The commenter recommended EPA

evaluate and consider the real costs associated with the designation through an evaluation of the number and types of facilities that may release reportable quantities of PFOA or PFOS, to determine what monitoring and analysis costs these facilities may incur to ensure compliance with CERCLA. Then, the commenter suggested that if EPA determines that costs should not be considered as part of the designation, costs should be considered as a factor of complying with CERCLA.

Response: EPA disagrees with the commenter that designation of PFOA and PFOS as CERCLA hazardous substances will lead to significant cost impacts for small businesses. First, this rule does not require monitoring and analysis specifically. Second, in its RIA, EPA demonstrated that the rule would not result in a significant impact to a substantial number of small entities; in fact, consistent with long-standing EPA policy regarding the implementation of the Regulatory Flexibility Act, the RIA considered small entity impacts related to the direct cost impacts of the rule and found that they are limited to the costs associated with the reporting of PFOA/PFOS releases at or above the RQ.

3. Direct Costs for Rule Familiarization

Comment: One commenter stated that EPA failed to consider the cost of "regulatory familiarization" in its economic analysis of the rulemaking. The commenter described "regulatory familiarization costs" as accounting for the value of time and effort that every potentially affected individual or business must undertake to determine if a regulation applies to their situation or not, and how their activities must adapt to comply.

Response: Rule familiarization constitutes a negligible cost of the rule. Facilities are expected to be familiar with the baseline requirements associated with reporting releases of non-PFOA/PFOS CERCLA hazardous substances to the NRC and to the State, Tribal and local emergency planning and response agencies. While the final rule is adding PFOA and PFOS to CERCLA's list of hazardous substances, this designation does not change or add requirements to CERCLA section 103, CERCLA section 111, and EPCRA section 304 release notification requirements.

4. Costs, Benefits, and the Economic Assessment

Comment: One commenter states that the rulemaking will result in a net social cost as markets over-adjust to concerns regarding CERCLA's joint and several liability scheme. The commenter also

contends that any transfer of costs from the public to polluters could occur even in the absence of the designation, thereby concluding that the rulemaking is unnecessary. Finally, the commenter states that any consistency between the designation and ongoing actions to address PFOA and PFOS contamination is irrelevant to a determination as to whether the designation meets a compelling public need.

Response: EPA disagrees with the commenter that the designation will cause the market to over-adjust in response to CERCLA's liability provisions. Market efficiency generally increases as more information becomes available. EPA is unaware of data suggesting that an over-adjustment is likely, and the commenter provided no such data. Further, once CERCLA's notification requirements and broadened enforcement authorities are applicable to PFOA and PFOS releases, the likelihood that costs will be shifted from the Federal government to polluters will increase. Specifically, reporting will facilitate increased transparency regarding releases of PFOA and PFOS, which will, in turn, both inform the Agency's understanding of the presence of these substances in the environment and allow EPA to respond to contamination in a timely manner.

EPA disagrees with the commenter that the consistency between the designation and other ongoing actions to address PFOA and PFOS contamination is irrelevant to a determination that the rule meets a compelling public need. Designation is still warranted independent of other Agency actions and is consistent with EPA's Agency-wide approach outlined in the Roadmap. As noted by the commenter, OMB Circular A-4 states that an agency "should try to explain whether the action is intended . . . to meet some other compelling public need such as improving governmental processes or promoting intangible values such as distributional fairness or privacy." Greater consistency between actions will "improve governmental processes" by allowing for greater efficiency and effectiveness in addressing PFOA and PFOS contamination across the United States. Additionally, when EPA is able to transfer certain response costs to PRPs, this represents an improvement in societal equity.

Comment: One commenter argues that EPA has not explained how designation encourages better waste management practices or how PFOA or PFOS-contaminated materials should be disposed of. This commenter also argues that EPA has failed to support its assertion that the designation will

produce public health benefits. Here, the commenter points out that EPA identifies the regulatory requirement to report a release of one pound of PFOA or PFOS as a particular benefit of the proposed rulemaking but contends that the quantity of material that would need to be released for reporting requirements to attach would be significant. Finally, the commenter states that the designation may have the unintended consequence of increasing treatment costs in both drinking water and wastewater.

Response: EPA agrees with the commenters that reports of releases at or above the RQ represent a meaningful benefit of the rule, as reporting will allow EPA to evaluate and respond to such releases in a timely manner. EPA disagrees with the commenter that the rule will not lead to improvements in the management of PFOA and PFOS contaminated materials. A potential direct benefit that may result from the reporting requirement is better waste management and/or treatment by facilities handling PFOA or PFOS, resulting from improved efforts to further reduce potential releases. Greater transparency provided by release reporting can lead to fewer releases to the environment and thus to potential health benefits associated with avoided exposure. For additional information regarding the potential benefits of the designation, including other benefits of release reporting, see Section VI of this preamble.

In this final action, EPA has expanded its economic assessment of indirect benefits to include illustrative quantified and unquantified health benefits. EPA quantified a small subset of potential health benefits. This includes an illustrative assessment of reduced incidence of cardiovascular disease, birthweight impacts, and renal cell carcinoma under a range of scenarios. This considers potential benefits to those populations which rely on private drinking wells, where there may be response and cleanup as a result of the final rule. Additionally, EPA assessed additional unquantified health benefits. See RIA Chapter 5.

EPA does not agree with the commenter that the proposed rule will hinder water treatment or efforts to remove background levels of PFOA or PFOS in wastewater and drinking water. When, how, and why the water sector would remove these substances from drinking water and whether they dispose of it in a hazardous waste landfill is complex and will depend on the volume and concentration of PFAS captured, availability of disposal sites, decisions made at individual public

water systems, and State and Federal regulatory actions and enforcement actions.

EPA also disagrees with the claim that designation will increase the costs associated with managing drinking water treatment residuals. As discussed in section VII.I.1, efforts to address PFAS in drinking water and wastewater treatment have already been initiated prior to this designation, and the associated costs of those efforts are attributable to those separate efforts. The NPDWR Economic Assessment Appendix H includes a sensitivity analysis that accounts for potential cost increases associated with treatment of residuals as hazardous waste. The designation of PFOA/PFOS as CERCLA hazardous substances does not require disposal or treatment of water treatment residuals as hazardous waste.

Comment: One commenter challenged whether the designation would have the benefits that EPA claims. The commenter asserts that existing tools at EPA's disposal, as well as those in development, can provide the Agency with the authority it needs to address PFOA and PFOS releases and obviate the need for designation. The commenter also states that EPA's failure to quantify the likely costs and purported benefits of this rule are especially egregious in light of the Agency's alleged failure to consider alternative actions to achieve its goals. The commenter also encouraged EPA to conduct a full RIA. Finally, the commenter claimed that there are negligible positive effects associated with the designation, and challenged EPA's assertion that substantial benefits will flow from the designation as flawed.

Response: EPA disagrees with the commenter that the rule is unlikely to lead to the benefits the Agency has identified. EPA has identified a significant body of scientific evidence demonstrating that PFOA and PFOS are persistent and mobile in the environment, and that exposure to PFOA and PFOS may lead to adverse human health effects. Therefore, to the extent that this designation results in reduced or eliminated exposure to PFOA/PFOS, as EPA expects it will, there may be potentially significant human health benefits associated with designation. EPA further explains its reasoning regarding these benefits in Section VI.A of this preamble and in the RIA. For example, the notification requirement under the designation will facilitate earlier notification of EPA and State authorities regarding releases of PFOS and PFOA. Relatedly, designation will enable EPA to exercise its statutory

authorities to address PFOA and PFOS contamination in a timely manner.

With respect to the commenter's claims that the Agency has failed to substantiate its quantification of potential costs, transfers, and benefits, the RIA accompanying the final rule has quantitatively assessed such impacts to the extent possible. Additional benefits and costs remain unquantified due to a lack of available data and highly uncertain circumstances, as further discussed in the rule and RIA. Additionally, EPA has included an analysis of potential alternative policy options associated with the reporting requirement; details of this analysis are found in the Appendix of the RIA.

a. Indirect Costs

Comment: One commenter points out that EPA's economic assessment estimates only the costs associated with reporting activity. The commenter also stated that all costs related to potential increases in response activities and increases in the speed of response activities are only qualitatively described, and that EPA refers to these costs as indirect costs. However, when EPA discusses the benefits of the proposed rule, all the reported benefits related to health protection stem from these "indirect" effects. The commenter also said that costs associated with conducting response activities, including the significant costs associated with complex litigation that frequently occurs under CERCLA, is a direct impact of designating substances as CERCLA hazardous substances and must be considered in a regulatory impact analysis. EPA has a wealth of information to inform the frequency at which sites are placed on the NPL; data also exist to inform the costs of final cleanup decisions, as memorialized in public Superfund decision documents. The commenter asserts that while these analyses may not be perfect, they would be far superior to simply ignoring costs which are an inevitable and direct result of the proposed rule.

A commenter asserts that EPA has not fully considered the potential cost impacts of the Proposed Designation and it is evidenced by the lack of information provided by EPA as to the magnitude and scope of those impacts. The commenter states that the limited economic analyses that EPA performed to support the proposal is flawed and its analysis about airports is particularly deficient. The commenter states that the airport analysis simply does not make sense, and seems to have been completed in a vacuum, with little or no outreach to airport operators or others with airport expertise. Another

commenter pointed out that the cost for the airport industry to transition to a new foam is not insignificant and many airports will struggle to transition absent any Federal grant funding.

Response: EPA disagrees with the commenter's assertion that potential response costs are direct; such actions are discretionary, contingent, and made on a site-by-site basis. EPA also disagrees that the Agency ignored the potential indirect costs of the proposed designation of PFOA and PFOS as CERCLA hazardous substances; the economic assessment developed for the proposed rule included a detailed qualitative assessment of these potential indirect costs. The RIA accompanying the Final Rule provides quantified estimates of potential indirect costs and cost transfers associated with response, as well as certain related indirect benefits. These estimates are in part based on the data suggested by the commenter, e.g., NPL listing process, RODs, etc.

EPA does not agree with the commenter that a more detailed evaluation of direct costs is necessary. EPA provides, in the RIA, an estimated low and high range of potential reporting requirement frequencies and associated costs. Consistent with the guidance of Office of Management and Budget's (OMB's) Circular A-4, this RIA includes an assessment of potential indirect costs, benefits, and transfers to provide the public with insights related to these impacts. To better inform the public of potential indirect costs and benefits, EPA has expanded its analyses of indirect costs, cost transfers, and benefits in the final rule RIA relative to the analysis developed for the proposed rule. For many of the potential impacts that could result from the designation, EPA has developed estimates under a range of scenarios designed to reflect uncertainty in response activity.

EPA also considered quantitative and qualitative benefits and costs as part of its totality of the circumstances analysis. Please see Section VI of this preamble.

EPA appreciates the information provided by commenters on potential PFAS cleanup costs at airports regarding the costs to replace AFFF delivery systems. However, EPA disagrees that the designation would lead to a significant increase in costs of transitioning to use of PFAS-free foam for airports. Independent of EPA's CERCLA hazardous substance rulemaking, Congress has taken certain actions to address PFAS contamination, including directing the transition away from PFAS-containing AFFF, protecting fire fighters, preventing runoff from airports, and requiring DOD to prepare

a remediation schedule and develop information about associated costs. The aviation industry is already in the process of transitioning away from AFFF to other types of firefighting foam that do not contain PFAS. The costs associated with this transition are unrelated to the proposed designation of PFOA and PFOS as CERCLA hazardous substances. Once this transition is complete and AFFF is no longer used at airports, EPA expects no or minimal releases from airports. In the interim, any direct costs incurred by airports as a result of a designation would be limited to the costs of reporting in the event that a PFOA/PFOS release of one pound or more occurs in a 24-hour period.

Comment: Many commenters disagree with EPA's proposition that the uncertainties are too great to conduct a robust analysis and stated that EPA should conduct a more detailed analysis of the potential direct and indirect effects of the proposed designation. Some commenters asserted that the costs of the designation would dramatically outweigh any benefits. A commenter stated that their analysis, PFOS and PFOA Private Cleanup Costs at Non-Federal Superfund Sites (referred to as the Cleanup Cost Analysis), estimates that the costs of cleanup for potentially responsible parties (PRP) could total over \$17.4 billion dollars for existing non-Federal national priority sites alone, and annualized private party cleanup costs at existing non-federal sites could cost \$700–\$900 million annually. The commenter asserts that despite any existing uncertainties, these costs are simply too large for EPA to ignore. The commenters also pointed to DoD's ongoing remediation work which can provide example cost data that EPA could use to build estimates. EPA has acknowledged cleanup cost uncertainties in the past and has still estimated these costs.

A commenter suggested that EPA should follow OMB guidance and conduct a formal quantitative analysis of relevant uncertainties (e.g., the number of sites to be remediated, the cost of available cleanup technologies, the cleanup level goals for each possible media). Regardless of whether this proposal exceeds the billion-dollar threshold for formal probabilistic uncertainty analysis, Circular A-4 does not prevent an agency from conducting such an analysis if it would inform agency decision making.

Response: EPA has conducted a more thorough and robust RIA that characterizes uncertainties to better describe potential direct and indirect

costs, benefits and transfers associated with the designation.

EPA provides, in the RIA, an estimated low and high range of potential reporting requirement frequencies and associated costs. Consistent with the guidance of Office of Management and Budget's (OMB's) Circular A-4, this RIA includes an assessment of potential indirect costs, benefits, and transfers to provide the public with insights related to these impacts.

To better inform the public of potential impacts, EPA has expanded its analyses of indirect costs, benefits, and transfers in the final rule RIA relative to the analysis developed for the proposed rule. For costs, transfers, and benefits, EPA has developed estimates under a range of scenarios designed to reflect uncertainty in indirect costs, transfers, and benefits. EPA disagrees that the commenter's cost analysis provides a reasonable representation of the costs associated with the proposed designation of PFOA and PFOS as hazardous substances. The analysis is based on several unfounded or inaccurate assumptions that lead to the overestimation of costs. For example, it assumes that the proposed designation would require all existing non-Federal NPL sites to search for PFOS/PFOA contamination. The designation, however, does not by itself require any systematic re-evaluation of NPL sites. Throughout the Superfund process, from the remedial investigation through site cleanup to five-year reviews, EPA evaluates potential risks posed by actual and threatened releases of hazardous substances, pollutants or contaminants. Since PFOA and PFOS are already considered as pollutants or contaminants, this rulemaking, by itself, should not result in any change to the investigation, cleanup and review processes for sites that are currently on the NPL. Any policy decisions to address PFOA/PFOS subsequent to the hazardous substance designation would likely apply to a subset of NPL sites where potential PFOA/PFOS contamination is not already being addressed rather than systematically to all existing non-federal NPL sites. Chapter 5 of the RIA also presents cost estimates for response at non-NPL sites. As noted in the Final Rule, EPA expects that response costs to address PFOS/PFOA will fall within typical response cost ranges for actions to address other hazardous substances and recognizes that response costs will be significant in some cases.

Additionally, EPA disagrees with the commenter's suggestion for EPA to use cost data for Department of Defense

(DoD) PFAS response efforts as the basis for estimating costs likely to result from the proposed designation. Data for DoD sites (*i.e.*, military installations, facilities of the National Guard, and Formerly Used Defense Sites (FUDS) in the United States) would not be representative of costs associated with non-Federal CERCLA sites as the types, quantity, and handling of PFAS are expected to vary greatly. DoD's cost estimates represent one reference point for potential PFAS response costs with a focus specifically on applications related to national defense. EPA also expects the size and scope of, and therefore costs associated with, Federal PFOA and PFOS cleanup sites to be substantially larger than non-federal sites in part because Federal sites are generally larger in size than non-federal sites. The costs associated with addressing PFAS released by Federal agencies are not representative of non-federal facilities as the types, quantity, and handling of PFAS vary greatly. Among other factors, this may also reflect that AFFF use is disproportionately higher at military sites relative to other sites; AFFF is a major source of PFAS contamination.

J. Enforcement

Comment: Numerous commenters expressed support for the rulemaking, noting that designation facilitates CERCLA's "polluter-pays" principle by placing the burden of investigating, responding to, and addressing PFOA/PFOS contamination to the parties responsible for the release. These commenters also stated that designation could potentially accelerate the Superfund cleanup process. One commenter requested that EPA ensure that the costs of cleanup are borne by manufacturers and users of PFOA and PFOS, not the public.

Response: The Agency agrees that designation clearly supports the timely cleanup of contaminated sites and facilitates CERCLA's polluter-pays principle. EPA also notes that, as discussed in Section III.C of this preamble, it expects to focus on implementing the objectives of the PFAS Strategic Roadmap by holding responsible those who significantly contribute to the releases of these substances into the environment.

Comment: Numerous commenters expressed concerns that the designation will shift the costs of CERCLA cleanups of PFOA and PFOS from chemical and product manufacturers to various third parties, including water utilities, waste management utilities, airports, fire departments, State governments, farmers, and landowners. Another

commenter claimed that utilities could be implicated as PRPs at both NPL and non-NPL sites—despite being potentially de minimis contributors to contamination—and, because of CERCLA's joint and several liability scheme, such parties could theoretically be held responsible for the entire cost of cleanup.

Many commenters argued that EPA's use of enforcement discretion will neither adequately address the liability concerns of certain public sector entities nor ensure that cleanups and settlements assign primary responsibility to parties that significantly contributed to contamination or otherwise profited from the conditions resulting in contamination.

Some commenters also requested that the Agency clarify how enforcement discretion would function in the context of PFOA- or PFOS-related contamination, particularly for water utilities. Finally, several commenters asked EPA to clarify that a CERCLA designation will not impact the land application of municipal biosolids in any way before finalizing this rulemaking.

Response: While EPA acknowledges that the designation has the potential to impact municipalities, EPA does not have information suggesting that designation will result in unusual liability outcomes. EPA recognizes that some parties who do not bear primary responsibility for contamination may be sued and face uncertain litigation costs. EPA believes that CERCLA's liability limitations, coupled with EPA enforcement discretion policies, should operate to minimize hardship for parties that did not significantly contribute to contamination. EPA expects that designation should not change CERCLA's liability framework and that CERCLA will continue to operate as it has for decades (with respect to the more than 800 existing hazardous substances) to resolve who should pay for the cleanup and how much.

EPA also disagrees with the commenters' position that designation will necessarily result in a shift of cleanup costs from PFOA or PFOS manufacturers, to utilities and other sectors. As the Agency describes in sections II.E.7 and VI.B., CERCLA liability does not inevitably flow from any particular release. The question of whether an entity may be subject to litigation or could be held liable under CERCLA involves both site and fact-specific analyses. Additionally, while one commenter raised the issue of incurring potential CERCLA liability despite de minimis contribution to

contamination at Superfund sites, EPA notes that—as described in Section VI.B.2—the statute already includes several provisions that may limit liability or the financial impact of liability, including for de minimis parties.

EPA gave careful consideration to CERCLA's liability scheme, and the impact designation may have on CERCLA liability. EPA concluded that designation will not change CERCLA's liability framework. Designation does not automatically confer liability, nor does it alter CERCLA's statutory or regulatory framework for liability. EPA determined that existing limitations in CERCLA coupled with existing CERCLA enforcement policies are sufficient to mitigate concerns about liability that may arise after designation. No additional action is necessary to ensure that those limitations and policies continue to operate as they have for decades. Nonetheless, EPA intends to develop a policy, consistent with those limitations and policies, that explains EPA's priorities for CERCLA enforcement in the context of PFOA and PFOS releases. Please see Section VI.C. for a more detailed discussion. *See also* FY 2024–2027 National Enforcement and Compliance Initiatives.

Regarding the question about application of biosolids, please refer to section VII.A.3.

VIII. Summary of This Final Rule

The designation of PFOA and PFOS as hazardous substances would have three direct effects: (1) Reporting and notification obligations when there is a release of PFOA or PFOS, their salts or structural isomers above the reportable quantity, (2) obligations on the U.S. Government when it transfers or sells certain properties, and (3) an obligation on DOT to list and regulate CERCLA designated hazardous substances as HMTA hazardous materials.

A. Default Reportable Quantity

EPA is setting the RQ by operation of law at the statutory default of one pound pursuant to section 102(b) of CERCLA for PFOA and PFOS and their salts and structural isomers. EPA did not propose, nor is it including in this final action, a RQ adjustment for these substances. If the Agency chooses to propose adjusting the RQ in the future, it would do so through notice-and-comment rulemaking.

B. Direct Effects of Designating PFOA, PFOS, and Their Salts and Structural Isomers as Hazardous Substances

1. Release Reporting Requirements

Section 103 of CERCLA requires any person in charge of a vessel or facility to immediately notify the NRC when there is a release of a hazardous substance, as defined under CERCLA section 101(14), in an amount equal to or greater than the RQ for that substance. The reporting requirements are further codified in 40 CFR 302.6. As of the effective date of this action, any person in charge of a vessel or facility as soon as he or she has knowledge of a release from such vessel or facility of one pound or more of PFOA or PFOS, their salts or structural isomers in any 24-hour period is required to immediately notify the NRC in accordance with 40 CFR 302.6. CERCLA section 111(g) requires owners or operators of any vessel or facility to “provide reasonable notice to potential injured parties by publication in local newspapers serving the affected area” of a release of a hazardous substance.

In addition to these CERCLA reporting requirements, EPCRA section 304 requires owners or operators of facilities to immediately notify their SERC (or TERC) and LEPC (or TEPC) when there is a release at or above the reportable quantity of PFOA or PFOS, their salts or structural isomers in a 24-hour period. EPCRA section 304 also requires these facilities to submit a follow-up written report to the SERC (or TERC) and LEPC (or TEPC) within 30 days of the release. (*Note: Some states provide less than 30 days to submit the follow-up written report. Facilities are encouraged to contact the appropriate State or Tribal agency for additional reporting requirements.*) See 40 CFR part 355, subpart C, for information on the contents for the initial telephone notification and the follow-up written report.

EPCRA and CERCLA are separate, but interrelated, environmental laws that work together to provide emergency release notifications to Federal, State, Tribal, and local officials. Notice given to the NRC under CERCLA serves to inform the Federal government of a release so that Federal personnel can evaluate the need for a response in accordance with the National Oil and Hazardous Substances Contingency Plan, the Federal government’s framework for responding to both oil and hazardous substance releases. The NRC maintains all reports of hazardous substance and oil releases made to the Federal government.

Relatedly, release notifications under EPCRA given to the SERC (or TERC) and to the LEPC (or TEPC) are crucial so that these State, Tribal, and local authorities have information to help protect the community.

2. Requirements Upon Transfer of Government Property

Under CERCLA section 120(h), when Federal agencies sell or transfer federally owned, real property, they must provide notice of when any hazardous substances “was stored for one year or more, known to have been released, or disposed of” and covenants concerning the remediation of such hazardous substances in certain circumstances. <https://www.govinfo.gov/content/pkg/USCODE-2021-title42/pdf/USCODE-2021-title42-chap103-subchap1-sec9620.pdf>.

3. Requirement of DOT To List and Regulate CERCLA Hazardous Substances

Section 306(a) of CERCLA requires substances designated as hazardous under CERCLA to be listed and regulated as hazardous materials by DOT under the Hazardous Materials Transportation Act.

IX. Statutory and Executive Order Reviews

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

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review

This action is a “significant regulatory action”, as defined under section 3(f)(1) of Executive Order 12866, as amended by Executive Order 14094. Accordingly, EPA, submitted this action to the Office of Management and Budget (OMB) for Executive Order 12866 review. Documentation of any changes made in response to the Executive Order 12866 review is available in the docket. EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis, “*Regulatory Impact Analysis of the Final Rulemaking to Designate Perfluorooctanoic Acid and Perfluorooctanesulfonic Acid as CERCLA Hazardous Substances*”, is also available in the docket and briefly summarized in *Section I, Executive Summary* of this action.

B. Paperwork Reduction Act

The information collection activities in this final rule have been submitted

for approval to the OMB under the Paperwork Reduction Act. The Information Collection Request (ICR) document that EPA prepared has been assigned EPA ICR number 2708.02, OMB Control No. 2050–0227. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here. The information collection requirements are not enforceable until OMB approves them.

The designation of PFOA and PFOS, and their salts and structural isomers, as hazardous substances require any person in charge of a vessel or facility that identifies a release of one pound or more within a 24-hour period of these substances to report the release to the NRC under section 103 of CERCLA and to the SERC (or TERC) and LEPC (or TEPC) under section 304 of EPCRA. The implementing regulations of CERCLA section 103 and EPCRA section 304 are codified at 40 CFR parts 302 and 355, respectively.

Respondents/affected entities: Any person in charge of a vessel or facility from which there is a release of PFOA or PFOS and their salts and structural isomers, equal to or greater than the RQ of one pound within 24 hours.

Respondent’s obligation to respond: Mandatory under section 103 and section 111 of CERCLA and section 304 of EPCRA.

Estimated number of respondents: 0 to 614 releases per year.

Frequency of response: Varies.

Total estimated burden: 6,889 hours (per year) maximum. Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: Approximately \$1,630,000 (per year) maximum, includes approximately \$585,000 annualized operation and maintenance costs (and no capital costs).

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 OMB control numbers for EPA’s regulations are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. The small entities subject to the requirements of this action, including importers and importers of articles that contain these

substances, are: (1) PFOA and/or PFOS manufacturers; (2) PFOA and/or PFOS processors; (3) manufacturers of products containing PFOA and/or PFOS; (4) downstream users of PFOA and PFOS; (5) downstream users of PFOA and/or PFOS products; (6) waste management facilities; and (7) wastewater treatment facilities. (Note: PFOA and PFOS noted here include their salts and structural isomers). The Agency has estimated that there may be up to 614 reported releases of PFOA or PFOS in any one year and that a small percentage of the annual reports will be submitted by small entities. As further context, even if the maximum number of reports (614) were created to account for every estimated release in a given year and all 614 of these reported releases were from the smallest of the small entities (as described in the RIA, defined using SBA size standards), only 2.5 percent of the 24,836 smallest of the small businesses identified by EPA would be affected. The estimated cost of \$2,658 to report a release of PFOA or PFOS is not greater than one percent of the annual revenues for the typical small entity in any impacted industry. For example, estimated annual breakeven costs per facility are lowest for Reupholstery and Furniture Repair (NAICS 811420) at \$3,591 at the one percent threshold. Given the estimated notification costs per release of \$2,658, EPA does not expect a small business facility's cost to cross even the one percent threshold. Additionally, EPA considered how direct reporting costs may impact small governmental jurisdictions. The \$2,658 reporting cost per release associated with the final rule represents 0.001 percent of average local government revenues serving a population of 50,000 or less, which is well below one percent. Further, for a local government serving just 100 residents, the \$2,658 in costs for reporting represents 0.5 percent of these revenues, also well below a one percent threshold.

Details of this analysis are presented in Section 6.2 of the *Regulatory Impact Analysis of the Final Rulemaking to Designate Perfluorooctanoic Acid and Perfluorooctanesulfonic Acid as CERCLA Hazardous Substances*, available in the docket.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any State, local or Tribal governments

that may result in expenditures, in the aggregate, or to the private sector, of \$100 million or more in any one year.

E. Executive Order 13132: Federalism

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

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

This action does not have Tribal implications as specified in Executive Order 13175. It does not have substantial direct effects on one or more Tribal Nations, on the relationship between the Federal Government and Tribal Nations, or on the distribution of power and responsibilities between the Federal Government and Tribal Nations. Thus, Executive Order 13175 does not apply to this action.

Designating PFOA and PFOS, and their salts and isomers as CERCLA hazardous substances triggers release reporting requirements under EPCRA section 304 in addition to the release notification requirement under CERCLA section 103. Under EPCRA section 304, facilities are required to immediately report any releases of these substances at or above the default RQ of one pound to the State, Tribal, and local implementing agencies. The associated reporting burden of this effort on Tribes is expected to be minimal and if release were to occur, and Tribal agencies would be able to take action, if necessary, to protect their community from exposure to these substances. If Tribal agencies do not have the resources to respond to an emergency situation, they may request assistance from the State or local emergency response agencies. Executive Order 13175 does not apply to this action.

Consistent with EPA's Policy on Consultation with Tribal Nations, EPA offered government-to-government consultation to all federally recognized Tribes during the development of this action. No Tribe requested consultation. EPA hosted a national Tribal informational webinar on September 7, 2022, to explain the action and answer questions (https://clu-in.org/conf/tio/TribesPFOAPFOS_090722/).

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

Executive Order 13045 directs Federal agencies to include an evaluation of the

health and safety effects of the planned regulation on children in Federal health and safety standards and explain why the regulation is preferable to potentially effective and reasonably feasible alternatives. This action is subject to Executive Order 13045 because it is a significant regulatory action under section 3(f)(1) of Executive Order 12866, and EPA believes that the environmental health or safety risk addressed by this action may have a disproportionate effect on children. Evidence indicates that exposure to PFOA and/or PFOS are associated with adverse health effects relevant to children, including developmental effects to fetuses during pregnancy or to breast-fed infants, cardiovascular effects and immune effects in children. Other evidence suggests that these substances are associated with endocrine and reproductive effects that impact development. Both PFOA and PFOS are known to be transmitted to the fetus via the placenta and to the newborn, infant, and child via breast milk. Further information on all health effects of PFOA and PFOS is in section V. A. PFOA and PFOS Pose a Hazard. Accordingly, we have evaluated the environmental health or safety effects of PFAS exposures on children. The protection offered by using the suite of tools CERCLA provides to address prevalent PFAS contamination may be especially important for children because childhood represents a life stage associated with increased susceptibility to PFAS-related health effects, such as developmental effects.

Furthermore, EPA's *Policy on Children's Health* also applies to this action. Information on how the Policy was applied is available under "Children's Environmental Health" in section V. A. PFOA and PFOS Pose a Hazard of this preamble.

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

This action is not a "significant energy action" because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. This action designates PFOA and PFOS as CERCLA hazardous substances and does not involve the supply, distribution or use of energy.

I. National Technology Transfer and Advancement Act

This action does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All

Executive Order 14096 (88 FR 25,251, Apr. 26, 2023) directs Federal agencies to advance the goal of environmental justice (EJ) for all. This action builds upon and supplements the efforts of Executive Order 12898 (59 FR 7629, February 16, 1994) to address EJ concerns.

EPA believes that the human health or environmental conditions that exist prior to this action result in or have the potential to result in disproportionate and adverse human health or environmental effects on communities with EJ concerns. The demographic analysis of plastics manufacturers, facilities reporting to the TRI, and U.S. airports found that people of color and low-income populations are disproportionately represented (except near small/medium airports). In particular, these sites have a higher percentage of people of color surrounding them relative to the national average. This finding holds whether focusing on assessing all populations within one or three miles of these sites or only populations served by private wells.

EPA believes that this action is likely to reduce existing disproportionate and adverse human health or environmental effects on communities with EJ concerns. To the extent that the final rule leads to additional response actions to mitigate or eliminate exposure to PFOA/PFOS, or to actions that mitigate exposure earlier, health risks for populations communities living near sites where releases occur may decline. Based on the above analysis, the proportion of the population near these sites identified as racial or ethnic minorities with various potential communities with EJ concerns or (in some cases) people living in structures with a higher probability of containing lead paint (built before 1960) exceeds the national average. Thus, EPA expects that the final rule will at least partially mitigate the existing burden of PFOS/PFOA exposure that falls disproportionately on communities with EJ concerns.

Potential exposure across several key demographic categories were analyzed relative to facilities with known historical use, releases, and/or known contamination of PFOA and PFOS (U.S. EPA, 2024e). Due to uncertainty regarding the location of future PFOA/

PFOS releases, this analysis uses these facilities as a proxy for identifying where response actions for PFOA and PFOS may occur and provides demographic information about the surrounding populations. This analysis examines the following site types as proxies for facilities that may potentially be affected:

- Sites owned/operated by plastics material and resin manufacturing firms identified as having produced PFOS and/or PFOA ⁷⁶
- Sites owned/operated by companies reporting PFOS and PFOA releases (including PFOA and PFOS salts) to EPA's Toxic Release Inventory (TRI) (U.S. EPA, 2023e) ⁷⁷
- Operating U.S. airports and airfields ⁷⁸
 - Large U.S. airports and airfields
 - All other U.S. airports and airfields (i.e., medium and small)

Areas around plastics material and resin manufacturer sites and/or sites reporting releases to TRI, on average, are in areas with higher concentrations of people of color, Black/African American residents, and households with a ratio of income to poverty level of two and below compared with national average. These areas also have much higher rates of structures built before 1960 which

⁷⁶ Data acquired from: Environmental Protection Agency, "Enforcement and Compliance History Online (ECHO)", August 2023. Because not all plastic material and resin manufacturers use PFAS, only a fraction of the facilities reported in ECHO as plastics material and resin manufacturers were used in this analysis. To filter facilities involved in the use or manufacture of PFAS, this analysis uses proxy sites identified using sites owned/operated by companies that participated in EPA's PFOA Stewardship Program, under the assumption that the likelihood of PFOA/PFOS contamination is potentially high at these sites.

⁷⁷ TRI reporting is not currently required for isomers of PFOA and PFOS.

⁷⁸ Because the National Plan of Integrated Airport Systems (NPIAS) public facing dataset presented by the Federal Aviation Administration (FAA) does not contain geographic information, this analysis relies on data from the United Nations Office for the Coordination of Humanitarian Affairs. To assess the coverage of the UN database, this analysis cross-referenced the list of airports represented in both datasets; this exercise found that the UN data contained 98% of all airports listed in the NPIAS. Of the 2% of sites listed in the NPIAS but not in the UN database, about half were located in rural Alaska. Full citations of these datasets are presented below:

(1) United Nations Office for the Coordination of Humanitarian Affairs, "The Humanitarian Data Exchange: Airports in the United States of America", June 2021. Downloaded on June 18, 2021. Accessed at: <https://data.humdata.org/dataset/ourairports-usa>. The dataset categorized airports by the following size categories: small, medium, and large.

(2) Federal Aviation Administration. "National Plan of Integrated Airport Systems (NPIAS)—Current—Airports", October 07, 2020. Downloaded February 2022. Accessed at: https://www.faa.gov/airports/planning_capacity/npias/current/.

can have lead paint and lead to higher exposures of lead. These findings suggest that releases related to manufacturing facilities could have EJ implications, such as disproportionate adverse impacts on local communities. Additionally, on average, airports across the U.S. are surrounded by populations that generally reflect national averages in relevant demographic categories. Large airports, however, are more likely to be surrounded by higher rates of people of color relative to the U.S. population. A complete discussion of the analysis behind these findings is available in Section 6.3 of the RIA accompanying this rulemaking. These findings, combined with the uncertainty surrounding the location of future releases, are indicative of potential impacts but do not provide a clear indication of the type of disparities related to potential exposure to PFAS. Consistent with the policy priorities outlined in Executive Orders 14096 (The White House, 2023) and 14008 (The White House, 2021), EPA expects this regulation will have a beneficial impact on disadvantaged communities as well as populations or communities with EJ concerns. While the locations that may be affected by this final rule are uncertain, to the extent that these proxy locations are representative of likely locations, this screening analysis suggests that the designation may improve conditions for nearby populations potentially at risk of exposure, including communities with EJ concerns. To the extent that PFAS releases are consistent with the broader releases reported to TRI and typically involve disposal or manufacturing sites, demographic data around plastics material and resin manufacturer sites and historical releases may be a more reliable predictor of the type of community potentially affected by this proposed rulemaking. Specific site conditions and demographic patterns will determine the magnitude of effects on the surrounding human and natural environment. These details will likely become more apparent over time as EPA implements response actions and release reports are made, allowing for a more robust analysis of disproportionate and adverse outcomes experienced by populations communities with EJ concerns. This improved information would not increase risk for communities with EJ concerns and may improve the speed and design of response actions.

Further, the information supporting this Executive Order review is contained in the following sections in the preamble to this action: II.C., VI.A. and B. These sections explain that the

designation of PFOA and PFOS as hazardous substances and the required reporting and notification requirements, will result in more information about the location and extent of releases. This improved information does not increase risk or result in any adverse environmental justice impacts.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and EPA will submit the rule report to each House of the Congress and to the Comptroller General of the United States. This action meets the criteria set forth in 5 U.S.C. 804(2).

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- requirements, Superfund, Water pollution control, Water supply.
- Michael S. Regan,**
Administrator.
- For the reasons set forth in the preamble, EPA amends 40 CFR part 302 as follows:
- PART 302—DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION**
- 1. The authority citation for part 302 continues to read as follows:
- Authority:** 33 U.S.C. 1251 et. seq., 42 U.S.C. 9601, 42 U.S.C. 9602, 42 U.S.C. 9603
- 2. Amend § 302.4:
- a. By revising “Note II to Table 302.4”.
- b. In “Table 302.4” by adding, in alphabetical order, entries for “Perfluorooctanesulfonic acid, salts, & structural isomers^v”, “Perfluorooctanesulfonic acid^v”, “Perfluorooctanoic acid, salts, & structural isomers^v”, and “Perfluorooctanoic acid^v”;
- c. In Appendix A to § 302.4 by adding in numerical order entries for “335–67–1” and “1763–23–1”.
- The revision and additions read as follows:
- § 302.4 Hazardous substances and reportable quantities.**
- * * * * *
- Note II to Table 302.4**
- Hazardous substances are given a Statutory Code based on their statutory source. The “Statutory Code” column indicates the statutory source for designating each substance as a CERCLA hazardous substance. Statutory Code “1” indicates a Clean Water Act (CWA) Hazardous Substance [40 CFR 116.4; 33 U.S.C. 1321(b)(2)(A)]. Statutory Code “2” indicates a CWA Toxic Pollutant [40 CFR 401.15, 40 CFR part 423 Appendix A, and/or 40 CFR 131.36; 33 U.S.C. 1317(a)]. Statutory Code “3” indicates a CAA HAP [42 U.S.C. 7412(b); Pub. L. 101–549 November 15, 1990; 70 FR 75047 December 19, 2005; 69 FR 69320 November 29, 2004; 61 FR 30816 June 18, 1996; 65 FR 47342 August 2, 2000; 87 FR 393 January 5, 2022]. Statutory Code “4” indicates Resource Conservation and Recovery Act (RCRA) Hazardous Wastes [40 CFR part 261 Subpart D—Lists of Hazardous Wastes; 42 U.S.C. 6921]. (Note: The “RCRA waste No.” column provides the waste identification numbers assigned by RCRA regulations). Statutory Code “5” indicates a hazardous substance designated under section 102(a) of CERCLA. The “Final RQ [pounds (kg)]” column provides the reportable quantity for each hazardous substance in pounds and kilograms.
- * * * * *
- List of Subjects in 40 CFR Part 302**
- Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Reporting and recordkeeping

TABLE 302.4—LIST OF HAZARDOUS SUBSTANCES AND REPORTABLE QUANTITIES

Hazardous substance	CASRN	Statutory code	RCRA waste No.	Final RQ [pounds (kg)]
* * * *	*		*	*
Perfluorooctanesulfonic acid, salts, & structural isomers [∨]	N.A.	5		1 (0.454)
Perfluorooctanesulfonic acid [∨]	1763–23–1	5		1 (0.454)
Perfluorooctanoic acid, salts, & structural isomers [∨]	N.A.	5		1 (0.454)
Perfluorooctanoic acid [∨]	335–67–1	5		1 (0.454)
* * * *	*		*	*

[∨]The Agency may adjust the statutory RQ for this hazardous substance in a future rulemaking; until then the statutory one-pound RQ applies.

* * * *

Appendix A to § 302.4—Sequential CAS Registry Number List of CERCLA Hazardous Substances

CASRN	Hazardous substance
* * * *	
1763–23–1	Perfluorooctanesulfonic acid
* * * *	

CASRN

Hazardous substance

* * * *

335–67–1

Perfluorooctanoic acid

[FR Doc. 2024–08547 Filed 5–7–24; 8:45 am]

BILLING CODE 6560–50–P



FEDERAL REGISTER

Vol. 89

Wednesday,

No. 90

May 8, 2024

Part IV

Department of Agriculture

Animal and Plant Health Inspection Service

9 CFR Part 11

Horse Protection Amendments: Final Rule

DEPARTMENT OF AGRICULTURE**Animal and Plant Health Inspection Service****9 CFR Part 11**

[Docket No. APHIS–2022–0004]

RIN 0579–AE70

Horse Protection Amendments**AGENCY:** Animal and Plant Health Inspection Service, USDA.**ACTION:** Final rule.

SUMMARY: We are amending the horse protection regulations to provide that the Animal and Plant Health Inspection Service will screen, train, and authorize qualified persons for appointment by the management of any horse show, horse exhibition, or horse sale or auction to detect and diagnose soring at such events for the purposes of enforcing the Horse Protection Act. These and other regulatory amendments will strengthen the Agency's efforts to protect horses from the cruel and inhumane practice of soring as the Act requires and by so doing eliminate unfair competition.

DATES: This rule is effective on February 1, 2025, except for § 11.19, which is effective June 7, 2024.

FOR FURTHER INFORMATION CONTACT: Dr. Aaron Rhyner, DVM, Assistant Director, USDA–APHIS–Animal Care, 2150 Centre Ave., Building B, Mailstop 3W11, Fort Collins, CO 80526–8117; horseprotection@usda.gov; (970) 494–7484.

SUPPLEMENTARY INFORMATION:**Background**

Under the Horse Protection Act (HPA, or the Act, 15 U.S.C. 1821 *et seq.*), the Secretary of Agriculture is authorized to promulgate regulations to prohibit the movement, showing, exhibition, or sale of sore horses.

The Secretary has delegated responsibility for administering the Act to the Administrator of the U.S. Department of Agriculture's (USDA) Animal and Plant Health Inspection Service (APHIS). Within APHIS, the responsibility for administering the Act has been delegated to the Deputy Administrator for Animal Care. Regulations and standards established under the Act are contained in 9 CFR part 11 (referred to below as the Horse Protection regulations or just the regulations), and 9 CFR part 12 lists the rules of practice governing administrative proceedings.

Section 2 of the Act, "Definitions" (15 U.S.C. 1821(3)), defines a "sore" horse as follows:

"The term 'sore' when used to describe a horse means that:

(A) An irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) Any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) Any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) Any other substance or device¹ has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given."

Soring has been used almost exclusively in the training of certain Tennessee Walking Horses and racking horses² to induce pain, resulting in an exaggerated gait that is valued in the show ring. However, the HPA's prohibition against sored horses participating in shows, exhibitions, sales, and auctions extends to events involving all horse breeds.³ In addition to declaring that the soring of horses is cruel and inhumane, Congress further found that the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign

commerce and creates unfair competition.

Background of HPA Regulations

Under the HPA, it is unlawful for any person to show, exhibit, sell, or transport sore horses, or to use any prohibited equipment, device, paraphernalia, or substance in horse shows, exhibitions, sales, or auctions. The HPA holds horse owners responsible should they allow any such unlawful activities to occur, and requires management of horse shows, exhibitions, sales, and auctions (referred to as "management" or "event management," below) to ensure that sore horses do not compete or otherwise participate in these events.

After Congress passed the HPA in 1970, APHIS established regulations to enforce the Act, including restrictions on the use of certain equipment, devices, and substances. In accordance with the Act, the regulations also include inspection provisions for detecting soring in horses at shows, exhibitions, sales, and auctions. In 1976, Congress amended the Act⁴ to allow (but not require) the management of any horse show, exhibition, or sale or auction to appoint persons qualified to inspect horses for soreness. Section 4 (15 U.S.C 1823(c)) requires the Secretary of Agriculture to prescribe by regulation requirements for any appointment by the management of a horse show, exhibition, sale, or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purpose of enforcing the Act. Although the Act does not require that management appoint a qualified person to inspect horses, if management chooses not to do so it can be held liable for violating the Act if it fails to disqualify a sore horse from participating in an event. If, alternatively, event management appoints a qualified person to conduct inspections, management may be held liable only for failing to disqualify a sore horse after being notified by the qualified person or by the Secretary of Agriculture, or his or her designee, that a horse is sore.

Responding to Congress's 1976 amendment to the Act, APHIS revised the regulations (44 FR 1558–1566, January 5, 1979) to include qualifications for "Designated Qualified Persons," or DQPs, to serve as third-party inspectors employed and compensated by the industry, as well as provisions for certifying industry-run

¹ We interpret "device" to include chains, which are commonly placed on the limbs of Performance division Tennessee Walking Horses and racking horses when competing in shows. The association of chains with devices has been included in the regulations since 1979: "General Prohibitions" (§ 11.2(a)) states that, notwithstanding the provisions of paragraph (b), "... no chain, boot, roller, collar, action device, nor any other device ... shall be used. ..." [our emphasis].

² The racking horse is a breed derived from the Tennessee Walking Horse. It has a smooth, natural gait known as the "rack," a four-beat gait with only one foot striking the ground at a time.

³ Records of non-compliance with the HPA's soring prohibition is rare in breeds other than the Tennessee Walking Horse and racking horse. APHIS nonetheless conducts occasional inspections and investigates other breed activity, and keeps records of any such noncompliance.

⁴ Public Law 94–360, section 3, July 13, 1976, 90 Stat. 915; <https://www.govinfo.gov/content/pkg/STATUTE-90/pdf/STATUTE-90-Pg915.pdf>.

programs to train and license DQPs. Prior to this final rule, these training and licensing programs were administered by Horse Industry Organizations, or HIOs.

HIOs have historically filled several roles, both unregulated and regulated, for horse shows, exhibitions, sales, and auctions. For example, event management sometimes retains an HIO to assist with activities not regulated under the Act, such as registering participants and coordinating event logistics, supplying show judges, and promoting events.⁵ Regulated HIO activities, in addition to training and licensing DQPs, included reporting disciplinary actions against exhibitors, event management, and DQPs to APHIS. Under the previous regulatory regime, an HIO seeking certification to train and license DQPs was required to submit to APHIS a formal request in writing for certification of its DQP program and a detailed outline of the program.

Under the Horse Protection program prior to promulgation of this final rule, DQPs were the primary party responsible for inspecting and diagnosing soreness in horses participating in horse shows, exhibitions, auctions, or sales. A DQP was a qualified person who, under the provisions of 15 U.S.C 1823(c) cited above, could be appointed by management of a horse show or sale to detect horses that are sore, and to otherwise conduct inspections for the purpose of enforcing the Act. DQPs were reimbursed for services directly by event management or by an HIO contracting with the DQPs to provide inspections for events. DQPs were required to have equine experience and meet professional qualifications as set forth in the regulations.

DQP candidates also had to successfully complete a formal training program developed and delivered by the HIO before they could be licensed, except that veterinarians already accredited by USDA were able to be licensed as DQPs without having to participate in formal training. Such veterinarians also had to be either a member of the American Association of Equine Practitioners, or a large animal practitioner with substantial equine experience, or be, based on the HIO's judgment, otherwise knowledgeable of equine lameness as related to soring and soring practices. The regulations provided that veterinarians having such knowledge might include those with a small animal practice who own, train,

judge, or show horses, or who are Doctors of Veterinary Medicine who teach equine-related subjects in an accredited college or school of veterinary medicine.

Alternatively, DQPs were able to be farriers, horse trainers, and other knowledgeable individuals whose past experience and training would, in the HIO's judgment, qualify them for positions as HIO stewards or judges (or their equivalent), provided that they were trained and licensed by an HIO or association whose DQP program was certified by APHIS.

APHIS Veterinary Medical Officers (VMOs) would sometimes attend HPA-covered events unannounced to oversee and conduct inspections and to otherwise determine compliance with the Act. To ensure that horses are disqualified when soreness is detected or when other violations are found, APHIS also reviewed reports by event management, HIOs, and DQPs, and conducted audits of records maintained by certified DQP programs.

APHIS has used several options for resolving a case in which the evidence substantiates that an alleged violation has occurred. These include issuing official warnings to those involved in the alleged violation, disqualification from competing, offering to resolve the case through a stipulated penalty, and referring the case to the USDA Office of the General Counsel for formal administrative action before the USDA Office of Administrative Law Judges or referral to the U.S. Department of Justice.

As we explained in the proposal on which this final rule is based, this rule replaces a final rule that was filed for public inspection on the **Federal Register** website, in advance of official publication, on January 19, 2017. However, the incoming Administration at that time ordered this and other rules pending publication to be withdrawn, which USDA accordingly did. As the result of a lawsuit claiming that the rule had actually been promulgated and that USDA had withdrawn the 2017 final rule without proper notice and comment as required under the Administrative Procedure Act, a notice of proposed rulemaking to withdraw the 2017 final rule legally was published in the **Federal Register** on July 21, 2023 (88 FR 47068–47071, Docket No. APHIS–2011–0009), and finalized on October 31, 2023 (88 FR 74336–74341, Docket No. APHIS–2011–0009). This current rule incorporates provisions included in the 2017 HPA final rule to eliminate soring, including replacing DQPs with APHIS-authorized inspectors and banning pads and action devices on

Tennessee Walking Horses and racking horses, the only two breeds in which APHIS currently finds elevated levels of soring.

Evaluations of the Horse Protection Program

Since 2009, multiple evaluations have been conducted outside the Agency to determine program efficacy. In September 2010, USDA's Office of the Inspector General (OIG) formally evaluated APHIS' oversight of the Horse Protection program⁶ in accordance with generally accepted government auditing standards.⁷ USDA–OIG concluded that the inspection program, in which the horse industry trains and licenses DQPs to inspect horses under APHIS' oversight, is ineffective in ensuring that horses are not sore upon inspection as required under the Act.

USDA–OIG's findings regarding the persistence of soring are consistent with those of the USDA's Office of the Judicial Officer (OJO), which issues final decisions on behalf of the Secretary of Agriculture for purposes of judicial review. The Secretary of Agriculture, through the OJO, has found that DQP inspections of horses are less probative than inspections conducted by APHIS VMOs. Decisions issued by the OJO include accounts of exhibitors showing sored horses that had been inspected and cleared by DQPs, cursory inspections or use of incorrect methods by DQPs, and exhibitors attempting to avoid violations by having another person acknowledge responsibility.

In addition, a 2021 study⁸ by the National Academy of Sciences (NAS) analyzed the causes of soring and its diagnosis in light of the current regulations. This is the most recent available study on this subject. The NAS study concurs with the USDA–OIG audit report's recommendation that a regulatory change to the inspection component of the Horse Protection program is necessary to eliminate the conflicts of interest that encourage soring. The NAS committee authoring the study examined the inspection process, which included a review of 61

⁶ USDA–OIG, Administration of the Horse Protection Program and the Slaughter Horse Transport Program Audit Report, 33601–2–KC, September 2010. The document is available on the *Regulations.gov* website (see under **ADDRESSES** in this document for a link to *Regulations.gov*).

⁷ *Generally Accepted Government Auditing Standards* (the "Yellow Book") is a publication of the U.S. Government Accountability Office (GAO): <https://www.gao.gov/assets/gao-18-568g.pdf>.

⁸ National Academies of Sciences, Engineering, and Medicine: *A Review of Methods for Detecting Soreness in Horses* (2021), <https://nap.nationalacademies.org/catalog/25949/a-review-of-methods-for-detecting-soreness-in-horses>.

⁵ HIOs may continue conducting such unregulated activities under the new regulatory scheme.

inspection videos provided by APHIS and by HIOs that revealed numerous instances of inadequate performance by DQPs.⁹ The NAS committee strongly recommended that the use of DQPs for inspections under the current regulations be discontinued and that only veterinarians, preferably with equine experience, be allowed to examine horses, as is done in other equine competitions. The committee added that if APHIS continues to use third-party inspectors, they should be limited to veterinarians or other equine industry professionals who are screened for potential industry conflicts of interest and trained by APHIS to properly inspect horses for soring. The committee also stated that consequences for performing substandard examinations should be strictly enforced, and that reports of substandard performance and enforcement warning letters should come from APHIS, not from HIOs.

These evaluations, which were, again, external to APHIS, also correspond to evaluations of program efficacy that APHIS conducts as part of ongoing evaluation of its Horse Protection program. Inspection data compiled by APHIS from fiscal years (FY) 2017 to 2022 demonstrated that inconsistencies persisted in the number of violations detected by APHIS officials and those issued by DQPs inspecting horses. During this period, APHIS attended about 16 percent of all HPA-covered events featuring Tennessee Walking Horses, racking horses, and other breeds at which horse industry DQPs conducted inspections. These inspections were conducted on horses competing in the Performance (“padded”) division as well as the flat-shod division. While APHIS attended only a fraction of the events at which DQPs were appointed to inspect horses, APHIS consistently reported much higher rates of noncompliance at these events based on its VMO inspection findings when compared to DQP findings. Moreover, virtually all noncompliances were found in padded horses competing in the Performance division.

Proposed Rule

In light of the foregoing evaluations, on August 21, 2023, we published in the **Federal Register** (88 FR 56924–56962, Docket No. APHIS–2022–0004) a proposal¹⁰ to amend the Horse Protection regulations. Substantive

changes we proposed to make in part 11 included:

- Removing the requirement that DQPs be trained and licensed by HIOs and removing the term DQPs from the regulations. Instead, we proposed that APHIS would screen and train qualified persons to be “Horse Protection Inspectors,” or HPIs. APHIS would authorize these applicants, preferably licensed veterinarians, as HPIs after screening them for potential conflicts of interest and conducting training.

- Removing all regulatory requirements pertaining to HIOs, as HIOs would no longer have any regulatory responsibilities specific to them. APHIS would assume program administration and development, HPI training, and HPI disciplinary actions as necessary to enforce the Act and regulations. We stated that other services contracted between HIOs and event management, such as supplying judges and handling show logistics, would not be affected.

- Prohibiting any device, method, practice, or substance applied to any horse that can mask evidence of soring. (We stated that existing prohibitions on other items and practices that can reasonably be expected to cause or contribute to soring would be retained in the regulations.)

- Prohibiting all action devices, artificial extension of toe length, pads, wedges, and lubricants¹¹ on the limbs or feet of Tennessee Walking Horses and racking horses (with exceptions for approved therapeutic uses of artificial extension of toe length, pads, wedges, and substances). An action device is any boot, collar, chain, roller, beads, bangles, or other device which encircles or is placed upon the lower extremity of the leg of a horse in such a manner that it can either rotate around the leg, or slide up and down the leg so as to cause friction, or which can strike the hoof, coronet band, or fetlock joint. We proposed to afford the industry 270 days from the effective date of the final rule before the prohibition on pads and wedges, and artificial toe extensions, would be effective.

- Replacing the “scar rule”¹² with language that more accurately describes visible dermatologic changes indicative

of soring, and removing the requirement that such changes be bilateral.

- Requiring the management of any horse show, exhibition, sale, or auction that elects to utilize an APHIS representative or HPI to choose and appoint an additional HPI if more than 100 horses are entered in the event.

- Requiring the management of any horse show, exhibition, sale, or auction that elects to utilize an APHIS representative or HPI to inspect horses to have at least one farrier physically present if more than 100 horses are entered in the event, or if there are 100 or fewer horses to have a farrier on call within the local area to be present if requested by an APHIS representative or HPI. We stated that farriers would not be required for shows that do not utilize an inspector.

- Adding new reporting and recordkeeping requirements for management of all horse shows, exhibitions, sales, and auctions covered under the Act. These include retaining records for at least 90 days of any horse allowed to show under therapeutic treatment, informing APHIS and reporting event information at least 30 days in advance of the event, and notifying APHIS of changes to event information at least 15 days in advance of the event. These requirements were intended to prevent disqualified persons and horses from participating in HPA-covered events and to give APHIS sufficient time to schedule an APHIS representative to inspect at the event, if requested.

Discussion of Comments

We solicited comments concerning our proposal for 60 days ending October 20, 2023. We received 8,787 comments on the proposed rule through submissions received via [regulations.gov](https://www.regulations.gov), email, and U.S. mail. Comments received by APHIS via email and U.S. mail were copied into [regulations.gov](https://www.regulations.gov). We conducted a thorough and unbiased review of all comments, the majority of which consisted of variations on a single form letter supporting the rule submitted by over 7,000 persons, as well as a form letter submitted by an organization supporting the rule with 107, 257 signatories listed. Variations of other form letters generally opposing or supporting the proposed rule were submitted by smaller groups of commenters. Other comments were from: State and Federal elected officials, including U.S. Senators and Representatives; State agricultural agencies and farm bureaus; gaited horse breeder organizations, trotting horse federations and organizations, and other

⁹NAS study, page 30.

¹⁰To view the proposal, supporting documents, and the comments we received, go to www.regulations.gov and enter APHIS–2022–0004 in the Search field.

¹¹All other substances are already prohibited on the on the extremities above the hoof of any Tennessee Walking Horse or racking horse while being shown, exhibited, or offered for sale at any horse show, horse exhibition, or horse sale or auction.

¹²In place of this term, we prefer to use “Dermatologic conditions indicative of soring (DCIS),” although we still use “scar rule” in this document when referring to the current regulations or when a commenter refers to it as such.

domestic and foreign horse industry organizations; equine veterinarians and veterinary associations; horse rescue and animal welfare advocacy organizations; horse owners, trainers, and exhibitors; and saddle clubs, farriers, cattle grower associations, small business owners, and other interested persons. We address the issues the commenters raised in the order that they appear in the regulatory text of the proposed rule.

Based on the comments received, we are finalizing the proposed rule, including these significant modifications:

- We have revised proposed § 11.5, so that it provides for appeal of a disqualification rather than appeal of an inspection report.

- We have elected not to finalize the proposed 270-day implementation period for phasing out pads, wedges, and artificial toe extensions on Tennessee Walking Horses and racking horses as provided for in § 11.6(c).

- We have elected not to provide management of a covered horse show, exhibition, sale, or auction with the option of requesting a variance at least 15 days before an event if no APHIS representative or HPI is available. This requirement was in proposed § 11.16(a)(6).

- We have elected not to require that veterinarians be licensed as a qualification for authorization as an HPI. This requirement was in proposed § 11.19(a)(1).

- We have revised the language of our proposed description of dermatological conditions indicative of soring by making the list of conditions illustrative, rather than requiring that the presence of any one condition must result in a diagnosis of soring. We made this revision and moved this provision to revised § 11.7.

We explain why we made each of these changes to the proposed regulations under the relevant section below. Our responses to economic issues and questions received from commenters are included in the economic analysis summarized in this final rule and available as a supporting document on [regulations.gov](https://www.regulations.gov) (see footnote 10).

Comments on Supporting Data in the Proposal

We included in the proposal two tables showing inspection data for HPA-covered events from fiscal years (FY) 2017 through 2022. Table 1 presents Performance division horse inspection data for HPA-covered events from FY 2017 to FY 2022. Table 2 presents flat-shod horse inspection data for HPA-

covered events from the same period. Each table shows, by year, the number of horses inspected by DQPs at events where APHIS officials were not present, the number of noncompliance violations the DQPs found, and the rate of noncompliance (number of horses inspected divided by the number of violations found). Each table also shows the number of horses inspected by DQPs at events where APHIS officials were present, the number of noncompliance violations the DQPs found in the presence of APHIS officials, and the rate of noncompliance. Finally, each table shows the number of horses inspected by APHIS officials at these events, the number of noncompliance violations they found, and the rates of noncompliance.

The noncompliance rates detected by DQPs when APHIS is present and when APHIS is not present are calculated using the same method, by using the number of noncompliances detected by DQPs and the number of horse entries inspected by DQPs. We cited this data in the proposal to highlight the differences between noncompliances detected by DQPs when APHIS officials are present to observe DQP inspections and when APHIS officials are not present. These differences, in our view, are significant in that they suggest that in the absence of APHIS officials checking their work, DQPs are passing horses during inspections that they likely know would not pass if checked by an APHIS official. We therefore can only conclude that some DQPs are unwilling to correctly palpate and, therefore, make a proper diagnosis of the horses they inspect. As a result, the current DQP system is not contributing to the goal of eliminating soring in Tennessee Walking Horses and racking horses, particularly those that show as Performance division horses in pads and action devices. To underscore this point, the table data for flat-shod horses shows dramatically lower rates of noncompliance in APHIS' inspections of horses, although a smaller discrepancy in rates of noncompliance remains when DQPs are inspecting horses when APHIS VMOs are present and when they are not.

Several commenters stated that the noncompliance data we included in tables 1 and 2 is incomplete, misleading, and based on a subjective inspection protocol that renders any conclusions APHIS draws from the data as being unreliable. One such commenter noted that the data reproduced in the tables in the proposal does not match up with activity reports publicly available on APHIS's Horse Protection program website. The

commenter noted that the proposed rule indicates that USDA inspectors detected a total of 323 instances of noncompliance in FY 2022, but that the activity report for that year shows only 117 instances. The commenter stated that USDA needs to explain the discrepancy, as it calls into question the higher rates of noncompliance at these events based on the APHIS VMO inspection findings.

The commenter is comparing data sets from two report types that are not commensurable. The fiscal year activity report that the commenter found online¹³ only includes noncompliance data reported by APHIS VMOs to management of the regulated event for possible disqualification. The report does not include instances of noncompliance that were observed by an APHIS VMO and referred to a DQP for appropriate follow-up inspection or remedial action. Those instances, which often result in actions taken by the DQPs themselves, are not part of the activity report, but were part of the data sets in tables 1 and 2 of the proposed rule. The fiscal year activity report also does not include instances of noncompliance that were observed by a DQP during inspection but reported by the DQP directly to management. In sum, the data in tables 1 and 2 of the proposed rule provide a more accurate depiction of the rate of noncompliance than the activity reports, which show a more limited range of noncompliance data.

We included the tables in the proposed rule to show that DQPs were far more likely to identify noncompliance of any sort when APHIS VMOs were also present and observing at the event.

The commenter also stated that the data in the proposed rule showing higher rates of soring detected by VMOs is invalid because it was not based on a random sample of horses inspected. As a result, the USDA's data purportedly showing higher rates of noncompliance detected by USDA inspectors cannot properly be treated as showing the violation rate at Tennessee Walking Horse events because it is based on inspections of a subset of horses that were singled out in advance as being suspected of soring.

As the commenter indicated, we indeed acknowledged in the proposed rule that many horses selected by VMOs for inspection "are more likely to be diagnosed [as sore], as that sample

¹³ APHIS Horse Protection Program FY 2022 Activity Report: https://www.aphis.usda.gov/animal_welfare/downloads/hp/fy2022-horse-program-activity-report.pdf.

presented indications of soring prior to inspection.” We have never claimed that inspections of horses for soring are randomized, although we also inspect horses showing no indications of soring. The data is not restricted to a random sample because APHIS does not operate in an environment in which a fully random sampling is warranted, or, indeed, possible.

After 50 years of enforcing the HPA, APHIS has amassed an aggregate body of data indicating the Tennessee Walking Horse and racking horse industry is disproportionately likely to sore their horses, and DQPs in the industry are disproportionately unlikely to detect the soring. This is true regardless of the year in question, the number of inspections conducted, or other controls applied. For example, in 2023, APHIS VMOs conducted significantly more inspections than in 2022; yet the rate of soring detected remained almost identical. Our inspection efforts under the HPA thus

properly focus on those industries that present a much higher risk of soring their horses based on prior experience over the past 50 years.

It is also worth noting, as we did in the proposed rule, that both USDA–OIG and the NAS study committee reached similar conclusions regarding the Tennessee Walking Horse and racking horse industry, and that the NAS study was jointly requested not only by APHIS, but also by the Tennessee Department of Agriculture and the Tennessee Walking Horse Breeders Foundation.

Further, the commenter stated that the data cited in tables 1 and 2 of the proposal is misleading because it reflects rates for all HPA noncompliance violations, not just soring violations. The commenter added that by failing to distinguish between violations that do and do not involve soring, USDA overinflates the data that supposedly shows soring violations, and that the

actual rate of soring is likely even lower than that reported.

The commenter is correct that the data cited in the proposal includes HPA noncompliances that are not categorized as “sore” noncompliances. However, we disagree that the tables were misleading. The proposed rule did not purport to indicate that tables 1 and 2 contained only instances of noncompliance indicative of soring. Again, the articulated purpose of tables 1 and 2 in the proposed rule was to show that there are still higher rates of soring, insofar as DQPs were much more likely to identify all types of noncompliance, both actual soring and otherwise, when APHIS VMOs were also present at the event. And, in fact, the majority of these noncompliances across all years in the data chart were indeed categorized as “sore.” Aside from a slight decrease in FY2019, the percentage of noncompliances categorized as “sore” continued to increase year after year, as the following table shows:

TABLE 1—NUMBERS OF SORE AND OTHER NONCOMPLIANCES DETECTED BY APHIS, FY2018–FY2023 *

	FY18	FY19	FY20	FY21	FY22	FY23
Number of Sore Noncompliances APHIS Detected	78	180	61	122	257	525
Number of Other HPA Noncompliances APHIS Detected	27	69	19	37	66	96
Total Number of HPA Noncompliances APHIS Detected	105	249	80	159	323	621
Percentage Involving Sore Noncompliance	74%	72%	76%	77%	80%	85%

* This table combines noncompliances of both Performance and flat-shod horses. Not included are noncompliances detected by APHIS at events where DQPs were not present.

TABLE 2—OVERALL NONCOMPLIANCE RATES DETECTED BY APHIS, FY2018–FY2023 *

	FY18	FY19	FY20	FY21	FY22	FY23
Number of Entries Inspected by APHIS	1,556	1,198	326	541	1,287	2,740
Number of Sore Noncompliances APHIS Detected	78	180	61	122	257	525
Noncompliance Rate Detected by APHIS Involving Sore Non-compliances (%)	5%	15%	19%	23%	20%	19%
Number of Other HPA Noncompliances APHIS Detected	27	69	19	37	66	96
Noncompliance Rate Detected by APHIS Involving Other HPA Noncompliances (%)	2%	6%	6%	7%	5%	4%

* This table combines noncompliances of both performance and flat-shod horses. Not included are noncompliances detected by APHIS at events where DQPs were not present.

The same commenter claimed that the data on noncompliances reported by APHIS resulted from a subjective inspection process that has been shown to be incapable of producing reproducible results. The commenter stated that USDA implemented a requirement in late 2016 that a horse found in violation of the HPA by a VMO must be re-inspected by a second VMO, if present. USDA removed that requirement in 2021 because we concluded that a single VMO’s finding of soring was reliably accurate without the need for additional confirmation. The commenter stated, however, that when the second inspection rule was in use between 2017 and 2021, the number of violations dropped significantly

whenever two VMO inspectors had to agree on a finding of a violation. The commenter concluded, therefore, that the number of violations APHIS reported in the tables in FY 2017, FY 2021, and FY 2022 is likely lower than what is reported.

The fact that APHIS VMOs occasionally reach different conclusions about whether a horse is sore does not categorically invalidate the ability or the reasoned judgment of a trained inspector with respect to detecting and diagnosing soreness in horses. The protocol referred to by the commenter required APHIS VMOs to make exactly the same findings in order to document a violation, and, as the NAS study stated, “[t]he requirement that two

VMOs must make exactly the same findings (*i.e.*, sensitive on the lateral pastern but not bulbs of heels or medial pastern) does not consider changes that may occur over time between examinations, how the horse may respond to repeated palpation, or how the presence of foreign substances either parenterally or topically may influence findings over time.”¹⁴ Further, the NAS study noted that “[d]istractions and stressors can inhibit a horse’s sensitivity to and expression of pain, such that detection of soreness would be missed, or a horse’s reaction to distractions could be incorrectly attributed to pain. Moreover, when more than one

¹⁴ NAS study, Conclusion 2–5, page 34.

inspector examines the horse, its behavior may differ between the two inspections if the number and type of distractions and stressors at that location and time also differ.”¹⁵

While we agree with the commenter that inspection does often entail a professional’s judgment that observable symptoms are indicative of soreing, we disagree with the commenter’s characterization of the inspection process as subjective and incapable of producing reproducible results. The NAS study describes the current process APHIS uses for detecting soreness, which involves informed observation of the horse’s movement and posture and palpation of the limbs, as “the gold standard for detecting local pain and inflammation. These examination methods are known to be valid and reliable when performed by veterinarians who are trained and highly experienced in detecting lameness and pain. They are employed to detect lameness, injury, and pain in all breeds of horses that are used in competitions, shows, recreational riding, work, breeding, and teaching.”¹⁶

The same commenter also stated that the NAS study recognizes and supports their position that USDA’s current inspection protocol is predominantly subjective and does not yield reproducible and consistent results. As evidence, the commenter stated that USDA’s own inspectors cannot agree on whether an individual horse is sore. The commenter cited inspection data from one horse event in 2016, which showed that when two different USDA officials inspected the same horses, they could not agree on the same conclusion up to 52 percent of the time. Based on this discrepancy, the commenter stated that APHIS can draw no valid conclusions that Agency inspectors generally find a higher rate of violations and cannot use data obtained from that inspection protocol as evidence that soreing persists.

The commenter’s characterization of the NAS study distorts its content. The study did not suggest that the current inspection protocol is incapable of detecting soreing; to the contrary, as noted above, it considered the current practice for detecting soreness to be the “gold standard” for doing so. NAS also found, however, that APHIS’ inspection protocol was actually overly prescriptive. At the time of the NAS study, a second VMO was required to inspect a horse if the first VMO initially found it to be bilaterally sore and, to warrant a finding of soreing and disqualification, “the second inspection

must be exactly the same as to the area of apparent pain and the type of response given by the horse as well as findings of skin changes indicative of previous injury.”¹⁷ Thus, even if the second VMO also found the horse to be sore, any difference between the first and second inspections, however minor, could invalidate the finding. The NAS study noted that “[f]ailure by a VMO to adhere to such a prescriptive protocol could “allow for possible objections to the VMO’s finding by the horse custodian,” adding that “inspection by a second VMO may cast doubt on the ability of VMOs to detect pain or other abnormalities and may negatively affect the VMO’s ability to make appropriate judgments.”¹⁸ The study recommended that properly qualified and trained individuals be afforded greater latitude to make a professional judgment of soreing under a less prescriptive protocol, noting that under the two-VMO protocol, a determination of soreing can easily be overturned when it should not; in other words, a false negative on reinspection is more likely the outcome than is a false positive of soreing.

With respect to the inspection data cited by the commenter from one show in 2016, the nature of the prescriptive protocol may explain why inspections by different VMOs resulted in a different finding 52 percent of the time at that show. Even so, the single show data the commenter cited is not a representative sampling, nor does it address the ability of APHIS VMOs to detect soreing.

In claiming the unreliability of the USDA inspection protocol and, thus, of the data from those inspections, the commenter also referred to a research project included in the NAS study report, conducted by Dr. Paul Stromberg, that examined skin biopsies from Tennessee Walking Horses disqualified for scar rule violations. Dr. Pamela E. Ginn, a member of the NAS study committee and a board-certified veterinary pathologist and a specialist in veterinary dermatopathology, also examined the biopsies and reviewed Dr. Stromberg’s conclusions.

As this comment pertains mainly to questioning the accuracy of the scar rule, we respond to the comment under the heading “Dermatologic Conditions Indicative of Soring” below.

Another commenter, citing the same 2016 event inspection data as the commenter above, stated that APHIS is

relying on different “violation” rates when APHIS officials are present and when they are not present, and that this is misleading.

We interpret the commenter to mean that it is misleading for APHIS to show that DQPs are allowing sore horses to pass inspection when not under the supervision of APHIS officials and citing the discrepancy in rates. We disagree that this is misleading because we are simply citing the results of DQP inspections under different conditions. We agree with the commenter that DQPs find more noncompliances when APHIS officials are present.

A commenter also questioned the reliability of the noncompliance data by stating it is based on citations issued by APHIS VMOs lacking equine experience. The commenter noted that the NAS study report explained that “examinations should be performed not only by a veterinarian, but by a veterinarian who has equine experience.”

We disagree that noncompliance data presented in the proposed rule should be considered unreliable because certain noncompliance was detected by individuals lacking equine experience, although if lack of experience is an issue, we note that it is DQPs, rather than APHIS VMOs, who are doing most of the inspections and are so situated currently. We note that APHIS VMOs, by virtue of being veterinarians working within the Horse Protection program, are experienced with equines and have received training in equine medicine. APHIS’ training of VMOs involves practice in learning and applying medically established methods of diagnosing soreing. We intend to extend a similar rigorous level of HPI training to qualified persons with equine experience under the changes we proposed to the Horse Protection program.

The commenter also stated that APHIS’ inspection methods fail to account for injuries or sensitivity that may occur from “legal” activity that occurs during a show, comparing the minor sensitivity that may result from normal activity during a show to what a human athlete might feel after competing. The commenter stated that USDA unfairly disqualifies horses post-show for such sensitivity when no evidence of actual soreing is found, and that USDA disregards any plausible explanations for sensitivity not resulting from soreing.

We disagree with the commenter, in that any show activity considered “normal” would not result in a response to sensitivity painful enough to be confused with soreing, particularly if an

¹⁵ *Ibid.*, Conclusion 3–1, page 52.

¹⁶ *Ibid.*, Finding 2–2, page 33.

¹⁷ J. Baker, former VMO, USDA Animal Care Horse Protection Program, personal communication, July 27, 2020; cited in NAS study, page 32.

¹⁸ NAS study, Conclusion 2–4, page 34.

inspector has the training and experience to palpate and diagnose horses accurately. To this end, we note again that palpation as practiced by APHIS VMOs was determined by the NAS study to be the “gold standard” in detecting local pain and inflammation indicative of soring, particularly when administered by a properly qualified and trained veterinarian. We also note that medical professionals such as VMOs are specifically trained in making the sort of differential diagnoses cited by the commenter based on their professional judgment. In addition, our records indicate that horses at flat-shod shows that also compete athletically almost never exhibit soreness on post-show inspection. We see no reason to discount our data on noncompliance as being unreliable or misleading for the reason the commenter claims.

The commenter also stated that the data does not support USDA’s decision to treat Tennessee Walking Horses and racking horses differently from other breeds.¹⁹ The commenter explained that USDA based its decision that Tennessee Walking Horses require special rules on the conclusion that violation rates are much higher at Tennessee Walking Horse events than at competitions with other breeds, but that the USDA provided no data showing violation rates for other breeds as comparison. The commenter added that USDA apparently does not have data for other breeds because it does not inspect those breeds the same way it inspects Tennessee Walking Horses, and concluded from this that the Agency should not place more onerous restrictions on the breed without evidence to support that action. Another commenter echoed this point, stating that other breeds have not been subject to decades of stringent subjective inspections and that they are rarely inspected by the same protocols as Tennessee Walking Horses and racking horses.

In the proposed rule, we provided several reasons why APHIS does not inspect other breeds for soring to the degree that we inspect Tennessee Walking Horses and racking horses. As the commenter noted, we indicated in the proposal that we base this approach on our informed knowledge and monitoring for signs of soring in other breeds and, as a means to further improve our ability to monitor the activities of other breeds, we proposed in § 11.16(a) that management of all

horses covered under the Act report their events 30 days in advance. Moreover, the current regulations in § 11.2(c) and (d) and § 11.6 listing prohibitions specific to Tennessee Walking Horses and racking horses (provisions regarding substances and workouts) already treat these breeds differently, as findings of soring are highly concentrated in these breeds and infrequent in all other breeds. We also note that in the occasional inspections we conduct on other breeds, we have found only rare instances of noncompliance, and we maintain records of such noncompliances.

In the small sample of data from events attended by APHIS where other breeds were inspected, we found a very low noncompliance rate comparable to that found in flat-shod Tennessee Walking Horses and racking horses. These events included Missouri Fox Trotters, Rocky Mountain, and Spotted Saddle Horses. The average noncompliance rate detected by APHIS from FY 2017 to FY 2022 at these events was 0.8 percent, whereas the average noncompliance rate detected by APHIS for flat-shod horses across the same years was 1.9 percent. In table 1 of the proposal, during the same period, the average noncompliance rate from APHIS inspections of Tennessee Walking Horses and racking horses competing in Performance division events was 25 percent, and 34.1 percent in FY 2022 alone.

While isolated cases of soring have been reported in other horse breeds, we question the commenter’s implication that only regular inspections of other horse breeds will confirm these breeds to be at lower risk of soring, as opposed to other means of knowledge gathering sufficient to establish an informed level of risk, which includes occasional inspections. We noted, for instance, that the distinctive 2-inch-high stacked pads worn by Tennessee Walking Horses and racking horses are not used at shows by any other breed. In addition, “[e]quine veterinarians on the NAS committee noted that skin changes seen on the pasterns of Tennessee Walking Horses are not observed on the pasterns of other breeds of horses (Arabians, American Saddlebreds, Morgan horses), which also train with action devices such as chains and rollers but do not wear them when shown at competitions.”²⁰

While all horse breeds are subject to provisions of the Act, we proposed Tennessee Walking Horse- and racking horse-specific prohibitions on certain items and practices because USDA has 50 years of data showing a documented

record of soring in these breeds that simply does not exist for other breeds. On the other hand, if USDA were considering establishing new regulations in a currently unregulated community, presuming beforehand that one class of entity will be more noncompliant than other classes without evidence would be inappropriate.

Finally, soring imparts little to no advantage to competitors at other breed shows, as the gaits on which most breeds are evaluated are noticeably distinct from the exaggerated “big lick” step featured at many Tennessee Walking horses and racking horse events. While we make a distinction between Tennessee Walking Horses and racking horses and other breeds by prohibiting the use of pads, artificial extension of the toe, and action devices, we note that it is not necessarily the pad or action device in itself that can cause soring *per se*, but rather their specific application and use in training of a horse. Pads and wedges in certain forms, for instance, can actually be used in training in such a way as to cause soring. We address this issue further in the comment responses below.

Definitions

In § 1.1, we proposed adding definitions for *custodian*, *day(s)*, *event manager*, *Horse Protection Inspector (HPI)*, *local area*, *participate*, and *therapeutic treatment*.

A commenter stated that a definition should be added for stewarding.

We believe that new § 11.6(b)(21) adequately defines what we consider to be stewarding. The paragraph prohibits the use of whips, cigarette smoke, or similar actions or paraphernalia to distract a horse or to otherwise impede the inspection process during an examination, including but not limited to, holding the reins less than 18 inches from the bit shank. All such actions constitute stewarding.

The same commenter stated that a definition should be added for “substances.”

In a 2016 proposed rule to revise the HPA regulations (81 FR 49112–49137, Docket No. APHIS–2011–0009), we proposed adding such a definition.²¹ However, in response to comments at that time, we refrained from including it in the regulations. In brief, commenters raised questions about the regulatory status of substances having multiple uses and what constitutes a substance that should be prohibited, as

¹⁹ Related to this point, we note that in current § 11.2(c) and (d) restrictions on substances and workouts specific to Tennessee Walking Horses and racking horses have long been part of the regulations.

²⁰ NAS study, page 81.

²¹ To view this proposed rule, go to <https://www.regulations.gov/document/APHIS-2011-0009-0001>.

well as requests to provide a definition that covers all substances of concern.

As no useful definition of “substances” can encompass all their uses and abuses for the purposes of regulation, we believe the regulation is adequate and have opted not to define the term. As explained elsewhere in this document, the Act provides us with the authority to restrict or prohibit practices, including the use of substances, that can cause soring or mask evidence of it.

We proposed revising the definitions of *action device*, *Administrator*, *APHIS representative*, *inspection*, *management*, *person*, and *sponsoring organization*. We proposed removing the definitions for *APHIS Show Veterinarian*, *Designated Qualified Person or DQP*, *horse industry organization or association*, *lubricant*, *Regional Director*, and *show manager*. Our responses to comments received on these changes are addressed below.

We proposed no changes to, and received no substantive comments on, the definitions for *Act*, *Animal and Plant Health Inspection Service (APHIS)*, *Department*, *exhibitor*, *horse*, *horse exhibition*, *horse sale or horse auction*, *horse show*, *Secretary*, *sore*, and *State*.

We proposed revising the definition for *action device* by adding beads and bangles to the list of such devices.

One commenter recommended that we also remove the word “joint” in the definition when referring to the fetlock, adding that the fetlock includes the joint and this wording implies it may be acceptable to strike the area between the coronary band and the fetlock joint.

The term “fetlock joint” has been part of the HPA regulations since 1979 and is only included in the definition of *action device*. While we agree that the term “fetlock” includes the metacarpophalangeal and metatarsophalangeal joints, both “fetlock” and “fetlock joint” are used in scientific literature interchangeably to refer to the same region of a horse’s distal limb. We are finalizing as proposed.

We proposed revising the definition for *Administrator* by adding U.S. mail and email addresses for sending mail to the Administrator of APHIS. We received no comments on this revision and are finalizing as proposed.

We proposed removing the definition for *APHIS Show Veterinarian* and revising the definition of *APHIS representative*. The current definition of *APHIS representative* is any employee of APHIS, or any officer or employee of any State agency who is authorized by the Administrator to perform

inspections or any other functions authorized by the Act, including the inspection of the records of any horse show, horse exhibition, horse sale or horse auction. We proposed revising this term to read “any employee or official of APHIS,” which includes APHIS-employed veterinarians attending shows in an official capacity. APHIS representatives will include qualified full-time and intermittent VMOs employed by APHIS to inspect horses for soring. HPIs, on the other hand, will not be APHIS representatives under this definition because they are not employees of APHIS and not compensated by the Agency, but will be authorized to conduct inspections and will contract as third parties with event management for their services. We received no comments specifically addressing this change and are finalizing as proposed.

We proposed adding a definition for the term *custodian*, which we proposed to mean any person who has initial control of and who presents a horse for inspection at any horse show, horse exhibition, horse sale, or horse auction. We noted that a person acting as custodian may typically perform additional roles, such as owner, exhibitor, seller, or transporter. Also, the custodian must be able to provide required information about the horse as required in part 11.

A few commenters expressed support for the new definition but recommended that we limit the definition to “any adult person, of the age of 18 or older,” noting that children should not be allowed to present horses for inspection.

We agree with the commenter’s recommendation and are modifying the definition in this final rule by adding “any adult person, age 18 or older”. If a minor were found to be in violation with the regulations, the person’s status as a minor could complicate legal liability and responsibility for purposes of addressing the infraction and enforcing the Act. Custodian of a noncompliant horse is a role APHIS pursues for enforcement.

Another commenter recommended that we insert the words “and/or subsequent” after the word “initial,” as the proposed wording would not address the question of subsequent control of the horse.

Occasionally, the person who has initial control of the horse will have someone else take their place during the inspection process. That person will have to meet the same requirements as the custodian who had initial control of the horse. We agree with the commenter’s recommendation and will address it by removing “initial” from

the definition. By removing this word, the term accounts for any person having control of the horse at any time, initially or subsequently.

We proposed and are adding the term *day(s)* to § 1.1, and defining it to mean business days, *i.e.*, days other than weekends and Federal holidays. In several instances, the regulations require the submission of reports or records with a period of days, and we wish to clarify that weekends and Federal holidays are not included within that day count. We received no comments specifically addressing this addition and are finalizing as proposed.

The current definition of *Designated Qualified Person* is “a person meeting the requirements specified in § 11.7 . . . who has been licensed as a DQP by a horse industry organization or association having a DQP program certified by the Department and who may be appointed and delegated authority by the management of any horse show, horse exhibition, horse sale or horse auction under section 4 of the Act to detect or diagnose horses which are sore or to otherwise inspect horses and any records pertaining to such horses for the purposes of enforcing the Act.”

We proposed removing the term *Designated Qualified Person or DQP* and its definition, as well as all regulatory requirements in the regulations pertaining to them. Instead, APHIS will screen, train, and authorize *Horse Protection Inspectors or HPIs* qualified to conduct inspections of horses, devices, and records for the purposes of determining compliance with the Act at horse shows, exhibitions, sales, and auctions. HPIs, preferably veterinarians, will be authorized by APHIS pursuant to proposed § 11.19 and appointed by management of the event. Accordingly, we are including a definition for *Horse Protection Inspector* in the regulations, included below. We received no comments specifically addressing this proposed action and are finalizing as proposed.

We proposed to add the term *event manager* to mean the person who has been delegated primary authority by a sponsoring organization for managing a horse show, horse exhibition, horse sale, or horse auction. An individual event manager will need to be designated even if the event is managed by a team of persons. This definition will clarify management responsibility. We received no comments specifically addressing this addition and are finalizing as proposed.

The term *horse industry organization or association* is currently defined as

“an organized group of people, having a formal structure, who are engaged in the promotion of horses through the showing, exhibiting, sale, auction, registry, or any activity which contributes to the advancement of the horse.” We proposed removing the term *horse industry organization or association* and its definition, as all regulatory requirements under the Act pertaining to these groups, including requirements for certification of DQP programs, recordkeeping, and other requirements assigned to them will no longer be included in the revised regulations.

A few commenters opposed removal of the term and removal of the role played by HIOs under the current program. One commenter stated that the change will impose significant new recordkeeping and reporting requirements, and new tasks such as crowd control, on local show managers.

We are making no changes based on these comments. We disagree with the commenter's point that the proposed regulatory changes eliminate HIOs or prevent them from working with show management. As we noted in the proposal, HIOs are free to continue supplying other services to shows and events not subject to regulation, including registering participants and coordinating event logistics, supplying show judges, and promoting events. This rulemaking does not affect their freedom to contract with event management to perform these services. The proposed removal of the term was solely to reflect the fact that they would no longer have a distinct role specifically pertaining to APHIS' Horse Protection regulations.

We proposed adding the term *Horse Protection Inspector (HPI)* to mean a person meeting the qualifications in proposed § 11.19 whom the Administrator has authorized as an HPI and who may be appointed and delegated authority by the management of any horse show, horse exhibition, horse sale or horse auction under section 4 of the Act to detect or diagnose horses which are sore or to otherwise inspect horses and any records pertaining to such horses for the purposes of detecting or diagnosing soring.

A commenter stated that we should clarify in the definition that HPIs are not APHIS representatives.

We agree, and will clarify the definition we proposed by adding a sentence stating that “HPIs are not employees of APHIS.”

The current regulations define *inspection* to mean “the examination of any horse and any records pertaining to

any horse by use of whatever means are deemed appropriate and necessary for the purpose of determining compliance with the Act and regulations. Such inspection may include, but is not limited to, visual examination of a horse and records, actual physical examination of a horse including touching, rubbing, palpating and observation of vital signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, action device, or any other equipment, substance or paraphernalia from the horse when deemed necessary by the person conducting such inspection.”

To emphasize that any means of determining compliance with the Act and regulations must be approved by APHIS, we proposed revising the definition of *inspection* to include the words “any visual, physical, and diagnostic means approved by APHIS to determine compliance with the Act and regulations,” with some illustrative examples. While we received comments on what inspections should include and address them elsewhere in this document, we received no comments on the definition itself and are finalizing as proposed.

We proposed adding a definition for *local area*, which we define as the area within a 10-mile radius of the horse show, horse exhibition, horse sale, or horse auction. This term will be added in conjunction with § 11.13(b)(3), which requires event management to have a farrier on call within the local area if requested by an APHIS representative or HPI appointed by management and 100 or fewer horses are entered in the horse show, exhibition, sale, or auction. When over 100 horses are entered in an event, management will be required to have a farrier onsite unless they elect to enforce the HPA without recourse to an inspector.

A commenter disagreed with the proposed definition of *local area* and advised a 30-mile radius to compromise the local area, while another commenter suggested it be increased to greater than 40 miles.

We are finalizing as proposed. A farrier may be required to provide services to assist an APHIS representative or HPI in conducting an inspection, such as removing a shoe. A 10-mile radius allows the on-call farrier to be close enough to arrive at a show promptly if so requested by an APHIS representative or HPI. This, in turn, forestalls delays in conducting inspections. We also note that the first commenter also stated that most horse events retain a farrier onsite, and the other commenter assumed that farriers

would not be onsite in recommending a radius of more than 40 miles.

The term *lubricant* in the current definitions means “mineral oil, glycerine or petrolatum, or mixtures exclusively thereof, that is applied to the limbs of a horse solely for protective and lubricating purposes while the horse is being shown or exhibited. . . .” We proposed removing the definition for *lubricant* and prohibiting the use of lubricants on the limbs of all Tennessee Walking Horses and racking horses; the current regulations allow the use of lubricants for Tennessee Walking Horses and racking horses under certain circumstances. Some commenters opposed prohibiting lubricants but were silent on removal of the definition itself. We discuss our reasons for prohibiting lubricants to prevent the soring of horses in this document under the heading “Prohibitions for Tennessee Walking Horses and racking horses.”

We proposed revising the current definition of *management*, which means “any person or persons who organize, exercise control over, or administer or are responsible for organizing, directing, or administering any horse show, horse exhibition, horse sale or horse auction and specifically includes, but is not limited to, the sponsoring organization and show manager.” We received no comments on this proposed change to replace “show manager” with “event manager” and are finalizing as proposed.

We proposed adding a definition of *participate* to § 1.1 to mean engaging in any activity, either directly or through an agent, beyond that of a spectator in connection with a horse show, horse exhibition, horse sale, or horse auction, and includes, without limitation, transporting, or arranging for the transportation of, horses to or from equine events, personally giving instructions to exhibitors, being present in the warm-up or inspection areas or in any area where spectators are not allowed, and financing the participation of others in equine events. We received no comments specifically addressing this proposed addition and are finalizing as proposed.

Person in the regulations means “any individual, corporation, company, association, firm, partnership, society, organization, joint stock company, or other legal entity.” We proposed revising the definition by adding “State or local government agency” to the list of illustrative examples of a person. This change highlights that State and local government agencies also fall under the definition of *person* for the purposes of enforcing the regulations.

We received no comments specifically addressing this proposed revision and are finalizing as proposed.

As currently defined in the regulations, *Regional Director* means “the APHIS veterinarian who is assigned by the Administrator to supervise and perform official duties of APHIS under the Act in a specified State or States.” We proposed to remove the term from § 11.1 because APHIS representatives performing Horse Protection duties are no longer organized and managed by region. We received no comments specifically addressing this revision and are finalizing as proposed.

The regulations currently define *sore* to mean, among other things, that “a person has engaged in a practice involving a horse and, as a result of such . . . practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving.” Although we proposed no changes to the definition of *sore*, one commenter asked if the part of the definition referring to a person “engaged in a practice involving a horse” is applicable to a scenario in which a horse is injured in its stall.

We are finalizing as proposed. The regulatory definition of *sore* is patterned after the statutory definition. The scenario mentioned by the commenter is presumably accidental. If, in the professional judgment of a qualified inspector, the horse is not sore, and presuming no other noncompliance is identified, the horse could be shown under the regulations. However, regardless of the commenter’s question, if the horse is injured it should first be evaluated to determine if it needs medical attention.

Another commenter stated that the definition of *sore* is not enforceable unless “a person” is actually observed committing any of the actions prohibited under the definition.

We disagree with the commenter. The Act does not require that an act of soring be observed. To the contrary, the Act defines “sore” based on the condition of the horse after the act has occurred. See 15 U.S.C. 1821(3) (defining “sore” as when “an irritating or blistering agent has been applied,” “any burn, cut, or laceration has been inflicted,” any tack, nail, screw, or chemical agent has been injected,” or “any other substance or device has been used”). Moreover, the commenter’s suggestion would deprive properly qualified and trained inspectors from making a professional judgment that a practice that resulted in soring had occurred prior to the inspection.

Sponsoring organization in the current regulations means “any person under whose immediate auspices and responsibility a horse show, horse exhibition, horse sale, or horse auction is conducted.” We proposed revising the current definition to mean “any person or entity whose direction supports and who assumes responsibility for a horse show, horse exhibition, horse sale, or horse auction that has, is, or will be conducted.” We are making this change to clarify that an “entity” is also included under the definition, and to ensure that any person or entity supporting and assuming responsibility for such an event also falls under the definition. Our proposed revision also clarifies that the sponsoring organization’s responsibility applies whether the event in question has already occurred or is yet to occur. We received no comments specifically addressing this revision and are finalizing as proposed.

We also are adding a definition for the term *therapeutic treatment* to mean relating to the treatment of disease, injury, or disorder by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was prescribed. We proposed to define this term to ensure that therapeutic practices applied to any horse covered under the regulations are administered or overseen by qualified veterinarians only. This definition corresponds with the exceptions allowed under the definition of *sore* for any practice involving therapeutic treatment of a horse by or under the supervision of a licensed veterinarian.

A commenter stated that the definition should include a set time limit to be part of the prescribed therapeutic use of pads and other restricted items.

We are making no changes to the definition based on the comment, as we believe a licensed veterinarian is generally best qualified to determine specific treatment plans. We note that we proposed in § 11.14(b)(5) that an expected length of treatment be included as part of the veterinary record that is to be maintained by event management. All such treatment plans are subject to APHIS review, in order to determine whether the plans include the use of substances or practices to cause or mask soring.

A few commenters asked that we include “and such therapeutic practices cannot supersede what is allowed within the HPA” to the end of the definition.

We are adding no such change to the definition because it is unnecessary.

The regulations are limited to what is required or permitted in the Act and do not supersede it.

Prohibitions Concerning Exhibitors

Current § 11.2, “Prohibitions concerning exhibitors,” lists general and specific prohibitions for any device, method, practice, or substance used on any horse at any horse show, horse exhibition, horse sale, or horse auction if such use causes or can reasonably be expected to cause such horse to be sore. We are moving those prohibitions from § 11.2 to revised § 11.6 and reserving § 11.2 in the regulations for future use. No commenters took issue with our proposal to move the prohibitions to another section and reserve § 11.2.

Non-Interference With APHIS Representatives

Current § 11.3 contains the “scar rule,” which refers to the presence of certain types of dermatologic conditions on the horse’s pastern and fore pastern suggesting that a horse has been sored.

We proposed removing the scar rule from this section. We are including a revised version of it in § 11.7, a section which we had previously reserved in the proposed rule, under the heading “Dermatologic conditions indicative of soring,” or DCIS. We originally proposed to move the revised scar rule to § 11.6(b)(22) but determined that it is thematically incompatible with other provisions in § 11.6(b). We discuss DCIS at greater length later in this document.

The language we proposed adding to revised § 11.3 prohibits persons from assaulting, resisting, opposing, impeding, intimidating, threatening, or interfering with APHIS representatives or HPAs, or in any way influencing attendees of a horse show, exhibition, sale, or auction to do the same. Persons guilty of such violations may be held criminally liable and referred to the U.S. Department of Justice for prosecution. As we noted in the proposal, this amendment strengthens regulatory protections for the safety of both APHIS representatives and HPAs appointed by management and engaged in duties at the events listed, as well as the safety of horses and attendees. We received no comments specifically addressing this revision and are finalizing as proposed.

Owners, Trainers, Exhibitors, Custodians, Transporters, and Any Other Disqualified Person

Section 11.4 of the current regulations includes requirements regarding inspection of horses by APHIS representatives, as well as detention of horses for inspection if an APHIS veterinarian has probable cause to

believe that a horse is sore. We proposed revising § 11.4 to include provisions regarding the status of persons whom USDA has disqualified from showing, exhibiting, selling, or auctioning horses. Provisions for inspection and detention of horses, which currently comprise this section, have been moved to proposed § 11.8.

The text we proposed for revised § 11.4 requires that any person disqualified from participating in any horse show, exhibition, sale, or auction shall not show, exhibit, or enter any horse, directly or indirectly through any agent, employee, corporation, partnership, or other device, and shall not judge, manage, or otherwise participate in events covered by the Act within the period during which the disqualification is in effect. We received no comments specifically on this change and are finalizing this provision to prevent disqualified persons from continuing to participate in shows and other events either directly or indirectly through the aid of other identities or persons.

Appeal of Inspection Report

Section 11.5 currently requires the management of any horse show, horse exhibition, horse sale, or horse auction to provide APHIS representatives with unlimited access to the grandstands and all other premises of any horse show, exhibition, or horse sale or auction, including any adjacent areas under their direction, for the purpose of inspecting horses or records. Management must also provide an adequate, safe, and accessible area for the visual inspection and observation of horses. This section also requires persons having custody of any horse at any horse show, exhibition, or horse sale or auction to admit any APHIS representative or DQP appointed by management to all areas of barns, compounds, horse vans, horse trailers, stables, or other grounds or related areas at any horse show, exhibition, or horse sale or auction, for the purpose of inspecting any such horse at reasonable times.

We proposed moving these provisions for access to premises and records to a new § 11.9 and changing the heading of § 11.5 to read “Appeal of inspection report.” In the proposed rule, we proposed to revise § 11.5 to provide that any horse owner, trainer, exhibitor, custodian, or transporter may appeal inspection report findings all or in part to the Administrator. We also proposed that the appeal would require a written statement contesting the inspection finding(s) as well as any documentation or other information in support of the appeal. We proposed that the appeal

would have to be received by the Administrator, preferably by electronic mail, or by U.S. mail, within 21 business days of receipt of the inspection report. The Administrator would then send a final decision to the person requesting the appeal.

Several commenters addressed this proposed provision. One commenter stated that “inspection report” is not a defined term in the proposed rule.

As discussed below, the term does not appear in the revised regulations and thus does not need to be defined in this final rule. With that being said, to address the comment for the purposes of the proposed rule, we would define an inspection report as a report that details the finding resulting from an inspection to determine compliance with the Act and regulations. Any alleged noncompliances of the Act or regulations found as a result of the inspection would have been noted in the report.

A few commenters supporting the proposed rule stated that appeals should only apply to adjudicated cases, not inspection reports, adding that the current regulations [§ 11.25] require HIOs to provide a process to appeal penalties resulting from inspections—not the results of the inspections themselves. One commenter stated that if a horse is found sore under the proposed regulations and disqualified without prosecution or penalty, there should be no appeal.

The Act directs the Secretary not to assess a penalty or issue a cease-and-desist order without giving parties the right to appeal and opportunity to a hearing. There will be no civil penalties assessed without notice and an opportunity for a hearing, and all noncompliances will be subject to enforcement by the Department. As explained below, we have amended proposed § 11.5 so that it addresses due process and provides for appeal of a disqualification.

A commenter stated that the removal of the regulatory role of HIOs leaves no recourse or appeal for a determination of violation and appears to permit an appeal only if USDA determines there is “probable cause” to do so, meaning it passes an absolute judgment upon its own decision and imposes a 21-day limitations period on any appeal. The commenter added that by imposing a 21-day deadline, USDA would now require owners and trainers to challenge every disqualification or risk having USDA later argue that any such challenge was waived.

Though unclear, the commenter’s mention of “probable cause” is apparently in reference to the provision

for re-inspection of detained horses under proposed § 11.8(h), in which an alleged violator may request re-inspection and testing of a horse provided that the request is made to APHIS “immediately after the horse has been examined by APHIS representatives,” and that “an APHIS representative determines that sufficient cause for re-inspection and testing exists.” The 21-day limitation period referenced by the commenter applies to appeal of the inspection report under proposed § 11.5. As discussed below, the two are distinct processes, and, under the terms of the proposed rule, a party could file an appeal to contest an inspection report regardless of whether re-inspection was requested or not.

The intent of proposing appeal of an inspection report under § 11.5 was to explore potential options to provide parties with a recourse to appeal disqualification, including possible options to resolve disputes before the show takes place. The 21 days permitted for an appeal gives time for the alleged violator to prepare an appeal, although the individual can choose to submit the appeal of disqualification at any point up to 21 days. We did not consider it likely that an alleged violator would appeal the inspection report unless they had been disqualified. With that being said, the commenter is correct that, under the specific terms of the proposed rule, there was no direct recourse for appeal in the proposed rule following a determination resulting in a disqualification. Moreover, for purposes of due process, it is the disqualification itself, rather than the inspection report, for which we think appeal should be afforded.

To address this matter, we are revising proposed § 11.5 to provide for appeal of the disqualification itself, rather than the inspection report. As revised, it provides that any horse owner, trainer, exhibitor, custodian (or any other person responsible for entering the horse in an event), or transporter may appeal to the Administrator for a decision on whether a disqualification decision concerning a horse at a horse show, horse exhibition, horse sale, horse auction, or other covered event was justified. There may only be one appeal per disqualified horse per event; however, all parties with interest in the disqualification may contribute to the appeal. (This will preclude duplicative appeals and help focus agency resources on expeditious evaluation of the appeals received.) To appeal, the horse owner, trainer, exhibitor, custodian, or transporter must send a written statement contesting the disqualification and include any

documentation or other information in support of the appeal. To receive consideration, the appeal must be received by the Administrator, preferably by electronic mail, to horseprotection@usda.gov within 21 days of the date the horse owner, trainer, exhibitor, custodian or transporter received the disqualification that is the subject of the appeal. In addition, we are adding an avenue to request expedited review. If expedited review of the appeal is requested, this must be noted as such, and information in support of this request must accompany the appeal so that APHIS may ascertain whether expedited review is warranted. The Administrator will send a final decision, in writing via either electronic mail or postal mail, to the person requesting the appeal as promptly as practicable. Additionally, the above-mentioned provision for re-inspection in proposed § 11.8(h), in which an alleged violator may request re-inspection of a horse, addresses due process concerns to some degree by giving the violator an imminent opportunity to appeal a disqualification resulting from inspection in the field. However, the re-inspection is contingent on whether the inspector determines that sufficient cause exists for doing so. If the horse passes a re-inspection before the show, there is no disqualification based on inspection results. If the horse fails the re-inspection, the disqualification stands, and the alleged violator may appeal through the process in § 11.5.

The same commenter stated that forcing owners and trainers to challenge every disqualification on a purportedly inadequate record does not comport with due process or allow them to be heard in a meaningful manner. The commenter added that to comport with due process, USDA must require any disqualification to be supported by adequate evidence and documentation by requiring the inspector to document and provide photographic evidence of any “dermatologic conditions,” and allowing an owner or trainer to photograph or film an inspection in order to raise challenges to that inspection at a later date.

APHIS representatives and HPis are required to document noncompliant dermatologic conditions, as well as any other indications of noncompliance.²²

²² APHIS representatives and other qualified persons prepare this documentation as part of fulfilling the notification requirement for reporting sore horses to management in accordance with section 4 of the Act (15 U.S.C. 1823(b)). The Horse Protection program also internally requires that such documentation be prepared and maintained for reporting and enforcement purposes by APHIS

As the commenter correctly stated, due process involves providing the custodian of the horse adequate notice of the basis for the disqualification as soon as practicable and prior to the deadline to appeal. We will do so by providing the inspection report to the custodian following the disqualification so that, prior to leaving the event, they have the information necessary to mount an appeal based on dispute of material fact. With that being said, owners and trainers are free to record inspections from a position outside the inspection area.

One commenter stated that a fundamental tenet of due process requires that parties receive fair notice of the specific standards by which they are being deprived of any property interest. On this point, they stated that the standards for an HPA violation under the existing regulations and the proposed rule are vague and fail to provide adequate notice, particularly the revised scar rule’s reference to “dermatologic conditions.”

We disagree that the regulations do not provide persons with knowledge of what might constitute a violation, including with respect to dermatologic conditions. The prohibitions on particular action devices, types of pads and wedges, and substances are clear and unambiguous. Likewise, under the regulations as revised in this final rule, dermatologic conditions cannot be any conditions whatsoever, but only those that an HPI or APHIS representative determines to be indicative of soring as that term is defined in the statute, including irritation, moisture, edema, swelling, redness, epidermal thickening, and loss of hair (patchy or diffuse). Moreover, following the disqualification, the HPI or APHIS representative will disclose the specific basis for the disqualification through issuance of an inspection report and the party involved may contest the disqualification through appeal.

A commenter asked us what happened to the provisions in current § 11.25, particularly in light of a discrepancy between the preamble and the regulatory text. The preamble had stated that the regulatory text of the proposed rule contained a parallel process in § 11.5 “for alleged violators to appeal penalties resulting from inspections conducted by APHIS representatives or HPis appointed by management,” yet the regulatory text contained no such parallel process.

The provisions in § 11.25 give authority to HIOs to establish and

representatives and qualified persons inspecting horses.

enforce minimum penalties for violators. Because we proposed to relieve HIOs of all regulatory roles and responsibilities under the HPA, there was no longer a need for the provisions in that section. With regard to the discrepancy between the preamble and the regulatory text, we initially intended to draft a separate process to establish and enforce minimum penalties for violators, as well as the right for violators to contest any attempt to enforce such penalties. Later on, during development of the proposed rule, we determined that the existing right to a hearing provided for in the Act, the process for which is described in 7 CFR part 1, contains such a process, and that a separate process would be duplicative and potentially confusing. The regulatory text of the proposed rule reflects the Agency’s intent.

With that being said, as noted above, we are explicitly providing for appeal of disqualification under § 11.5 in this final rule.

In 2016, we published a separate proposed rule to revise the HPA regulations in the **Federal Register** (81 FR 49112–49137, Docket No. APHIS–2011–0009). In response to the 2016 proposal, several commenters submitted due process concerns over reviews of pre-show inspection findings of soring and subsequent disqualification from showing. Some commenters at the time requested that we develop a pre-show process whereby owners and trainers may contest and seek immediate review of a finding that a horse is sore. They also suggested that when USDA diagnoses a horse as sore after initially being passed by a DQP, the horse should be allowed to be shown until there is a final decision in the matter, *i.e.*, until due process is completed.

We suggested in the proposal to this final rule that one possible solution involves conducting pre-show inspections far enough in advance of the exhibition or show to allow for an opportunity to be heard before the event. A key problem with this solution, however, is that the farther in advance of a show that an inspection takes place, the more time there is to sore a horse after the inspection and before the show. Monitoring protocols would need to be developed and staffed to ensure horses are not sored following inspection. Moreover, under the current event structure, there is insufficient time to conduct a review process between the inspection and the horse being exhibited or shown, and it would require a significant change in show and exhibition practices, and possible restructuring of the industry itself, to allow such a process to take place. It

would also entail deploying more inspectors to shows and developing monitoring protocols to ensure horses are not sore following inspection.

We acknowledged in the proposal that there may be other means of addressing the issue and requested public comment regarding other alternatives to a pre-show review process, including consideration of regulatory bodies, statutory authorities, or incentives and disincentives, including withholding or forfeiture of prize money. To determine the feasibility of a pre-show inspection and review, we asked for comments addressing the particulars of such a review, including where and when the pre-show inspection might be conducted, how monitoring of horses after inspection would take place to prevent tampering, and what parties should be involved in the review process.

We received several comments supporting and opposing a pre-show inspection that would allow for reviews of soreness findings.

Most commenters addressing this subject agreed that such a review is not feasible under the way that shows are currently conducted. Several commenters stated that it is not possible to adjudicate in the limited timeframe between examining a horse and competition, with one adding that the point is to have qualified inspectors undertaking examinations and not finding ways to override their findings. Another commenter stated that it is unacceptable to propose that the findings of a qualified, unbiased professional inspector should be challenged and overridden in the moment at an event. The commenter added that the HPA requires that a horse in violation must be prohibited from being shown, and that any delay in or failure to invoke this prohibition would be in violation of the Act. One commenter opined that concerns about due process originated in the conflicts seen when a DQP would ‘pass’ a horse and the APHIS inspector would subsequently ‘fail’ the horse as sore, and that with abolishment of the DQP program and the use of only inspectors screened and authorized by APHIS, a pre-show review to resolve such conflicts would be unnecessary.

We agree with commenters that it is not feasible to adjudicate in the limited timeframe between examining a horse and competition; we did not receive comments that suggested alternative show practices that would make a pre-show review process practicable. The HPA prohibits showing or exhibiting horses determined as sore from showing, with a litigation risk inherent

in allowing horses that may be sore to show. Also, the longer the interval between an inspection and the event, the more opportunity there is to sore a “cleared” horse. As we indicated in our recent proposal, section 4 (15 U.S.C. 1823(a)) of the HPA vests in management the responsibility to disqualify or prohibit a horse from being shown, exhibited, sold, or auctioned following a determination by an inspector that the horse is sore. Specifically, the statute and regulations require management to (among other actions) disqualify a horse in instances where (1) the horse is sore or (2) management is notified by a DQP or APHIS representative that the horse is sore. Further, section 5 (15 U.S.C. 1824) requires that management disqualify such horses by listing the failure to do so as an “unlawful act.” Because of these statutory considerations, and because commenters could not provide a meaningful way to allow for a pre-show hearing following an inspection resulting in disqualification, we consider the appeals process in this final rule, which allows for prompt post-disqualification appeal, due process regarding the deprivation caused by disqualification. Further, the re-inspection provision in proposed § 11.8(h) addresses due process concerns to some degree by giving an alleged violator an opportunity to appeal a disqualification resulting from inspection in the field provided sufficient cause for doing so is determined by an APHIS representative. If a horse passes a re-inspection before the show, there is no disqualification based on inspection results.

A commenter opposed to the proposed rule stated that under the current system, horse owners have no right to raise a challenge and have their horses shown if they are disqualified before a show, and that the rule offers no solution to this problem. The commenter stated that to address due process concerns with its enforcement efforts, USDA must begin by looking at other breeds covered under the HPA and consider an objective inspection system that utilizes blood testing, urinalysis, thermography, x-rays/radiology, and gas chromatography-mass spectrometry. The commenter further recommended that the program be overseen by an independent inspection entity under the current HIO structure or through some other new structure as is currently allowed in other breed programs.

These comments do not offer a workable solution. No such tests listed by the commenter can definitively rule out that a horse has been sore, and the

commenter discounted a determination of soring by a trained inspector who has palpated the horse and found sensitivity to be present. As we stated above, the NAS study considered this part of the inspection protocol to be the “gold standard” for detecting local pain and inflammation.²³ It is also worth noting that one commenter stated that the practice of disqualifying a horse based on an adverse inspection finding (*i.e.*, not allowing the horse to be shown/exhibited), with appeals possible after the fact, is consistent with what is done in other breeds. To that end, we note that one of the commenter’s suggestions would entail retention of the regulatory functions of HIOs, which, for reasons discussed in the proposed rule and this final rule, we are abolishing.

Finally, we note that the commenter failed to address critical details regarding how any pre-show review process could achieve the statutory prohibition against showing sored horses. Details that the commenter did not address in their recommendation include where and when the inspection should take place if a pre-show review process will be afforded, who should be physically present for the review process, and how the health and safety of the horse should be monitored after the inspection to make sure the horse is not subsequently sore while review is ongoing. Because of these deficiencies, and in light of the foregoing considerations that counsel against pre-show review processes, we do not consider the commenter to have provided a meaningful recommendation to afford pre-deprivation due process.

One commenter asked who would be appointed to a pre-show review process, noting that reviewers would have to be on site in addition to the inspectors, and wanted to know how APHIS would fill the gap.

We cannot answer the commenter’s question as to whom we would appoint, as we only asked for comments about the feasibility of establishing such a review process.

We also asked how a pre-show review process might implicate or interact with the re-inspection process currently located in § 11.4(h), which we are revising and moving to new § 11.8(h). As we note above, this re-inspection provision provides a pre-show means to appeal an initial disqualifying inspection in the field by requesting a second inspection provided that sufficient cause for reinspection exists and an APHIS representative is available to perform the re-inspection. If a re-inspection is granted and the horse

²³ NAS study, page 46.

passes, there is no disqualification based on inspection results. We received no comments specifically on this point.

Finally, a few commenters provided specific ideas for disincentivizing soring, as we requested. One commenter suggested that any horse found to be sore not be allowed to show for 6 months. The commenter also recommended making the offspring of a horse found to be sore more than one time ineligible for breed registration, as well as not allowing a sore horse to be sold for 2 years after diagnosis, which would reduce the value of such horses and disincentivize soring.

We think this final rule is adequate to disincentivize soring. Therefore, we do not think the measures proposed by the commenter, even if they fall within the bounds of the Act, are necessary.

A commenter suggested that the Act be strengthened by fining violators \$5,000 for the first offense, \$25,000 for the second, \$150,000 for the third, and taking the horse in question for a fourth offense.

We are making no change in response to the commenter's suggestion. Penalties are enshrined in the Act and require Congressional action to change.

Another commenter asked why the rule does not include the imposition of extended disqualification periods, up to and including lifetime disqualifications, and to consider including extended disqualification periods for sore horses or offenders with multiple violations.

These periods are listed in the Act and cannot be changed without an act of Congress.

Prohibitions To Prevent Soring

Current § 11.2, "Prohibitions concerning exhibitors," contains general and specific prohibitions on certain devices, methods, practices, or substances used on any horse at any horse show, horse exhibition, horse sale, or horse auction covered under the Act. These current prohibitions already include prohibitions intended specifically for Tennessee Walking Horses and racking horses regarding substances and duration of workouts in paragraphs (c) and (d) respectively.

We proposed to revise § 11.6 and retain the current § 11.2 heading "Prohibitions concerning exhibitors." As with current § 11.2, revised § 11.6 lists general and specific prohibitions on certain devices, methods, and practices used on any horse at any horse show, horse exhibition, horse sale, or horse auction. We also proposed to include new prohibitions in § 11.6(c) specific to Tennessee Walking Horses and racking horses.

General Prohibitions

Current paragraph § 11.2(a) contains a general prohibition on the use of any device, method, practice, or substance on any horse at any horse show, exhibition, sale, or auction if that use causes or can reasonably be expected to cause a horse to be sore.

We proposed in § 11.6(a) to include a similar general prohibition on the use of any device, method, practice, or substance. We also proposed adding a provision under the general prohibitions prohibiting the use on a horse of any device, method, practice, or substance that masks soring.

Under section 5 (15 U.S.C. 1824(7)) of the Act, APHIS has the authority to prohibit any equipment, device, paraphernalia, or substance that a horse is wearing or bearing which the Secretary by regulation under section 9 (U.S.C. 1828) of the Act prohibits to prevent the soring of horses. USDA considers prohibiting items and substances that mask soring to be essential in helping to prevent the soring of horses, as masking can impede efforts to detect soring through inspections. APHIS currently considers the use of substances to mask soring as a violation of the Act and regulations and conducts enforcement accordingly. Our addition of the prohibition on masking in the general prohibitions is intended to underscore what the Act already prohibits. (We also proposed prohibiting lubricating substances.)

As masking typically involves the use of substances, including lubricants, we address comments relating to masking below under "Lubricants."

Prohibited Devices, Equipment, and Practices

Paragraph (b) of current § 11.2, "Specific prohibitions," prohibits on any horse the use of certain devices, methods, practices, and substances at any covered horse show, exhibition, sale, or auction. Under the current regulations, some restricted uses are permitted provided they do not exceed the specifications accompanying each.

In proposed § 11.6(b), "Prohibited devices, equipment, and practices," we similarly list devices, equipment, and practices that are prohibited on any horse at a horse show, horse exhibition, horse sale, or horse auction, including Tennessee Walking Horses and racking horses. We address specific comments we received on the list below.

We noted in the proposal that § 11.6(b) will continue to allow breeds other than Tennessee Walking Horses and racking horses to use certain rollers, chains, and bell boots weighing 6

ounces or less, as well as pads that elevate or change the angle of hooves 1 inch or less at the heel, and certain toe extensions, shoes, and metal hoof bands. Except for Tennessee Walking Horses and racking horses, for which all action devices are prohibited under proposed paragraph (c)(1), we also proposed in paragraph (b) to continue to allow the use of an action device on each limb of a horse if the device weighs 6 ounces or less.

As proposed, we are moving from current § 11.2 to § 11.6(b)(1) the provision prohibiting more than one action device permitted under this section on any limb of a horse. We did not receive comments specific to that change and are finalizing as proposed.

In paragraph (b)(2), we are moving from current (b)(1) the prohibition on all beads, bangles, rollers, and similar devices, with the exception of rollers made of lignum vitae (hardwood), aluminum, or stainless steel, with individual rollers of uniform size, weight and configuration, provided each such device may not weigh more than 6 ounces, including the weight of the fastener. We did not receive comments specific to that provision and are finalizing as proposed.

In paragraph (b)(3), we are moving from current § 11.2(b)(2) the prohibition on chains weighing more than 6 ounces each, including the weight of the fastener. We did not receive comments specific to this provision and are finalizing as proposed. (We received comments on the prohibition of chains and chain weights pertaining to Tennessee Walking Horses and racking horses, which we address under "Action Devices, Pads, and Wedges" below.)

In paragraph (b)(4), we are moving from current § 11.2(b)(3) the prohibition on chains with links that are not of uniform size, weight, and configuration and chains that have twisted links or double links. We did not receive comments specific to that provision and are finalizing as proposed.

In paragraph (b)(5), we are moving from current § 11.2(b)(4) the prohibition on chains that have drop links on any horse that is being ridden, worked on a lead, or otherwise worked out or moved about. We did not receive comments specific to that provision and are finalizing as proposed.

In paragraph (b)(6), we are moving from current § 11.2(b)(6) the prohibition on chains or lignum vitae, stainless steel, or aluminum rollers which are not smooth and free of protrusions, projections, rust, corrosion, or rough or sharp edges. We did not receive

comments specific to that provision and are finalizing as proposed.

In paragraph (b)(7), we are moving from current § 11.2(b)(7)(i) the prohibition on boots, collars, or any other devices, with protrusions or swellings, or rigid, rough, or sharp edges, seams or any other abrasive or abusive surface that may contact a horse's leg. We did not receive comments specific to that provision and are finalizing as proposed.

In paragraph (b)(8), we are moving from current § 11.2(b)(7)(ii) the prohibition on boots, collars, or any other devices that weigh more than 6 ounces, except for soft rubber or soft leather bell boots and/or quarter boots that are used as protective devices. We did not receive comments specific to that provision and are finalizing as proposed.

In paragraph (b)(9), we are moving from current § 11.2(b)(8) the prohibition on pads or other devices on horses up to 2 years old that elevate or change the angle of such horses' hooves in excess of 1 inch at the heel. While we received many comments on the prohibition of pads on Tennessee Walking Horses and racking horses, we did not receive comments on this specific provision as it pertains to § 11.2(b) and are finalizing as proposed.

In paragraph (b)(10), we are moving from current § 11.2(b)(9) the prohibition on any weight on horses up to 2 years old, except a keg or similar conventional horseshoe, and any horseshoe on horses up to 2 years old that weighs more than 16 ounces.

Some commenters stated that USDA should prohibit weighted shoes on any Tennessee Walking Horses and racking horses at covered events because they can increase the potential for injury in the form of tissue damage or overexertion of the musculature. One commenter cautioned against an outright prohibition on weighted shoes, noting that all horseshoes have weight, and proposed a maximum shoe weight limit of 16 ounces, while other commenters suggested setting a similar shoe weight limit for all horses. Another commenter stated that some Tennessee Walking Horses are wearing shoes made from metals heavier than steel or iron, and that the heavier shoes are inducing soring even in horses in flat-shod classes. To prohibit the use of heavier metals for shoes, some commenters recommended that the shoes required for horses of all ages be made completely of rubber, plastic, aluminum, or steel. On the other hand, some commenters asked that we continue to allow heavy shoes for horses that tend to be overly "pacey."

We are finalizing as proposed. While we limit shoe weights on horses up to 2 years old to 16 ounces or less, there is no scientific literature that we are aware of on which we can base a prohibition on shoes weighing more than 16 ounces on older horses at this time. Therefore, we are not including a weight limit on shoes for horses 2 years and older. We are actively collecting data on the usage and effects of shoes weighing more than 16 ounces on horses and will consider prohibiting such shoes in a future rulemaking, if warranted.

Another commenter stated the proposed rule is insufficient because it allows the use of "a keg or similar conventional horseshoe" without a weight limitation.

The proposed provision in paragraph (b)(10) actually limits horseshoe weights on horses up to 2 years old to 16 ounces or less, which includes a "keg or similar conventional horseshoe." However, to ensure that the provision is clear on this point we are including the words "that weighs 16 ounces or less" after the words "keg or similar conventional horseshoe."

Many commenters asked that hoof bands and any weight attached to the hoof or horseshoe (other than a keg or similar conventional horseshoe itself, including the allowable caulk and any studs or material used on the bottom of the shoe for traction) weighing more than 16 ounces should be prohibited on horses of any age in the three breeds known to be subjected to soring. We are not making any changes to the regulations regarding hoof bands or horseshoe weights. Horseshoes are not a prohibited item and hoof bands, when used in accordance with proposed paragraph (b)(17), can serve to secure the shoe to the hoof. As we note above, we continue to collect data on the effects of shoes weighing more than 16 ounces on horses.

A commenter stated that if USDA allows heavy shoes, it should require management to inform APHIS if heavy shoes will be permitted at a show (extending § 11.16(a)(7) accordingly).

Proposed § 11.16(a)(7) requires that management contact APHIS if they plan to allow any horse to be shown, exhibited, or sold undergoing therapeutic treatment with any of the items otherwise prohibited in § 11.6. The proposed regulations do not consider shoes weighing more than 16 ounces on horses 2 years old and older to be a prohibited item. We are not making a change to the regulations that would require management to inform APHIS if they plan to allow heavy shoes because absent such a prohibition, we

do not expect any show to prohibit such shoes. We continue to gather information on the effects of shoes weighing more than 16 ounces and will consider future limitations on such shoes if we determine their prohibition is necessary to prevent the soring of horses.

The same commenter added that whether or not management plans to allow horses to wear pads or wedges, if they plan to allow the use of heavy shoes on horses, a farrier should be required to be present or on call to pull a shoe for inspection if called for by an APHIS representative or HPI.

The farrier requirement stands for any horse show that has appointed an APHIS representative or HPI to conduct inspections, as even horses wearing shoes that are not heavy may need to have a shoe pulled upon request of an inspector to check for conditions such as pressure shoeing. A trained farrier's presence is important because only a farrier can safely remove or replace shoes on a horse.

Several commenters cited possible problems with shoe width impeding proper inspection of the horse's hooves. Some commenters recommended a requirement that shoe dimensions cannot exceed 1½ inches wide by ½ inch thick and cannot obstruct the use of hoof testers on the sole and frog, and one suggested that APHIS adopt language from other breed disciplines by adding to the provision "the sole and entire frog of the foot must be visible."

We are not setting specific dimension requirements on shoes because we reviewed research available regarding horseshoe dimensions and did not determine there was sufficient evidence to justify any restrictions at this time. APHIS will collect data regarding the use of these shoes and consider horseshoe dimension restrictions in a future rulemaking if we determine they are necessary to prevent the soring of horses. We note that APHIS may examine or require that a shoe be removed at any time if necessary to determine if a horse is sore.

In paragraph (b)(11), we are moving from current § 11.2(b)(10) the prohibition on artificial extension of the toe length, whether accomplished with pads, acrylics, or any other material or combinations thereof, that exceeds 50 percent of the natural hoof length, as measured from the coronet band, at the center of the front pastern along the front of the hoof wall, to the distal portion of the hoof wall at the tip of the toe. The artificial extension must be measured from the distal portion of the hoof wall at the tip of the toe at a 90-

degree angle to the proximal (foot/h hoof) surface of the shoe.

Some commenters stated that, if they are to remain, recommended toe extensions should be within the limit of 50 percent of the natural hoof length as measured from the hairline of the hoof capsule to the center of the front pastern along the front of the hoof wall to the distal portion of the hoof wall at the tip of the toe. One commenter recommended that the maximum toe length be 4½ inches, including the thickness of the shoe, measured as specified in United States Equestrian Federation (USEF) General Rule 510.²⁴

We are finalizing as proposed. To make a determination about the specific lengths recommended by commenters, we will require more research on artificial toe lengths used for other horse breeds, most of which are regulated under USEF.

Another commenter stated that allowing toe extensions in proposed § 11.6(b)(11) is open to abuse because “natural hoof length” can be manipulated to far exceed ideal hoof length, and then a further toe extension is permitted beyond that. The commenter added that artificial toe extensions should be prohibited entirely.

We assume the commenter’s concern is not with the provision as applied in § 11.6(b)(11), but with artificial toe extensions and soring in Tennessee Walking Horses and racking horses, insofar as soring is rarely practiced and confers no competitive advantage to horses that do not practice the “big lick” step in Performance division events. We note that all artificial toe extensions will be prohibited on any Tennessee Walking Horse or racking horse unless such horse has been prescribed and is receiving therapeutic treatment as approved in writing by a licensed veterinarian. However, even if a Tennessee Walking Horse or racking horse is wearing artificial toe extensions under a therapeutic exemption, the toe extension cannot exceed the restrictions for all horses in § 11.6(b)(11) and (12) of this final rule. To the commenter’s point, regulations cannot prescribe “ideal” hoof length, but a prohibition of all toe extensions unless therapeutically required can be considered in a future rulemaking if evidence arises that supports such a prohibition in other horse breeds.

In paragraph (b)(12), we are moving from current § 11.2(b)(11) the prohibition on toe length that does not

exceed the height of the heel by 1 inch or more. The length of the toe must be measured from the coronet band, at the center of the front pastern along the front of the hoof wall to the ground. The heel must be measured from the coronet band, at the most lateral portion of the pastern, at a 90-degree angle to the ground, not including normal caulks at the rear of a horseshoe that do not exceed ¾ inch in length. That portion of caulk at the rear of a horseshoe in excess of ¾ of an inch must be added to the height of the heel in determining the heel/toe ratio.

A few commenters stated that caulks exceeding ¾ of an inch should be prohibited entirely.

We are finalizing as proposed. We will consider such a prohibition in a future rulemaking if evidence is identified supporting such a prohibition. As it stands now, caulks exceeding ¾ of an inch must have the extra height considered in heel/toe ratio measurements.

In paragraph (b)(13), we are moving from current § 11.2(b)(12) the prohibition on pads that are not made of leather, plastic, or a similar pliant material. While we received numerous comments regarding the prohibition on pads for Tennessee Walking Horses and racking horses, we received none that opposed our moving this specific provision to proposed § 11.6(b) and we are finalizing as proposed.

In paragraph (b)(14), we are moving from current § 11.2(b)(13) the prohibition on any object or material inserted between the pad and the hoof other than acceptable hoof packing, which includes pine tar, oakum, live rubber, sponge rubber, silicone, commercial hoof packing, or other substances used to maintain adequate frog pressure or sole consistency. We proposed and are adding a prohibition on the use of acrylic or other hardening substances as hoof packing.

A commenter stated that eliminating non-therapeutic pads and wedges in proposed § 11.6(c)(3) means that § 11.6(b)(14) should be revised to prohibit all objects or materials inserted into the hoof, as most hoof-packing materials require a pad to hold them in place.

We are making no changes in response to the commenter. Certain pads continue to be permitted for breeds other than Tennessee Walking Horses and racking horses not covered under § 11.6(c). Moreover, pads for therapeutic treatment can still be prescribed by a licensed veterinarian in accordance with proposed § 11.6(c)(3) for Tennessee Walking Horses and racking horses.

We proposed in paragraph (b)(15) to move from current § 11.2(b)(14) the prohibition on single or double rocker-bars on the bottom surface of horseshoes which extend more than 1½ inches back from the point of the toe, or which would cause, or could reasonably be expected to cause, an unsteadiness of stance in the horse with resulting muscle and tendon strain due to the horse’s weight and balance being focused upon a small fulcrum point.

A commenter asked that we develop a regulatory definition in § 11.6(b)(15) that clearly distinguishes between permitted shoes and prohibited “non-conventional” shoes and asked that we include other specific types of abusive shoes that APHIS wants to ban in order to prevent soring.

We are finalizing as proposed. Requirements pertaining to shoes are addressed in the discussion of § 11.6(b)(10); questions about the regulatory status of a specific shoe type can be directed to APHIS.²⁵

We proposed in paragraph (b)(16) to move from current § 11.2(b)(15) the prohibition on metal hoof bands, such as used to anchor or strengthen pads and shoes, if placed less than ½ inch below the coronet band. In paragraph (b)(17), we are moving from § 11.2(b)(16) the prohibition on metal hoof bands that can be easily and quickly loosened or tightened by hand, by means such as, but not limited to, a wing-nut or similar fastener.

A commenter asked why an exhibitor is not allowed to correct a loose hoof band and re-show.

We expect exhibitors presenting for inspection to check their horse for any compliance issues prior to actually presenting. If after the horse has passed inspection and prior to showing the custodian identifies that the hoof band has become loose, only then can the band be adjusted as needed under the supervision of an HPI authorized by the event or an APHIS representative.

In paragraph (b)(18), we proposed to move from current § 11.2(b)(17) the prohibition on any action device or any other device that strikes the coronet band of the foot of the horse except for soft rubber or soft leather bell boots that are used as protective devices. We did not receive comments specific to that provision and are finalizing as proposed.

In proposed paragraph (b)(19), we are moving from current § 11.2(b)(18) the prohibition on shoeing a horse or

²⁴ To view General Rule 510, go to <https://www.usef.org/forms-pubs/s9SeSv4S0Sc/gr-general-rules>.

²⁵ Send email to horseprotection@usda.gov, or U.S. mail to USDA/APHIS/AC, 2150 Centre Ave. Building B, Mailstop 3W11, Fort Collins, CO 80526-8117.

trimming a horse's hoof in a manner that will cause such horse to suffer, or can reasonably be expected to cause such horse to suffer pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving. To this prohibition, we added language not in current paragraph (b)(18) prohibiting paring the frog or sole in such a manner to cause the pain and distress described above, and prohibiting bruising of the hoof or any other method of pressure shoeing.

A commenter asked if a horse would be considered sore if a farrier accidentally trims a hoof too short, or if a ride across hard, rocky ground results in an accidental bruise to the sole.

We are finalizing as proposed. We note that under proposed § 11.6(b)(19), trimming a horse's hoof in a manner that will cause such horse to suffer, or can reasonably be expected to cause such horse to suffer pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving is prohibited. Also, bruising of the hoof or any other method of pressure shoeing is prohibited. Regardless of the intent of the farrier, any horse with such injuries entered into an event may be considered sore.

Another commenter stated that in all the APHIS "violations" issued there is not one pressure shoeing violation, so the justification for eliminating the pad on that basis is unfounded.

We disagree with the commenter about pressure shoeing. Pressure shoeing involves either cutting a significant portion of or causing significant trauma to a horse's hoof immediately before nailing a shoe to the hoof, and can cause or be expected to cause the horse to suffer pain or distress when moving. Further, the commenter is incorrect in stating there are no pressure shoeing violations. APHIS has issued at least one violation, in 2018, for pressure shoeing that is specifically a soring violation, but the number of violations issued for pressure shoeing is not indicative of its ability to cause pain and suffering in horses.

In paragraph (b)(20), we are moving from current § 11.2(b)(19) the prohibition on lead or other weights attached to the outside of the hoof wall, the outside surface of the horseshoe, or any portion of the pad except the bottom surface within the horseshoe. In addition, pads may not be hollowed out for the purpose of inserting or affixing weights, and weights may not extend below the bearing surface of the shoe. Hollow shoes or artificial extensions filled with mercury or similar substances are also prohibited in this paragraph.

While some commenters specifically asked us to consider prohibiting any weight of more than 16 ounces attached to the hoof or horseshoe on Tennessee Walking Horses, racking horses, and Spotted Saddle Horses, we received no comments specific to other prohibitions of this paragraph and are finalizing as proposed. Those comments are addressed under the discussion of paragraph (b)(10) above.

Stewarding

In proposed paragraph (b)(21), we added a prohibition on the use of whips, cigarette smoke, or similar actions or paraphernalia to distract a horse or to otherwise impede the inspection process during an examination, including but not limited to, holding the reins less than 18 inches from the bit shank.

The NAS study committee's earlier-cited observation of 61 inspection videos revealed numerous incidents of stewarding during the standing inspection that were not dealt with by the DQP, including holding the reins closer than 18 inches from the bit, often just below or on the shank. The committee noted that these restraint tactics can create a distraction during the palpation procedure by inducing pain in the oral cavity.²⁶ APHIS' experience in conducting inspections is consistent with NAS' observation.

A commenter stated it is necessary to hold the reins closer to the bit in order to control a horse undergoing palpation, as any flinch or movement from the horse will cause it to be turned down. We respond that such movements from a horse may indicate pain sensitivity upon palpation consistent with soring. An experienced, properly trained inspector can distinguish incidental movements of the horse from the specific behavioral signs of a pain response. The NAS study discusses several such behavioral indications of pain that are evaluated in veterinary clinical practice.²⁷

Another commenter recommended that in the prohibition, "alligator clips" be inserted after "smoke," adding that a far more detailed description of stewarding is needed in the regulations.

We are making no changes in response to the commenter's recommendation, as it is not possible to include an exhaustive list of all things that could be used to distract a horse or otherwise impede the inspection process. The prohibition of "other stewarding actions or paraphernalia to distract a horse or to otherwise impede

the inspection process during an examination" includes alligator clips and anything else used to distract a horse or otherwise impede the inspection process during an examination.

Prohibitions for Tennessee Walking Horses and Racking Horses

Under proposed § 11.6(c), we prohibited pads, action devices, artificial toe length extension, and lubricants on any Tennessee Walking Horse or racking horse at any horse show, horse exhibition, horse sale, or horse auction, unless such horse has been prescribed and is receiving therapeutic treatment using pads, wedges, toe length extensions, or substances as approved in writing by a licensed veterinarian in accordance with proposed § 11.14(b).

The current regulation (§ 11.2(b)) prohibits the use of a chain or other action device on each limb of a horse if the device weighs more than 6 ounces. Therefore, the proposal to prohibit all action devices on Tennessee Walking Horses and racking horses under § 11.6(c)(1) has the effect of extending the existing prohibition to action devices weighing 6 ounces or less.

We also proposed under § 11.6(c)(3) to prohibit all pads and wedges on any Tennessee Walking Horse or racking horse at any horse show, unless prescribed for therapeutic treatment. Under the existing regulations, these horses were allowed to wear pads or wedges that elevate the angle of horses' hooves less than 1 inch at the heel. Under this proposal, no pads or wedges would be allowed, regardless of whether they create an angle less than 1 inch at the heel, unless a therapeutic exemption has been obtained.

In the proposed rule, we provided support indicating that pads, wedges, and action devices can, on their own or in conjunction with other substances and practices, cause soring. For example, with respect to pads, we noted that they can "cause a horse's foot to strike the ground at an unnatural angle" and "can also induce pain and soring over time." (88 FR 56936). We also noted in the proposed rule that the "clear majority of horses diagnosed by APHIS representatives and DQPs as being sore are Tennessee Walking Horses and racking horses, specifically those that participate in pads and action devices in certain competitions favoring a high-stepping, accentuated gait," that is, in competitions in which the use of soring could confer a "significant performance advantage" (88 FR 56937).

We further stated that, based on our observations and experience, including

²⁶ NAS study, page 49.

²⁷ NAS study, pages 54–65.

“compliance inspections, investigations, enforcement of alleged violations, oversight of industry-based inspection programs, and outreach to the horse industry . . . a relationship continues to exist between the use of certain permitted devices and soring, notably among Tennessee Walking Horses and racking horses.” (ibid). Finally, we indicated that this relationship between the use of devices and soring is not present in Morgans, American Saddlebreds, and other gaited breeds, and indicated that soring is rarely detected in flat-shod Tennessee Walking Horses and racking horses.

In other words, in the proposed rule we advanced two bases for the proposed prohibition on the use of pads, wedges, and action devices for Tennessee Walking Horses and racking horses: First, that pads, wedges, and action devices may, under certain circumstances, and particularly in conjunction with other substances and practices, cause soring; and second, that the use of pads, wedges, and action devices among Tennessee Walking Horses and racking horses is strongly associated with soring.

In the proposed rule, we also proposed under § 11.6(c)(2) to prohibit all artificial extension of the toe length in Tennessee Walking Horses and racking horses unless a horse has been prescribed it for therapeutic treatment. This proposal removes the existing allowance for artificial toe extensions on Tennessee Walking horses and racking horses that are less than 50 percent of the natural hoof length. We explain our rationale for the proposed ban on such artificial extensions below, under “Artificial Toe Extensions.”

Finally, we also proposed under § 11.6(c)(4) to prohibit the application of lubricants above the hoof of any Tennessee Walking or racking horse at any horse show, exhibition, sale, or auction, unless approved in writing by a licensed veterinarian for therapeutic use. Under the current regulations in § 11.2(c), all other substances are already prohibited on the extremities above the hoof of any Tennessee Walking Horse or racking horse while being shown, exhibited, or offered for sale at any horse show, horse exhibition, or horse sale or auction. We explain our rationale for the proposed ban on lubricants below, under “Lubricants.”

Before we discuss the comments we received on the proposed prohibitions on pads, wedges, and action devices, we feel it important to situate them within the historical context of our administration of the HPA regulations over the past 50 years and our knowledge of the relationship between

pads, wedges, and action devices and the soring of horses within the Tennessee Walking Horse and racking horse industry.

In a 1979 rulemaking,²⁸ APHIS stated that “if the horse industry makes no effort to establish a workable self-regulatory program for the elimination of sore horses, or if such program is established but does not succeed in eliminating the sore horse within a reasonable length of time, the Department will give serious consideration to the prohibition of all action devices and pads.” (Then, as now, an unacceptable percentage of horses wearing these devices and pads was found to be noncompliant with the Act.) Between 1979 and 1982, Auburn University School of Veterinary Medicine conducted a study (the “Auburn study”) that evaluated the effects of chronic and acute inflammatory responses on the front and hind limbs of horses. That study, which we discuss at greater length later in this document, determined that the combined use of prohibited substances and chains on the pasterns of horses caused lesions, tissue damage, and visible alterations of behavior consistent with soring. Finally, in a 1988 rulemaking²⁹ to expand the list of prohibited devices and equipment on horses, APHIS noted that “experts in the horse industry have advised us that elevating the foot can cause an increase in tension in the tendons, which can lead to inflammation. A tall pad can also contribute to stresses caused by extra weight on a horse’s foot. Additionally, elevating only the front feet, as is typically done, causes an unnatural angulation of the back and body of the horse, and changes the alignment of the shoulder muscles, the vertebrae, and the pelvis, all of which are then subject to stress, irritation, and inflammation.”

In other words, by 1979 we had identified a correlation between the use of action devices and pads and an increased incidence of soring within the Tennessee Walking Horse and racking horse industry; by 1982, a peer-reviewed third party had identified that chains can, in conjunction with other prohibited substances, cause effects consistent with soring; and by 1988, we had received expert advice that certain uses of pads and wedges can cause soring. As we mentioned above, the data cited in tables 1 and 2 of the proposed rule regarding noncompliance rates within the industry, which covered only a handful of years, must be viewed in

the context of the aggregate body of data that the Agency has amassed over 50 years of enforcing the HPA. This includes the above data.

As we noted in the proposed rule, we have attempted many solutions over the years to address the increased incidence of soring in the Performance division of the Tennessee Walking Horse and racking horse industry, a division that relies extensively on the pads, wedges, and action devices that we proposed to prohibit. Beginning in 2010, APHIS undertook several nonregulatory approaches to help the industry improve compliance with the Act, among them increased engagement with industry groups, inspection workshops for DQPs, and stepped-up APHIS presence at certain shows to oversee inspections and check whether disqualified persons were participating. From 2017 through 2022, APHIS hosted joint training sessions with HIOs to ensure all DQPs received the same training.

Nonetheless, these many attempts at nonregulatory solutions have done little to move us toward the statutory goal of eliminating soring, and incidents of soring remain statistically elevated in the Performance division of the Tennessee Walking Horse and racking horse industry, especially when compared to rates of soring noncompliance found in inspections of flat-shod Tennessee Walking Horses and racking horses. In FY 2022, APHIS VMOs found noncompliances in 34.1 percent of the 930 horses they inspected at Performance division events, compared to a noncompliance rate of only 1.7 percent of the 357 horses they inspected at flat-shod events, in which horses compete without wearing pads and action devices. As we note elsewhere in this rule, horses in both the Performance and flat-shod divisions are the same breeds, frequently come from the same bloodlines, and practice the same gaits. What differentiates these horses is the presence or absence of the tall pads, wedges, chains, and other action devices used in training and exhibition, and the exaggerated gait of Performance division horses.

Accordingly, after 44 years of attempts to encourage this division to address soring without recourse to Federal intervention in the form of restrictions and prohibitions, we have reached a point at which it is apparent that the prohibitions articulated in the proposed rule, along with establishing a corps of third-party inspectors working independently of the horse industry and free of conflicts of interest, are a necessary recourse to prevent the soring of horses. This determination is shared

²⁸ 44 FR 25172–25184, April 27, 1979.

²⁹ 53 FR 14778–14782, April 26, 1988.

by other parties with significant experience in and knowledge of the equine industry: The changes to the HPA regulations are supported by the American Veterinary Medical Association, the American Association of Equine Practitioners, and other major veterinary organizations in the United States. The outcome will place the Department in a stronger position to achieve the remedial purpose of the HPA, which is to prevent and eventually eliminate the abusive practice of soring.

We received many comments that specifically addressed our creation of a separate list of prohibitions under § 11.6(c) exclusively for the Tennessee Walking Horse and racking horse breeds.

Numerous commenters stated that APHIS must extend the list of prohibited actions and items specific to Tennessee Walking and racking horses in § 11.6(c) to all horse breeds, and Spotted Saddle Horses in particular. A smaller number of commenters opposed to the proposed rule stated that, by creating a separate list of prohibitions, APHIS is unfairly singling out Tennessee Walking Horses and racking horses and should be inspecting events featuring other breeds equally.

We are making no changes to § 11.6(c) regarding the breeds covered in that paragraph. Our reasoning for allowing the use of these items on some breeds, but prohibiting all such items on Tennessee Walking Horses and racking horses, is as follows. We did not state in the proposed rule that pads, wedges, action devices, and toe extensions are always necessarily and *per se* associated with soring. While they can cause soring, as we stated in the proposed rule, action devices and pads are sometimes used for proprioceptive purposes during training of Morgans, American Saddlebreds, and other gaited breeds.³⁰ If the use of action devices and pads always and *per se* caused soring, we would detect soring in those breeds that rely on such devices and pads at a rate commensurate with the incidence of soring in the Performance division of the Tennessee Walking Horse and racking horse industry. However, based on our knowledge of all horse breeds showing or exhibiting in the United States, soring in breeds other than Tennessee Walking Horses and racking horses is rare.

We are not contending that soring never occurs in other breeds; for instance, soring has been known to

occur in the Spotted Saddle Horse community. However, the infrequency of soring in that breed does not warrant the targeted enforcement that we consider necessary to address the dramatically higher incidence of soring detected among Tennessee Walking Horses and racking horses, especially those competing in the Performance division with tall pads and action devices.³¹

APHIS will continue to enforce the Act and monitor the instances of soring in breeds and classes other than the Performance division of the Tennessee Walking Horse and racking industry. However, as we noted in the proposed rule and again reiterate, soring imparts little to no advantage to competitors at these shows, as the gaits on which most breeds are evaluated are noticeably distinct from the exaggerated “big lick” step featured at Tennessee Walking horses and racking horse Performance division events, and events for other breeds do not incentivize soring by placing such a premium on the “big lick” step.

A commenter, noting that the proposal states that “soring in breeds other than Tennessee Walking Horses and racking horses confers no significant performance advantage and is therefore rarely if ever practiced” stated that this is a blanket assumption that glosses over the longstanding problems with the current inspection model and ignores that Spotted Saddle horses have been targeted as well. As support, the commenter noted that the U.S. Department of Justice successfully prosecuted Barney Davis, a Spotted Saddle Horse trainer, and two of his employees for various violations of the HPA after a USDA investigation.

The Act prohibits soring in all breeds of horses, which is why the U.S. Department of Justice was able to successfully prosecute a soring violation in a Spotted Saddle Horse. This particular case does not discount the proposed rule’s statements on other breeds, nor does it invalidate our risk-based inspection method. We use the same inspection protocol on all breeds of horses covered under the Act. In our more than 50 years of enforcing the Act, soring has occurred far more frequently at Tennessee Walking Horse and racking horse shows than at Spotted Saddle

horse shows,³² and the exclusion of Spotted Saddle Horses or any other breed from proposed § 11.6(c) does not preclude a horse in those breeds at any covered event from being diagnosed as sore.

One commenter stated that the final rulemaking should reaffirm that the HPA applies to all horse show breeds as provided in proposed § 11.6(a) and (b), and that the new restrictions provided in § 11.6(c) specific to Tennessee Walking Horses, racking horses, and Spotted Saddle Horses are not intended to negate the continuing obligation of other breeds and shows to comply with the law.

The new regulatory prohibitions on Tennessee Walking Horses and racking horses do not negate the obligation of other breeds also covered under the Act to be in compliance with the Act’s provisions, which we monitor through a risk-based inspection protocol. The general prohibitions in § 11.6(a) apply to all horse breeds. Further, while we do not include Spotted Saddle Horses under the prohibitions in § 11.6(c), this fact does not preclude APHIS from issuing a violation for a finding of soring, or a finding of use of a device is prohibited under § 11.6(a), for a Spotted Saddle Horse or any other breed, or for a finding that the use of an action device, method, practice, or substance “causes or can reasonably be expected to cause such horse to be sore or is otherwise used to mask previous and/or ongoing soring.” These horses can be diagnosed as sore—or a device, method, practice, or substance can be determined to be prohibited under § 11.6(a)—regardless of breed.

One commenter stated that USDA lacks evidence showing an absence of soring in other breeds and has itself acknowledged that other breeds do engage in soring. The commenter added that APHIS has found evidence of soring during inspections conducted at Spotted Saddle Horse and Missouri Fox Trotter events.

As addressed above, APHIS focuses its risk-based enforcement efforts where soring is most concentrated, *i.e.*, on Tennessee Walking Horse and racking horse shows, particularly Performance division events in which horses wear the tall pads and action devices and practice the “big lick.” Persons exhibiting horses in events in which soring confers no competitive advantage have no incentive to sore their horses. Further, APHIS has never denied that soring occurs, albeit rarely, in breeds other than Tennessee Walking Horses

³⁰ Clayton, Hilary, “Rehabilitation for Horses.” Paper presented at American Association of Equine Practitioners, July 2014.

³¹ APHIS inspections at Fox Trotter, Spotted Saddle Horse, Rocky Mountain Horse, and Mountain Horse shows between FY 2017 and FY 2022 resulted in a noncompliance rate of under 1 percent. The overall rate of noncompliance at performance shows featuring Tennessee Walking Horses in pads and action devices in FY 2022 was 34.1 percent.

³² See footnote 31.

and racking horses.³³ From FY 2017 to FY 2022, APHIS conducted 88 inspections at 6 shows featuring Fox Trotter, Spotted Saddle Horses, Rocky Mountain Horses, and Mountain Horses and found a rate of noncompliance under 1 percent, compared to a 34 percent rate of noncompliance found by APHIS VMOs in inspections of Performance division Tennessee Walking Horses in FY 2022 alone.³⁴

Action Devices, Pads, and Wedges (§ 11.6(c)(1) and (3))

In the proposal, we invited public comment on the effects upon horses of action devices and pads, including wedges, whether used alone or in combination with other training methods. We have chosen to address comments on action devices and pads under one heading because many commenters made statements referring to them in combination.

Numerous commenters expressed general support for prohibiting action devices and pads in order to prevent soring. A smaller number stated support for prohibiting action devices and pads because they unfairly allow sored horses to gain a competitive advantage. Several other commenters stated that action devices and pads, when used in the ways we have addressed above, are being used to sore horses.

On the other hand, many commenters opposed prohibiting action devices and pads for Tennessee Walking Horses and racking horses, stating that pads, chains, and other action devices currently allowed under the regulations do not cause soring. A few commenters stated that the action devices, tall pads, and weighted shoes enhance the talent for the “big lick” that these horses already have. Another commenter stated that equine veterinarians that regularly treat the Tennessee Walking Horse credit the use of the pads with decreased laminitis but provided no support to back this claim.

One commenter stated that prohibiting pads and action devices exceeds USDA’s statutory authority because Congress made clear that the “twin goals” of the Act are to prohibit soring while simultaneously protecting and enhancing fair competition. On this point, the commenter cited as support *Thornton v. United States Department of Agriculture*,³⁵ quoting from it that

“[t]he Horse Protection Act was adopted to further two public purposes: the altruistic one of protecting the animals from an unnecessary and cruel practice and the economic one of eliminating unfair competition from sored pseudo-champions that could fatally damage the Tennessee walking horse industry.”³⁶ The commenter posited that the proposed prohibition on pads and action devices among the Tennessee Walking Horse and racking horse industry would undermine fair competition by imposing collateral punishments on members of the industry who do not sore their horses, and thus was inconsistent with the Act.

The purpose of the Act is to prevent soring of horses, which has benefits for the welfare of horses and for eliminating unfair competition. The “Congressional statement of findings” states that horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore. Nothing in the regulations—which apply to all Tennessee Walking horses and racking horses, and which are aimed at addressing a practice, soring, that Congress found to cause unfair competition—undermines fair competition.

A commenter stated that it appeared that our rationale for proposing to ban pads and action devices on Tennessee Walking Horses and racking horses at regulated events was that, because some percentage of the owners and/or trainers who show horses in the Performance division of competition seem to be involved in soring, the way to address soring was to prohibit action devices and pads for all Tennessee Walking Horses and racking horses. The commenter stated that APHIS had misconstrued its authority under the Act to prohibit devices which, the commenter asserted, was limited to prohibiting only devices that cause soring. The commenter stated APHIS’ proposed prohibitions were based on the erroneous legal premise that the Secretary has authority to eliminate any practice, however safe in itself, that seems to be associated in some loose statistical way with the members in the industry who engage in *other* practices that are already separately prohibited. The commenter stated that this interpretation of the Act could be used by APHIS to prohibit events entirely,

the economic one of eliminating unfair competition from sored pseudo-champions that could fatally damage the Tennessee walking horse industry.” *Id.* at 1511 (internal citations removed).

³⁶ Tennessee Walking Horse Celebration comment, page 27.

because staging any horse show could contribute to soring.

The commenter is incorrect that the Act limits prohibitions of devices to those that cause soring; section 5 (15 U.S.C. 1824(7)) and section 9 (15 U.S.C. 1828) jointly authorize APHIS to prohibit the use of devices by regulation if the prohibition is necessary to prevent soring. To that end, we disagree with the commenter’s contention that there is no more than a loose statistical connection between the use of pads and action devices within the Tennessee Walking Horses and racking horse industry and incidences of soring; table 1 of the proposed rule indicated that noncompliance, primarily due to soring, is 1300 percent more likely in the Tennessee Walking Horse and racking horse division that uses pads and action devices than in the Tennessee Walking Horse and racking horse division that does not.³⁷ The commenter’s contention that APHIS’ interpretation of the Act would authorize the wholesale prohibition of all horse shows is likewise in error. There is no provision of the Act that authorizes the elimination of horse shows and exhibitions.

The commenter also stated that because the Act does not prohibit practices or items that do not cause soring, it does not provide the USDA authority to prohibit action devices and pads. To the point regarding authority, we disagree that USDA lacks authority under the Act to prohibit pads and action devices. Section 5 (15 U.S.C. 1824) of the Act specifically prohibits, as unlawful, the showing or exhibiting of a sore horse. Section 2 (15 U.S.C. 1821) of the Act defines “sore” to include “any other substance or device” that “has been used by a person on any limb of a horse . . . and, as a result of such . . . use . . . such horse suffers, or can reasonably be expected to suffer, physical pain . . . when walking, trotting, or otherwise moving . . . except that such term does not include” use for therapeutic treatment. Section 9 (15 U.S.C. 1828) of the Act provides USDA with broad authority to issue regulations as deemed necessary to carry out the provisions of this chapter. Finally, section 5 (15 U.S.C. 1824(7)) of the Act authorizes APHIS to prohibit the showing or exhibiting of a horse which

³³ Persons can report suspected cases of soring to horseprotection@usda.gov for further investigation.

³⁴ Proposed rule (88 FR 56930), table 1.

³⁵ *Thornton v. U.S. Dep’t of Agric.*, 715 F.2d 1508 (11th Cir.) 1983. This case provides that “[t]he Horse Protection Act was adopted to further two public purposes: the altruistic one of protecting the animals from an unnecessary and cruel practice and

³⁷ See proposed rule (88 FR 56930), table 1, FY 2017 to FY 2022 average noncompliance rate detected by APHIS. Over the 6 years of data provided, noncompliance rates for Performance division Tennessee Walking Horses and racking horses averaged 25.1 percent, whereas noncompliance rates for flat-shod Tennessee Walking Horses and racking horses during that same period was 1.91 percent.

is wearing or bearing any equipment, device, paraphernalia, or substance which the Secretary by regulation under section 9 (15 U.S.C. 1828) prohibits to prevent the soring of horses. The proposed ban on action devices and pads for Tennessee Walking Horses and racking horses is therefore within the Agency's statutory authority in several ways. First, as we stated in the proposed rule and reiterate in this rule, action devices and pads may, under certain circumstances, and particularly in conjunction with other substances and practices, cause soring. It is thus within our statutory authority under section 2 (15 U.S.C. 1821) to prohibit their use insofar as they can cause soring. Second, irrespective of action devices and pads causing soring, there is a statistically elevated incidence of soring in the Performance division of the Tennessee Walking Horse and racking horse industry that is not found in other breeds that compete in pads and action devices, nor is it found in the flat-shod division of the Tennessee Walking Horse and racking horse industry, which does not compete in pads and action devices. The statistically elevated incidence of soring is thus breed and class-specific. It is also long-standing; again, by 1979, APHIS was already aware of increased incidence of soring within the Performance division. Finally, it has not been able to be addressed by other means, despite many efforts by the Agency to do so. Accordingly, the prohibitions in this rule are also within our statutory authority under sections 5 and 9 (15 U.S.C. 1824 and 1828) of the HPA as necessary to prevent the soring of horses.

The same commenter added that the proposed ban on action devices and pads is arbitrary and capricious because the use of action devices and pads does not, *per se*, cause soring. Similarly, other commenters stated that pads and action devices have never been shown to cause soring.

As we note above, we did not state in the proposed rule that pads and action devices *per se* cause soring; indeed, we pointed to specific examples where they are used for purposes that do not result in soring. What we said, however, is that they can cause soring. In this regard, we disagree with the latter commenters that pads and action devices do not cause soring. We have provided support in the proposal and this final rule indicating that chains and other action devices can inflict pain and exacerbate soring through repeated strikes to the leg in training and while the horse performs, particularly if the leg is already irritated from soring off-

site (e.g., if irritating substances have also been applied to the skin or if the leg is sore from the use of heavier action devices at the horse's home barn, away from the show). Indeed, the NAS study notes that horses are often trained with action devices weighing in excess of the 6-ounce action devices currently allowed for competition; action devices above this weight are prohibited during shows and exhibitions because they can cause soring.³⁸ We have also provided that pads, when used in certain ways, can cause a horse's foot to strike the ground at an unnatural angle and induce tendon problems and soring over time, as can the repeated lifting of heavy pads and horseshoes.

The same commenter added that if action devices and pads were a cause of soring then the inspection results would have shown a violation rate of near 100 percent.

As noted previously, the commenter's stated assumption was that the Act requires APHIS to establish that a device causes soring in order to prohibit its use during regulated events. The Act, however, does not require us to prove that a device always and *per se* causes soring in order to prohibit it. Rather, under section 5 (15 U.S.C. 1824(7)) and section 9 (15 U.S.C. 1828) of the Act, we may prohibit the use of a device through the issuance of regulations if we determine that the prohibition is necessary to prevent the soring of horses. Pads and action devices may be employed in certain ways to cause soring, and the class of Tennessee Walking Horses and racking horses that use pads and action devices, the Performance division, is disproportionately likely to have horses found to be sore following inspection. For these reasons, we consider it necessary to prohibit the use of pads and action devices on Tennessee Walking Horses and racking horses in order to prevent the soring of horses.

As support for pads and action devices not causing soring, one commenter cited a joint statement by two major veterinary organizations and a pair of studies that evaluated the effects of pads and action devices on horses.³⁹ In the joint statement by the American Veterinary Medical Association and the American Association of Equine Practitioners,⁴⁰ the commenter quoted the statement

that "there is little scientific evidence to indicate that the use of action devices below a certain weight are detrimental to the health and welfare of the horse. . . ."

What the commenter declined to add was that the joint statement also "support[s] a ban on the use of action devices and performance packages in the training and showing of Tennessee Walking Horses." The excerpt quoted by the commenter, in its full context, reads as follows:

"Action devices used in the training and showing of Tennessee Walking Horses include chains, ankle rings, collars, rollers, and bracelets of wood or aluminum beads. When used in conjunction with chemical irritants on the pastern of the horse's foot, the motion of the action device creates a painful response, resulting in a more exaggerated gait. While there is little scientific evidence to indicate that the use of action devices below a certain weight are detrimental to the health and welfare of the horse, banning action devices from use in the training and showing of Tennessee Walking Horses reduces the motivation to apply a chemical irritant to the pastern."

We agree with the professional judgment of the American Medical Veterinary Association and the American Association of Equine Practitioners, although we note the Act only covers showing, and not training, activities. If no action devices are allowed on Tennessee Walking Horses and racking horses during shows and exhibitions, there is less incentive to sore a horse as there will be no mechanism to strike the limb to induce the exaggerated show gait through pain.

Further, the joint statement notes that "[p]erformance packages (also called stacks or pads) . . . add weight to the horse's foot, causing it to strike with more force and at an abnormal angle to the ground. They also facilitate the concealment of items that apply pressure to the sole of the horse's hoof. Pressure from these hidden items produces pain in the hoof so that the horse lifts its feet faster and higher in an exaggerated gait."

The knowledge and expertise that these two veterinary organizations have regarding the horse industry and equine veterinary science is not in question. We concur with the full statement but have more to say below about the point regarding action devices below a certain weight being detrimental.

The commenter also cited two other studies⁴¹ in claiming that the use of

³⁸ NAS study, page 81.

³⁹ National Celebration comment, page 22.

⁴⁰ Joint Statement of the Am. Med. Veterinary Assoc. and Am. Assoc. of Equine Practitioners, 2016 [included in Celebration comment, incorrectly dated 2012], Exhibit 17 of comment at <https://www.regulations.gov/comment/APHIS-2022-0004-8788>.

⁴¹ Thermography in Diagnosis of Inflammatory Processes in Horses in Response to Various Chemical and Physical Factors: Summary of the Research from September 1978 to December 1982, prepared by Dr. Ram C. Purohit, Associate Professor

action devices and pads does not cause a horse to be sore. We cited one of these studies (the “Auburn study”) in the proposal to support the prohibition of action devices and pads as being necessary to prevent soring.

The Auburn study involved exercising horses for 2 to 3 weeks wearing 2-, 4-, and 6-ounce chains (action devices), after which it was determined that the use of such chains for a duration of 2 to 3 weeks “did not produce any harmful effects to the horses’ legs, with exception to some loss of hair from 6-ounce chains in the pastern areas.”⁴² The commenter also reported that a USDA study in 1975 similarly found no lesions present on horses wearing chains under 8 ounces in weight.

While we acknowledge that the lighter chains in and of themselves appear in these particular studies to have no harmful effects on horses, we note that the Auburn study also applied irritating substances to horses’ limbs and exercised them in such chains. Under these conditions, Dr. Ram C. Purohit, the study’s author, reported that “[t]he combined use of detergent, chains, and mustard oil on the pasterns of horses causes lesions and tissue damage visible to the naked eye. They also cause alterations of the horse’s behavior that are predictable.”⁴³

While the commenter noted that Dr. Purohit achieved these effects by exercising horses in 10-ounce chains, they did not address our point that “if a horse may be trained sore using 10-ounce chains (or other weight and/or substance combinations)⁴⁴ and then shown in 6-ounce chains, the use of the 6-ounce chain may reasonably be expected to cause the horse to experience pain while walking, trotting, or otherwise moving.”⁴⁵ Moreover, another quote from Dr. Purohit offered by the commenter, in which the doctor stated that his data “provided no evidence that chains of eight ounces or less used from three to five weeks in a normal, non-scarred horse produced inflammation or soreness,” addresses

neither the use of chains with irritating substances during training nor the effects of wearing chains of heavier weights for periods appreciably longer than 3 to 5 weeks.

We mention this in order to highlight that the manner in which a horse is trained has a material bearing on whether the use of chains during shows and exhibitions contributes to soring, and precludes us from saying that chains of a certain weight cannot be associated with soring. For example, if an irritant is applied to a horse’s limbs during training and/or the horse has been trained in heavy chains, performing in chains of 6 ounces or less may cause the horse to suffer physical pain or distress when moving during the competition, and thus to meet the statutory definition of being “sore.” This is entirely consistent with the findings of the Auburn study and highlights one of the limitations of the HPA: APHIS has no authority over training practices under the HPA; our authority is limited to the horse shows, exhibitions, sales, and auctions covered by the Act. We are limited to determining, primarily through inspection, whether horses at such events are sore. Within these constraints, it is the Agency’s finding that Tennessee Walking Horses and racking horses in the Performance division are disproportionately likely to be determined to be sore, regardless of the weight of the chains in which they perform.

The commenter also stated that this rulemaking reverses APHIS’ position on the use of 6-ounce chains, stating that “not only was the evidence USDA relies on today in front of it at the time it adopted the current regulations permitting the use of pads and action devices in 1989, but it relied on that evidence [i.e., the Auburn study] to reach a conclusion—action devices weighing 6 ounces or less are permissible because they do not cause soring—that is completely at odds with the ban the Agency now proposes.”⁴⁶ The commenter also cited a July 28, 1988 interim rule (53 FR 28366–28373), in which USDA stated that “while chains and other action devices weighing more than 6 ounces can sore horses, those weighing 6 ounces or less are not themselves likely to cause soring” (page 28370). The commenter concluded that “USDA may not change course and ban action devices by relying on a study that undermines the rationale for a complete ban on action devices and pads.”⁴⁷

The commenter is incorrect that the Agency changed course without providing any indication in the proposed rule that its thinking had evolved regarding the meaning and import of the Auburn study since 1988. The 1988 interim rule assumed that horses would be trained and shown in chains of equivalent weight, and cited the Auburn study to establish a *de minimis* chain weight in compliance with a Court Order.⁴⁸ The 1988 interim rule cited no data in support of this assumption regarding training, and this assumption, if ever true, no longer corresponds to industry practices. To that end, we cited the NAS study to indicate that use of heavy chains and devices during training was currently widespread within the Tennessee Walking Horse and racking horse industry. Given what we now know about training practices, other aspects of the Auburn study that we assumed to be inoperative in 1988 are in fact germane.

We proposed under paragraph (c)(3) to prohibit all pads and wedges on any Tennessee Walking Horse or racking horse at any show or other covered event, unless the horse has been prescribed and is receiving therapeutic treatment involving the use of pads or wedges as approved in writing by a licensed veterinarian.

A commenter stated that APHIS had acknowledged that pads and action devices do not cause soring by choosing not to ban their use in other breeds. The commenter added that the pads used by Tennessee Walking Horses during training and those used by other breeds were the same, and cited the USEF rulebook as evidence that Arabian, Anglo-Arabian, Andalusian, Friesian, Saddlebred, and Morgan horses may all be shown in pads. The commenter also disagreed with our contention that the gait of Tennessee Walking Horses in the Performance division is noticeably different from that of other Performance breeds, and submitted photos that, the commenter contested, showed a similar accentuated gait in Friesian, Hackney, American Saddlebred, and other horse breeds.

Again, the commenter’s stated assumption is that APHIS has statutory authority to prohibit a device, such as pads, only if it causes soring. As we have stated above, section 5 (15 U.S.C. 1824(7)) and section 9 (15 U.S.C. 1828) of the Act authorize APHIS to prohibit the use of a device by issuing regulations if the prohibition is necessary to prevent soring.

of Veterinary Medicine at Auburn University, and *Soring in Tennessee Walking Horses: Detection by Thermography*, August 1975, prepared by Dr. H.A. Nelson, et al., then of APHIS’s Veterinary Lab Services, Ames, Iowa.

⁴² Auburn Study, Phase XI. Use of 2-, 4- and 6-Ounce Chains.

⁴³ Ibid., Phase VII, Simultaneous Use of Chemicals and Chains for Soring Horses.

⁴⁴ The NAS study indicated that “[w]alking horses are often trained with action devices weighing in excess of the 6-ounce action devices currently allowed for competition. The use of heavier or more cumbersome devices in training may be more likely to contribute to the formation of the lesions described in this report” (page 81).

⁴⁵ 88 FR 56938.

⁴⁶ National Celebration comment, page 23.

⁴⁷ Ibid., page 24.

⁴⁸ Am. Horse Prot. Ass’n, Inc. v. Lyng, 681 F. Supp. 949, 958 (D.D.C. 1988).

Depending on how they are used or designed, pads can cause soring. However, we are not banning them for Tennessee Walking Horses and racking horses because they always and *per se* cause soring, which they do not. Were we to do so, the commenter would be correct in assuming the prohibition should be extended to all other padded breeds. Rather, we are prohibiting the use of pads in Tennessee Walking Horses and racking horses because the Performance division, in which horses of these breeds routinely exhibit in pads, has a disproportionately high incidence of soring relative to other breeds and even to flat-shod Tennessee Walking Horses and racking horses. As we have stated previously, the incidence of soring is disproportionately more likely in Tennessee Walking Horses and racking horses that compete in pads than other breeds, and noncompliance, particularly in the form of soring, is even 1,300 percent more likely than other flat-shod classes of Tennessee Walking Horses and racking horses. This disproportionate incidence makes it necessary to prohibit the use of pads for Tennessee Walking Horses and racking horses at regulated events in order to prevent soring.

A commenter also claimed that our proposed prohibition of pads is lacking on the same grounds as action devices, claiming that pads also do not cause soring.

As noted above, we are prohibiting the use of pads in Tennessee Walking Horses and racking horses because the only Tennessee Walking Horse and racking horse class that routinely exhibits in pads has a disproportionately high incidence of soring, relative to other breeds and even to flat-shod Tennessee Walking Horses and racking horses. Further, we noted above that the uniquely tall stacks of pads and wedges worn in exhibition by Performance division Tennessee Walking Horses and racking horses, when employed in certain ways, can cause a horse to become sore, a point with which the American Veterinary Medical Association and American Association of Equine Practitioners concur.

The commenter further reasoned that “if raising a horse’s heel through pads could cause soring by itself, then USDA would necessarily need to ban the use of pads in all HPA Breeds.”⁴⁹

Again, we never contended that pads always and *per se* cause soring; indeed, we specifically pointed to instances in other breeds where horses are able to use pads (and action devices) without

either item causing soring, and where instances of soring in those breeds are rare. However, we did indicate that pads can cause soring, either on their own or in conjunction with other substances and practices. Additionally, there is a statistically elevated incidence of soring among horses in the Performance division of the Tennessee Walking Horse and racking horse industry in comparison to other breeds that use pads during competition.

The commenter further contended that “of course the pads used by these other breeds during training are no different from those used by Tennessee Walking Horses.” This contention is in error and does not acknowledge the obvious difference between the tall stacks of pads and wedges used to train and show Performance division Tennessee Walking Horses and the much thinner protective pads used by most other breeds.

The same commenter cited an affidavit by USDA’s former Chief Staff Veterinarian for Horse Protection matters from 1973 to 1978, Dr. Lois Hinson, who testified that clinics that USDA conducted definitively prove that pads *per se* do not cause inflammation or soring in the hooves of horses, but rather extreme angulation of the hoof causes inflammation and soring. The commenter indicated that these studies are the only ones the commenter is aware of that evaluated whether pads cause soring on Tennessee Walking Horses and racking horses.

As we noted previously, one of the commenter’s stated assumptions was that APHIS could only ban pads if the pads always and *per se* cause soring. As previously articulated, we are prohibiting pads on Tennessee Walking Horses and racking horses not because they always and *per se* cause soring, but because they can cause soring. Soring is so disproportionately likely in Tennessee Walking Horses and racking horses wearing pads that the prohibition is necessary in order to prevent soring. This is consistent with our authority under section 5 (15 U.S.C. 1824(7)) and section 9 (15 U.S.C. 1828) of the Act. Accordingly, the studies and affidavit of Dr. Hinson are not relevant to our proposed prohibition.

The commenter also stated that USDA lacks evidence showing an absence of soring in other breeds and has itself acknowledged that other breeds do engage in soring.

We note that USDA has never stated that other breeds do not sore their horses. What we have stated in the proposal and in this final rule is that breeds other than Tennessee Walking Horses and racking horses have not been

found to sore horses with any frequency, as soring confers no competitive advantage to horses that do not perform the exaggerated “big lick” step in Performance division shows.

Further, the same commenter stated that USDA has not provided evidence that violations such as pressure shoeing are otherwise impossible to detect beneath pads, or that such violations occur with such frequency that a ban on pads is warranted. The commenter added that pressure shoeing can be detected currently through radiography and other means.

The Auburn study found that the ability to detect pressure soring (the illegal application and/or use of bolts, screws, blocks, hoof packing material, and other methods of pressure) through visual and physical inspection of the soles of horses’ hooves is limited because pads obscure the solar surface of the foot.⁵⁰ APHIS agrees with this finding. Moreover, because evidence of pressure soring can be removed prior to inspection, the evidence of soring would not necessarily appear on radiographs as the commenter contends.

One commenter recommended that we include in § 11.6(c) a clarification that explicitly allows applications of nails to limbs (feet) to secure horseshoes.

We acknowledge the commenter’s point but do not find it necessary to add such a clarification, as nails are usually necessary to secure the shoe to the hoof.

Two commenters opposed to the prohibition on action devices and pads cited a 2017 study⁵¹ that found no evidence of change in biological markers associated with stress and pain with stacked pads and action devices.

APHIS is aware of the study cited by the commenters as well as the limitations of the study that the authors themselves pointed out, including that the horses were never exercised at a running walk, there were no riders on the horses when exercised, and the evaluation period of when the horses were outfitted with stacked wedge pads and chains was only 5 days. Accordingly, the authors of the study themselves acknowledged that “these findings should not be extrapolated to the long-term use of such devices.”⁵² While the chains used on the horses in

⁵⁰ Auburn study, Phase xvi.

⁵¹ Everett JB, Schumacher J, Doherty TJ, et al. *Effects of stacked wedge pads and chains applied to the forefeet of Tennessee Walking Horses for a five-day period on behavioral and biochemical indicators of pain, stress, and inflammation*. American Journal of Veterinary Research 2018; 79:21–32. <https://doi.org/10.2460/ajvr.79.1.21>.

⁵² Letters to the Editor. *American Journal of Veterinary Research* 2018; 79:248–249. <https://doi.org/10.2460/ajvr.79.3.248>

⁴⁹ National Celebration comment, page 24.

this study were 6-ounce chains, Tennessee Walking Horses can be trained with chains much heavier than what the regulations allow,⁵³ along with the use of prohibited substances on the pasterns of these horses in training to make them more reactive to action devices during shows.

Several commenters stated that banning pads and action devices on Tennessee Walking Horses and racking horses constitutes a violation of their rights under the U.S. Constitution. Specifically, one commenter stated that the Takings Clause of the Fifth Amendment of the U.S. Constitution provides that when the Federal Government takes private property for a public use, it must provide just compensation. The commenter expressed concern that if USDA proceeds with the ban on pads and action devices, its actions will amount to a taking because it would destroy all the value in Tennessee Walking Horses trained to compete in the performance division by essentially banning the sport in which they compete.

To support this point, the commenter provided statements from several trainers⁵⁴ supporting why the value of such horses would diminish. Some trainers cited the time and cost required to retrain a horse to compete flat-shod (without pads), while others stated, without explanation, that very few horses trained to compete in the Performance division are able to make the transition to competing flat-shod. Underscoring this latter point, the commenter added that “[I]t would be like asking a professional athlete to drop one sport and train for another.” Similarly, another commenter opined that Performance division Tennessee Walking Horses have been specifically bred and trained to compete with action devices and pads and cannot simply be retrained to compete as a flat-shod horse.

We disagree with the commenter that the regulations would result in the loss of all economically valuable use of Tennessee Walking Horses competing in the Performance division. The statements from trainers provided by the commenter that cite the time and cost required to retrain such a horse actually underscore that retraining is possible. If the regulations deprived the horse of all economic value regardless of its use, retraining would be either impossible or materially irrelevant. Indeed, based on the statements provided, there is no basis to conclude that the value of

Tennessee Walking Horses competing in the Performance division—that is, trained to perform in stacked pads and action devices—would necessarily be reduced if they cannot compete wearing these items. It is, of course, possible that this could occur and that the prohibitions in the rule will render some horses less valuable. However, to the extent that this foregone value was derived from an illicit and illegal activity, soring, that was being pursued in order to gain a competitive advantage, this reduction in value is foreseen by the Act and consistent with it. And again, a reduction in value, particularly illicitly derived value, is not tantamount to loss of all economically valuable use; even if there were some basis to conclude that the regulations would result in some limited reduction in value, that is not sufficient to show the loss of all economically valuable use.

First, while the commenter implies that horses competing flat-shod and in stacked pads are engaging in two dramatically different activities, a prominent Tennessee Walking Horse industry organization⁵⁵ notes that they both actually employ the same basic gaits—the flat-foot walk, the running walk, and the canter. These are described by the organization as “natural, inherited gaits,”⁵⁶ with the only difference between flat-shod and Performance gaits being that the latter is practiced with “more animation and accentuated brilliance.”⁵⁷ We cite this organization’s statement to show that the industry itself notes that the same gaits, described as being natural and inherent to the breed, are used by horses competing with and without stacked pads and actions devices, the main difference between the two being the degree of animation.

Second, despite the claim that such horses cannot be retrained to show without pads, commenters did not explain specifically why such horses cannot practice an inherited gait on their natural hooves, rather than on unnaturally tall pads. Further, trainers and other commenters responding to this rulemaking have stated that flat-shod horses can achieve the animated “big lick” step with proper training. If the only elements missing from a show are pads and action devices, we question why their absence alone will affect the value of a horse in terms of its ability to show. Nowhere do

commenters explain how these items work in any benign way to animate what they otherwise claim to be the natural and inherited ability of such horses to practice the “big lick” step.

One commenter opined that Performance division Tennessee Walking Horses have been specifically bred and trained to compete with action devices and pads and cannot simply be retrained to compete as a flat-shod horse, although this and other commenters provided no specific evidence that Performance division horses trained to perform with the use of pads and action devices cannot perform well without them. We note that other breeds of horses can transition successfully from one sport to another. Racehorses are successfully retrained to practice dressage and jumping, and other breeds have switched easily from English- to Western-style riding, and the industry itself indicates that the horses can easily be retrained to different purposes.⁵⁸ While commenter concern over how this rulemaking may affect a horse’s value is understandable, we note that this rulemaking makes no changes to the ability of horses to freely compete in shows and exhibitions. Further, the evidence that the commenter provided, as well as evidence we obtained from some commenters and the industry website discussed above, suggests they can be retrained.

Numerous commenters opined that the prohibition on action devices and pads would diminish public interest in shows and result in the cultural and economic decline of the Tennessee Walking Horse industry. Some stated that Performance division horses that use pads and action devices are essential to horse shows and, without such classes, owners and spectators would lose interest in the shows.

The commenters ignore the fact that flat-shod classes compete widely within the Tennessee Walking Horse industry and are of growing popularity. This fact suggests that the use of pads and action devices are not essential to the survival of shows featuring such breeds. Without pads and action devices, the same shows could be held under the same management, and, if trained to go flat-shod, which, again, we have reason to believe is possible, the same horses could continue to compete in them with the same custodians and trainers. To that end, we again note that the industry itself indicates that Tennessee Walking Horses can be easily retrained to different purposes, and that the basic gait for padded and flat-shod Tennessee

⁵³ Equine experts on the NAS Committee also raise this point in their study (page 81).

⁵⁴ National Celebration comment, page 32.

⁵⁵ Tennessee Walking Horse Breeders’ and Exhibitors’ Association website: <https://twhbea.com/the-breed/disciplines/>. Accessed January 5, 2024.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

Walking Horses is the same. This comports with evidence provided by veterinary organizations with expertise in equine medicine and humane animal care, which we discuss immediately below, and which suggests that Tennessee Walking Horses can be retrained to go flat-shod in far less time than we proposed to afford for the transition.

Interest in flat-shod shows is growing nationwide. In a 2015 article,⁵⁹ the president of a prominent Tennessee Walking Horse owners' association noted that entries for its sanctioned, flat-shod shows across the country almost doubled from 2012 to 2014, adding that the number of such shows has also increased. The economic analysis accompanying this final rule provides an evaluation of its economic impact on the affected segments of the horse industry.

Some commenters stated that USDA has failed to conduct a proper cost-benefit analysis for the proposed ban on action devices and pads.

We address the topic of economic impacts in the economic analysis prepared for this final rule.

We proposed to have the prohibition on pads and wedges, and artificial toe extensions, on Tennessee Walking Horses and racking horses to become effective 270 days after promulgation of a final rule. In the proposal, we also invited comments on whether this is an appropriate timeframe for transitioning to a prohibition on pads and wedges, and artificial toe extensions.

Many commenters stated that the USDA should reevaluate its proposal to delay the ban on hoof pads for Tennessee Walking Horses and racking horses for 270 days after finalizing the regulations. They noted that the proposed rule states that pads can induce pain by "caus[ing] a horse's foot to strike the ground at an unnatural angle." One commenter added that Tennessee Walking Horses "sometimes have their pads/wedges removed at the conclusion of show season with no negative ramifications to the horse. The transition from pads to flat-shod can be and sometimes is accomplished in a day, as long as the hoof is trimmed to maintain the same proportions." One commenter stated that no scientific evidence was provided to support the claim that transitioning the horse from padded to flat-shod requires a set period of time. Some commenters additionally asked that artificial toe extensions not have the 270-day phaseout period.

Another commenter asked if owners are allowed to exhibit with these devices and pads up and until the end of the 270-day period and deemed a 90-day period sufficient, adding that those affected and covered under this regulation have had sufficient time to plan and institute training without the use of these devices.

In the proposed rule, we had stated that it takes approximately 6 to 8 months for a padded horse to become acclimated to walking and performing without pads. However, we reviewed the evidence provided by veterinary organizations with expertise in equine medicine and humane animal care that stated a grace period was not necessary for acclimation to walking without pads. We reconsidered the 270-day requirement and the evidence on which we based it, as well as statements from several commenters that a 270-day phaseout period for pads and toe extensions could unduly extend the time that horses are suffering from soring as a result of continued use of these items. Accordingly, we are establishing February 1, 2025, as the date on which pads and toe extensions can no longer be used on Tennessee Walking Horses and racking horses. This change reduces the amount of time that horses are made to wear these items.

A commenter stated that if therapeutic treatment using a pad or wedge is allowed, there is potential for pressure shoeing. The commenter recommended that "pressure shoeing" be defined clearly in § 11.1 to prevent uncertainty or ambiguity.

We agree with the commenter that a potential for pressure shoeing exists whenever pads and wedges are used, which is a reason we are prohibiting such items to prevent soring. However, the practice can be applied in many ways and to define the term "pressure shoeing" in one prescriptive way may limit APHIS' options for citing it as a violation. As we go forward with these regulatory changes, we will evaluate the potential for this practice in conjunction with the use of therapeutic pads and wedges.

Some commenters stated that pads are sometimes used as a way to alleviate pain and prevent damage to hoof structures and related connective tissue in all breeds of horses.

Pads with legitimate therapeutic applications may be used on Tennessee Walking Horses and racking horses in accordance with the veterinary prescription requirements in § 11.14(b).

A commenter suggested that we include limits on dimensions of therapeutic pads and wedges, adding

that a veterinarian may be persuaded by owners and trainers to prescribe such items that are identical to those currently used in performance packages.

We do not consider it necessary to include such specific dimensions within the regulations. As management is required to maintain all records of therapeutic treatment, including prescription information, APHIS can evaluate and determine the suitability of any such prescription for pads and wedges as warranted. If APHIS disputes a therapeutic treatment at a show on veterinary grounds, the horse will not be allowed to show.⁶⁰ If APHIS disputes such a therapeutic treatment in the records required to be maintained, we reserve the right to contact the appropriate State veterinary board regarding the veterinarian prescribing that treatment.

Several commenters opposed to the proposed rule stated that the existence of 15-year-old and older Tennessee Walking Horses and racking horses still showing in pads is evidence that soring is neither a common nor serious problem.

We incorporate our earlier rationale for the prohibition and note that the presence of older horses wearing pads in shows is neither evidence that pads are harmless nor that horses performing at that age are not being sored. A horse can be sored at any age.

A commenter stated that APHIS does not clearly explain how it intends to determine if a pad is used for therapeutic purposes or used as an action device.

To determine if a pad is used for therapeutic purposes, APHIS will review, as necessary, the relevant records that management is required to maintain in paragraph (b) of proposed § 11.14 for each horse receiving therapeutic treatment. A pad can only be used therapeutically in accordance with the veterinary requirements in paragraph (b) of proposed § 11.14. Under the revised regulations, action devices will be prohibited on all Tennessee Walking Horses and racking horses as they have no therapeutic exemption.

A few commenters stated that prescriptions for use of therapeutic pads and wedges should be submitted by the prescribing veterinarian to APHIS and be received before the horse is allowed to be shown wearing those devices. One commenter recommended that prescriptions for horses under therapeutic treatment be limited to 6

⁵⁹ Meyer, Holly. "Walking horse group successful with flat-shod rules." *The Tennessean*, July 18, 2015.

⁶⁰ Persons wishing to appeal a disqualification based on a therapeutic treatment can do so in accordance with 9 CFR 11.5.

months and that renewals should only be allowed after an in-person veterinary exam and filed with APHIS before horses with therapeutic devices are allowed to be exhibited.

We consider the proposed requirements sufficient to ensure that a horse showing under a therapeutic exemption is cleared to do so by the veterinarian prescribing the pads and wedges. We also note that treatment duration and prescription renewals are generally best determined by prescribing licensed veterinarians, as they are usually best able to determine the particular medical condition of the horse. Under § 11.14(b), this information is part of the management recordkeeping requirement and APHIS can evaluate the suitability of prescribed treatments as warranted to determine whether they are being used to cause or mask soring.

Commenters also suggested that an online database of verified currently valid prescriptions be maintained by USDA for instant verification by inspectors.

We do not currently see the need to maintain such a database to maintain prescription records but will consider the need for one in the future. APHIS will ensure that inspectors have the resources needed to conduct inspections, but it will still be the responsibility of event management to provide APHIS with records associated with the therapeutic treatment as outlined in proposed § 11.14 each time a horse is allowed to be shown, exhibited, sold, or auctioned with devices, pads, substances, applications, or other items restricted under proposed § 11.6(c).

The commenter also asked that APHIS require a signed statement from the licensed veterinarian who prescribed the pads/wedges that the individual horse is medically cleared to participate in the event with the prescribed pads/wedges.

We note that a signed statement from the licensed veterinarian is already part of the proposed requirement, as it is necessary for the prescription. As the prescription is being provided to show management, it would be assumed that the licensed veterinarian believes the horse is medically cleared to participate. APHIS may access and review records of prescriptions required to be kept by management.

The same commenter added that APHIS should include a regulatory presumption that a horse with pads or wedges is “sore” for purposes of the HPA unless the owner, trainer, custodian, or exhibitor can produce the required documentation.

The commenter appeared to be referring to a Tennessee Walking Horse or racking horse present in pads or wedges at a covered event. APHIS will not presume a horse to be sore without a diagnosis by a qualified inspector. However, unless the pads or wedges have a therapeutic purpose as prescribed by a licensed veterinarian, any such horse present at or attempting to participate in a covered event would be in violation of the regulations. We do not stipulate who is to provide this information to event management, just that event management needs to provide the information to APHIS.

Several commenters expressed concern that certain noninvasive therapeutic treatments they currently use to keep horses competitive and comfortable on showing weekends will require veterinary supervision, particularly vibration plate therapy, saltwater spa therapy, massage therapy, and electromagnetic pulse therapy. The commenters asked to continue such therapies without the veterinary requirement.

If such treatments are for Tennessee Walking Horses and racking horses and involve the application of substances to a horse's limbs at a show or other covered event, they require a prescription issued by a licensed veterinarian as a therapeutic exemption. Massage therapy does not require such a prescription. We will evaluate the effects of other treatments, emerging or as currently practiced, under the revised regulations. Any questions about therapeutic treatments may be submitted to APHIS.

Artificial Toe Extension (§ 11.6(c)(2))

Artificial toe extensions are used legitimately on many breeds of horses to make adjustments to gait and to correct certain medical conditions such as clubfoot, which is why they are permitted, with restrictions on length, under proposed § 11.6(b) for breeds other than Tennessee Walking Horses and racking horses.

However, toe extensions can also be used to sore horses by increasing stress on already sore tendons and ligaments, which is why we proposed to prohibit all artificial extension of the toe length on any Tennessee Walking Horse or racking horse at any horse show, horse exhibition, horse sale, or horse auction, unless such horse has been prescribed and is receiving therapeutic treatment using artificial extension of the toe length as approved in writing by a licensed veterinarian. Also, as we noted above, there is a long-standing statistically elevated incidence of soring in the division of Tennessee Walking

Horses and racking horses that rely on artificial toe extensions. If a Tennessee Walking Horse or racking horse is wearing artificial toe extensions under a therapeutic exemption, the therapeutic extensions cannot exceed the restrictions for all horses in new § 11.6(b)(11) and (12).

We discuss our decision to eliminate the proposed 270-day phaseout period for artificial toe extensions on Tennessee Walking Horses and racking horses in the discussion of pads above.

Lubricants (§ 11.6(c)(4))

Under the current regulations (§ 11.2(c)), all substances are prohibited on the extremities above the hoof of any Tennessee Walking Horse or racking horse while being shown, exhibited, or offered for sale at any horse show, horse exhibition, or horse sale or auction, excepting lubricants such as glycerine, petrolatum, and mineral oil, or mixtures thereof: *Provided, That:*

- The horse show, horse exhibition, or horse sale or auction management agrees to furnish all such lubricants and to maintain control over them when used at the horse show, horse exhibition, or horse sale or auction.

- Any such lubricants shall be applied only after the horse has been inspected by management or by a DQP and shall only be applied under the supervision of the horse show, horse exhibition, or horse sale, or auction management.

- Horse show, horse exhibition, or horse sale or auction management makes such lubricants available to Department personnel for inspection and sampling as they deem necessary.

We proposed in § 11.6(c)(4) to prohibit lubricants on the extremities above the hoof of any Tennessee Walking Horse or racking horse entered for the purpose of being shown or exhibited, sold, auctioned, or offered for sale in or on the grounds of any horse show, horse exhibition, or horse sale or auction. We consider this action necessary to prevent the soring of horses, as we can determine no legitimate use for such lubricants in the absence of the use of chains and action devices, and as lubricants can be used to mask soring, either by conditioning sored skin or by illicitly containing numbing or other agents to reduce the painful effects of soring.

The longstanding regulatory prohibition on substances was put in place out of concern over the application of irritating and masking agents on horses with the intent to cause or mask soring. These concerns arose from high numbers of positive tests for prohibited substances on Tennessee

Walking Horses and racking horses exhibiting in the Performance division. Masking agents such as benzocaine and lidocaine can temporarily anesthetize the skin of a horse and mask soring so that inspectors cannot detect pain upon inspection. The only purpose for applying lubricants is to allow action devices to move more smoothly on the leg. With our prohibition on action devices, lubricants are no longer necessary for that purpose. We proposed to prohibit lubricants because they can be easily mixed with numbing substances to mask soring and because such mixing makes it difficult to detect masking substances. We are also seeing lubricants being used to soften sored skin in order to make the condition appear less than sore.

Under current § 11.2(c)(1) through (3), lubricants may be applied only if event management furnishes them, supervises their application, and makes them available for testing by APHIS. These specific requirements were included in § 11.2(c) because lubricants, if not kept under management control, have a reasonable likelihood of being tampered with, although given the industry conflicts of interest found during the OIG audit and cited in the NAS study, event management may themselves not be able to ensure the integrity of lubricants they furnish and control.

As we showed in table 3 of the proposal, an unacceptable number of Tennessee Walking Horses and racking horses that APHIS randomly tested between FY 2017 and FY 2022 were positive for prohibited substances. Some 144 out of 194 Performance division horses tested by APHIS in FY 2018 were positive for prohibited substances, and over the period from FY 2017 to FY 2022 the average rate of positives was more than 40 percent. During this 6-year period, masking and numbing agents constituted about 36 percent of the prohibited substances detected on all horses tested, with 90 percent of them competing in the Performance division wearing the stacked pads and action devices. As we explained in the proposal, a strong association remains between the application of substances and soring in Tennessee Walking Horses and racking horses competing in the Performance division.

We received comments asking whether APHIS has evidence of masking of soring in Tennessee Walking Horses and racking horses, as well as in other breeds.

As noted above, we have detected through substance testing anesthetizing agents such as benzocaine that are used to mask the pain of soring on the limbs of Tennessee Walking Horses and

racking horses. We have also noted the use of lubricants to soften sored skin in order to make the condition appear less sore and thus mask the soring.

One commenter stated that USDA in the proposal ignores the express carve-out in the statutory definition of “sore” for the “application” of “any substance” for therapeutic reasons under directions of a licensed veterinarian.

The commenter is correct. In the proposed rule, we did not expressly include a therapeutic exception for substances as prescribed by a licensed veterinarian as we did with pads, wedges, and toe extensions. We intended to include one and, to correct this oversight, are adding one to proposed § 11.6(c)(4) in conformance with the Act.

A commenter stated that the proposed ban on all substances falls outside the USDA’s statutory authority under the HPA and is arbitrary and capricious based on USDA’s failure to provide a reasoned basis for the rule or to support it with substantial evidence. The commenter stated that the HPA limits bans on substances only to those that have caused or could cause soring.

A ban on substances administered as part of therapeutic treatment under direction of a licensed veterinarian would have exceeded our statutory authority. We have corrected that inadvertent omission in this final rule. We disagree with the commenter, however, that a substance must cause or be expected to cause soring in order to be prohibited. Substances, including lubricants, can be used to condition the skin in such a way that masks evidence of soring, or can contain numbing agents that evade detection. We note, additionally, that for Tennessee Walking Horses and racking horses all other substances are already prohibited. The only substances not currently prohibited are lubricants, which can, as noted above, only be used if furnished by event management and applied after inspection. As we also stated above, we see no legitimate use for such lubricants if action devices are prohibited during regulated events.

The same commenter stated that the substance testing data provided in table 3 of the proposal are skewed to show higher numbers of violations, because where there is already a suspicion of soring, USDA engages in selection bias. (Table 3 includes prohibited substance data for both Performance and flat-shod horses for HPA-covered events from FY 2017 to FY 2022.)

As with the risk-based inspections APHIS performs on horses where there is reasonable suspicion of soring, it is immaterial that substance testing is not

based on a random sample because APHIS does not operate in an environment in which a random sample is warranted, or, indeed, possible. As table 3 in the proposed rule indicates, Tennessee Walking Horses and racking horses showing in the Performance division are disproportionately more likely to test positive for prohibited substances than flat-shod horses, regardless of the year in question, the number of inspections conducted, or other controls applied. Whether prohibited substances are detected in random testing or detected through testing arising from reasoned suspicion, the result in either case is that horses are found to have prohibited substances on their limbs. Under the revised regulations in § 11.6(c)(4), any substance detected on the limbs of Tennessee Walking Horses and racking horses constitutes a violation.

Many commenters requested clarification on the prohibition of the use of any substances on the limbs of all Tennessee Walking Horses and racking horses. Several asked if commonly applied substances such as fly sprays and liniment would be prohibited. One such commenter expressed concern that the ban on substances could encompass certain therapeutic substances for which the HPA provides a limited allowance, and recommended that APHIS modify the ban to allow limited use of truly therapeutic substances and continue to maintain and utilize its list of defined prohibited foreign substances as guidance in enforcing the ban.

Section 5 (15 U.S.C. 1824(7)) and section 9 (15 U.S.C. 1828) of the Act authorize APHIS to prohibit the use of a substance by issuing regulations if the prohibition is necessary to prevent soring. Under the revised regulations, only substances having a legitimate therapeutic use may be applied to horses provided that the prescription, expected length of treatment, name of the prescribing veterinarian, and other pertinent information are provided to management and maintained under the recordkeeping requirements we proposed in § 11.14(b). Fly sprays and other over-the-counter products would only be permitted under the requirements for approving a therapeutic treatment. Based on the color, texture, and smell during a gross inspection, many seemingly benign products are indistinguishable from numbing, irritating, or caustic substances. Further, such products can be mixed with masking agents making them more difficult to detect. As to the commenter’s request that we maintain a list of defined prohibited substances, this list is unnecessary because we are

prohibiting all substances on Tennessee Walking Horses and racking horses not exempted for therapeutic treatment.

The same commenter stated that by extending the prohibition to include the use of lubricants during competition, USDA seeks to ban substances that not only have no connection to soring but are actually used to reduce friction and help prevent a horse from becoming sore, and therefore, the ban on lubricants is arbitrary and capricious and USDA should not enact the proposed ban.

We disagree that the ban is arbitrary and capricious. As we explain above, lubricants can mask soring by illicitly containing anesthetizing agents, and the appearance and feel of some lubricants during a gross inspection are indistinguishable from numbing agents such as benzocaine gel. Lubricants are a permitted substance in the current regulations because, as the commenter states, they were used to reduce friction and soring from the movement of action devices. With the prohibition of action devices we proposed, the need for such lubricants becomes unnecessary. The same commenter stated that the proposal points to no evidence that lubricants cause soring or even mask soring.

While lubricants *do not* cause soring, lubricants can mask soring by carrying anesthetizing agents, as noted above.

The same commenter stated that treating Tennessee Walking Horses differently from other HPA breeds is unlawful, particularly in the absence of any evidence demonstrating how often trainers of other breeds are using substances to their horses' detriment.

Lubricants are not prohibited on breeds other than Tennessee Walking Horses and racking horses because soring is not concentrated in other breeds. We consider prohibiting lubricants on Tennessee Walking Horses and racking horses as being necessary to prevent soring.

The commenter also stated that USDA has not provided a definitive list of which substances are banned.

All substances are banned on the extremities of Tennessee Walking Horses and racking horses.

The commenter also stated that USDA has not provided the level at which a substance would cause a violation or the levels at which a substance may trigger a violation, adding that a violation for an amount of a substance that is insufficient to cause a horse to be sore is not rationally connected to the relevant statutory language in the HPA regarding soring.

Under section 5 (15 U.S.C. 1824(7)), the Act allows the Secretary to prohibit

substances "as he deems necessary" under section 9 (15 U.S.C. 1828) in order to prevent soring. As all substances will be prohibited on the legs of Tennessee Walking Horses and racking horses, there is no minimum authorized amount.

Another commenter noted that some horses are allergic to commonly used substances such as liniments and insect repellents and asked if such horses would be considered sore if they presented at inspection with peeling, sores, or hives resulting from applications of commonly used topical products.

We assume that the commenter means that the products were applied to the horse at some point prior to the event, with sufficient time having elapsed for an allergic reaction to be present on inspection. The skin changes associated with soring are distinctly different from those caused by an allergic reaction and a qualified inspector can make this distinction.

A number of commenters recommended a drug testing requirement, especially for substances on the legs and systemically administered NSAIDs⁶¹ and other drugs in urine and blood, as is done for other competition breeds, to maintain the integrity of the sport. Another commenter agreed with testing urine and blood, noting that NSAIDs and other substances can be used to mask soring but are not detected by a physical exam. One commenter recommended that horses be tested for the presence of tranquilizing and visually distorting drugs.

We are making no changes based on this commenter recommendation. Testing for prohibited substances is already covered under APHIS regulatory authority and does not require a change to the proposed regulations. We pursue current and new testing methods that will facilitate our ability to enforce compliance with the Act.

Dermatologic Conditions Indicative of Soring (DCIS)

Under current § 11.3 of the regulations, all horses⁶² subject to the "scar rule" that do not meet certain criteria are considered sore and are subject to all prohibitions of section 5 of the Act. Paragraph (a) states that "the anterior and anterior-lateral surfaces of the fore pasterns (extensor surface) must be free of bilateral granulomas, other bilateral pathological evidence of

inflammation, and, other bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair."

A footnote is also appended to paragraph (a). It defines "granuloma" as "any one of a rather large group of fairly distinctive focal lesions that are formed as a result of inflammatory reactions caused by biological, chemical, or physical agents." We explained in the proposal that this definition, for regulatory purposes, describes a granuloma as a dermatological change visible to the naked eye, which differs considerably from the medical definition that identifies granuloma as a change at the histological, microscopic level. We discussed the significance of this difference in the proposed rule.

Paragraph (b) of the scar rule states that "the posterior surfaces of the pasterns (flexor surface), including the sulcus or 'pocket' may show bilateral areas of uniformly thickened epithelial tissue if such areas are free of proliferating granuloma tissue, irritation, moisture, edema, or other evidence of inflammation."

In paragraph (a)(2) of current § 11.21, the requirements for inspection of horses by DQPs include an examination to determine whether the horse meets the scar rule conditions.

We proposed moving the scar rule to new paragraph (b)(22) of § 11.6 and revising it as follows: "The forelimbs and hindlimbs of the horse must be free of dermatologic conditions that are indicative of soring. Examples of such dermatologic conditions include, but are not limited to, irritation, moisture, edema, swelling, redness, epidermal thickening, loss of hair (patchy or diffuse) or other evidence of inflammation. Any horse found to have one or more of the dermatologic conditions set forth herein shall be presumed to be 'sore' and be subject to all prohibitions of section 6 (15 U.S.C. 1825) of the Act." We also proposed to remove the requirement that the conditions be bilateral.

Several commenters expressed concerns that the dermatological conditions listed can have many possible causes and therefore may not in fact be indicative of soring. Some commenters questioned how inspectors would distinguish a dermatological change caused by soring from a change resulting from incidental causes. Some stated that, as the cause of a condition can be interpreted in different ways, the proposed language for dermatologic conditions indicative of soring is subjective and unreliable.

One such commenter stated that the proposed rule provides no evidence to

⁶¹ Non-steroidal anti-inflammatory drugs.

⁶² The regulation states that it applies to all horses born on or after October 1, 1975, but as this obviously includes every horse living it no longer needs to be included in the regulations.

establish that the dermatologic conditions listed are actually reliable evidence of soring, and as a result a horse could be disqualified solely on the basis that it has “patchy” hair loss on one leg even though such hair loss could be the result of many possible causes. Similarly, another commenter stated that the revised “scar rule” protocol fails to draw a connection between the conditions being present and any evidence that soring has actually occurred, particularly as each of the conditions can have several different causes unrelated to soring, such as pastern dermatitis. The commenter opined that with only evidence of the condition and no other evidence linking it to a specific cause, “horse trainers and owners have no guidelines by which they can expect to know whether or not their horse will be able to compete, and ‘what level of irritation, moisture, or patchy hair will lead to a disqualification is left in the eye of the beholder.’”⁶³ The commenter concluded that the revised scar rule provides no objective guidance to inspectors as to what should or should not be a violation.

By including the statement in our proposed revised DCIS language, “[a]ny horse found to have one or more of the dermatologic conditions set forth herein shall be presumed to be ‘sore,’” we inadvertently proposed to establish a rigid standard by which an inspector would have no choice but to diagnose a horse with any of the listed conditions as sore, regardless of his or her professional judgment as to whether soring caused the condition. As a result, the standard, as we proposed it, could have the unintended result of calling out all horses that display such conditions as being sore when in fact some of them have not been sored. To that end, we agree with commenters that the dermatological conditions listed in the proposed rule can have other causes and, thus, lead to differential diagnoses.

We disagree, however, that a determination of soring based, in part or in whole, on the observation of one or more of the listed conditions is necessarily arbitrary or subjective. Each of the conditions listed in the proposed rule has been identified with soring in certain instances; for example, the proposed rule spoke at length about the association between non-uniform epidermal thickening found by APHIS VMOs and soring. (88 FR 56942). Another condition associated with soring that APHIS VMOs see is a distinct pattern of thickened skin ridges on the posterior pastern, consistent with

lichenification. In contrast to the pattern of linear skin ridges indicative of soring, field injuries tend to be jagged and focal in appearance.

Our revision of the proposed DCIS protocol emphasizes that the dermatologic conditions listed in the protocol are not, in and of themselves, always necessarily indicative of soring, but are indicative based upon the informed determination of a qualified inspector. Properly qualified persons with specific veterinary training and equine experience are trained to make differential diagnoses; determining whether a condition observed is or is not indicative of soring would be no different. To that end, we note that training in differential diagnoses is an established core function of the medical profession, whether in human medicine or veterinary medicine. And, for the foregoing reasons, we disagree that the inspector must be able to conclusively identify the specific cause of the condition. Such a requirement would necessarily mandate the inspector to be cognizant of all practices used on-farm and during training, an unmeetable standard and one for which APHIS lacks statutory authority.

To address the above commenters’ concerns about the proposed DCIS protocol language, while still affording inspectors the discretion to make determinations of soring based on the dermatologic conditions they observe during an inspection, we are revising the proposed DCIS (§ 11.7) language to read as follows:

If a Horse Protection Inspector or APHIS representative, upon inspection, finds that any limb of a horse displays one or more dermatologic conditions that they determine are indicative of soring as that term is defined in 15 U.S.C. 1821, the horse shall be presumed to be sore and subject to all prohibitions set forth in 15 U.S.C. 1824. Examples of dermatologic conditions that will be evaluated in determining whether a horse is sore shall include, but are not limited to, irritation, moisture, edema, swelling, redness, epidermal thickening, and loss of hair (patchy or diffuse).

This revised DCIS language provides that if an HPI or APHIS representative is present and finds a DCIS after inspection, that finding creates a presumption that the horse is sore. It is our opinion that HPs or APHIS representatives are best qualified to evaluate a horse under the DCIS because they have specific veterinary training and equine experience and are trained to make differential diagnoses. We acknowledge that show management may elect not to utilize an APHIS

representative or an HPI; however, show management is still obligated to ensure that the horses at a show or exhibition are free of dermatologic conditions indicative of soring even if an HPI or APHIS representative is not present. Accordingly, if show management elects not to utilize an HPI or an APHIS representative, and one or more horses subsequently are found to display dermatologic conditions that would establish the presumption of soreness, show management is subject to liability for showing or exhibiting a sore horse in violation of 15 U.S.C. 1824.

The revised DCIS language contains modifications to address the concerns expressed by commenters. As previously noted, we believe that an HPI or APHIS representative is best qualified to evaluate whether the horse has any dermatologic conditions, and further, whether any one or more of those conditions are indicative of soring. The initial proposed language lacked such a modification.

The revised DCIS language further addresses commenters’ concerns because it clarifies that the mere presence of any dermatologic condition does not automatically result in a determination of soring. Rather, a dermatologic condition results in a determination of soring only after the horse is inspected and it is determined by an HPI or APHIS representative that the condition is indicative of soring as that term is defined in the HPA. Further, rather than mandating that the inspector find the horse sore if any of the listed dermatologic conditions are present, the revised language now presents a non-exhaustive list of examples of the types of dermatologic conditions an HPI or APHIS representative “will consider” in evaluating whether the horse is sore. In other words, by our presenting the list of dermatologic conditions as illustrative instead of prescriptive, the regulatory requirement to regard anything on that list as always being indicative of soring is gone. It remains the case, though, that HPs or APHIS representatives, depending on their observations during the inspection, may consider a horse sore based on the presence of any one or more of the conditions on the list upon a finding that one or more of those conditions is indicative of soring. If one or more such dermatologic conditions on the list presents itself during the inspection, HPs or APHIS representatives, as part of their evaluation of whether the condition is more likely than not caused by soring, would need to consider other possible causes. As previously noted, APHIS representatives are trained to

⁶³ National Celebration comment, page 43.

make differential diagnoses and HPIs will be trained accordingly.

Additionally, if an HPI or APHIS representative finds a horse sore based on the presence of one or more dermatologic conditions during the inspection, violators will have recourse to appeal through a request for re-inspection pursuant to § 11.8(h) or through appeal of a disqualification pursuant to § 11.5. We discuss that appeal process above in this document, in our discussion of comments we received regarding our proposed revisions to § 11.5.

In the proposed rule,⁶⁴ we noted that the NAS committee reviewed an unpublished but peer-reviewed evaluation (“Stromberg report”) of 136 microscopic biopsies of skin samples taken from 68 Tennessee Walking Horses that had been disqualified for violations of the scar rule during the Tennessee Walking Horse National Celebration events of 2015 and 2016.⁶⁵ The evaluation, directed by Dr. Paul Stromberg, a veterinary anatomic pathologist, examined 136 pastern biopsies (right and left pastern from each horse).

A commenter stated that the NAS study agreed with Dr. Stromberg’s conclusion that the biopsies evaluated⁶⁶ from the disqualified horses showed no basis or proof of a scar rule violation.

We disagree with the commenter. As NAS reported, “[Dr. Stromberg] did not find any evidence of scar tissue or granulomatous inflammation and therefore concluded there was no basis or proof of scar rule violation.”⁶⁷ However, the NAS committee made no conclusion about whether Dr. Stromberg’s conclusion was warranted, and noted that Dr. Stromberg’s study did not include “images of gross lesions corresponding to the biopsy selection areas.” Nowhere in their study does the NAS committee concur with the conclusion of Dr. Stromberg’s study that there was no basis for finding a scar rule violation, and in fact, the committee found abnormalities in the biopsies he examined that do not rule out soring as a cause.

Dr. Pamela E. Ginn, a member of the NAS study committee and a board-certified veterinary pathologist and specialist in veterinary dermatopathology, also examined the biopsies and reviewed Dr. Stromberg’s

conclusions. Drs. Ginn and Stromberg both noted abnormal dermatological thickening prominent in the biopsy specimens that does not normally occur without a previously inflicted injury on the pasterns. The NAS study authors indicated that while these changes are recognized as secondary, chronic lesions, and do not provide clear evidence of the initial injury to the skin that led to these changes, they correlate with the grossly detectable lesions of irregular epidermal thickening known as lichenification, a pathologic change most often caused by rubbing, scratching, or other repeated trauma to the skin.⁶⁸

In brief, while the Stromberg report found no granulomas in the tissue microscopically and concluded from this that there was no evidence of a violation, Dr. Stromberg’s own findings of “variably thickened epidermis” and the NAS study’s finding that the biopsies were consistent with gross lesions of lichenification support a conclusion that the pasterns studied actually were noncompliant with the scar rule, as non-uniformly thickened epithelial tissue and evidence of inflammation were present. As we noted above, to diagnose soring an inspector need not identify exactly what action occurred to cause a dermatological condition, just that something occurred outside the event that resulted in a sore horse.

We also proposed in § 11.6(b)(22) that violations of the scar rule need not be bilateral in nature due to the practice of violators obscuring signs of soring on at least one limb. In the definition of “sore” in section 2 of the Act (15 U.S.C. 1821), a horse is considered sore if the agents and other devices listed in the definition and used in the soring are applied to, inflicted on, injected into, or used on “any limb of a horse.” This definition, which is fundamental to understanding the Act’s requirements regarding soring, allows for diagnoses of soring regardless of the number of limbs involved. Therefore, a horse may be sore if a single limb has been subjected to the use of one of the devices, substances, or practices enumerated in the statutory definition of the term “sore.”

Several commenters opposed our proposed change to allow for a presumptive determination of soring in cases where only one limb shows dermatological conditions indicative of soring.

One such commenter stated that accidents happen and horses sometimes develop flesh or scars that will not grow hair from these natural injuries, adding

that it would be unfair to consider a horse with a unilateral scar as “sored.” Another commenter similarly stated that removing the bilateral requirement could cause horses to be wrongly diagnosed as sore due to dermatologic conditions resulting from pasture injuries. Similarly, another commenter stated that the proposed rule’s language fails to give inspectors any objective criteria by which to differentiate a true case of soring from a horse presenting accidental injuries.

Because of our revisions to the proposed DCIS regulatory text, we consider the commenters’ concerns to be addressed. We agree that a scar on one leg may be caused by something other than soring, but we also assert that soring should not be automatically ruled out as a possible cause. We note that, historically, the requirement for pathological evidence of inflammation indicative of soring was made to be bilateral, as it was thought that a horse was unlikely to display such evidence only unilaterally if it truly had been sored. On this point, we previously thought that there was no reason to ever unilaterally sore a horse. Moreover, properly qualified persons with specific veterinary training and equine experience are trained to make differential diagnoses, and determining whether the condition observed is or is not indicative of soring would be no different, so we reiterate that we disagree that the inspector must be able to conclusively identify the cause of the condition.

However, inspectors do see unilateral soring, in which one pastern shows clear evidence of soring while the other pastern may show dermatologic change, but not to the degree that it meets the threshold of noncompliance. Signs of soring may be more apparent on one pastern than the other due to several causes, including soring to balance the step height in both front limbs or the result of masking soring. In addition, technological advancements such as lasering the skin have resulted in inspectors seeing more indications of unilateral soring. Specifically, APHIS VMOs inspecting Performance division Tennessee Walking Horses frequently observe significant skin changes in one pastern indicative of soring (*e.g.*, hyperkeratosis, acanthosis, alopecia), while the contralateral pastern has an unnaturally smooth appearance not attributable to any accident or disease. In such instances, APHIS VMOs may conclude that a horse with one sored pastern and one uniquely smooth pastern has had evidence of soring on the latter pastern effaced using lasers or other applications, as trainers know that

⁶⁴ 88 FR 56941.

⁶⁵ NAS study, page 78.

⁶⁶ As we explained in the proposed rule (88 FR 56941–56942), Dr. Stromberg evaluated the biopsies for soring based on a regulatory definition of “granuloma” in current § 11.3 that is different from the definition used in pathology.

⁶⁷ NAS study, page 78.

⁶⁸ *Ibid.*, Finding 4–2, page 82.

a unilateral soring indication will not meet the current scar rule criteria in § 11.3 for a diagnosis of soring that is bilateral.

One commenter stated that we provided no evidence or citations regarding the use of lasers and other tools to artificially efface evidence of soring on one limb. The commenter reasoned that “if the premise is that violators are able to get rid of visible signs of soring, then the rational conclusion should be that a visual inspection is not a good way to detect soring.”⁶⁹

We note that the revised DCIS language does not require an inspector to make a finding of laser treatment—the inspector need only observe and evaluate one or more dermatologic conditions on the horse indicative of soring on one limb. That being said, the commenter wrongly assumes that effacing sored skin leaves no trace of alteration. Lasers or other means used to smooth skin on one limb leave distinct signs that cannot be mistaken for natural, unaltered skin, particularly when contrasted with distinct signs that soring has been undertaken on the other limb. In effect, the sored skin is lasered away, leaving unnaturally smoothed, hairless skin in a particular location on the pastern—the smoothed skin obscures the soring but itself is entirely visible. Further, a person properly trained to diagnose equine soring can identify characteristics of the smoothed skin (*e.g.*, location on the foot, corresponding lack of hair, straight margins) that rule it out as being attributable to any natural cause.

As to the question of unintended or natural injuries on one pastern being wrongly diagnosed as soring, trained APHIS representatives and HPIs with the knowledge to differentiate such accidental conditions from deliberate soring will further limit the potential for erroneous diagnoses. On the posterior pastern, skin changes resulting from soring show a distinct pattern of thickened skin ridges, consistent with lichenification, that are not seen with field injuries. This is further supported by the NAS study, which reinforced the point that self-inflicted repeated injury to this one area of the skin is unlikely. In contrast to the pattern of linear skin ridges indicative of soring, field injuries tend to be jagged and focal in appearance.

One commenter stated that USDA provided no adequate explanation for eliminating the carve-out in the prior scar rule that permitted uniform thickening of epithelial tissue on the

posterior surface of pasterns, and that removing the allowance for non-traumatic epidermal thickening will result in disqualifications that are not based on actual soring.

We note that there was never an allowance for “non-traumatic epidermal thickening” in the current scar rule. There was an allowance for “uniformly thickened epithelial tissue,” but only if it was free of “other evidence of inflammation.” Our revisions to the current scar rule are based on the NAS study observation that epidermal thickening can be indicative of a response to chronic injury consistent with soring.

One commenter stated that removing the scar rule and replacing it with a list of dermatologic changes that are indicative of soring is ambiguous, as dermatologic changes in horses can occur naturally through the aging process. Another commenter noted that horses in New Mexico are prone to dermatological changes from fly bites, fungus, and other naturally occurring hazards, and asked if such changes would be considered soring.

We disagree with the first commenter’s implication that normal signs of dermatologic aging on the limbs of horses can be incorrectly attributed to soring and note that dermatologic conditions are already listed in the current scar rule, so the current regulations are not being “replaced.” Visual changes to the skin resulting from soring appear markedly different from signs of aging. As we noted above, skin changes resulting from soring often show a distinct pattern of thickened skin ridges on the posterior pastern, consistent with lichenification. With respect to the other commenter’s concerns, a qualified inspector can also distinguish deliberate signs of soring from changes resulting from fly bites and other natural conditions or environmental hazards. As we noted above, in contrast to the distinct pattern of linear skin ridges indicative of soring, field injuries tend to be jagged and focal in appearance. Equine veterinarians on the NAS committee agreed that the skin changes seen on the pasterns of Tennessee Walking Horses are not observed on the pasterns of other breeds, including those that also train with action devices,⁷⁰ further supporting the conclusion that the skin changes observed in response to soring are unique, distinctive, and identifiable

to APHIS veterinarians and HPIs trained to detect and diagnose soring.

A few commenters asked that USDA–APHIS consider including in proposed paragraph (b)(22) inspection instructions recommended by the NAS study, beginning with “[a] trained inspector should examine the skin of the front limb of the horse from the knee (carpus) to the hoof . . .”⁷¹ and continuing with several details describing a horse whose dermatologic condition does not qualify as a scar rule violation.

While the instructions cited by the commenter provide useful inspection guidance, we do not consider it necessary to include inspection details in the regulations, particularly as inspection techniques may evolve over time with new knowledge and technological developments. APHIS will ensure that HPI training includes workshops, classroom and virtual instruction, and hands-on training, with evaluations to confirm mastery of subject matter. This approach will use multiple methods to provide HPIs with the knowledge and skills required to evaluate whether dermatologic conditions present on a horse during an inspection are indicative of soring. We intend to make information on inspection procedures publicly available on our website on or near the effective date of this rule.

Finally, we are moving the revised DCIS language from proposed § 11.6(b)(22) to § 11.7, which we initially proposed to reserve but will now include the revised contents of proposed § 11.6(b)(22). We are making this change because § 11.6(b) overall lists “prohibited devices, equipment, and practices,” none of which characterize DCIS. The heading for § 11.7 will be “Dermatologic conditions indicative of soring.”

Other Proposed Changes to Prohibitions Concerning Exhibitors

We proposed moving time restrictions on workouts and performances for 2-year-old Tennessee Walking Horses and racking horses from current § 11.2(d) to revised § 11.6(d). We proposed to prohibit show or exhibition workouts or performances of 2-year-old Tennessee Walking Horses and racking horses, as well as working exhibitions of 2-year-old Tennessee Walking Horses and racking horses (horses eligible to be shown or exhibited in 2-year-old classes) at horse sales or auctions, that exceed a total of 10 minutes continuous workout or performance without a minimum 5-minute rest period between

⁷⁰NAS study, Finding 4–1, page 82. Other breeds in which soring is infrequent can and do use action devices permitted under proposed § 11.6(b). We discuss the relationship between action devices and soring under “Prohibitions for Tennessee Walking Horses and racking horses,” above.

⁷¹Ibid., Recommendation 4–1, page 86.

⁶⁹National Celebration comment, page 41.

the first such 10-minute period and the second such 10-minute period, and more than two such 10-minute periods per performance, class, or workout.

A commenter recommended that we prohibit the mounted showing or exhibition of horses less than 30 months old, adding that the term “two-year olds” should be defined, as these animals may not be even 24 months old and, if shown under saddle, will have been in training since they were 18 months old. The commenter stated that this is cruel for young horses and the regulations should be changed to prohibit it.

Stating the age at which it is appropriate to start training a horse is outside the scope of the HPA. As horse breed and discipline organizations will often have their own definitions of horse ages, we are not inclined to impose a definition of the term and are finalizing as proposed.

We also proposed moving the horse-related information requirements under § 11.2(e) to revised § 11.6(e). These requirements currently prohibit failing to provide information or providing any false or misleading information required by the Act or regulations or requested by APHIS representatives, by any person that owns, trains, shows, exhibits, or has custody of, or direction or control over any horse shown, exhibited, sold, or auctioned, or entered for the purpose of being shown, exhibited, sold, or auctioned at any horse show, exhibition, sale, or auction. In the proposed rule, we added to the description of the person who must abide by the requirements to include any person that enters, transports, or sells any horse shown, exhibited, sold, or auctioned.

We are requiring, as proposed, that this provision also apply to information supplied to HPIs at their request. This information includes, but is not limited to, information concerning the name, any applicable registration name and number, markings, sex, age, and legal ownership of the horse; the name and address of the horse’s training and/or stabling facilities; the name and address of the owner, trainer, rider, custodian, any other exhibitor, or other legal entity bearing responsibility for the horse; the class in which the horse is entered or shown; the exhibitor identification number; and any other information reasonably related to the identification, ownership, control, direction, or supervision of any such horse. We received no comments that specifically addressed this provision and are finalizing as proposed.

We also proposed adding to § 11.6(e) that failure to provide the information requested in that paragraph may result

in termination under the responsibilities and liabilities of management in § 11.13.

A commenter was confused over our use of “termination” when we explained in the proposal preamble the consequence of management not providing the information requested. The commenter asked if we intended to use the word “disqualification,” as this is the word we actually used in the regulatory text. The commenter is correct.

Inspection and Detention of Horses

Section 11.4(a) currently includes the requirement that each horse owner, exhibitor, trainer, or other person having custody of, or responsibility for, any horse at any horse show, exhibition, or sale or auction allow any APHIS representative to reasonably inspect such horse at all reasonable times and places the APHIS representative may designate. We proposed moving this requirement to new § 11.8(a) and including HPIs appointed by management to also have the authority to inspect and make such designations. We received no comments that specifically addressed this change and are finalizing as proposed.

We also proposed to retain the requirement in current § 11.4(b), in which an APHIS representative must notify the owner, exhibitor, trainer, or other person having custody of or responsibility for a horse at any horse show, horse exhibition, or horse sale or auction that APHIS desires to inspect the horse, and that it must not be moved from the horse show, exhibition, or sale or auction until such inspection has been completed and the horse has been released by an APHIS representative. We included this requirement in proposed § 11.8(b) and added that HPIs may also make the notification to the owner, exhibitor, trainer, or other person having custody that APHIS desires to inspect the horse. We retained the provision that only an APHIS representative could officially detain and release the horse as these decisions are made on behalf of the Department.

A commenter observed that we did not propose to give authority to HPIs to detain horses, release them from detainment, or supervise any of the other activities currently restricted to APHIS representatives in current § 11.4. The commenter expressed concern that show management, seeking to avoid horses being detained, might elect to utilize only HPIs because they lack the power to detain horses. The commenter added that we provided HPIs with this authority in the 2016 proposal and recommended that this final rule likewise extend such authority to HPIs,

or that we should at least provide that an HPI may seek written or verbal approval to detain a horse from an APHIS representative.

The commenter is correct in that we proposed to extend this authority to HPIs in the 2016 proposal. However, we subsequently determined that under section 6 (15 U.S.C. 1825(e)(1)) of the Act, only the Secretary may detain (for a period not to exceed twenty-four hours) for examination, testing, or the taking of evidence, any horse at any horse show, horse exhibition, or horse sale or auction which is sore or which the Secretary has probable cause to believe is sore. Accordingly, this is a Federal responsibility under the Act, and only APHIS representatives are authorized on behalf of the Secretary to take this official action.

We proposed moving to paragraph (c) of proposed § 11.8 the requirement in current § 11.4(c) which states that, for the purpose of inspection, testing, or taking of evidence, APHIS representatives may detain for a period not to exceed 24 hours any horse, at any horse show, exhibition, or sale or auction, which is sore or which an APHIS representative has probable cause to believe is sore. Such detained horse may be marked for identification and any such markings must not be removed by any person other than an APHIS representative. Other than the comment above requesting HPI involvement in detaining horses, we received no comments that specifically addressed this change and are finalizing as proposed.

In proposed § 11.8(d), we included requirements for detained horses, moved from current § 11.4(d), which state that detained horses are required to be kept under the supervision of an APHIS representative or secured under an official USDA seal or seals in a horse stall, horse trailer, or other facility with limited access. In addition, APHIS must have at least one representative present in the immediate detention area when a horse is being held in detention. The official USDA seal or seals may not be broken or removed by any person other than an APHIS representative, unless the life or well-being of the horse is in danger by fire, flood, windstorm, or other dire circumstances that are beyond human control, or the horse needs immediate veterinary care that its life may be in peril before an APHIS representative can be located, or the horse has been detained for the maximum 24-hour detention period and an APHIS representative is not available to release the horse. Detaining a horse is an official decision requiring an APHIS representative to act on behalf of

the Secretary. Other than the comment above requesting HPI authority to detain horses, we received no comments that specifically addressed this change and are finalizing as proposed.

In proposed § 11.8(e), we included from current § 11.4(e) the requirement that the owner, exhibitor, trainer, or other person having custody of or responsibility for any horse detained by APHIS for further inspection, testing, or the taking of evidence be allowed to feed, water, and provide other normal custodial and maintenance care, such as walking and grooming, for the detained horse. This is allowed provided that such care is rendered under the direct supervision of an APHIS representative. We received no comments that addressed this change and are finalizing as proposed.

Additionally, the regulations we proposed in § 11.8(e)(2) allow any non-emergency veterinary care of the detained horse provided that the use, application, or injection of any drugs or other medication for therapeutic or other purposes is rendered by a veterinarian in the presence of an APHIS representative and the identity and dosage of the drug or other medication and its purpose is furnished in writing to the APHIS representative prior to its use, application, or injection. The use, application, or injection of such drug or other medication must be approved by the APHIS representative. This approval is an official oversight function limited to officials acting on behalf of the Secretary. Further, while retaining this requirement from the current regulations, we also proposed to replace the term “APHIS Show Veterinarian” in § 11.4(e)(2) with “APHIS representative” for the reasons explained above under “Definitions.”

A commenter expressed concern that APHIS’ approval of any drug or medication under this provision may put the APHIS representative in conflict with the attending veterinarian. The commenter recommended that the APHIS representative have the option of further penalizing the owner, trainer, exhibitor, or other person having immediate custody of or responsibility for the horse if a substance is administered without the approval of the APHIS representative.

If care is administered outside the presence of an APHIS representative, has not been furnished in writing to the APHIS representative in advance, and has not been approved by the APHIS representative, such care would be noncompliant with the regulations.

We also proposed moving to § 11.8(f) the requirement from current § 11.4(f) that APHIS must inform the owner,

trainer, exhibitor, or other person having immediate custody of or responsibility for any horse allegedly found to be in violation of the Act or the regulations of such alleged violation or violations before the horse is released by an APHIS representative. We added language allowing an HPI to deliver this information to the person having responsibility for the horse, although the actual decision to release the horse from detention will be made by an APHIS representative. Other than the comment above requesting HPI authority to detain horses, we received no comments that specifically addressed this change and are finalizing as proposed.

Current § 11.4(g) requires that the owner, trainer, exhibitor, or other person having immediate custody of or responsibility for any horse that an APHIS representative determines must be detained for examination, testing, or taking of evidence, be informed after such determination is made and must allow the horse to be immediately put under the supervisory custody of APHIS or secured under official USDA seal until the completion of the examination, testing, or gathering of evidence, or until the 24-hour detention period expires. We proposed retaining this requirement and including it in § 11.8(g), but to replace “examination” with “inspection” wherever it is used to make the terminology more consistent with its use in other parts of the regulations. Other than the comment above requesting HPI authority to detain horses, we received no comments that specifically addressed this change and are finalizing as proposed.

Current § 11.4(h) contains provisions for requesting re-inspection and testing by persons having custody of or responsibility of horses allegedly found to be in violation of the Act or regulations. We proposed moving from § 11.4(h) to new § 11.8(h) the provisions for re-inspection and testing and extending authority to HPs for certain actions not requiring an official decision or determination. Paragraph (h) states that the owner, trainer, exhibitor, or other person having custody of or responsibility for any horse allegedly found to be in violation of the Act or regulations, and who has been notified of such alleged violation by an APHIS representative or HPI as stated in new § 11.8(f), may request re-inspection and testing of said horse within a 24-hour period. A re-inspection can only occur under the following conditions: (1) A request is made to an APHIS representative immediately after the horse has been inspected by the representative or an HPI appointed by

management and before the horse has been removed from the inspection facilities; (2) an APHIS representative determines that sufficient cause for re-inspection and testing exists; and (3) the horse is maintained under APHIS supervisory custody as prescribed in paragraph (d) of the section until such re-inspection and testing has been completed. For a re-inspection to occur, an APHIS representative must be present to authorize it.

A commenter questioned the value of a re-inspection as late as 24 hours after the initial inspection. The commenter stated that the horse’s condition can change during that time, and the results of the re-inspection may be different, adding that any re-inspection should take place before the horse leaves the inspection area, after an initial finding that the horse is not in compliance.

When APHIS determines that sufficient cause exists to conduct a re-inspection, the APHIS representative will endeavor to perform the re-inspection as close in time after the initial inspection as necessary, unless APHIS suspects the horse to be in a state where a later inspection may yield more accurate results. The 24-hour window for re-inspection is necessary only in cases in which an APHIS representative may not be available to reinspect immediately or where a later inspection may yield more accurate results.

We proposed replacing the term “APHIS Show Veterinarian” with “APHIS representative” throughout § 11.8(h) and using the terms “inspection” and “re-inspection” rather than “examination” and “re-examination” for consistency with the regulations. In addition, we proposed in paragraph (i) to require that the owner, exhibitor, trainer, or other person having custody of, or responsibility for, any horse being inspected is required to render such assistance, as the APHIS representative or HPI may request, for purposes of the inspection. We received no comments on these specific changes and are finalizing as proposed.

Access to Premises and Records

As we noted in the proposal, inspector access to premises and records is necessary to ensuring that event management and participants are in compliance with the Act and regulations. In proposed § 11.9, we included requirements for managers to provide access to premises and records for inspection and for exhibitors to provide access to barns, vans, trailers, stalls, and other locations of horses at any horse show, horse exhibition, horse sale, or horse auction. We also extended all access to premises and records for

the purposes of inspection to HPIs appointed by management.

Paragraph (a)(1), which we are moving from § 11.5(a)(1) and revising to include HPIs, proposed that the management of any horse show, exhibition, or sale or auction shall, without fee, charge, assessment, or other compensation, provide APHIS representatives and HPIs appointed by management with unlimited access to the grandstands, sale ring, barns, stables, grounds, offices, and all other areas of any horse show, exhibition, or sale or auction, including any adjacent areas under their direction, control, or supervision for the purpose of inspecting any horses, or any records required to be kept by regulation or otherwise maintained. We received no comments specifically addressing this change and are finalizing as proposed.

In paragraph (a)(2) we proposed that the management of any horse show, exhibition, sale, or auction shall, without fee, charge, assessment, or other compensation, provide APHIS representatives and HPIs appointed by management with an adequate, safe, and accessible area for the visual inspection and observation of horses. We moved this requirement from current § 11.5(a)(2) and revised it to include HPIs. We also removed language that only required providing such an area “while such horses are competitively or otherwise performing at any horse show or horse exhibition, or while such horses are being sold or auctioned or offered for sale or auction at any horse sale or horse auction.”

A commenter stated that this requirement is vague, adding that many shows are held in a field or other such places where a temporary ring is set up and no permanent sheltered facilities are on the property. Another commenter similarly stated that many horse events occur outside, and that many lack any sort of indoor space.

We are finalizing as proposed. Proposed paragraph (a)(2) requires providing APHIS representatives with an adequate, safe, and accessible area for the visual inspection and observation of horses for the duration of the event. While § 11.10 requires protection from the elements, we note that this could be accomplished through a temporary structure set up on-site. Additionally, while we do require a power source, we note that this could be accomplished through use of a generator.

We proposed to revise current § 11.5(b)(1) and include in proposed § 11.9(b)(1) the requirement that each horse owner, trainer, exhibitor, or other person having custody of or

responsibility for any horse at any horse show, exhibition, or horse sale or auction shall, without fee, charge, assessment, or other compensation, admit any APHIS representative or HPI appointed by management to all areas of barns, compounds, horse vans, horse trailers, stables, stalls, paddocks, or other show, exhibition, or sale or auction grounds or related areas at any horse show, exhibition, sale, or auction, for the purpose of inspecting any such horse, at any and all times. We received no comments specifically addressing this change and are finalizing as proposed.

Under proposed § 11.9(b)(2), which we moved from current § 11.5(b)(2), each owner, trainer, exhibitor, or other person having custody of or responsibility for, any horse at any horse show, exhibition, or sale or auction shall promptly present his or her horse for inspection upon notification, orally or in writing, by any APHIS representatives or HPIs appointed by management, that the horse has been selected for inspection for the purpose of determining whether such horse is in compliance with the Act and regulations. We received no comments specifically addressing this change and are finalizing as proposed.

Inspection Space and Facility Requirements

Section 11.6 currently contains horse inspection space and facility requirements for management of a horse show, exhibition, sale, or auction. Under the requirements, management must provide sufficient space and facilities for APHIS representatives to perform their duties as prescribed by the Act and regulations. These requirements include ensuring that APHIS representatives and HPIs appointed by management who inspect horses are provided with a safe area (for example, a well-defined inspection area where inspectors are free from potential harm) to conduct inspections and protection from the elements. The NAS study found that designating an inspection area that has as few distractions as possible reduces the effect of the environment on the horse's response to pain during examination.⁷² As explained below, we proposed to retain each of these requirements under proposed § 11.10.

In new § 11.10(a)(1), moved from current § 11.6(a), we proposed that the management of every horse show, exhibition, sale, or auction is required to provide, when requested by APHIS representatives or HPIs appointed by

management, without fee, charge, assessment, or other compensation, sufficient, well-lit space and facilities in a convenient location to the horse show, exhibition, sale, or auction arena, so they may carry out their duties under the Act and regulations, whether or not management has received prior notification or otherwise knows that such show, exhibition, sale, or auction may be inspected by APHIS. We added to this provision that the HPI can also make such requests.

A commenter stated that the space requirement in proposed § 11.10(a)(1) is vague and subject to interpretation, and recommended that the requirement should specify the minimum dimensions of the protected area.

We are finalizing as proposed. APHIS recognizes the wide variability of venues that host horse shows, exhibitions, sales, and auctions. As such, it is not possible to prescribe minimum dimensions as larger events will need more space than smaller ones. Management will be required to provide sufficient facilities consistent with § 11.10(a)(1) and their acceptance will be determined by APHIS representatives and/or HPIs appointed by management.

We proposed in § 11.10(a)(2) that management of every horse show, exhibition, sale, or auction is required to provide protection from the elements of nature, such as rain, snow, sleet, hail, windstorm, etc. Protection from the elements is needed in order to facilitate accurate inspections.

A few commenters opposed the requirement that management provide an area protected from the elements so that HPIs and APHIS representatives can perform inspections. One commenter stated that the requirement is vague, and that even a temporary shelter represents a cost burden to shows.

We are making no changes, as the space provisions we proposed will require management, when requested to do so by APHIS representatives or HPIs, to provide such protection to ensure that inspections are not adversely affected by weather. Historically, we have not observed problems with management meeting these requirements regardless of event size. Management is free to arrange for the most economical means of shelter, whether temporary or permanent, as long as it complies with the regulations in § 11.10.

Proposed § 11.10(a)(3), which we moved from current § 11.6(c), requires that event management provide a means to control crowds or onlookers in order that APHIS representatives and HPIs appointed by management may carry

⁷² NAS study, page 69.

out their duties safely and without interference. This requirement protects inspectors (whether APHIS representatives or HPIs appointed by management), staff, and spectators, as well as horses. We received no comments specifically addressing this change and are finalizing as proposed.

Inspections sometimes require the use of radiography and other equipment that must be connected to an electrical power source. In new § 11.10(a)(4), we proposed to require that an accessible, reliable, and convenient 110-volt electrical power source be available at the horse show, exhibition, sale, or auction site. This provision, which we moved from current § 11.6(d), has been amended so that the availability of a 110-volt electrical power source is a requirement. If fixed electrical service is not available, event management will be required to provide other means for electrical power such as a portable electric generator.

One commenter stated that it is standard practice for shows to make a generator available to run a fan or lights, but otherwise we received no comments specifically addressing this change and are finalizing as proposed.

Finally, we proposed in § 11.10(a)(5) to require appropriate areas to be provided adjacent to the inspection area for designated horses to wait before and after inspection, as well as an area to be used for detention of horses. An appropriate area would be one with sufficient space for the horses and separated from onlookers. We moved this requirement from current § 11.6(e) and revised it to include separation from onlookers.

A commenter recommended that the distance from onlookers should be specified and should not be less than 10 feet, with a fence or other barrier preventing onlookers from approaching the horses or people in the enclosure.

We are finalizing as proposed. We note that given the variability in venue size, a minimum distance specified by the commenter may not always be possible, but it remains the responsibility of event management to control crowds such that APHIS representatives and HPIs appointed by management can carry out their duties safely and without interference.

We also proposed to add a provision to § 11.10(b) stating that, except for the other persons listed below, only a management representative, HPIs appointed by management, and APHIS representatives are allowed to be in the warm-up and inspection area. Each horse in the designated warm-up area may be accompanied by no more than three individuals, including the person

having immediate custody of or responsibility for the horse, the trainer, and the rider. Each horse in the inspection area may only be accompanied by the person having immediate custody of or responsibility for the horse. No other persons will be allowed in the warm-up or inspection areas without prior approval from an APHIS representative or HPI appointed by management. We proposed this provision because our experience has shown that people congregating in designated inspection and warm-up areas can impede the ability of inspectors to perform their duties, and large groups of people massed in an area where multiple horses are warming up can be unsafe both to people and horses. We received no comments specifically addressing this change and are finalizing as proposed.

Responsibilities and Liabilities of Management

Under § 11.20 of the current regulations, event management that does not appoint a DQP to conduct inspections is responsible for identifying all horses that are sore or otherwise in violation of the Act or regulations, and must disqualify or disallow any horses which are sore or otherwise in violation from participating or competing in any horse show, exhibition, sale, or auction. If event management does not appoint qualified inspectors, management can be held liable for the failure to disqualify a sore horse from participating in a covered event.⁷³ If management appoints a DQP to conduct inspections, management can only be found liable for violations of the Act and regulations if they fail to disqualify a horse that the DQP identifies as a sore horse and notifies management accordingly.

As we proposed, HPIs will replace the current role played by DQPs. We also proposed the option that, if desired by event management, an APHIS representative (*i.e.*, a qualified employee of the Agency) can be retained to conduct inspections.

We proposed in § 11.13(a) to include the requirement from current § 11.20(a) that the management of any horse show, exhibition, sale or auction which does not utilize an APHIS representative (or HPI) is responsible for identifying all horses that are sore or otherwise in violation of the Act or regulations, and must disqualify or prohibit any horses which are sore or otherwise in violation of the Act or regulations from participating or competing in any horse

show, exhibition, sale, or auction. In the proposal, we acknowledged that management may choose not to appoint an APHIS representative or HPI to inspect horses, rendering them legally liable for any sore horses participating in the event.

A commenter noted that it is implied that without an APHIS inspector or HPI, the event management and related parties assume the liability of the enforcement of the HPA, but nowhere in the regulations does it specifically state that hiring inspectors absolves event management. The commenter stated that this needs to be answered.

Hiring an inspector does not absolve management of liability if sore horses participate in the event, as under current § 11.20(b)(1) management is still the agent responsible for disqualifying any sore horses reported to management by the inspector. If management does not do so, that constitutes a violation. Current § 11.20(a) states that the management of a horse show, exhibition, sale, or auction that does not appoint a DQP to conduct inspections is responsible for identifying all horses that are sore or otherwise in violation of the Act or regulations, and must disqualify or disallow any horses which are sore or otherwise in violation from participating or competing in any horse show, exhibition, sale, or auction. We proposed to retain these management requirements in proposed § 11.13(a) and (b) and are finalizing as proposed.

We reiterate that shows featuring Tennessee Walking Horses and racking horses performing in pads and action devices have historically posed a much higher risk of soring and show much higher rates of noncompliance than do flat-shod horses and other breeds that do not compete in the tall pads. In the proposal, we invited comments on which horse events covered under the Act APHIS should focus on with respect to compliance risks, particularly events that choose to forego an inspector.

Many commenters stated that APHIS needs to focus on breeds that are the focus of soring concerns—Tennessee Walking Horses and racking horses—as well as Spotted Saddle Horses. We agree with the commenters with respect to focusing enforcement efforts on Tennessee Walking Horses and racking horses. We have responded to comments concerning Spotted Saddle Horses above.

A commenter stated that the 2010 USDA–OIG audit and inspection data compiled by APHIS showed that DQPs are less likely to issue violations and more likely to allow sore horses to perform when APHIS is not present to confirm the outcome of inspections. For

⁷³ 15 U.S.C. 1824(3).

these reasons, the commenter recommended that APHIS prioritize random checks at events at which management has declined to engage either an APHIS representative or an HPI.

We agree with the commenter and will continue conducting risk-based checks at such events as warranted.

We proposed in § 11.13(b) to include requirements, moved from current § 11.20(b), for horse shows, exhibitions, sales, and auctions at which management utilizes an APHIS representative or HPI to conduct inspections. New paragraph (b)(1) will state that the management of any horse show, exhibition, sale, or auction that utilizes an APHIS representative or HPI must not take any action which may interfere with or influence the APHIS representative or HPI in carrying out their duties. We received no comments specifically addressing this change and are finalizing as proposed.

We proposed in paragraph (b)(2) to require that the management of any horse show, exhibition, sale, or auction that utilizes an HPI to inspect horses shall appoint at least 2 HPIs when more than 100 horses are entered. In current § 11.20(c), 2 DQPs are required for inspections when more than 150 horses are entered in an event. However, we determined that limiting the number of horses to 100 or fewer for one HPI, as proposed, allows that HPI to inspect horses more thoroughly and manageably. We also considered the fact that relatively few horse events covered under the Act involve the participation of 100 or more horses and most will therefore only require one inspector.

A commenter stated that if management chooses to appoint an APHIS representative, the proposal does not clearly address whether APHIS will send two representatives if more than 100 horses are entered in a covered event. The commenter also asked that if APHIS is already planning to send a representative to monitor the inspection activities at the show, will APHIS send a different representative for that purpose than the one designated for appointment by management, and added that this should be clarified in the final rule.

We are finalizing as proposed. If management requests APHIS representatives to inspect at an event, APHIS will send the needed number of APHIS representatives on the date requested as availability allows. If a show is allowing horses to participate under therapeutic exceptions, APHIS may send additional representatives to ensure compliance with the Act and regulations.

In paragraph (b)(3) of proposed § 11.13, we required the management of any horse show, exhibition, sale, or auction that utilizes an APHIS representative or HPI to inspect horses to have at least one farrier physically present at the event if more than 100 horses are entered in the event. If 100 or fewer horses are entered in the horse show, horse exhibition, horse sale, or horse auction, the management shall, at minimum, have a farrier on call within the local area to be present, if requested by an APHIS representative or HPI appointed by management.

Several commenters stated that the proposed farrier requirement is a cost burden, particularly to smaller horse shows. Some noted that farriers are likely to make more money serving their existing clients than agreeing to be on call weekends for shows. Some commenters declared there to be a shortage of farriers and that it would be impractical for management to expect on-call farriers to come promptly when needed.

We acknowledge that farriers are in demand and that shows may need to compensate them for their time accordingly. Indeed, at least two commenters stated that it is already standard practice with shows in dressage and other equine disciplines to require that a farrier be on site. As we will allow use of pads and wedges specifically for therapeutic treatment of Tennessee Walking Horses and racking horses participating in covered events, the farrier requirement is necessary to ensure compliance with the Act. During the inspection, a farrier can remove pads and wedges if requested by an APHIS representative or HPI if they need to examine the hoof more closely. We note that no farrier is required at events at which management opts not to utilize an APHIS representative or HPI to inspect horses.

One commenter questioned the need for a farrier at horse shows that do not allow bands, hoof black, toe extensions, tungsten shoes, mixed metal shoes, or any type of pads, including therapeutic, and that require the hoof and sole to be clearly visible for inspection.

We would still require that a farrier be available for such shows if over 100 horses are showing, as horses at these shows are still wearing shoes; and bands, hoof black, and mixed metal shoes, all of which can obscure visibility of the hoof and sole, are not actually prohibited. Furthermore, the farrier requirement only applies when management utilizes an APHIS representative or HPI to inspect horses. Management may opt to forego an inspector, although they will be liable

for ensuring that no sore horses participate or are otherwise present at the event.

One commenter stated that the requirement for having a farrier on call is unclear, as it seems to state that a farrier be on call only if requested by the APHIS representative or HPI, while the preamble addresses it as a requirement regardless of whether it is requested. The commenter asked that we clarify the intent of the requirement.

We intend the requirement to mean that if 100 or fewer horses are entered in the event, management must provide for a farrier in the local area to be on-call. If the APHIS representative or HPI at some point determines that the on-call farrier needs to come to the event, management will need to ensure that the farrier shows up to the event promptly. To clarify this point, we are revising § 11.13(b)(3) to state that if 100 or fewer horses are entered in the horse show, horse exhibition, horse sale, or horse auction, the management shall, at minimum, have a farrier be on call within the local area and ensure that the farrier appear promptly at the horse show, exhibition, sale, or auction if requested by an APHIS representative or HPI appointed by management.

We proposed in paragraph (b)(4) of § 11.13 a provision requiring event management to prevent tampering with any part of a horse's limbs or hooves in such a way that could cause a horse to be sore after an APHIS representative or HPI appointed by management has completed inspection and before participating in a show, exhibition, sale, or auction. We received no comments specifically on this provision and are finalizing as proposed.

Current § 11.20(b)(1) provides a means for event management to notify the Department when they consider the performance of a DQP to be inadequate or otherwise unsatisfactory. Under proposed § 11.13(b)(5), we similarly provided an opportunity for management to address concerns over the performance of an HPI utilized to conduct inspections. If dissatisfied with the performance of a particular HPI, management will need to notify, in writing, the Administrator as to why they believe the performance of the HPI is inadequate or otherwise unsatisfactory. We noted that it is in the best interests of management to notify APHIS promptly so that the Agency can gather relevant information and interview witnesses. We received no comments that specifically addressed this change and are finalizing as proposed.

Current paragraph (b)(1) also requires that "[m]anagement which designates

and appoints a DQP shall immediately disqualify or disallow from being shown, exhibited, sold, or auctioned any horse identified by the DQP to be sore or otherwise in violation of the Act or regulations or any horse otherwise known by management to be sore or in violation of the Act or regulations.” We proposed in § 11.13(b)(6) to similarly require that management that utilizes an APHIS representative or HPI must immediately disqualify or prohibit from showing, exhibiting, selling, offering for sale, or auctioning of any horse identified by the APHIS representative or HPI appointed by management to be sore or otherwise in violation of the Act or regulations, and any horse otherwise known by management to be sore or otherwise in violation of the Act or regulations. We received no comments that specifically addressed this change and are finalizing as proposed.

We proposed in § 11.13(c)(1) that management at horse shows, exhibitions, sales, and auctions be required to ensure that no devices or substances prohibited under proposed § 11.6 are present in the horse warm-up area. This provision ensures that such devices are not being used for any purposes contributing to soring in the warm-up area. We also proposed in paragraph (c)(2) that management must review the orders of the Secretary disqualifying persons from showing or exhibiting any horse, or judging or managing any horse show, exhibition, sale, or auction, and disallow the participation of any such person in any such event for the duration of the period of termination. We received no comments that specifically addressed this change and are finalizing as proposed.

We also proposed in § 11.13(c)(3) that management be required to verify the identity of all horses entered in the show, exhibition, sale, or auction, with acceptable methods of identification being: (1) A description sufficient to identify the horse, including, but not limited to, name, age, breed, color, gender, distinctive markings, and unique and permanent forms of identification when present (e.g., brands, tattoos, cowlicks, or blemishes); or (2) electronic identification that complies with ISO standards;⁷⁴ or (3) an equine passport issued by a State government and accepted in the government of the State in which the horse show, exhibition, or sale or auction will occur.

Several commenters recommended that USDA–APHIS require that horses

have a microchip for identification in order to show, with some noting that many equine breed and discipline organizations already require this. Another commenter agreed, noting that the identification of horses is essential to managing biosecurity concerns and would enable APHIS to identify horses that have been disqualified due to soring and ensure that such horses do not participate in the event in question.

We acknowledge the important reasons cited by the commenters for horse identification but are making no changes to the proposed identification methods, as they are modeled from and generally consistent with the identification requirements in 9 CFR part 86 for official identification of horses moving in interstate commerce. We consider the methods of identification we proposed to be sufficient but will consider the commenters’ recommendations in future rulemakings.

Records Required

In proposed § 11.14(a), moved from current § 11.22(a) and with additions, we required the management of any horse show, horse exhibition, horse sale, or horse auction that contains Tennessee Walking Horses or racking horses to maintain all records for a minimum of 90 days following the closing date of the show, exhibition, sale, or auction.⁷⁵ Records must contain the dates and place of the event, as well as the name and address of the sponsoring organization, event management, and each show judge, as applicable. Management will also be required to keep a copy of each class or sale sheet containing the names of horses, the registration number of the horse (if applicable), names and addresses of horse owner, the exhibition and class number or sale number of each horse, the show class or sale lot number, and the name and address of the person paying the entry fee and entering the horse in the show, exhibition, sale, or auction. Copies of the official program will also need to be kept if one has been prepared, as well as a copy of the scoring cards for shows containing Tennessee Walking Horses and racking horses that includes the place each horse finished in the class. Management must also maintain records showing the name and any registration name and number of each horse, as well as the names and addresses of the owner, the trainer, the custodian, and the exhibitor, and the location of the

home barn or other facility where the horse is stabled.

Records required to be kept by event management in § 11.14(a) also include those of horses disqualified from participating, which are already required to be kept by management and submitted to APHIS under current § 11.24(a). These records must contain the name, exhibition number and class number, or assigned sale number, and the registration name and number (if applicable) for each horse disqualified or prohibited by management from being shown, exhibited, sold, or auctioned, and the reasons for such action, as well as the name and address of the person designated by the management to maintain the records required. Finally, if management has appointed an HPI to conduct inspections at the event, the name and address of each HPI appointed to conduct the inspections is required to be recorded and kept.

Some commenters proposed that records be retained for a duration of 3 years, as opposed to 90 days, by event management for any horse show, exhibition, sale, or auction that contains Tennessee Walking Horses or racking horses found to be sore and in violation of the HPA, or longer, if necessary, until all known investigations or court cases are resolved and after final disposition of the matter.

While we consider 90 days to be a sufficient minimum period for maintaining records, we agree that in some cases an investigation may require that they be held longer to ensure due process. In § 11.22 of the current regulations, we state that the Administrator may, in specific cases, require that a horse show, horse exhibition, or horse sale or auction records be maintained by management for a period in excess of 90 days. We intended to include this provision in the proposed rule but inadvertently omitted it. In response to the above comments and to correct this oversight, we are including this provision in § 11.14(c) of the revised regulations.

A few commenters stated that APHIS should also require management to maintain entry forms for a minimum of 90 days and send them to APHIS within five days following the conclusion of the event.

We do not consider it necessary for management to maintain entry forms for 90 days, as in proposed paragraph (a)(5) we already require on the class or sale sheet the address of the person paying the entry fee and entering the horse in the event. In § 11.16(c), we require management to send these records to

⁷⁴ An international standard for regulating the radio frequency identification (RFID) of animals.

⁷⁵ These information collection activities will be scheduled for merger into 0579–0056 upon publication of this final rule.

APHIS within 5 days following the conclusion of the event.

A few commenters asked if APHIS intends to require management of all horse events, regardless of breed, to submit reports and keep records.

Section 11.16(d) requires management of horse events that do not include Tennessee Walking Horses or racking horses to submit to the Administrator information relating to any case where a horse was prohibited by management from being shown, exhibited, sold, or auctioned because it was found to be sore or otherwise in violation of the Act or regulations. Other than this, APHIS is not requiring management of other horse events to submit reports and keep records at this time. Management of events covered under the Act will need to notify APHIS of the event under paragraphs (a) and (b) of proposed § 11.16.

One commenter stated that eliminating the role of HIOs in the industry is arbitrary and will impose significant new recordkeeping and reporting requirements, and new tasks such as crowd control, on local show managers. The commenter added that under the existing system, HIOs manage these tasks, leaving management to perform tasks which they have never had to previously manage or face being found in violation and having their shows shut down.

We disagree with the commenter's point that the proposed regulatory changes eliminate HIOs or prevent them from working with show management to assist with the tasks described. As we noted in the proposal, HIOs are simply being relieved of their regulatory roles and may continue to contract with and supply recordkeeping and other services to shows and events in a support capacity, including registering participants and coordinating event logistics (including crowd control), supplying show judges, and promoting events.

In the current regulations, there are no recordkeeping requirements for horses under the care of a licensed veterinarian and undergoing therapeutic treatment with pads or other restricted items. We proposed in § 11.14(b) to require that the management of any horse show, exhibition, or sale or auction that allows any horse to be shown, exhibited or sold with devices, pads, substances, applications, or other items restricted under proposed § 11.6(c) for therapeutic treatment must maintain the following information for each horse receiving the therapeutic treatment for a period of at least 90 days following the closing date of the horse show, exhibition, sale, or auction: (1) The name, exhibition

number and class number, or assigned sale number, and the registration name and number (if applicable) for each horse receiving therapeutic treatment; (2) the name, address, and phone number of the licensed veterinarian providing the therapeutic treatment; (3) the State and license number of the licensed veterinarian providing the therapeutic treatment; and (4) the name and address and phone number of the licensed veterinarian's business. Finally, the records will also need to contain a description of the disease, injury, or disorder for which the treatment is given, to include at minimum the starting date of treatment, prescription, or design of the treatment plan, and expected length of treatment, including an estimate of when it is anticipated to be discontinued.

A commenter noted that proposed § 11.14(b) requires management of any event that allows any horse to be shown, exhibited, or sold with devices, pads, substances, applications, or other items restricted under § 11.6(c) for therapeutic treatment to maintain information for each horse receiving the therapeutic treatment. The commenter added, however that there are no devices, substances or applications restricted in § 11.6(c) for therapeutic treatment. Therefore, the commenter asked that § 11.14(b) be amended to remove the reference to "devices, substances or applications" and to add "wedges" since those are allowed in § 11.6(c) for therapeutic treatment.

In the proposal, § 11.6(c) allowed only the use of wedges, pads, and toe extensions for therapeutic purposes if administered by a qualified veterinarian and documented in accordance with the regulations in part 11. Accordingly, we will remove "devices" and "applications" from § 11.14(b) as requested by the commenter and add "wedges, pads, and toe extensions," as these are items that can be used therapeutically. However, we are retaining "substances" in § 11.14(b), as we had intended that substances can be used therapeutically in accordance with the veterinary requirements in § 11.6(c)(4).

A commenter stated that the record requirement for horses receiving therapy seems unnecessarily redundant and invasive, and that requiring only the veterinarian's business contact information should be sufficient.

We disagree that the therapeutic exemption records are unnecessarily redundant and invasive and are finalizing as proposed. We have included prohibitions on pads, wedges, substances, and toe extensions in this new rule as they have been consistently

associated with soring in Tennessee Walking Horses and racking horses. If a horse is to be shown under a therapeutic exemption with these items, a legitimate veterinary need must be cited and documented so that APHIS can review in case of any concerns as to the validity of the treatment. If APHIS disputes a therapeutic exemption at a show, the horse would not be permitted to be shown. Such disqualification could be appealed in accordance with the provisions in revised § 11.5. If APHIS disputes such an exemption in the course of reviewing records, we would consider submitting it to the appropriate State veterinary board.

With respect to our requiring information about the veterinarian, it is important to have adequate information about the veterinarian as such records help to ensure that therapeutic practices are either applied by or under the oversight of a qualified veterinarian. We are applying this recordkeeping requirement to all horses participating in events covered under the Act to ensure that any such horses under therapeutic care involving restricted or prohibited items in proposed § 11.6(c) are receiving legitimate veterinary treatment and are not being sored.

Inspection of Records

Under proposed § 11.15, moved from current § 11.23(a), the management of any horse show, horse exhibition, horse sale, or horse auction will be required to permit any APHIS representative or HPI appointed by management, upon request, to examine and make copies of all records pertaining to any horse that are required in the regulations or otherwise maintained during business hours or agreed upon times. In addition, a room, table, or other facilities necessary for proper examination and copying of such records will need to be made available to the APHIS representative or HPI appointed by management.

A commenter stated that this provision should indicate whether a copier is a required to be provided.

Management is not required to provide a photocopier. We are finalizing as proposed.

Reporting by Management

We proposed in new § 11.16(a) a requirement that the management of any horse show, horse exhibition, horse sale, or horse auction notify the Administrator of the event by mail or email not less than 30 days before it occurs and submit the following information: (1) The name and address of the horse show, exhibition, sale, or auction; (2) the name, address, phone

number (and email address, if available) of the event manager; (3) the date(s) of the horse show, horse exhibition, horse sale, or horse auction; (4) a copy of the official horse show, exhibition, sale, or auction program, if any such program has been prepared; (5) anticipated or known number of entries; (6) whether management requests an APHIS representative to perform inspections at the horse show, horse exhibition, horse sale, or horse auction; or, if not, whether management has chosen and appointed an HPI to inspect horses, or will have no inspector. If neither an APHIS representative nor an HPI is available on the date of the event, we proposed that event management may request a variance. Variances must be submitted by mail, fax, or electronic means such as email to the Deputy Administrator of Animal Care at least 15 days before the event and state the reason for requesting the variance; and (7) whether management will allow any horse to be shown, exhibited, or sold with prohibitions under § 11.6(c) for therapeutic treatment.

Many commenters stated that the proposed recordkeeping requirements in proposed § 11.16 constitute an undue burden on management, particularly those at smaller shows. Some added that the proposed reporting requirements are extreme, as show management would be legally liable for missing information, which they stated was endemic at shows, as well as new liabilities such as notifying USDA of any event more than 30 days out and documenting the use therapeutic pads or devices.

We note that under both the current and proposed regulations, primary responsibility for recording and reporting required data is the responsibility of management. Ultimate liability for ensuring these requirements are met has always rested upon management, even when an HIO has been legally contracted to perform these tasks on behalf of management.

In paragraph (a)(6), we proposed that event management be required to provide information on whether they are requesting an APHIS representative to perform inspections at the horse show, horse exhibition, horse sale, or horse auction; or, if not, whether they have chosen and appointed an HPI to inspect horses or have no inspector. A commenter asked if it is reasonable to expect that an APHIS inspector will be available for each projected show if requests are made at the beginning of the year. The commenter noted that requests must be submitted by show management a minimum of 30 days prior to the event but saw no provision for a response time, and suggested that

APHIS should provide an answer within 10 business days of the request.

While we have proposed to make APHIS representatives available to conduct inspections if requested, we can provide no timeline as to when we will respond to management regarding their request but will do so as promptly as circumstances allow. We cannot guarantee that an APHIS representative will be available to inspect every show requested by management but will provide such representatives as resources allow.

Another commenter stated that under the proposal, horse shows must advise of their need for an HPI at least 30 days prior to the horse show but that there is a 15-day period of which to respond. If after 15 days, the event or show manager is informed an HPI is unavailable, management will only have 15 days to secure another option for inspection, such as a local veterinarian. The commenter stated that this short timeframe will either result in cancellation of the event or result in costly fees at the last-minute request.

Under proposed § 11.16(a)(6), management choosing to use an HPI are required to notify APHIS that they have chosen and appointed an HPI from the official list. In other words, an HPI should already be secured by the time APHIS is notified at least 30 days prior to the event. Management is not constrained from seeking and securing an HPI more than 30 days before the show if they wish. In the event that an HPI cannot be secured for a given show, management is free to conduct the show without having appointed an HPI or APHIS representative to conduct inspections. APHIS may send representatives to observe such shows unscheduled, as warranted.

If neither an APHIS representative nor an HPI is available on the date of the event, we also proposed in paragraph (a)(6) that event management may request a variance. Variances would have to be submitted in writing to the Deputy Administrator of Animal Care at least 15 days before the event and state the reason for requesting the variance.

Several commenters asked for more information about the proposed variance provision. Some commenters stated that variances are not within the regulatory authority of APHIS and in no situation should event management be relieved of their responsibility to ensure sore horses are not shown. Another commenter agreed, stating that under the HPA, APHIS lacks the authority to relieve management from liability for allowing a sore horse to be shown. The commenter added that to the extent APHIS proposed the variance for that

purpose, there is no need for management to be relieved of their legal obligation to ensure that sore horses are not shown. This commenter and a few others also noted correctly that no variance is granted under current regulations if a DQP is not available. Some commenters asked whether a variance means a show would need to be cancelled if no APHIS representatives are available on the date requested.

We have considered the several comments we received that question the legality and intended purpose of the variance. We did not intend to absolve management of responsibility under the Act, and the commenters are correct in stating that under the Act (section 4 (15 U.S.C. 1823(a)), and the current regulations (§ 11.20), the responsibility of management to disqualify sore horses and to be liable if they fail to do so is clear. Based on these comments and our own re-evaluation of the variance, we agree with the commenters and will not finalize this provision for variances in paragraph (a)(6). We are finalizing the other provisions of § 11.16(a) as proposed.

We proposed in § 11.16(b) a requirement that, at least 15 days before any horse show, exhibition, sale, or auction is scheduled to begin, the management of the event must notify APHIS of any changes to the information required to be submitted to APHIS under § 11.16(a) by mail, fax, or email. We included this provision so that APHIS is aware of any changes to the event, such as a change in the number of horses participating or the addition of show classes, that could potentially affect inspections and compliance. We assume that no changes have occurred to the submitted information unless we receive notification to the contrary. We received no comments specifically addressing this revision and are finalizing as proposed. We are removing the fax option for these records because the Horse Protection program no longer receives correspondence from persons by fax. Further, U.S. mail and other electronic methods for submission are more efficient for both the industry and the Agency.

We proposed that under § 11.16(c), within 5 days following the conclusion of any horse show, exhibition, sale, or auction that contains Tennessee Walking Horses or racking horses, the management of such an event is required to submit to APHIS the records required by § 11.14 by mail, fax, or email. This provision is a revision of current § 11.24(a). Event information required under § 11.16(c) that has not

changed and was already submitted in accordance with § 11.16(a) (information to be submitted at least 30 days before the event) will not need to be submitted again. We received no comments that specifically addressed this provision and are finalizing as proposed. We are removing the fax option for submitting the information for the reasons cited above.

Under § 11.16(d), we proposed that within 5 days following the conclusion of any horse show, horse exhibition, horse sale, or horse auction which does *not* include Tennessee Walking Horses or racking horses, the management of such show, exhibition, sale or auction shall submit to the Administrator the following information: Any case where a horse was prohibited by management from being shown, exhibited, sold or auctioned because it was found to be sore or otherwise in violation of the Act or regulations. Information will include at a minimum the name, exhibition number and class number, or assigned sale number, and the registration name and number (if applicable) for each horse disqualified or prohibited by management from being shown, exhibited, sold, or auctioned, and the reason(s) for such action. This provision is a revision of current § 11.24(b). We received no comments that specifically addressed this provision and are finalizing as proposed.

Several commenters asked whether the responsibility for reporting requirements will fall to show managers on site or to USDA inspectors, and that more detail of the required timelines is needed to adequately follow these rules.

When APHIS representatives or HPIs appointed by event management are onsite they can request any records needed from management. To summarize, management is still responsible for submitting records under proposed § 11.16. Event management will be required to provide APHIS with information on an event at least 30 days in advance of it occurring, as noted above, along with informing APHIS whether they intend to utilize an APHIS representative or an authorized HPI to perform inspections at the event. Management will need to contact APHIS at least 15 days in advance informing us of any changing to the information required to be submitted at least 30 days in advance. The new requirements for event management will take effect upon the effective date of this rule.

Several commenters also asked how management responsibilities and liability will change as a result of these changes to the regulations.

In accordance with sections 4 and 5 (15 U.S.C. 1823(b) and 15 U.S.C.

1824(3)) of the Act, management will continue to be responsible and ultimately liable for disqualifying a horse upon notification by an inspector that a horse is sore, or when no inspector has been appointed.

Transportation Requirements

Under proposed § 11.17, moved from current § 11.40, we required that each person who ships, transports, or otherwise moves, or delivers or receives for movement, any horse with reason to believe such horse may be shown, exhibited, sold or auctioned at any horse show, horse exhibition, horse sale, or horse auction, must allow and assist in the inspection of such horse at any such horse show, exhibition, sale, or auction to determine compliance with the Act and regulations. The person will also need to furnish to any APHIS representative or HPI appointed by management upon their request the following information: (1) Name and address of the horse owner and of the shipper, if different from the owner or trainer; (2) name and address of the horse trainer; (3) name and address of the carrier transporting the horse and of the driver of the means of conveyance used; (4) origin of the shipment and date thereof; and (5) destination of the shipment. We received no comments specifically addressing this section and are finalizing as proposed.

Utilization of Inspectors

We proposed in § 11.18(a) that the management of any horse show, horse exhibition, horse sale, or horse auction may utilize an APHIS representative or an HPI to detect and diagnose a horse which is sore or to otherwise inspect horses for compliance with the Act or regulations. In paragraph (b), we included the requirement that if management elects to utilize an HPI to detect and diagnose horses which are sore or to otherwise inspect horses for compliance with the Act or regulations, the HPI must currently be authorized by APHIS pursuant to § 11.19 of the regulations to perform this function.

Several commenters, without providing evidence, objected to replacing DQPs with HPIs, stating that most DQPs have sufficient equine experience to inspect horses for soring.

We are finalizing as proposed. We explained in the proposed rule why we are replacing DQPs with HPIs with regard to industry conflicts of interest irrespective of what equine experience a DQP may have.

One commenter approved of APHIS providing a representative to conduct inspections at no cost, but stated that without any guarantee a representative

will be available, and without a set, contracted cost for HPIs, it leaves show management unable to budget the appropriate funds for a show. Some commenters stated that the cost of hiring an HPI needs to be a fixed cost and should not be more than \$275 per inspector per day. A few commenters requested that APHIS pay for anything above the standard \$275 per day.

We acknowledge the commenters' concerns but note that shows are already budgeting for DQPs to conduct inspections. HPIs are not employed by APHIS and can negotiate contracts with shows based on their own costs and expenses. We have no intention of subsidizing HPIs, but note that shows that have concerns about the cost of HPIs may request inspections be conducted by APHIS representatives. While we cannot guarantee availability of an APHIS representative for a given request, we will make them available to the extent that program resources allow.

Other public comments we received noted that veterinarians, when available, could charge more for their time than could veterinary technicians or other qualified non-governmental persons, resulting in higher costs that may be prohibitive for smaller horse shows and exhibitions. One such commenter stated that while we proposed that the Act requires USDA to allow for the appointment by event management of persons qualified to detect and diagnose soring, the rule precludes this requirement by coercing management to accept USDA inspectors at all horse shows by making the alternative (*i.e.*, veterinarians) cost prohibitive. The commenter explained that the cost of hiring a privately employed veterinarian of a show's choice (which would still force the show to pick from a pre-approved list of certified USDA HPIs) versus accepting a free inspector hand-picked by USDA effectively forces shows to choose the latter.

We acknowledge that as third-party contractors, veterinarians authorized as HPIs may indeed charge higher rates than other qualified inspectors without veterinary degrees. We disagree, however, that the rule incentivizes management to accept only an APHIS representative to conduct inspections because of the costs associated with a veterinarian. If, as the commenter also claims, there are not enough veterinarians to inspect the number of horses competing each season and there is no indication that veterinarians will seek to become USDA-approved HPIs, we have stated in this rule that we will authorize non-veterinary qualified persons as HPIs, with which

management could then likely contract at a lower cost than a veterinarian HPI. Management thus would have the option to appoint a non-veterinary HPI, to appoint an APHIS representative, or hold the event without retaining an inspector.

A commenter stated that in 2023, an industry publication reported that 61 percent of shows were single-day events and that only 3 percent of all shows were 5 days or longer. The commenter stated that the longer shows are likely the only shows capable of securing the financing to hire HPIs and cover their travel expenses, effectively eliminating 97 percent of Tennessee Walking Horse and racking horse shows.

Fees and costs associated with hosting the event include cost of the venue, judges, advertising, announcers, and awards. Those fees and costs usually determine the appropriate entry fee for participants of the event. Inspections are another cost that management of Tennessee Walking Horse and racking horse shows currently incur. We have no data indicating that only events that are 5 days or longer will have the funds to cover HPI expenses.

We note that with the discontinuation of DQPs, the costs formerly attributed to their fees might/could be used to help cover the costs associated with HPIs. Shows can apply the funds they currently use for DQPs to offset the cost of hiring an HPI under the revised regulations. Shows that cannot afford the increased cost may request inspection by APHIS representatives at no cost.

We also proposed including a provision in paragraph (c) of § 11.18 that the management of any horse show, exhibition, sale, or auction must not utilize any person to detect and diagnose horses which are sore or to otherwise inspect horses for the purpose of determining compliance with the Act and regulations, if that person has not been authorized by APHIS or if that person has been disqualified by the Secretary, after notice and opportunity for a hearing, in accordance with section 4 (15 U.S.C. 1823) of the Act, to make such detection, diagnosis, or inspection. We received no comments specifically addressing this section and are finalizing as proposed.

We also included a provision in proposed paragraph (d) requiring that, after the effective date of the final rule, only APHIS representatives and HPIs as defined in § 11.1 may be utilized by management to detect and diagnose horses which are sore or otherwise inspect horses for compliance with the Act or regulations. Any DQPs seeking to continue inspecting or other persons

wishing to become inspectors after the effective date of this final rule must apply to APHIS and meet eligibility qualifications for authorization included in proposed § 11.19.

One commenter stated that APHIS did not propose an effective date as to when show management would be required to utilize APHIS representatives or HPIs as inspectors. Another commenter recommended that § 11.19 of the proposed rule should become effective as soon as possible following APHIS' consideration of public comments and development of a final rule. The commenter stated that this should be accomplished well in advance of the 2024 horse show season.

The requirements in proposed § 11.19 for accepting, training, and authorizing HPIs are effective 30 days after publication of this final rule. This will allow APHIS to prepare inspectors for the effective date of the remaining provisions of the rule, which is February 1, 2025.

It is the Agency's intent that, because the acceptance, training, and authorizing of HPIs may be accomplished in advance of the other provisions of the rule, the HPI-specific provisions of the rule do not depend on the other provisions, are capable of operating independently irrespective of the implementation of the other provisions, and are thus distinct and severable from these provisions. It is thus also the Agency's intent that, should a court hold any provisions of this rule to be invalid, such action shall not affect any other provision of this rule. For example, should the rule's prohibitions on the use of pads, action devices, and toe extensions within the Tennessee Walking Horse and racking horse industry be removed, HPIs could still be trained and authorized regarding the remaining provisions of the rule, as well as the Act itself, and the Agency would still have jurisdiction over such training and authorization. Likewise, should the provisions regarding DCIS be removed, HPIs could still be trained and authorized regarding the remaining provisions of the rule, as well as the Act itself, and the Agency would still have jurisdiction over such training and authorization. Finally, should the HPI-specific provisions be removed and DQPs be retained, DQPs could still be trained and authorized regarding the remaining provisions of the rule and the Act itself.

A few commenters requested that APHIS clarify the final rule to prohibit HIOs from licensing new DQPs, but to permit currently-licensed DQPs in good standing to continue to inspect horses for compliance under the revised

provisions following the effective date, until the HPI program is fully implemented.

We are finalizing as proposed. DQPs can continue to perform inspections under the current program until the new program is implemented. We have no authority to prohibit HIOs from licensing new DQPs in accordance with the existing regulations as long as the current inspection program is in effect.

Authorization and Training of Horse Protection Inspectors

We noted in the proposal that, under the current regulations in § 11.7, HIOs operating APHIS-certified DQP programs are responsible for selecting, training, evaluating, licensing, and disciplining DQPs. When an HIO requests certification of its DQP program, APHIS requires the HIO to submit criteria it intends to use to select DQP applicants, as well as training plans, standards of conduct expected of DQPs, and other materials.

We proposed to have APHIS assume the training and authorization of inspectors, which involves removing and reserving § 11.7 and proposing new requirements for inspectors in a new § 11.19. As we noted in the proposal, we determined that the current regulations delegating DQP training and licensing responsibilities to HIOs were not addressing the conflicts of interest and inadequate training resulting in a failure to diagnose sore horses, and that APHIS having a direct regulatory role in these functions would best achieve the aim of eliminating soring. Such was also the finding of the 2010 USDA-OIG audit and the 2021 NAS study.⁷⁶

Section 11.7(a) of the current regulations lists the basic qualifications required of DQPs. In brief, persons are eligible to be licensed as DQPs if they are: (1) Licensed veterinarians with equine experience, or (2) farriers, horse trainers, or other knowledgeable horsemen whose experience and training qualify them for positions as HIO stewards or judges and who have been formally trained and licensed as DQPs by an APHIS-certified HIO.

As we noted in the proposal, DQPs are not evaluated and licensed by APHIS for their suitability as inspectors. These tasks are performed by HIOs that APHIS has certified based on the criteria in § 11.7(b). Certified HIOs must maintain and enforce DQP training requirements and standards of conduct and are responsible for ensuring that DQPs follow all regulatory requirements pertaining to them throughout § 11.7.

⁷⁶ OIG Audit Report, page 19; NAS study, Recommendation 2–1, page 4.

Some commenters opposed to the proposed rule expressed general support for the current DQP program and the performance of HIOs in training DQPs and facilitating shows. One such commenter opposed to abolition of the DQP program submitted several objections on this point.

First, the commenter stated that our proposed elimination of the DQP program is at odds with the HPA because it effectively eliminates the Tennessee Walking Horse industry's participation in the HPA's enforcement and the self-regulatory scheme that Congress enacted. The commenter opined that Congress amended the HPA in 1976 to give show management a role in the inspection process because USDA lacked the resources to conduct inspections on its own. Therefore, elimination of the DQP program is contrary to the HPA's vision of an industry that will work with USDA to police itself.

We disagree with the commenter that the Act includes industry self-regulation as a requirement, nor does it stipulate that inspectors come from the industry. The Act directs the Secretary of USDA to prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses. The proposed regulations follow this requirement by establishing a pool of qualified persons which management can then choose from and appoint. The proposed regulation allows management to appoint a qualified person to diagnose soring in horses. We explained at length in the proposal the inability of the industry under the current program to address conflicts of interest that impede accurate inspections and enforcement of violations of the Act.

The commenter stated that the credentials required to be an authorized HPI will make it cost prohibitive for shows and, in effect, force management to accept free APHIS inspectors at all horse shows. In addition, the likely shortage of private persons meeting APHIS' qualification standards will also induce horse show management to appoint APHIS representatives instead of HPIs. The effect, the commenter stated, is that the proposed regulation does not give management a choice in who it appoints to inspect horses and, therefore, the regulation is not consistent with the Act's intent to encourage the horse industry to self-regulate.

The regulation was written to give management an ample pool of qualified inspectors to choose from and, at the

same time, address the OIG audit and NAS study recommendations regarding conflict-of-interest issues. We believe it is consistent with the Act's self-regulatory scheme because it gives management choices.

Furthermore, to support its comment that the proposed regulation is at odds with the Act, the commenter cited USDA's ability to direct and control the HPIs in ways that, in effect, makes HPIs *de facto* USDA agents.

We are uncertain about what the commenter means by referring to HPIs as "USDA agents," as they will be third-party contractors and not employees of APHIS. The Act gives USDA the authority to prescribe the requirements for the appointment by management of persons qualified to detect and diagnose a horse which is sore. This provision gives USDA authority to define, by regulation, "persons qualified" and to oversee the administration of the HPI program.

The commenter also stated that it is arbitrary for USDA to insist that private horse inspectors have doctoral training in veterinary medicine while its own representatives do not need any credential besides agency employment to inspect horses for soring, adding that any qualification imposed on private persons seeking to serve as horse inspectors must equally apply to USDA representatives.

We do not require that HPIs necessarily have doctoral training. In proposed § 11.19(a)(1), under the HPI qualification requirements we stated that the applicant must be a licensed veterinarian, except that veterinary technicians and persons employed by State and local government agencies to enforce laws or regulations pertaining to animal welfare may also be authorized if APHIS determines that there is an insufficient pool of veterinarians among current HPIs and applicants to be HPIs. Further, the commenter incorrectly stated that Agency representatives are not required to be credentialed to inspect horses. All APHIS representatives that conduct the actual hands-on inspections of horses for soring are veterinarians. The commenter further stated that the proposal lacks a principled basis by which to exclude professional horse trainers and farriers from its new licensing regime, and opined that neither veterinary technicians nor local animal welfare personnel have greater claim to accurately detect soring in horses than professional horse trainers and farriers and may have far less equine or even large-animal experience.

Under the Act, "[t]he Secretary shall prescribe by regulation requirements of

persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses. . . ." We determined that persons qualified to inspect horses must be free of the conflicts of interest explained in the proposal and noted in the OIG audit and NAS study. Many trainers and farriers working in the Tennessee Walking Horse and racking horse industries are not likely to meet this requirement. Further, veterinary technicians and animal welfare officials have the animal welfare experience necessary to conduct inspections in good faith.

One commenter cited a Tennessee law, Tenn. Comp. R. & Regs. 1730-03-.02, that the commenter suggested may not authorize veterinary technicians to make diagnoses, stating that this law could also limit the pool of HPI applicants, which would make it more necessary to include professional horse trainers and farriers as eligible to apply to become HPIs.

We disagree that the Tennessee law cited would limit the pool of HPI applicants. Veterinary technicians in Tennessee who apply, meet the requirements, and are authorized as HPIs would be performing duties under the authority of the Horse Protection Act. To the extent that it could be argued that the Tennessee regulation conflicts with the Act, section 1829 of the Act would be operative, and the Tennessee regulation would be preempted.

The same commenter stated that the elimination of the DQP program was arbitrary and capricious because USDA's data in support of eliminating it is unreliable and does not provide a reasoned basis for USDA's decision.

We disagree that our proposed elimination of the current DQP program is arbitrary and capricious. We note evidence we presented in the proposal from the OIG audit report, which found that DQPs are less likely to issue violations and more likely to allow sored horses to perform when APHIS officials are not present to observe and confirm the outcome of inspections. Further, in a review of program data from 2005 to 2008, the OIG audit noted that out of 1,607 events in which DQPs provided inspection services, 49 percent of the violations they issued occurred at the 108 events at which APHIS officials were also present, suggesting that DQPs were considerably more inclined to issue violations when under APHIS observation than when they were not.

In the proposed rule, we cited findings of USDA's Office of the Judicial Officer (OJO), which issues final decisions on behalf of the Secretary of Agriculture, as evidence that soring

continues to persist within the Tennessee Walking Horse and racking horse communities largely due to conflicts of interest. We stated that the Secretary of Agriculture, through the OJO, has found that DQP inspections of horses are less probative than inspections conducted by APHIS VMOs. Decisions issued by the OJO include accounts of exhibitors showing sored horses that had been inspected and cleared by DQPs, cursory inspections or use of incorrect methods by DQPs, and exhibitors attempting to avoid violations by having another person acknowledge responsibility. In the paragraph describing the OJO findings, we provided a footnote, footnote 12 of the proposed rule, which provided links to four illustrative examples of OJO decisions.

In citing of OJO decisions as support for eliminating the DQP program, a commenter suggested that we had mischaracterized the cases we cited. The commenter stated that three of the cases cited were unsuccessful appeals of default judgments that contain no discussion of the underlying examination, and in the fourth, the administrative law judge (ALJ) expressed significant concern about the credibility of the VMO but nonetheless found in APHIS' favor.

We agree that the three cases cited were unsuccessful appeals of default judgments; they were not cited to illustrate that the OJO had found problems with the DQPs. Rather, as described in footnote 12 in the proposal, the cases were cited to provide examples of "Decisions for showing sored horses." The footnote directed the public to 3 resources that collectively contained more than 30 other OJO Decisions and Orders regarding the HPA.

Some commenters questioned whether APHIS will have the resources to enforce the proposed changes to the regulations under the new program.

APHIS will have the resources, including inspectors, necessary to enforce the changes we are making to the regulations and to conduct ongoing evaluation of the effectiveness of the program. We are tasked under the HPA to enforce its provisions and APHIS will allocate resources to this end as needed.

Proposed § 11.19 includes the qualifications required of persons who are applying to APHIS as HPI candidates. Applicants will be required to show that they meet all qualifications in two tiers, designated as Tier 1 and Tier 2. As we explain below, an applicant must meet the Tier 1 requirement as a prerequisite to be further evaluated under Tier 2

requirements. In the proposal, we invited comment on the clarity of the proposed process, and/or the utility of a tiered process for evaluating HPI applicants as proposed, including suggestions for simplifying it or replacing it with an altogether different process.

One commenter stated that there is no need to have a tiered process for narrowing down potential applicants to see if they meet the HPI requirements, adding that the requirements themselves are simple enough and that tiers imply inaccurately that there are two grades of inspectors.

We are finalizing the tiered process as proposed. Section 11.19(a) clearly explains that HPI applicants must meet Tier 1 qualifications first and will be further evaluated based on Tier 2 qualifications. We see no implication that two distinct grades of inspectors are being considered.

Prior to authorization, APHIS will ensure that inspectors are sufficiently trained and qualified to perform inspections and, once authorized, that they observe all standards of conduct and perform their duties consistent with enforcing the Act and regulations. All applicants will be required to submit an HPI application to APHIS using guidance provided on the APHIS Horse Protection Program website.⁷⁷

We listed in paragraph (a)(1) of proposed § 11.19 the qualifications of Tier 1, which require that the applicant be a licensed veterinarian, except that veterinary technicians and persons employed by State and local government agencies to enforce laws or regulations pertaining to animal welfare may also be authorized if APHIS determines that there is an insufficient pool of veterinarians among HPs and applicants to be HPs. Tier 1 includes no special provision for HPI eligibility for farriers, horsemen, and other laypersons with industry experience.

A substantive number of commenters stated that due to a shortage of qualified equine veterinarians and veterinary technicians, USDA will be unable to secure qualified equine experts to conduct inspections. Some cited an American Association of Equine Practitioners study as evidence, noting that the study indicates by the year 2030 it is estimated the U.S. market will require 5,300 equine veterinarians just to stay even.

The commenter is referring to the total number of U.S. equine veterinarians estimated to be needed by the year 2030. As of 2022, there were

3,645 practicing equine vets in the United States.⁷⁸ We acknowledged in the proposal that given the number and geographical distribution of veterinarians in the United States, there may be an insufficient number of such veterinarians with equine experience applying to be authorized as HPs, with several commenters on the 2016 proposed rule raising the same concern. Given this possibility, the proposal includes a provision for authorizing qualified veterinary technicians and local animal control officials with equine experience to conduct inspections if the numbers of licensed equine veterinarians applying are insufficient. All qualified persons authorized as HPs will receive the training sufficient to conduct accurate and objective inspections for soring.

Further, given the shortage of veterinarians cited by commenters, we have elected not to finalize the requirement that veterinarians be licensed under proposed § 11.19(a)(1) as a qualification for authorization. We are also basing this change on the fact that APHIS VMOs are not required to be licensed. As for the commenters' concern that there is also a shortage of veterinarians (whether licensed or not) or qualified veterinary technicians that have sufficient equine experience to meet the qualification requirements in the proposed regulation, we acknowledge the nationwide shortage of veterinarians and will authorize veterinary technicians and State/local animal control officers to conduct inspections if an insufficient number of veterinarians apply. This, however, does not preclude our duty under the Act to enforce its provisions accordingly and the Agency will allocate resources as needed to do so.

Some commenters asked that we expand the inspector pool to allow current DQPs to be considered, as they are skilled horsemen and capable of identifying a sore horse and succeeding in other inspection requirements.

Any person may submit an application to be considered for authorization. However, as indicated in the OIG audit, the NAS study, and in the view of all major veterinary organizations, veterinarians with equine experience are best qualified to detect soring in horses. Among other advantages, their medical training in anatomy and physiology affords them the ability to discern signs of soring in a horse that may be missed by experienced inspectors who lack such

⁷⁷ <https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/hpa>.

⁷⁸ "From the President: Making the Work Fit the Workforce." *Equine Veterinary Education* 12:3, December 2022: page iii.

intensive training, or whose judgment may be impaired by conflicts of interest. We intend to train and authorize HPIs to effectively detect soring in horses.

Some commenters stated that the Department needs to declare that only large animal veterinarians, specifically equine veterinarians, are allowed to be HPIs, as a licensed veterinarian may have no knowledge of horses. A few commenters stated that few State or local animal control officials have any experience with horses.

While our preference is to authorize qualified equine veterinarians as HPIs, we will ensure that other veterinarians with equine experience, as well as qualified veterinary technicians and local animal control officials with equine experience, receive the training required to conduct accurate and objections inspections for soring. The regulation does not require applicants to be equine veterinarians, just that the applicant meets the Tier 1 qualifications and, under Tier 2, “demonstrate[s] sufficient knowledge and experience of equine husbandry and science and applicable principles of equine science, welfare, care, and health for APHIS to determine that the applicant can consistently identify equine soring and soring practices.” We acknowledge that many animal control officers do not regularly work with horses, but those who do apply with an appropriate amount of equine experience will be considered as needed.

One commenter noted that some veterinary technicians are not accredited and as a result probably do not “possess a level of medical training” necessary to be authorized as an HPI. The commenter recommended that we add “accredited” to the veterinary technician requirement in proposed § 11.19(a)(1). Another commenter stated that APHIS must clarify and strengthen the criteria for seeking accredited veterinary technicians.

We are making no changes in response to the comment. Veterinary technicians applying for authorization as HPIs will be evaluated based on their knowledge and experience, and whether they are likely to be able to successfully perform the duties required. APHIS’ internal criteria for selecting candidates will take into account accreditation status and types of accreditations earned, as well as equine experience, so we do not see a need to expressly include “accredited” to the requirement.

A commenter asked what criteria APHIS will use when determining to open the HPI applicant pool to credentialed veterinary technicians.

While APHIS will prioritize authorizing veterinarians with equine experience as HPIs, we will consider authorizing qualified veterinary technicians and animal welfare officials with equine experience if insufficient numbers of qualified veterinarians with equine experience apply. All qualified persons whom APHIS authorizes as HPIs to conduct inspections will be trained to have the knowledge and skills necessary to accurately diagnose soring in horses.

If an applicant meets the qualifications in Tier 1, we will then evaluate whether a candidate meets the qualifications listed in Tier 2, which we include in proposed paragraph (a)(2). In order for APHIS to consider the applicant as a candidate to be an HPI, all qualifications must be met. Guidance explaining details of these qualifications will be posted to the APHIS Horse Protection website.

We proposed in § 11.19(a)(2)(i) of the Tier 2 qualifications that the applicant must demonstrate sufficient knowledge and experience of equine husbandry and science and applicable principles of equine science, welfare, care, and health to determine that the applicant can consistently identify equine soring and soring practices. The current regulations do not specifically require that inspectors demonstrate this knowledge during evaluation of their application. While an HIO could establish this application requirement as part of its certified DQP program, APHIS cannot confirm that the HIO is actually enforcing the requirement under the current regulations.

A commenter asked how applicants will be required to demonstrate this knowledge.

On the HPI application submitted to APHIS, applicants will be asked to describe their applicable knowledge and experience. Throughout the application process, APHIS will request additional information to determine an applicant’s suitability as needed. APHIS will ensure that authorized HPIs, with confirmed prior equine experience, have the knowledge necessary to perform effectively in the role. We are finalizing paragraph (a)(2)(i) as proposed.

For an applicant to be considered for HPI authorization, we proposed in § 11.19(a)(2)(ii) that the applicant must not have been found to have violated any provision of the Act or the regulations in 9 CFR part 11 occurring after July 13, 1976, or have been assessed any civil penalty, or have been the subject of a disqualification order in any proceeding involving an alleged violation of the Act or regulations occurring after July 13, 1976. This

requirement is similar to one currently under DQP licensing requirements for HIOs in § 11.7(c)(4). As other requirements in paragraph (c) pertain to HIOs, they are no longer necessary. We received no comments specifically on this provision and are finalizing as proposed.

We proposed in § 11.19(a)(2)(iii) the qualification requirement that the applicant, as well as the applicant’s immediate family and any person from whom the applicant receives a financial benefit, must not participate in the showing, exhibition, sale, or auction of horses or act as a judge or farrier, or be an agent of management. The current regulations in § 11.7(d)(7)(i) prohibit a DQP from exhibiting, selling, auctioning, or purchasing any horse sold at any horse show, sale, or auction at which he or she has been appointed to inspect horses, and paragraph (d)(7)(ii) prohibits a DQP from inspecting horses at any horse show, exhibition, sale or auction in which a horse or horses owned by a member of the DQP’s immediate family or the DQP’s employer are competing or being offered for sale. This provision identifies conflicts of interest at the application stage, rather than applying them after the inspector has already been authorized to conduct inspections.

One commenter stated that the prohibition against HPIs, their family members, or their employers participating in the showing, exhibition, sale, or auction of horses or acting as a judge, farrier, or management is too broad, and suggested that the prohibition would eliminate people who exhibit or show horses in dressage, jumping, and reining events that do not use Tennessee Walking Horses or racking horses. Similarly, another commenter asked if this requirement refers to all horses or just to Tennessee Walking Horses and racking horses, adding that if it refers to all horses, it might eliminate many equine veterinarians as HPI candidates as many will have family members involved in their respective horse world. The commenter asked that we limit the prohibition to involvement with the two breeds mentioned. Another commenter asked if proposed § 11.19(a)(2)(iii) will prohibit an HPI from buying or selling a horse.

We have reviewed commenter concerns over this HPI qualification requirement in proposed paragraph (a)(2)(iii) and agree that it is unnecessarily broad in scope. The requirement potentially excludes persons having a financial or other association with horse breeds and events in which soring confers no

competitive advantage, and extends to their immediate families and anyone from whom the applicant receives a financial benefit, as well as persons wanting to buy or sell horses. Holding all applicants to a such a rigid regulatory qualification standard, without APHIS having the flexibility to assess their individual circumstances, would potentially shrink the pool of qualified persons otherwise eligible to apply to be HPIs. Accordingly, we are removing this qualification requirement from the regulations and in its place will ask applicants to sign a code of conduct attesting to their freedom from financial or professional conflicts of interest, subject to screening and verification by APHIS. Under this code of conduct, applicants and trainees can be denied continuation in the program and HPIs can be disqualified if found to have conflicts of interest.

Another commenter asked how APHIS can screen HPI applicants for biases and conflicts of interest against Tennessee Walking or racking horses, adding that applicants could have preconceived ideas that all Tennessee Walking Horses and racking horses are sore.

We reply that the stated purpose of screening applicants for conflicts of interest is not to determine any personal biases an applicant may or may not have, but whether the applicant is situated in any financial or other relationship or otherwise has engaged in actions that would affect his or her ability to inspect horses objectively. If an applicant has behaved or communicated in such a way that indicates an unwillingness to perform unbiased inspections, we believe the screening provisions we proposed in paragraph (a)(2)(v) and adherence to the code of conduct will address such disqualifying behaviors. Furthermore, the training HPIs receive will allow them to distinguish sore from non-sore horses using techniques validated by veterinary best practices.

A few commenters recommended that in addition to the screening proposed in the rule to check for criminal and professional breaches of conduct, veterinarian HPIs should be restricted from servicing covered events within a 30- to 50-mile radius of their veterinary practice. The latter should also apply to non-veterinarian HPIs.

We are making no changes in response to the comment. In the event that a relationship exists between an HPI or veterinarian and event management resulting in a conflict of interest, the number of miles in distance the practice may be from the event is immaterial. Veterinarians typically

travel at or beyond this radius to serve their clients.

A commenter stated that HPIs should not be permitted to inspect a horse if family or business relationships could impair the HPI's objectivity. The commenter suggested that APHIS include a recusal requirement if an HPI is presented with a horse owned, trained, or exhibited by or in the custody of a family member, co-worker, or client, as well as a requirement that show management provide copies of show entries to HPIs at least 2 business days prior to the show so that HPIs can identify potential recusal situations in advance.

We note that authorized HPIs will undergo screening for conflicts of interest and will be required to sign a code of conduct, which should preclude a recusal requirement. As to providing HPIs with a list of show entries before the date of the show, we do not see the utility of this as some horses are typically entered on the day of the show. HPIs, however, are free to request an advance entry list from a show if they wish.

We proposed in paragraph (a)(2)(iv) that the applicant must not have been disqualified by the Secretary from performing diagnosis, detection, and inspection under the Act, which is similar to the requirement in current § 11.7(c)(6) in which HIOs must not license such persons. We received no comments specifically on this requirement and are finalizing as proposed. With the removal of proposed § 11.19(a)(2)(iii), we are redesignating proposed paragraph (a)(2)(iv) as (a)(2)(iii).

We proposed in paragraph (a)(2)(v) that the applicant must not have acted in a manner that calls into question the applicant's honesty, professional integrity, reputation, practices, and reliability relative to possible authorization as an HPI. We believe that such in-depth screening to determine an applicant's suitability is only possible if APHIS directs the application process and decides whether to authorize a person to conduct inspections. We proposed that applicants screened under Tier 2 will not be considered to be authorized as HPIs if any of the following sources of evidence in proposed paragraph (a)(2)(v) raises questions about their suitability. We received no comments specifically on this provision and are finalizing as proposed. With the removal of proposed § 11.19(a)(2)(iii), we are redesignating proposed paragraph (a)(2)(v) as (a)(2)(iv).

We proposed under paragraph (a)(2)(v)(A) to review criminal

conviction records, if any, that may indicate the applicant lacks the honesty, integrity, and reliability to appropriately and effectively perform HPI duties.

One commenter recommended that this paragraph be expanded to make any conviction under State or Federal law for animal cruelty or neglect, or any administrative penalty or suspension imposed for violating professional licensure requirements, a disqualifying factor for authorization as an HPI.

We are making no change in response to the commenter. Disqualifying factors for authorization as listed by the commenter are already addressed under proposed § 11.19(a)(2)(v)(D), which covers any other evidence reflecting on the honesty, reputation, integrity, and reliability of the applicant. We are finalizing this change as proposed.

Under proposed paragraph (a)(2)(v)(B), APHIS will review records of the person's actions while participating in Federal, State, or local veterinary programs when those actions reflect on the honesty, reputation, integrity, and reliability of the applicant. Also, under proposed paragraph (a)(2)(v)(C), APHIS will review judicial determinations in any type of litigation adversely reflecting on the honesty, reputation, integrity, and reliability of the applicant. Finally, we proposed in paragraph (a)(2)(v)(D) to review any other evidence reflecting on the honesty, reputation, integrity, and reliability of the applicant to perform HPI duties.

We received no comments specifically on these provisions and are finalizing as proposed. With the removal of proposed § 11.19(a)(2)(iii), proposed paragraphs (a)(2)(v)(A) through (a)(2)(v)(D) will become (a)(2)(iv)(A), (a)(2)(iv)(B), (a)(2)(iv)(C), and (a)(2)(iv)(D) respectively.

Current § 11.7(b) contains several specific training requirements that HIOs are required to provide to DQPs. As APHIS will train all HPIs to perform inspection duties, we proposed to include in paragraph (b) of § 11.19 the requirement that all applicants selected as candidates will complete a formal training program administered by APHIS prior to authorization. APHIS will train HPIs using professionally recognized, science-based approaches to detecting sore, many of which were evaluated and recommended in the above-mentioned NAS study. Continual training of HPIs as APHIS determines to be necessary will be a condition of maintaining authorization to inspect horses. Additional details of the training program will be available on the APHIS Horse Protection website.

A commenter recommended that APHIS include the list of training subjects from the 2016 proposed rule and 2017 final rule and exam requirement in this final rule. The commenter added that including these training topics will provide transparency that APHIS will instruct HPIs on relevant subject areas for diagnosing and detecting soring and enforcing the HPA. APHIS will determine subject areas needs and training necessary for the program, which may differ from what was published in 2016. We intend to make publicly available an inspection guide that includes training procedures by this rule's effective date. We are finalizing § 11.19(b) as proposed.

Under proposed § 11.19(c), APHIS will maintain a list of all HPIs on the APHIS Horse Protection website. The list will also be available by writing to APHIS via email or U.S. mail. Event management can appoint an HPI of their choosing from the list for a given date as availability allows.

Several commenters stated that the rule appears to allow show management to select which USDA-authorized inspector(s) will examine horses and that further clarity is needed concerning this point and how it will work in practice. They added that the department should directly assign USDA licensed-and-trained inspectors to shows.

Section 4 (15 U.S.C. 1823(c)) of the Act allows for event management to appoint persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcement. This new rule is consistent with what is required in the Act itself and describes the process in which event management may either appoint an HPI or request an APHIS representative to inspect horses. All HPIs available for appointment will be trained and authorized by APHIS and if event management elects to have an APHIS representative attend the event, APHIS will determine who that representative will be.

One commenter stated that, contrary to APHIS' contention, section 4 of the Act does not require that management be granted the choice of which inspector to utilize. The commenter suggested that to the extent section 4 of the HPA requires some element of choice, that requirement is satisfied by the choices already presented: (1) to appoint an inspector in the first place and, if so, (2) the choice to request an APHIS representative or an HPI.

We disagree with the commenter. Section 4 (15 U.S.C. 1823(c)) of the Act states that "[t]he Secretary shall

prescribe by regulation requirements for the appointment by the management . . . of persons qualified to detect and diagnose a horse which is sore. . . ." The first choice presented by the commenter does not include the act of appointing a specific inspector. The second choice is a request for APHIS to appoint an inspector rather than allowing management to appoint one as the Act requires.

One commenter expressed concern that allowing management to choose an HPI from a list provided to them raises the potential for abuse, as show management could select an HPI that is more lenient to show management and perpetuate problems with conflicts of interest. Another commenter agreed and expressed concern that a group of HPIs sympathetic to "big lick" proponents could control the process by which those HPIs are assigned to and paid by horse shows affiliated with the HIO.

We have proposed a screening component for HPI applicants and a code of conduct for authorized HPIs sufficient to address the concerns of the commenters. APHIS will regularly evaluate authorized HPIs for conflicts of interest and can permanently disqualify any such HPI that fails to perform his or her duties satisfactorily. We are finalizing § 11.19(c) as proposed. We proposed in § 11.19(d)(1) that APHIS may deny an application to be authorized as an HPI for any of the reasons outlined in paragraph (a) of § 11.19. In such instances, the applicant will be provided written notification of the grounds for the denial. The applicant may appeal the decision, in writing, within 30 days after receiving the written denial notice. The appeal will need to state all of the facts and reasons that the person wants the Administrator to consider in deciding the appeal. As soon as practicable, the Administrator will grant or deny the appeal, in writing, stating the reasons for the decision. We also proposed in paragraph (d)(2) that APHIS may permanently disqualify any HPI who fails to inspect horses in accordance with the procedures prescribed by APHIS or otherwise fails to perform duties necessary for APHIS to enforce the Act and regulations, after notice and opportunity for a hearing. Requests for hearings and the hearings themselves will be in accordance with the Uniform Rules of Practice for the Department of Agriculture in subpart H of part 1, subtitle A, of 7 CFR. We received no comments specifically on these provisions and are finalizing as proposed.

General Comments

A substantial number of commenters expressed trust that APHIS will expeditiously finalize a new HPA rule in order to protect horses from abuse.

This final rule does such.

Other commenters opposed to the proposed action stated that it constituted an overreach of the USDA through excessive regulation of the gaited horse industry.

The Horse Protection Act, enacted by Congress, gives the Secretary of USDA the authority to issue such rules and regulations as he deems necessary to carry out its provisions, including preventing sored horses from participating in horse shows, exhibitions, sales, and auctions. The proposed rule and this final rule provide ample evidence that the regulatory revisions in this final rule are warranted based on the practices of the industry that is regulated.

Several commenters noted that the racking horse is a specific breed and should not be confused with other gaited breeds that perform a rack, and recommended that the term 'racking horse' be changed to "Racking Horse," in order to avoid confusion between the specific breed and other breeds that perform a rack.

As we noted earlier in this final rule, the racking horse is a breed derived from the Tennessee Walking Horse with a natural gait known as the "rack," a four-beat gait with only one foot striking the ground at a time. We are making no change, as we do not consider the lower-case usage of the term to be a point of confusion about this breed with other breeds.

One commenter stated that a recent study reported a genetic mutation in horses that affects gait and makes them more susceptible to soring, adding that the mutation can occur in any horse breed, not just those listed in the rule. The commenter recommended that APHIS expand the scope of the rule to include all gaited horse breeds or types that have the genetic mutation that predisposes them to soring.

We are making no changes based on the commenter's recommendation. The commenter did not cite a specific article but apparently is referring to a mutation in the DMRT3 gene (also referred to as the "gait keeper" mutation) that can affect locomotion in horses.⁷⁹ The mutation occurs naturally, and its

⁷⁹ One such discussion of this topic is Andersson, L., Larhammar, M., Memic, F. et al. *Mutations in DMRT3 affect locomotion in horses and spinal circuit function in mice*. *Nature* 488, 642–646 (2012). <https://doi.org/10.1038/nature11399>.

presence does not make a horse more predisposed to being sore.

Some commenters stated that the USDA should work with the industry rather than try to impose additional regulations supported by radical animal rights groups.

USDA seeks to enforce provisions of the HPA objectively and acknowledges the importance of working with the industry toward that end. USDA collaborated closely with the gaited horse industry to develop the Designated Qualified Persons program in 1979, and since that time we have continued to work with the industry in developing regulatory policy, procedures, and methods of inspection to eliminate soring. This work is described in the proposed rule. As the industry under the current regulations has not made adequate progress in eliminating soring in horses, we are revising the regulations so that APHIS has greater oversight over inspections and enforcement. The revisions were made by the Agency on its own accord based on our experiences and data, as corroborated by third parties that had no inherent bias towards the industry or the Agency.

A commenter asked if APHIS has a hierarchical matrix to sort out owners from trainers, grooms, and transporters so as to assign responsibility for prosecution.

APHIS maintains no such matrix, but we follow section 5 (15 U.S.C. 1824) of the Act, which lists unlawful acts by those transporting, showing, exhibiting, entering, selling, auctioning, or offering for sale any horse which is sore and includes owners who allow such activities. These activities do not include groomers unless a groom also fulfills one of the aforementioned roles.

Several commenters stated that the USDA has ignored due process and violated property rights by not allowing horses to be shown or exhibited, regardless of whether they are considered by APHIS representatives to be sore.

While APHIS officials may inspect horses and notify management of its reasonable belief that a horse is sore or otherwise in noncompliance with the Act and regulations, it is management's decision alone whether to disqualify or prohibit the horse from being shown, exhibited, sold, or auctioned. Management that does not disqualify a horse that has been diagnosed as sore at the event by an APHIS representative or HPI are subject to possible criminal and civil penalties.

Some commenters stated generally that APHIS lacks an understanding of

the Tennessee Walking Horse and racking horse industries.

Commenters provided no support for this statement. From 1979 to the present, APHIS has administered the Horse Protection program under which the Agency certifies HIOs to train and license DQPs to conduct inspections. As we noted in the proposed rule, APHIS has also conducted collaborative outreach and training programs with the industry. Despite our efforts, the industry has shown scarce improvement in enforcing the HPA. Our oversight of the program has provided us with ample data regarding soring and an ever-evolving familiarity with industry practices and activities.

Several commenters stated that the current self-regulatory approach and program inspection structure are sufficient to prohibit soring.

We disagree with the commenters. As detailed in the proposed rule and this final rule, the results of APHIS inspections of horses at HPA-covered events, corroborated by the findings of the earlier cited USDA–OIG audit and NAS study, as well as findings by the USDA Judicial Officer, indicate that the current inspection program is inadequate to reduce instances of soring. Many commenters, including Members of Congress and a national veterinary organization, asked that APHIS not extend the comment period for the rule, while other Members of Congress and stakeholders in the gaited horse industry asked us to extend it by 60 days. Commenters requesting a 60-day extension stated that the current comment end date does not allow enough time for the industry to obtain its own economic analysis of the proposed rule, retain and meet with an expert, provide data, and secure a completed analysis.

We made no changes to the 60-day comment period for the proposed rule. We determined this number of days to be sufficient for persons to prepare and submit substantive comments, particularly as the industry had already completed the groundwork necessary for drafting and submitting a detailed economic analysis on the 2016 HPA proposal.⁸⁰ That proposal included many of the same major revisions in this current rulemaking, including APHIS assuming the training and authorizing of inspectors, a farrier requirement, and prohibition of action devices and pads for Tennessee Walking Horses and racking horses.

⁸⁰ For one example, see National Celebration comment, page 95: <https://www.regulations.gov/comment/APHIS-2011-0009-11184>.

APHIS provides statistical information on its inspection activities, regulatory correspondence, and enforcement actions under the HPA to serve the public interest in the actions and functions of the Federal Government and in compliance with applicable laws. One commenter stated that the Tennessee Walking Horse industry has a 98 percent compliance rate with the Act and regulations. Several other commenters, including a few referring to compliance rates “documented by Rood and Riddle,” cited rates of 90 percent or higher.

The compliance percentages cited by the commenters appear to consist of combined data from inspections at both flat-shod and performance horse shows, including many events at which no APHIS officials were present to oversee DQP inspections. The commenters provided no data on compliance rates from the Rood and Riddle Equine Hospital and APHIS was unable to locate any data issued by Rood and Riddle regarding HPA compliance rates.

A few commenters stated that the swabbing of horses with alcohol by APHIS officials at the 2023 Tennessee Walking Horse National Celebration was a form of harassment and abuse.

We disagree with the commenters. The swabbing, which is harmless to horses, was in conjunction with testing for prohibited substances that can cause or mask the effects of soring. APHIS swabs with alcohol because it helps to lift the substance to be tested off the skin. APHIS is authorized to perform such testing under its statutory obligation to enforce compliance with the Act. The swabbing allows us to specifically identify the substance on the pasterns but is not required to identify a horse as noncompliant, as any Tennessee Walking Horse or racking horse with a substance on its limbs is in noncompliance under current § 11.2(c) and the proposed regulations.

Some commenters suggested that APHIS file animal abuse charges in cases of soring.

The Act and regulations are enforced at the Federal level by USDA. Civil and criminal proceedings are initiated under the Act. We note that many local jurisdictions have animal cruelty laws that cover animal abuse.

A commenter suggested the proposed rule should become effective as soon as possible following APHIS's consideration of public comments and development of final prohibited actions, practices, devices, and substances, and should, if at all possible, be accomplished well in advance of the 2024 horse show season.

We are making no such change, but we acknowledge the commenter's interest and have worked to complete this rulemaking in as timely a manner as possible under the rulemaking process. There are legal and procedural requirements that we must follow regarding any regulatory action including, but not limited to, the need for review of all comments received to fulfill the requirements of the Administrative Procedure Act; the need to review, and, as necessary, revise regulatory text and supporting documentation in response to comments; and the need to comply with Executive orders governing the regulatory process.

A commenter stated that a digital directory with contact information for HPIs and disqualified persons would improve compliance and enforcement for both APHIS and event managers. Another commenter recommended that APHIS collaborate with the USEF and commercial horse show software companies to develop an integrated software database system to furnish up-to-date lists of disqualified horses, owners, and custodians.

We acknowledge the commenters' suggestions and will consider them as the Horse Protection program continues to enhance enforcement efforts. We note that we intend to make a list of HPIs available on the Horse Protection website, where lists of disqualifications can currently be found.

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule with the changes discussed in this document.

Executive Orders 12866, 13563, and 14094 and Regulatory Flexibility Act

This final rule has been determined to be significant for the purposes of Executive Order 12866, as amended by Executive Order 14094, "Modernizing Regulatory Review," and, therefore, has been reviewed by the Office of Management and Budget.

We have prepared an economic analysis for this rulemaking. The economic analysis provides a cost-benefit analysis, as required by Executive Orders 12866 and 13563, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules,

and of promoting flexibility. The economic analysis also provides a final regulatory flexibility analysis that examines the potential economic effects of this rulemaking on small entities, as required by the Regulatory Flexibility Act. The economic analysis is summarized below. Copies of the full analysis are available on the *Regulations.gov* website (see footnote 10 in this document for a link to *Regulations.gov*) or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

The Horse Protection Act (HPA, or Act, 15 U.S.C. 1821 *et seq.*) prohibits sore horses from participating in horse exhibitions, sales, shows, or auctions covered under the Act. Soring is the practice of intentionally injuring a horse's front feet and limbs to cause pain so intense that the horse lifts its legs quickly to relieve the pain when its hooves strike the ground, thereby producing a distinctive high-stepping gait.

In September 2010, USDA's Office of Inspector General (OIG) released an audit of the Animal Plant and Health Inspection Service's (APHIS) enforcement of the HPA. In addition, a 2021 National Academy of Sciences (NAS) study examined methods used to inspect horses for soreness and made recommendations. A proposed rule was published in response to several findings and recommendations contained in that audit and in the NAS study, as well as in response to data independently obtained by the Agency. This final rule will codify most of the provisions of the proposed rule. The objective of the final rule is more effective enforcement of the Horse Protection Act.

The principal amendment to the Horse Protection regulations is that APHIS will screen, train and authorize qualified persons to conduct inspections at horse shows, horse exhibitions, horse sales, and horse auctions to ensure compliance with the HPA. APHIS will authorize applicants, preferably veterinarians, as Horse Protection Inspectors (HPI⁸¹) after screening them for potential conflicts of interest and conducting training. APHIS will also develop a process for denying an application or disqualifying a person authorized to inspect horses who does not meet our qualifications or who otherwise fails in duties or conduct under the Act or regulations. Another provision of the final rule is that the event management may elect instead to

have an APHIS representative conduct inspections. The final rule will remove all regulatory responsibilities and requirements for horse industry organizations and associations (HIOs).

Currently, horse shows either assume responsibility for conducting preshow inspections for evidence of soring or contract with an APHIS-certified HIO to provide DQPs to conduct inspections. However, the OIG audit discovered conflicts of interest between DQPs, the HIOs that license and hire them, and organizers of the shows and exhibitions that contract with HIOs to provide DQPs. The OIG audit noted that at times DQPs fail to inspect horses adequately or to issue violations in accordance with the regulations. Concurring with the findings of the OIG audit, the NAS study committee concluded that some horses experiencing soreness are not being identified during inspections and strongly recommended that use of DQPs for inspections under the current program be discontinued.

Inspection data compiled by APHIS from fiscal years (FY) 2017 to 2022 show that inconsistencies persist in the number of violations detected by APHIS officials and those issued by DQPs inspecting horses. During this period, APHIS attended about 16 percent of all HPA-covered events featuring Tennessee Walking Horses, racking horses, and other breeds at which horse industry DQPs conducted inspections, including performance as well as flat-shod classes. While APHIS attended only a fraction of the events at which DQPs were appointed to inspect horses, APHIS consistently reported higher rates of noncompliance at these events based on its VMO inspection findings. Most horses inspected by APHIS officials at these events were chosen at random, although APHIS chose to inspect some horses for which a suspicion of soring was warranted.

DQPs consistently reported higher rates of noncompliance when APHIS officials were in attendance than when they were not. In FY 2021, for example, if only horses wearing "performance packages" (*i.e.*, a padded horse) are considered, APHIS officials detected 158 instances of noncompliance with the HPA out of the 398 horses APHIS inspected at the 17 events attended, resulting in close to a 40 percent rate of noncompliance for performance horses. In contrast, of the 207 events attended and inspected only by DQPs during the same period, DQPs detected just 321 instances of noncompliance with the HPA out of the 13,198 performance horses they inspected, recording only a 1.9 percent rate of noncompliance when APHIS officials were not present and 7.1

⁸¹ The term Designated Qualified Persons or DQPs, would be replaced by HPIs or horse protection inspectors under the proposed rule.

percent when they were. Also notable is that the rate of noncompliance detected for horses wearing performance packages was significantly and consistently higher than that detected for flat-shod horses.

In addition, the final rule will also prohibit all action devices, and all non-therapeutic pads, wedges, toe extensions, and lubricants at all events involving Tennessee Walking Horses and racking horses, as these items are used to induce or hide soring. The rule will also update the scar rule by including language that better describes visible dermatologic changes and stating that the changes do not have to be bilateral.

An additional amendment to the rule will also require a farrier to be present at shows with 100 or more horses and on-call for shows with fewer than 100 horses if the management of the shows utilizes an APHIS representative or HPI. Also, for horse shows that utilize an HPI, if there are more than 100 horses participating in the show, there must be an additional HPI.

The prohibition of pads, wedges, toe extensions, and action devices does not impose costs on show management or participants. However, performance horses would potentially have to be retrained. It may take two to six months resulting in potentially forgone revenue of \$53 to \$163 per horse. Most of the income generated from these horses are from other sources such as breeding.

Of these amendments to the Horse Protection regulations, only the amendments requiring a farrier to be present at a show of more than 100 horses, or on call if fewer than 100 horses are participating, may result in additional costs, along with recordkeeping, for show management and participants. The amendments requiring an inspection shelter and a backup power source may also result in additional costs. The requirement for shelter would potentially impact the other classes of horses as it is currently a requirement of the Tennessee Walking Horses and racking horses.

In the final rule, event managers have the option to have an APHIS inspector present at no cost to them. This means that there will be no additional expenses incurred by event managers in terms of hiring inspectors. However, if an APHIS inspector is not available, event management can still proceed with the event but will assume full liability if any horses entered in the event are found to be sore.

Alternatively, event management can choose to hire and pay an inspector as under the current regulations. Event management may have the ability to

pass on the cost of hiring an inspector to the exhibitors. This allows management to allocate the expenses associated with the inspector to the exhibitors, as per their discretion.

Currently, horse shows either assume responsibility for conducting preshow inspections for evidence of soring or contract with an APHIS-approved HIO to provide DQPs to conduct inspections. HIOs may be able to pass this cost on to the exhibitors and participants in the show. Under the final rule, if an APHIS inspector is used, they will no longer have to bear the costs associated with having inspectors at the shows. This could potentially result in cost savings to the HIOs and the exhibitors. The cost of having inspectors at the shows varies by region and ranges from \$350 to \$23,000 with the average being \$700 to \$800 per show.

Conversely, it is possible that HPIs will charge more for their inspections than DQPs currently do. The rate that HPIs will charge for their services under the final rule, as compared to the current rate of compensation for DQPs mentioned above, is unknown because the rate is negotiated between the inspectors and the management that contracts for their services, and thus not within APHIS' purview. Management may also be able to pass the costs of having inspectors at the shows on to the exhibitors.

Based on the estimates of an expert elicitation commissioned by APHIS,⁸² the cost of services provided per show by veterinarians, farriers, and inspectors ranges from a few hundred to several thousand dollars. Because this analysis was conducted several years ago, we use the consumer price index (CPI) to convert the costs to 2021 dollars. APHIS believes these estimates to be reasonably accurate. However, we acknowledge that there is some level of uncertainty, as the structure of the industry may have changed. In addition, we do not know the impact that the pandemic may have had on the industry. The incidence of the costs to the show of the farrier would depend on their ability to pass the costs along to participants or other entities involved with the shows. In addition, many of the entities may already have farriers present at shows, auctions, and sales. Many, if not most, of the entities that may be affected by this rulemaking are small.

The final rule would result in foregone revenue for most current DQPs, who would not meet APHIS'

requirements for HPIs under the terms of the rule. As noted above, the average cost of having inspectors at shows is \$700 to \$800 per show. With 59 currently authorized DQPs and 300 shows on average per year, this suggests that DQP income is supplemental, rather than a primary source of revenue, for most DQPs. Additionally, APHIS anticipates 30 new initial applications from parties interested in becoming HPIs under the new requirements. For new HPIs who were not previously DQPs, this final rule will result in new income.

Management of horse shows may incur an additional \$200 to \$500 to provide an inspection tent to protect the horses from the elements. This is currently a requirement for the performance horses so the other horse classes will be affected.

While the final rule will result in better enforcement of the HPA, implementation of the changes will result in additional costs to APHIS in terms of conducting inspections, screening, and training potential HPIs. We expect that APHIS costs will increase by approximately \$6.4 million. This assumes that APHIS inspectors will attend approximately 300 shows per year. Over the last 5 years, there have been an average of 226 shows per year. In addition, the industry and APHIS may incur additional recordkeeping costs of \$47,000 and \$127,000, respectively. There is also a one-time rule familiarization cost of about \$2,047 per entity. Training costs will include renting a training horse and employee travel. The average 3-day horse rental is \$450 and the travel cost per employee is \$1,900. APHIS will not charge a fee for training; however, the participants may have to pay their travel expenses to and from training and lodging. If funds are available, APHIS will pay travel expenses and other costs associated with attending training.

The benefits of the final rule are expected to justify the costs. The final-rule changes to the Horse Protection regulations will promote the humane treatment of Tennessee Walking Horses and racking horses by more effectively ensuring that those horses that participate in exhibitions, sales, shows, or auctions covered by the HPA are not sore. This qualitative benefit, enhancing animal welfare, is likely to result in greater public confidence that the animals are being treated humanely.

The final rule is not expected to adversely impact the communities in which shows are held because Tennessee Walking Horse and racking horse shows are expected to continue. Owners are motivated to show their

⁸² Expert Elicitation in Support of the Economic Analysis of the Tennessee Walking and Racking Horse Industry; RTI International, 3040 Cornwallis Road, Research Triangle Park, NC 27709; November 2012.

prized horses and are likely to continue participating in shows. Better enforcement of the HPA is expected to also benefit shows and participants by improving the reputation of the Tennessee Walking Horse and racking horse industry. Participation in events may increase if the final rule were to result in increased confidence by owners that individuals who intentionally sore horses to gain a competitive advantage are likely to be prevented from participating. Management of horse shows, exhibitions, sales, and auctions will also benefit from no longer having to bear the costs of compensating inspectors if they use APHIS inspectors.

In an attempt to eliminate soring, APHIS considered several alternatives to the final rule. These include programmatic changes such as increased training, issuing enforcement warning letters to HIOs and DQPs, increasing oversight of DQP inspections, and sending VMOs to observe events having a higher likelihood of sored horses being present. APHIS has also worked to build trust with the industry by funding joint trainings with HIOs on proper inspection procedures, arranging clinics for the public to learn about inspections and ask questions, and transitioning primary enforcement to DQPs such that VMOs would not re-inspect a horse that a DQP finds noncompliant. In addition, APHIS has funded prohibited substance testing and limited the number of rule updates to HIOs between show seasons so that DQPs are not overly burdened with new information. These non-regulatory solutions have not meaningfully decreased detections of soring, however.

One alternative that we also considered was to eliminate the use of non-APHIS inspectors and to limit inspectors to APHIS VMOs. While this approach would address conflicts of interest and allow APHIS to have a direct role in managing inspections, we determined that the availability of inspectors could be subject to the number of VMOs available at any given time and their geographic distribution. Further, section 1823, paragraph (c) of the Act provides for “the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse which is sore. . . .” which precludes assigning an inspector to an event and eliminating any element of choice for event management. Under this proposal, management would be able to choose to appoint an APHIS representative or an APHIS-authorized inspector.

Another alternative considered was implementing our 2017 final rule to revise the HPA regulations. However, we consider this final rule preferable to that rule for several reasons. Among them, this rule provides that management may request direct APHIS inspection of a show at no cost to management, an option not provided for in the 2017 final rule despite comments that HPIs could be cost-prohibitive for smaller shows.

The Small Business Administration’s (SBA) small-entity standard for business associations that promote horses through the showing, exhibiting, sale, auction, registry, or any activity which contributes to the advancement of the horse, is not more than \$15.5 million in annual receipts (North American Industry Classification System (NAICS) 813910). Based on information obtained from the Census of Agriculture and the Economic Census we infer that the entities affected by this final rule are likely small by SBA standards.

Executive Order 13175

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

The Animal and Plant Health Inspection Service has assessed the impact of this final rule on Indian tribes and determined that this final rule does not, to our knowledge, have tribal implications that require tribal consultation under Executive Order 13175. If a Tribe requests consultation, the Animal and Plant Health Inspection Service will work with the Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions and modifications identified herein are not expressly mandated by Congress.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with

State and local officials. (See 2 CFR chapter IV.)

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. The Act does not provide administrative procedures which must be exhausted prior to a judicial challenge to the provisions of this final rule.

Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), some of the reporting and recordkeeping requirements included in the proposed rule and this final rule were previously approved under Office of Management and Budget (OMB) control number 0579–0056. The remaining reporting and recordkeeping requirements that were solely associated with the proposed rule and this final rule were submitted to OMB as a new information collection and were assigned OMB comment-filed number 0579–0490. After approval, this information collection will be merged into 0579–0056 in the future.

New information collection requirements created by the regulations of this final rule include Unsatisfactory Performance Notices; Retention of Records for Horse Therapeutic Treatment; Providing Show, Exhibition, Sale, or Auction Information to APHIS Within 30 Days; Providing Changed Show, Exhibition, Sale, or Auction Information to APHIS Within 15 Days; Post-Show Reports; and Authorization of HPI Applicants. As described above, APHIS received several public comments on a seventh information collection requirement in the proposed rule, Requests for Variance, and it has chosen not to finalize this activity.

The remaining information collection procedures are unchanged. The six activities in this final rule present a new total of 530 estimated respondents, 1,135 estimated responses, and 610 hours of estimated burden. The estimated time per response changed slightly from 33 minutes per response to 32 minutes per response.

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. Specific details about forms

for reportable activities can be found in the information collection request supporting statement.

The use of electronic email submissions affords a decrease in notification time, record of submission, and reduction of paperwork, costs, and mailing activities. Respondents are free to maintain required records as best suited for their organization. APHIS removed fax submissions as a routine option deeming the technology obsolete.

For assistance with E-Government Act compliance related to this final rule, please contact Mr. Joseph Moxey, APHIS' Paperwork Reduction Act Coordinator, at (301) 851-2533, or the Animal Care contact listed above under **FOR FURTHER INFORMATION CONTACT**.

Congressional Review Act

Pursuant to subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act, 5 U.S.C 801 *et seq.*) OIRA has determined that this rule does not meet the criteria set forth in 5 U.S.C. 804(2).

Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104.4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, tribal governments, and the private sector. Under section 101 of the UMRA, APHIS generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires APHIS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective, or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) that may result in expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 13132

APHIS has reviewed this rule in accordance with Executive Order 13132 regarding federalism and has

determined that it does not have "federalism implications." The rule does not "have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

List of Subjects in 9 CFR Part 11

Animal welfare, Horses, Reporting and recordkeeping requirements.

■ For the reasons discussed in the preamble, APHIS revises 9 CFR part 11 to read as follows:

PART 11—HORSE PROTECTION REGULATIONS

Sec.

- 11.1 Definitions.
- 11.2 [Reserved]
- 11.3 Non-interference with APHIS representatives and HPIS.
- 11.4 Owners, trainers, exhibitors, custodians, transporters, and any other person who has been disqualified.
- 11.5 Appeal of disqualification.
- 11.6 Prohibitions concerning exhibitors.
- 11.7 Dermatologic conditions indicative of soring.
- 11.8 Inspection and detention of horses.
- 11.9 Access to premises and records.
- 11.10 Inspection space and facility requirements.
- 11.11–11.12 [Reserved]
- 11.13 Responsibilities and liabilities of management.
- 11.14 Records required and disposition thereof.
- 11.15 Inspection of records.
- 11.16 Reporting by management.
- 11.17 Requirements concerning persons involved in transportation of certain horses.
- 11.18 Utilization of inspectors.
- 11.19 Authorization and training of Horse Protection Inspectors.

Authority: 15 U.S.C. 1823–1825 and 1828; 7 CFR 2.22, 2.80, and 371.7.

§ 11.1 Definitions.

For the purpose of this part, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also impart the plural.

Act means the Horse Protection Act of 1970 (Pub. L. 91–540) as amended by the Horse Protection Act Amendments of 1976 (Pub. L. 94–360), 15 U.S.C. 1821 *et seq.*, and any legislation amendatory thereof.

Action device means any boot, collar, chain, roller, beads, bangles, or other device which encircles or is placed upon the lower extremity of the leg of a horse in such a manner that it can either rotate around the leg, or slide up and down the leg so as to cause friction,

or which can strike the hoof, coronet band or fetlock joint.

Administrator means the Administrator, Animal and Plant Health Inspection Service, or any person authorized to act for the Administrator. Mail for the Administrator should be sent to the Animal and Plant Health Inspection Service, Animal Care/Horse Protection, 2150 Centre Avenue, Building B, Mailstop 3W11, Fort Collins, CO 80526–8117. Electronic mail for the Administrator should be sent to horseprotection@usda.gov.

Animal and Plant Health Inspection Service (APHIS) means the Animal and Plant Health Inspection Service of the United States Department of Agriculture.

APHIS representative means any employee or official of APHIS.

Custodian means any adult person, age 18 or older, who has control of and presents a horse for inspection at any horse show, horse exhibition, horse sale, or horse auction. The custodian must be able to provide information about the horse that is required by this part.

Day(s) means business days, *i.e.*, days other than weekends and Federal holidays.

Department means the United States Department of Agriculture (USDA).

Event manager means the person who has been delegated primary authority by a sponsoring organization for managing a horse show, horse exhibition, horse sale, or horse auction.

Exhibitor means:

(1) Any person who enters any horse, any person who allows his or her horse to be entered, or any person who directs or allows any horse in his or her custody or under his or her direction, control, or supervision to be entered in any horse show or horse exhibition;

(2) Any person who shows or exhibits any horse, any person who allows his or her horse to be shown or exhibited, or any person who directs or allows any horse in his or her custody or under his or her direction, control, or supervision to be shown or exhibited in any horse show or horse exhibition;

(3) Any person who enters or presents any horse for sale or auction, any person who allows his or her horse to be entered or presented for sale or auction, or any person who allows any horse in his or her custody or under his or her direction, control, or supervision to be entered or presented for sale or auction in any horse sale or auction; or

(4) Any person who sells or auctions any horse, any person who allows his or her horse to be sold or auctioned, or any person who directs or allows any horse in his or her custody or under his or her

direction, control, or supervision to be sold or auctioned.

Horse means any member of the species *Equus caballus*.

Horse exhibition means a public display of any horses, singly or in groups, but not in competition. The term does not include events where speed is the prime factor, rodeo events, parades, or trail rides.

Horse Protection Inspector (HPI) means a person meeting the qualifications in § 11.19 whom the Administrator has authorized as an HPI and who may be appointed by management or a representative of management of any horse show, horse exhibition, horse sale or horse auction under section 4 of the Act (15 U.S.C. 1823) to detect or diagnose horses which are sore or to otherwise inspect horses and any records pertaining to such horses for the purposes of detecting or diagnosing sores. HPIs are not employees of APHIS.

Horse sale or horse auction means any event, public or private, at which horses are sold or auctioned, regardless of whether or not said horses are exhibited prior to or during the sale or auction.

Horse show means a public display of any horses, in competition, except events where speed is the prime factor, rodeo events, parades, or trail rides.

Inspection means any visual, physical, and diagnostic means approved by APHIS to determine compliance with the Act and regulations. Such inspection may include, but is not limited to, visual examination of a horse and review of records, physical examination of a horse, including touching, rubbing, palpating, and observation of vital signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe or any other equipment, substance, or paraphernalia from the horse when deemed necessary by the professional conducting such inspection.

Local area means an area within a 10-mile radius of the horse show, horse exhibition, horse sale, or horse auction.

Management means any person or persons who organize, exercise control over, or administer or are responsible for organizing, directing, or administering any horse show, horse exhibition, horse sale or horse auction and specifically includes, but is not limited to, the sponsoring organization and event manager.

Participate means engaging in any activity, either directly or through an agent, beyond that of a spectator in connection with a horse show, horse exhibition, horse sale, or horse auction, and includes, without limitation,

transporting, or arranging for the transportation of, horses to or from equine events, personally giving instructions to exhibitors, being present in the warm-up or inspection areas or in any area where spectators are not allowed, and financing the participation of others in equine events.

Person means any individual, corporation, company, association, firm, partnership, society, organization, joint stock company, State or local government agency, or other legal entity.

Secretary means the Secretary of Agriculture or anyone who has heretofore or may hereafter be delegated authority to act in his or her stead.

Sore when used to describe a horse means:

(1) An irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse;

(2) Any burn, cut, or laceration has been inflicted by a person on any limb of a horse;

(3) Any tack, nail, screw, or chemical agent has been injected by a person into or used on any limb of a horse; or

(4) Any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

Sponsoring organization means any person or entity whose direction supports and who assumes responsibility for a horse show, horse exhibition, horse sale, or horse auction that has, is, or will be conducted.

State means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, Northern Mariana Islands or the Trust Territory of the Pacific Islands.

Therapeutic treatment means relating to the treatment of disease, injury, or disorder by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was prescribed.

§ 11.2 [Reserved]

§ 11.3 Non-interference with APHIS representatives and HPIs.

No person shall assault, resist, oppose, impede, intimidate, threaten, or interfere with APHIS representatives or HPIs appointed by management, or in any way influence attendees of a horse show, horse exhibition, horse sale, or horse auction or other individuals to do the same.

§ 11.4 Owners, trainers, exhibitors, custodians, transporters, and any other person who has been disqualified.

Any person who has been disqualified by the Secretary from participating in any horse show, horse exhibition, horse sale, or horse auction shall not show, exhibit, or enter any horse, directly or indirectly through any agent, employee, corporation, partnership, or other device, and shall not judge, manage, or otherwise participate in events covered by the Act within the period during which the disqualification is in effect.

§ 11.5 Appeal of disqualification.

Any horse owner, trainer, exhibitor, custodian (or any other person responsible for entering the horse in an event), or transporter may appeal to the Administrator on whether a disqualification decision concerning a horse at a horse show, horse exhibition, horse sale, horse auction, or other covered event was justified. The APHIS representative or HPI will provide the inspection report to the custodian following the disqualification. There may only be one appeal per disqualified horse per event; however, all parties with interest in the disqualification may contribute to the appeal. To appeal, the horse owner, trainer, exhibitor, custodian (or any other person responsible for entering the horse in an event), or transporter must send a written statement contesting the disqualification and include any documentation or other information in support of the appeal. To receive consideration, the appeal must be received by the Administrator, preferably by electronic mail, to horseprotection@usda.gov within 21 days of the date the horse owner, trainer, exhibitor, custodian (or any other person responsible for entering the horse in an event), or transporter received the disqualification that is the subject of the appeal. If expedited review of the appeal is requested, this must be noted as such, and information in support of this request must accompany the appeal. The Administrator will send a final decision, in writing via either electronic mail or

postal mail, to the person requesting the appeal as promptly as practicable.

Note 1 to § 11.5: Appeals may also be sent by U.S. mail to APHIS, 2150 Centre Ave, Bldg. B, MS 3W-11, Fort Collins, CO 80547.

§ 11.6 Prohibitions concerning exhibitors.

(a) *General prohibitions for all horses.* Notwithstanding the provisions of this section, no action device, method, practice, or substance shall be used with respect to any horse at any horse show, horse exhibition, horse sale, or horse auction if such use causes or can reasonably be expected to cause such horse to be sore or is otherwise used to mask previous and/or ongoing soring.

(b) *Prohibited devices, equipment, and practices.* The use of the following action devices, equipment, or practices on any horse, at any horse show, horse exhibition, horse sale, or horse auction is prohibited:

(1) More than one action device permitted under this section on any limb of a horse.

(2) All beads, bangles, rollers, and similar devices, with the exception of rollers made of lignum vitae (hardwood), aluminum, or stainless steel, with individual rollers of uniform size, weight and configuration, provided each such device may not weigh more than 6 ounces, including the weight of the fastener.

(3) Chains weighing more than 6 ounces each, including the weight of the fastener.

(4) Chains with links that are not of uniform size, weight, and configuration; and chains that have twisted links or double links.

(5) Chains that have drop links on any horse that is being ridden, worked on a lead, or otherwise worked out or moved about.

(6) Chains or lignum vitae, stainless steel, or aluminum rollers which are not smooth and free of protrusions, projections, rust, corrosion, or rough or sharp edges.

(7) Boots, collars, or any other devices, with protrusions or swellings, or rigid, rough, or sharp edges, seams or any other abrasive or abusive surface that may contact a horse's leg.

(8) Boots, collars, or any other devices that weigh more than 6 ounces, except for soft rubber or soft leather bell boots and/or quarter boots that are used as protective devices.

(9) Pads or other devices on horses up to 2 years old that elevate or change the angle of such horses' hooves in excess of 1 inch at the heel.

(10) Any weight on horses up to 2 years old, except a keg or similar conventional horseshoe that weighs 16

ounces or less, and any horseshoe on horses up to 2 years old that weighs more than 16 ounces.

(11) Artificial extension of the toe length, whether accomplished with pads, acrylics, or any other material or combinations thereof, that exceeds 50 percent of the natural hoof length, as measured from the coronet band, at the center of the front pastern along the front of the hoof wall, to the distal portion of the hoof wall at the tip of the toe. The artificial extension shall be measured from the distal portion of the hoof wall at the tip of the toe at a 90-degree angle to the proximal (foot/hoof) surface of the shoe.

(12) Toe length that does not exceed the height of the heel by 1 inch or more. The length of the toe shall be measured from the coronet band, at the center of the front pastern along the front of the hoof wall to the ground. The heel shall be measured from the coronet band, at the most lateral portion of the pastern, at a 90-degree angle to the ground, not including normal caulks at the rear of a horseshoe that do not exceed 3–4 inch in length. That portion of caulk at the rear of a horseshoe in excess of 3–4 of an inch shall be added to the height of the heel in determining the heel/toe ratio.

(13) Pads that are not made of leather, plastic, or a similar pliant material.

(14) Any object or material inserted between the pad and the hoof other than acceptable hoof packing, which includes pine tar, oakum, live rubber, sponge rubber, silicone, commercial hoof packing, or other substances used to maintain adequate frog pressure or sole consistency. Acrylic and other hardening substances are prohibited as hoof packing.

(15) Single or double rocker-bars on the bottom surface of horseshoes which extend more than 1 1–2 inches back from the point of the toe, or which would cause, or could reasonably be expected to cause, an unsteadiness of stance in the horse with resulting muscle and tendon strain due to the horse's weight and balance being focused upon a small fulcrum point.

(16) Metal hoof bands, such as used to anchor or strengthen pads and shoes, placed less than 1–2 inch below the coronet band.

(17) Metal hoof bands that can be easily and quickly loosened or tightened by hand, by means such as, but not limited to, a wing-nut or similar fastener.

(18) Any action device or any other device that strikes the coronet band of the foot of the horse except for soft rubber or soft leather bell boots that are used as protective devices.

(19) Shoeing a horse, trimming a horse's hoof, or paring the frog or sole in a manner that will cause such horse to suffer, or can reasonably be expected to cause such horse to suffer pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving. Bruising of the hoof or any other method of pressure shoeing is also prohibited.

(20) Lead or other weights attached to the outside of the hoof wall, the outside surface of the horseshoe, or any portion of the pad except the bottom surface within the horseshoe. Pads may not be hollowed out for the purpose of inserting or affixing weights, and weights may not extend below the bearing surface of the shoe. Hollow shoes or artificial extensions filled with mercury or similar substances are prohibited.

(21) The use of whips, cigarette smoke, or other stewarding actions or paraphernalia to distract a horse or to otherwise impede the inspection process during an examination, including but not limited to, holding the reins less than 18 inches from the bit shank is prohibited.

(c) *Specific prohibitions for Tennessee Walking Horses and racking horses.* (1) All action devices are prohibited on any Tennessee Walking Horse or racking horse at any horse show, horse exhibition, horse sale, or horse auction.

(2) All artificial extension of the toe length is prohibited on any Tennessee Walking Horse or racking horse at any horse show, horse exhibition, horse sale, or horse auction, unless such horse has been prescribed and is receiving therapeutic treatment using artificial extension of the toe length as approved in writing by a licensed veterinarian.

(3) All pads and wedges are prohibited on any Tennessee Walking Horse or racking horse at any horse show, horse exhibition, horse sale, or horse auction, unless such horse has been prescribed and is receiving therapeutic treatment using pads or wedges as approved in writing by a licensed veterinarian.

(4) All substances are prohibited on the extremities above the hoof of any Tennessee Walking Horse or racking horse entered for the purpose of being shown or exhibited, sold, auctioned, or offered for sale in or on the grounds of any horse show, horse exhibition, horse sale, or horse auction, unless such horse has been prescribed and is receiving therapeutic treatment using substances as approved in writing by a licensed veterinarian.

(d) *Competition restrictions—2-Year-old horses.* Horse show or horse exhibition workouts or performances of

2-year-old Tennessee Walking Horses and racking horses and working exhibitions of 2-year-old Tennessee Walking Horses and racking horses (horses eligible to be shown or exhibited in 2-year-old classes) at horse sales or horse auctions that exceed a total of 10 minutes continuous workout or performance without a minimum 5-minute rest period between the first such 10-minute period and the second such 10-minute period, and, more than two such 10-minute periods per performance, class, or workout are prohibited.

(e) *Information requirements—horse related.* Failing to provide information or providing any false or misleading information required by the Act or regulations or requested by APHIS representatives or HPIS appointed by management, by any person that enters, owns, trains, shows, exhibits, transports or sells or has custody of, or direction or control over any horse shown, exhibited, sold, or auctioned or entered for the purpose of being shown, exhibited, sold, or auctioned at any horse show, horse exhibition, horse sale, or horse auction is prohibited and may result in disqualification under § 11.13. Such information shall include, but is not limited to: Information concerning the name, any applicable registration name and number, markings, sex, age, and legal ownership of the horse; the name and address of the horse's training and/or stabling facilities; the name and address of the owner, trainer, rider, custodian, any other exhibitor, or other legal entity bearing responsibility for the horse; the class in which the horse is entered or shown; the exhibitor identification number; and, any other information reasonably related to the identification, ownership, control, direction, or supervision of any such horse.

§ 11.7 Dermatologic conditions indicative of soring.

If an HPI or APHIS representative, upon inspection, finds that any limb of a horse displays one or more dermatologic conditions that they determine are indicative of soring as that term is defined in 15 U.S.C. 1821, the horse shall be presumed to be sore and subject to all prohibitions set forth in 15 U.S.C. 1824. Examples of dermatologic conditions that will be evaluated in determining whether a horse is sore shall include, but are not limited to, irritation, moisture, edema, swelling, redness, epidermal thickening, and loss of hair (patchy or diffuse).

§ 11.8 Inspection and detention of horses.

(a) For the purpose of effective enforcement of the Act, each horse owner, exhibitor, trainer, or other person having custody of, or responsibility for, any horse at any horse show, horse exhibition, horse sale, or horse auction, shall allow any APHIS representative or HPI appointed by management to inspect such horse at all reasonable times and places the APHIS representative or HPI may designate. Such inspections may be required of any horse which is stabled, loaded on a trailer, being prepared for show, exhibition, or sale or auction, being exercised or otherwise on the grounds of, or present at, any horse show, horse exhibition, or horse sale or horse auction, whether or not such horse has or has not been shown, exhibited, or sold or auctioned, or has or has not been entered for the purpose of being shown or exhibited or offered for sale or auction at any such horse show, horse exhibition, or horse sale or horse auction. APHIS representatives and HPIS appointed by management will not generally or routinely delay or interrupt actual individual classes or performances at horse shows, horse exhibitions, or horse sales or auctions for the purpose of examining horses, but they may do so in extraordinary situations, such as but not limited to, lack of proper facilities for inspection, refusal of management to cooperate with inspection efforts, reason to believe that failure to immediately perform inspection may result in the loss, removal, or masking of any evidence of a violation of the Act or the regulations, or a request by management that such inspections be performed by an APHIS representative.

(b) When any APHIS representative or HPI appointed by management notifies the owner, exhibitor, trainer, or other person having custody of or responsibility for a horse at any horse show, horse exhibition, or horse sale or horse auction that APHIS desires to inspect such horse, it shall not be moved from the horse show, horse exhibition, or horse sale or horse auction until such inspection has been completed and the horse has been released by an APHIS representative.

(c) For the purpose of inspection, testing, or taking of evidence, APHIS representatives may detain for a period not to exceed 24 hours any horse, at any horse show, horse exhibition, or horse sale or horse auction, which is sore or which an APHIS representative has probable cause to believe is sore. Such detained horse may be marked for identification and any such identifying

markings shall not be removed by any person other than an APHIS representative.

(d) Detained horses shall be kept under the supervision of an APHIS representative or secured under an official USDA seal or seals in a horse stall, horse trailer, or other facility to which access shall be limited. It shall be the policy of APHIS to have at least one representative present in the immediate detention area when a horse is being held in detention. The official USDA seal or seals may not be broken or removed by any person other than an APHIS representative, unless:

(1) The life or well-being of the detained horse is immediately endangered by fire, flood, windstorm, or other dire circumstances that are beyond human control.

(2) The detained horse is in need of such immediate veterinary attention that its life may be in peril before an APHIS representative can be located.

(3) The horse has been detained for a maximum 24-hour detention period, and an APHIS representative is not available to release the horse.

(e) The owner, exhibitor, trainer, or other person having custody of or responsibility for any horse detained by APHIS for further inspection, testing, or the taking of evidence shall be allowed to feed, water, and provide other normal custodial and maintenance care, such as walking, grooming, etc., for such detained horse, provided that:

(1) Such feeding, watering, and other normal custodial and maintenance care of the detained horse is rendered under the direct supervision of an APHIS representative.

(2) Any non-emergency veterinary care of the detained horse requiring the use, application, or injection of any drugs or other medication for therapeutic or other purposes is rendered by a Doctor of Veterinary Medicine in the presence of an APHIS representative and, the identity and dosage of the drug or other medication used, applied, or injected and its purpose is furnished in writing to the APHIS representative prior to such use, application, or injection by the Doctor of Veterinary Medicine attending a horse. The use, application, or injection of such drug or other medication must be approved by the APHIS representative.

(f) It shall be the policy of an APHIS representative or HPI appointed by management to inform the owner, trainer, exhibitor, or other person having immediate custody of or responsibility for any horse allegedly found to be in violation of the Act or the regulations of such alleged violation or

violations before the horse is released as determined by an APHIS representative.

(g) The owner, trainer, exhibitor, or other person having immediate custody of or responsibility for any horse or horses that an APHIS representative determines shall be detained for inspection, testing, or taking of evidence pursuant to paragraph (c) of this section shall be informed after such determination is made and shall allow said horse to be immediately put under the supervisory custody of APHIS or secured under official USDA seal as provided in paragraph (d) of this section until the completion of such inspection, testing, or gathering of evidence, or until the 24-hour detention period expires.

(h) The owner, trainer, exhibitor, or other person having custody of or responsibility for any horse allegedly found to be in violation of the Act or regulations, and who has been informed of such alleged violation by an APHIS representative or HPI appointed by management as stated in paragraph (f) of this section, may request re-inspection and testing of said horse within a 24-hour period, and an APHIS representative will grant the request provided that:

(1) Such request is made to an APHIS representative immediately after the horse has been inspected by an APHIS representative or HPI appointed by management and before such horse has been removed from the inspection facilities;

(2) An APHIS representative determines that sufficient cause for re-inspection and testing exists; and

(3) The horse is maintained under APHIS supervisory custody as prescribed in paragraph (d) of this section until such re-inspection and testing has been completed.

(i) The owner, exhibitor, trainer, or other person having custody of, or responsibility for, any horse being inspected shall render such assistance, as the APHIS representative or HPI appointed by management may request, for the purposes of such inspection.

§ 11.9 Access to premises and records.

(a) *Management.* (1) The management of any horse show, horse exhibition, or horse sale or auction shall, without fee, charge, assessment, or other compensation, provide APHIS representatives and HPis appointed by management with unlimited access to the grandstands, sale ring, barns, stables, grounds, offices, and all other areas of any horse show, horse exhibition, or horse sale or auction, including any adjacent areas under their direction, control, or supervision for the purpose of inspecting any horses, or any

records required to be kept by regulation or otherwise maintained.

(2) The management of any horse show, horse exhibition, or horse sale or auction shall, without fee, charge, assessment, or other compensation, provide APHIS representatives and HPis appointed by management with an adequate, safe, and accessible area for the visual inspection and observation of horses.

(b) *Exhibitors.* (1) Each horse owner, trainer, exhibitor, or other person having custody of or responsibility for any horse at any horse show, horse exhibition, or horse sale or auction shall, without fee, charge, assessment, or other compensation, admit any APHIS representatives and HPis appointed by management to all areas of barns, compounds, horse vans, horse trailers, stables, stalls, paddocks, or other show, exhibition, or sale or auction grounds or related areas at any horse show, horse exhibition, or horse sale or auction, for the purpose of inspecting any such horse, at any and all times.

(2) Each owner, trainer, exhibitor, or other person having custody of or responsibility for, any horse at any horse show, horse exhibition, or horse sale or auction shall promptly present his or her horse for inspection upon notification, orally or in writing, by any APHIS representatives or HPis appointed by the management that said horse has been selected for inspection for the purpose of determining whether such horse is in compliance with the Act and regulations.

(Approved by the Office of Management and Budget under control number 0579-0056)

§ 11.10 Inspection space and facility requirements.

(a) The management of every horse show, horse exhibition, horse sale, or horse auction shall provide, without fee, charge, assessment, or other compensation, sufficient space and facilities for APHIS representatives and HPis appointed by management to carry out their duties under the Act and regulations when requested to do so by APHIS representatives or HPis appointed by management, whether or not management has received prior notification or otherwise knows that such show, exhibition, sale, or auction may be inspected by APHIS. With respect to such space and facilities, it shall be the responsibility of management to provide at least the following:

(1) Sufficient, well-lit space in a convenient location to the horse show, horse exhibition, horse sale, or horse auction arena, acceptable to APHIS

representatives and HPis appointed by management, in which horses may be inspected.

(2) Protection from the elements of nature, such as rain, snow, sleet, hail, windstorm, etc.

(3) A means to control crowds or onlookers in order that APHIS representatives and HPis appointed by management may carry out their duties safely and without interference.

(4) An accessible, reliable, and convenient 110-volt electrical power source available at the show, exhibition, sale, or auction site.

(5) Appropriate areas adjacent to the inspection area for designated horses to wait before and after inspection, and an area to be used for detention of horses.

(b) Other than the persons noted below, only a management representative, HPis appointed by management, and APHIS representatives are allowed in the warm-up and inspection areas. Each horse in the inspection area may only be accompanied by the person having immediate custody of or responsibility for the horse. Inspected horses shall be held in a designated area under the observation by a management representative and shall not be permitted to leave the designated area before showing. Each horse in the designated warm-up area may be accompanied by no more than three individuals, including the person having immediate custody of or responsibility for the horse, the trainer, and the rider. No other persons are allowed in the warm-up or inspection areas without prior approval from an APHIS representative or HPI appointed by management.

§ 11.11–11.12 [Reserved]

§ 11.13 Responsibilities and liabilities of management.

(a) Horse shows, horse exhibitions, horse sales, and horse auctions at which the management does not utilize an APHIS representative or HPI. The management of any horse show, horse exhibition, horse sale, or horse auction which does not utilize an APHIS representative or appoint an HPI shall be responsible for identifying all horses that are sore or otherwise in violation of the Act or regulations, and shall disqualify or prohibit any horses which are sore or otherwise in violation of the Act or regulations from participating or competing in any horse show, horse exhibition, horse sale, or horse auction. Horses entered for sale or auction at a horse sale or horse auction must be inspected and, as appropriate, identified as sore or otherwise in violation of the

Act or regulations prior to the sale or auction and, as required by the Act, prohibited from entering the sale or auction ring. Sore horses or horses otherwise in violation of the Act or regulations that have been entered in a horse show or horse exhibition for the purpose of show or exhibition must be identified and disqualified prior to the show or exhibition. Any horses found to be sore or otherwise in violation of the Act or regulations during actual participation in the show or exhibition, must be removed from further participation immediately (e.g., prior to the horse placing in the class or the completion of the exhibition). All horses that placed first in each class or event at any horse show or horse exhibition shall be inspected after being shown or exhibited to determine if such horses are sore or otherwise in violation of the Act or regulations.

(b) Horse shows, horse exhibitions, horse sales, and horse auctions at which the management utilizes an APHIS representative or HPI appointed by management.

(1) The management of any horse show, horse exhibition, horse sale, or horse auction that utilizes an APHIS representative or HPI appointed by management shall not take any action which will interfere with or influence the APHIS representative or HPI appointed by management in carrying out their duties.

(2) The management of any horse show, horse exhibition, horse sale, or horse auction that utilizes an HPI to inspect horses shall appoint at least 2 HPIs when more than 100 horses are entered.

(3) The management of any horse show, horse exhibition, horse sale, or horse auction that utilizes APHIS representatives or HPIs to inspect horses shall have at least one farrier physically present if more than 100 horses are entered in the event. If 100 or fewer horses are entered in the horse show, horse exhibition, horse sale, or horse auction, the management shall, at minimum, have a farrier be on call within the local area. Management must ensure that the farrier appear promptly at the horse show, horse exhibition, horse sale, or horse auction if requested by an APHIS representative or HPI appointed by management.

(4) After an APHIS representative or HPI appointed by management has completed inspection, management must prevent tampering with any part of a horse's limbs or hooves in such a way that could cause a horse to be sore.

(5) If management is dissatisfied with the performance of a particular HPI, management should promptly notify, in

writing, the Administrator as to why management believes the performance of the HPI was inadequate or otherwise unsatisfactory.

(6) Management that utilizes an APHIS representative or HPI shall immediately disqualify or prohibit from showing, exhibition, sale, offering for sale, or auction of any horse identified by the APHIS representative or HPI to be sore or otherwise in violation of the Act or regulations and any horse otherwise known by management to be sore or otherwise in violation of the Act or regulations. Should management fail to disqualify or prohibit from being shown, exhibited, sold or auctioned any such horse, the management is responsible for any liabilities arising from the showing, exhibition, sale, or auction of said horses.

(c) Other responsibilities of management at horse shows, horse exhibitions, horse sales, and horse auctions.

(1) Ensure that no devices or substances prohibited under § 11.6 are present in the warm-up area.

(2) Review the orders of the Secretary disqualifying persons from showing or exhibiting any horse, or judging or managing any horse show, horse exhibition, horse sale, or horse auction and disallow the participation of any such person in any horse show, exhibition, sale, or auction, for the duration of the period of disqualification.

(3) Verify the identity of all horses entered in the horse show, horse exhibition, horse sale, or horse auction. Acceptable methods of identification are as follows:

(i) A description sufficient to identify the horse, including, but not limited to, name, age, breed, color, gender, distinctive markings, and unique and permanent forms of identification when present (e.g., brands, tattoos, cowlicks, or blemishes); or

(ii) Electronic identification that complies with ISO standards; or

(iii) An equine passport issued by a State government and accepted in the government of the State in which the horse show, horse exhibition, or horse sale or auction will occur.

(Approved by the Office of Management and Budget under control numbers 0579–0056 and 0579–0490)

§ 11.14 Records required and disposition thereof.

(a) The management of any horse show, horse exhibition, horse sale, or horse auction that contains Tennessee Walking Horses or racking horses shall maintain for a minimum of 90 days following the closing date of a horse

show, horse exhibition, horse sale, or horse auction all records containing:

(1) The dates and place of the horse show, horse exhibition, horse sale, or horse auction.

(2) The name and address (including street address or post office box number, and ZIP Code) of the sponsoring organization.

(3) The name and address of the horse show, horse exhibition, horse sale, or horse auction management.

(4) The name and address (including street address or post office box number, and ZIP Code) of each show judge.

(5) A copy of each class or sale sheet containing the names of horses, the registration number of the horse (if applicable), the names and addresses (including street address or post office box number, and ZIP Code) of the horse owner, the exhibition number and class number unique to each horse, or sale number assigned to each horse, the show class or sale lot number, and the name and address (including street address or post office box number, and ZIP Code) of the person paying the entry fee and entering the horse in a horse show, horse exhibition, horse sale, or horse auction.

(6) A copy of the official horse show, horse exhibition, horse sale, or horse auction program, if any such program has been prepared.

(7) A copy of the official judge's or scoring card(s) for each horse show class containing Tennessee Walking Horses and racking horses to include the place each horse finished in the class.

(8) The name and any applicable registration name and number of each horse, as well as the names and addresses (including street address or post office box number, and ZIP Code) of the owner, the trainer, the custodian, the exhibitor and the location (including street address and ZIP Code) of the home barn or other facility where the horse is stabled.

(9) The name, exhibition number and class number, or assigned sale number, and the registration name and number (if applicable) for each horse disqualified or prohibited by management from being shown, exhibited, sold or auctioned, and the reasons for such action.

(10) Name and address (including street address or post office box number, and ZIP Code) of the person designated by the management to maintain the records required by this section.

(11) The name and address of each HPI appointed by management to conduct inspections at the event, if an HPI was appointed.

(b) The management of any horse show, horse exhibition, horse sale, or

horse auction that allows any horse to be shown, exhibited or sold with wedges, pads, substances, or toe extensions restricted under § 11.6 for therapeutic treatment must maintain the following information for each horse receiving the therapeutic treatment for a period of at least 90 days following the closing date of a horse show, horse exhibition, horse sale, or horse auction:

(1) The name, exhibition number and class number, or assigned sale number, and the registration name and number (if applicable) for each horse receiving therapeutic treatment.

(2) The name, address (including street address and ZIP Code), and phone number of the licensed veterinarian providing the therapeutic treatment.

(3) The State and license number of the licensed veterinarian providing the therapeutic treatment.

(4) The name and address (including street address and ZIP Code) and phone number of the licensed veterinarian's business.

(5) A description of the disease, injury, or disorder for which the treatment is given, to include at minimum:

(i) Start date of treatment.

(ii) Prescription or specific design and prescription (for example, as to the height, weight, and material of a therapeutic pad) of the treatment plan.

(iii) Expected length of treatment period and an estimation of when treatment will be discontinued.

(c) The Administrator may, in specific cases, require that a horse show, horse exhibition, or horse sale or auction records be maintained by management for a period in excess of 90 days.

(Approved by the Office of Management and Budget under control numbers 0579-0056 and 0579-0490)

§ 11.15 Inspection of records.

The management of any horse show, horse exhibition, horse sale, or horse auction shall permit any APHIS representative or HPI appointed by management, upon request, to examine and make copies of any and all records pertaining to any horse that are required in the regulations or otherwise maintained, during business hours, or such other times as may be mutually agreed upon. A room, table, or other facilities necessary for proper examination and copying of such records shall be made available to the APHIS representative or HPI appointed by management.

(Approved by the Office of Management and Budget under control number 0579-0056)

§ 11.16 Reporting by management.

(a) At least 30 days before any horse show, horse exhibition, horse sale, or horse auction is scheduled to begin, management must notify the Administrator of such event by mail or electronic means such as email. Such notification must include:

(1) The name and address (including street address and ZIP Code) of the horse show, horse exhibition, horse sale, or horse auction.

(2) The name, address, phone number (and email address, if available) of the event manager.

(3) The date(s) of the horse show, horse exhibition, horse sale, or horse auction.

(4) A copy of the official horse show, horse exhibition, horse sale, or horse auction program, if any such program has been prepared.

(5) Anticipated or known number of entries.

(6) Whether management requests an APHIS representative to perform inspections at the horse show, horse exhibition, horse sale, or horse auction; or, if not, whether management has chosen and appointed an HPI to inspect horses, or will have no inspector.

(7) Whether management will allow any horse to be shown, exhibited, or sold with prohibitions under § 11.6 for therapeutic treatment.

(b) At least 15 days before any horse show, horse exhibition, horse sale, or horse auction is scheduled to begin, the management of any such horse show, horse exhibition, horse sale, or horse auction must notify the Administrator of any changes to the information required under § 11.16(a) by mail or electronic means such as email.

(c) Within 5 days following the conclusion of any horse show, horse exhibition, horse sale, or horse auction that contains Tennessee Walking Horses or racking horses, the management of such show, exhibition, sale or auction shall submit to the Administrator the information required to be maintained by § 11.14 by mail or electronic means such as email. Event information already submitted to APHIS under paragraph (a) of this section does not need to be sent again.

(d) Within 5 days following the conclusion of any horse show, horse exhibition, horse sale, or horse auction which does not include Tennessee Walking Horses or racking horses, the management of such show, exhibition, sale or auction shall submit to the Administrator the following information: Any case where a horse was prohibited by management from being shown, exhibited, sold or auctioned because it was found to be

sore or otherwise in violation of the Act or regulations. Information will include at a minimum the name, exhibition number and class number, or assigned sale number, and the registration name and number (if applicable) for each horse disqualified or prohibited by management from being shown, exhibited, sold or auctioned, and the reason(s) for such action.

(Approved by the Office of Management and Budget under control numbers 0579-0056 and 0579-0490)

§ 11.17 Requirements concerning persons involved in transportation of certain horses.

Each person who ships, transports, or otherwise moves, or delivers or receives for movement, any horse with reason to believe such horse may be shown, exhibited, sold or auctioned at any horse show, horse exhibition, horse sale, or horse auction, shall allow and assist in the inspection of such horse at any such horse show, horse exhibition, horse sale, or horse auction to determine compliance with the Act and regulations and shall furnish to any APHIS representative or HPI appointed by management upon their request the following information:

(a) Name and address (including street address or post office box number, and ZIP Code) of the horse owner and of the shipper, if different from the owner or trainer;

(b) Name and address (including street address or post office box number, and ZIP Code) of the horse trainer;

(c) Name and address (including street address or post office box number, and ZIP Code) of the carrier transporting the horse, and of the driver of the means of conveyance used;

(d) Origin of the shipment and date thereof; and

(e) Destination of shipment.

(Approved by the Office of Management and Budget under control number 0579-0056)

§ 11.18 Utilization of inspectors.

(a) The management of any horse show, horse exhibition, horse sale, or horse auction may elect to utilize an APHIS representative or HPI to detect and diagnose horses which are sore or to otherwise inspect horses for compliance with the Act or regulations.

(b) If management elects to utilize an HPI to detect and diagnose horses which are sore or to otherwise inspect horses for compliance with the Act or regulations, the HPI must currently be authorized by APHIS pursuant to § 11.19 to perform this function.

(c) The management of any horse show, horse exhibition, horse sale, or horse auction shall not utilize any person to detect and diagnose horses

which are sore or to otherwise inspect horses for the purpose of determining compliance with the Act and regulations, if that person has not been authorized by APHIS or if that person has been disqualified by the Secretary, after notice and opportunity for a hearing, in accordance with section 4 (15 U.S.C. 1823) of the Act, to make such detection, diagnosis, or inspection.

(d) After February 1, 2025, only APHIS representatives and HPIs as defined in § 11.1 shall be utilized by management to detect and diagnose horses which are sore or otherwise inspect horses for compliance with the Act or regulations. Any other persons seeking to continue inspecting or to become inspectors after February 1, 2025, must apply to APHIS and meet eligibility qualifications for authorization included in § 11.19.

§ 11.19 Authorization and training of Horse Protection Inspectors.

APHIS will authorize HPIs after the successful completion of training by APHIS. The management of any horse show, horse exhibition, horse sale, or horse auction may appoint HPIs holding a current authorization to detect and diagnose horses that are sore or to otherwise inspect horses and any records pertaining to such horses for the purposes of determining compliance with the Act and regulations.

(a) *Authorization process.* All persons wishing to become HPIs must submit an application to APHIS. Guidance regarding submitting applications is located on the APHIS Horse Protection website. Applicants will be required to show that they meet the Tier 1 qualifications in paragraph (a)(1) of this section in order for the application to be evaluated. If the applicant meets the qualifications in paragraph (a)(1) of the section, the applicant will be further evaluated based on the Tier 2 qualifications in paragraph (a)(2) of this section. In order for APHIS to consider the applicant as a candidate to be an HPI, all qualifications must be met.

(1) *Tier 1 qualifications.* The applicant must be a veterinarian, except that veterinary technicians and persons employed by State and local

government agencies to enforce laws or regulations pertaining to animal welfare may also be authorized if APHIS determines that there is an insufficient pool of veterinarians among current HPIs and applicants to be HPIs.

(2) *Tier 2 qualifications.* (i) The applicant must demonstrate sufficient knowledge and experience of equine husbandry and science and applicable principles of equine science, welfare, care, and health for APHIS to determine that the applicant can consistently identify equine soring and soring practices.

(ii) The applicant must not have been found to have violated any provision of the Act or the regulations in this part occurring after July 13, 1976, or have been assessed any civil penalty, or have been the subject of a disqualification order in any proceeding involving an alleged violation of the Act or regulations occurring after July 13, 1976.

(iii) The applicant must not have been disqualified by the Secretary from performing diagnosis, detection, and inspection under the Act.

(iv) The applicant must not have acted in a manner that calls into question the applicant's honesty, professional integrity, reputation, practices, and reliability relative to possible authorization as an HPI. APHIS will base this on a review of:

(A) Criminal conviction records, if any, indicating that the applicant may lack the honesty, integrity, and reliability to appropriately and effectively perform HPI duties.

(B) Official records of the person's actions while participating in Federal, State, or local veterinary programs when those actions reflect on the honesty, reputation, integrity, and reliability of the applicant.

(C) Judicial determinations in any type of litigation adversely reflecting on the honesty, reputation, integrity, and reliability of the applicant.

(D) Any other evidence reflecting on the honesty, reputation, integrity, and reliability of the applicant.

(b) *Training.* All applicants selected as candidates must complete a formal training program administered by APHIS prior to authorization. Continual

training as APHIS determines to be necessary is a condition of maintaining authorization to inspect horses.

(c) *Listing.* APHIS will maintain a list of all HPIs on the APHIS Horse Protection website. The list is also available by contacting APHIS by email or U.S. mail.

Note 1 to paragraph (c): Send email to horseprotection@usda.gov, or U.S. mail to USDA/APHIS/AC, 2150 Centre Ave., Building B, Mailstop 3W11, Fort Collins, CO 80526-8117.

(d) *Denial of an HPI application and disqualification of HPIs—(1) Denial.* APHIS may deny an application for authorization of an HPI, or deny continuation in the program to an HPI trainee not yet authorized, for any of the reasons outlined in paragraph (a) of this section. In such instances, the applicant shall be provided written notification of the grounds for the denial. The applicant may appeal the decision, in writing, within 30 days after receiving the written denial notice. The appeal must state all of the facts and reasons that the person wants the Administrator to consider in deciding the appeal. As soon as practicable, the Administrator will grant or deny the appeal, in writing, stating the reasons for the decision.

(2) *Disqualification.* APHIS may permanently disqualify any HPI who fails to inspect horses in accordance with the procedures prescribed by APHIS or otherwise fails to perform duties necessary for APHIS to enforce the Act and regulations, after notice and opportunity for a hearing. Requests for hearings and the hearings themselves shall be in accordance with the Uniform Rules of Practice for the Department of Agriculture in subpart H of 7 CFR part 1.

(Approved by the Office of Management and Budget under control number 0579-0490)

Done in Washington, DC, this 26th day of April 2024.

Jennifer Moffitt,

Under Secretary for Marketing and Regulatory Programs.

[FR Doc. 2024-09469 Filed 5-7-24; 8:45 am]

BILLING CODE 3410-34-P



FEDERAL REGISTER

Vol. 89

Wednesday,

No. 90

May 8, 2024

Part V

Environmental Protection Agency

40 CFR Part 751

Methylene Chloride; Regulation Under the Toxic Substances Control Act (TSCA); Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 751

[EPA-HQ-OPPT-2020-0465; FRL-8155-01-OCSPP]

RIN 2070-AK70

Methylene Chloride; Regulation Under the Toxic Substances Control Act (TSCA)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA or the Agency) is finalizing a rule to address the unreasonable risk of injury to health presented by methylene chloride under its conditions of use. TSCA requires that EPA address by rule any unreasonable risk of injury to health or the environment identified in a TSCA risk evaluation and apply requirements to the extent necessary so that the chemical no longer presents unreasonable risk. EPA's final rule will, among other things, prevent serious illness and death associated with uncontrolled exposures to the chemical by preventing consumer access to the chemical, restricting the industrial and commercial use of the chemical while also allowing for a reasonable transition period where an industrial and commercial use of the chemical is being prohibited, provide a time-limited exemption for a critical or essential use of methylene chloride for which no technically and economically feasible safer alternative is available, and protect workers from the unreasonable risk of methylene chloride while on the job.

DATES: This final rule is effective on July 8, 2024.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-HQ-OPPT-2020-0465. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Ingrid Feustel, Existing Chemicals Risk Management Division (7405M), Office of

Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001; telephone number: (202) 564-3199; email address: MethyleneChlorideTSCA@epa.gov.

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554-1404; email address: TSCA-Hotline@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

You may be potentially affected by this rule if you manufacture (defined under TSCA to include import), process, distribute in commerce, use, or dispose of methylene chloride or products containing methylene chloride. TSCA section 3(9) defines the term "manufacture" to mean to import into the customs territory of the United States (as defined in general note 2 of the Harmonized Tariff Schedule of the United States), produce, or manufacture. Therefore, unless expressly stated otherwise, importers of methylene chloride are subject to any provisions regulating manufacture of methylene chloride. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities include:

- Other Chemical and Allied Products Merchant Wholesalers (NAICS code 424690);
- Crude Petroleum Extraction (NAICS code 211120);
- All Other Basic Organic Chemical Manufacturing (NAICS code 325199);
- Other Chemical and Allied Products Merchant Wholesalers (NAICS code 424690);
- Petroleum Bulk Stations and Terminals (NAICS code 424710);
- Other Basic Inorganic Chemical Manufacturing (NAICS code 325180);
- Testing Laboratories (NAICS code 541380);
- Research and Development in the Physical, Engineering, and Life Sciences (except Nanotechnology and Biotechnology) (NAICS code 541715);
- Hazardous Waste Treatment and Disposal (NAICS code 562211);
- Solid Waste Combustors and Incinerators (NAICS code 562213);
- Materials Recovery Facilities (NAICS code 562920);
- Paint and Coating Manufacturing (NAICS code 325510);
- Air and Gas Compressor Manufacturing (NAICS code 333912);

- Gasket, Packing, and Sealing Device Manufacturing (NAICS code 339991);
- Residential Remodelers (NAICS code 236118);
- Commercial and Institutional Building Construction (NAICS code 236220);
- Plumbing, Heating, and Air-Conditioning Contractors (NAICS code 238220);
- Painting and Wall Covering Contractors (NAICS code 238320);
- All Other Miscellaneous Manufacturing (NAICS code 339999);
- Automotive Parts and Accessories Stores (NAICS code 441310);
- All Other Miscellaneous Store Retailers (except Tobacco Stores) (NAICS code 453998);
- Other Support Activities for Air Transportation (NAICS code 488190);
- All Other Automotive Repair and Maintenance (NAICS code 811198);
- Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance (NAICS code 811310);
- Footwear and Leather Goods Repair (NAICS code 811430);
- Adhesive Manufacturing (NAICS code 325520);
- All Other Miscellaneous Chemical Product and Preparation Manufacturing (NAICS code 325998);
- Audio and Video Equipment Manufacturing (NAICS code 334310);
- Reupholstery and Furniture Repair (NAICS code 811420);
- All Other Rubber Product Manufacturing (NAICS code 326299);
- All Other Miscellaneous Textile Product Mills (NAICS code 314999);
- All Other Miscellaneous Fabricated Metal Product Manufacturing (NAICS code 332999);
- Oil and Gas Field Machinery and Equipment Manufacturing (NAICS code 333132);
- Bare Printed Circuit Board Manufacturing (NAICS code 334412);
- Other Electronic Component Manufacturing (NAICS code 334419);
- All Other Miscellaneous Electrical Equipment and Component Manufacturing (NAICS code 335999);
- Printing Machinery and Equipment Manufacturing (NAICS code 333244);
- Petroleum Refineries (NAICS code 324110);
- Petroleum Lubricating Oil and Grease Manufacturing (NAICS code 324191);
- Painting and Wall Covering Contractors (NAICS code 238320);
- Welding and Soldering Equipment Manufacturing (NAICS code 333992);
- New Car Dealers (NAICS code 441110);
- Used Car Dealers (NAICS code 441120);

- Drycleaning and Laundry Services (except Coin-Operated) (NAICS code 812320); and
- Doll, Toy, and Game Manufacturing (NAICS code 339930).

This action may also affect certain entities through pre-existing import, including import certification, and export notification rules under TSCA. Persons who import any chemical substance in bulk form, as part of a mixture, or as part of an article (if required by rule) are also subject to TSCA section 13 import certification requirements and the corresponding regulations at 19 CFR 12.118 through 12.127; see also 19 CFR 127.28. Those persons must certify that the shipment of the chemical substance complies with all applicable rules and orders under TSCA. The EPA policy in support of import certification appears at 40 CFR part 707, subpart B. In addition, any persons who export or intend to export a chemical substance that is the subject of this final rule are subject to the export notification provisions of TSCA section 12(b) (15 U.S.C. 2611(b)), and must comply with the export notification requirements in 40 CFR part 707, subpart D. Any person who exports or intends to export methylene chloride must comply with the export notification requirements in 40 CFR part 707, subpart D.

B. What is the Agency's authority for taking this action?

Under TSCA section 6(a) (15 U.S.C. 2605(a)), if EPA determines through a TSCA section 6(b) risk evaluation that a chemical substance presents an unreasonable risk of injury to health or the environment, EPA must by rule apply one or more requirements listed in TSCA section 6(a) to the extent necessary so that the chemical substance or mixture no longer presents such risk.

C. What action is the Agency taking?

Pursuant to TSCA section 6(b), EPA determined that methylene chloride presents an unreasonable risk of injury to health, without consideration of costs or other non-risk factors, including an unreasonable risk to potentially exposed or susceptible subpopulations identified as relevant to the 2020 Risk Evaluation for Methylene Chloride by EPA, under the conditions of use (Refs. 1, 2). A detailed description of the conditions of use that contribute to EPA's determination that methylene chloride presents an unreasonable risk is in Unit II.C.4. Accordingly, to address the unreasonable risk, EPA is issuing this final rule under TSCA section 6(a) to:

- (i) Prohibit the manufacture, processing, and distribution of methylene chloride for all consumer use, as outlined in Unit IV.C.;
- (ii) Prohibit most industrial and commercial use of methylene chloride and delay prohibition for two conditions of use, as outlined in Unit IV.C.;
- (iii) Require a workplace chemical protection program (WCPP), including inhalation exposure concentration limits and related workplace exposure monitoring and exposure controls, for 13 conditions of use of methylene chloride (including manufacture; processing; several industrial and commercial uses such as laboratory use; and disposal), as outlined in Unit IV.B.;
- (iv) Identify a de minimis threshold for products containing methylene chloride for the prohibitions and restrictions on methylene chloride, as outlined in Unit IV.A.;
- (v) Require recordkeeping and downstream notification requirements for manufacturing, processing, and distribution in commerce of methylene chloride, as outlined in Unit IV.E.; and
- (vi) Provide a 10-year time-limited exemption under TSCA section 6(g) for emergency use of methylene chloride in furtherance of the National Aeronautics and Space Administration's mission for specific conditions which are critical or essential and for which no technically and economically feasible safer alternative is available, taking into consideration hazard and exposure, as outlined in Unit IV.F., with conditions for this exemption to include compliance with the WCPP described in Unit IV.B.

EPA notes that all TSCA conditions of use of methylene chloride (other than the use of methylene chloride in consumer paint and coating removers, which was subject to separate action under TSCA section 6 (84 FR 11420, March 27, 2019) (FRL-9989-29) are subject to this final rule. Condition of use is defined in TSCA section 3(4) to mean the circumstances, as determined by EPA, under which a chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of.

In addition, EPA is amending the general provisions of 40 CFR part 751, subpart A, to define "Article," "Authorized person," "Owner or operator," "Potentially exposed person," "Product," "Regulated area," and "Retailer" so that these definitions may be commonly applied to this and other rules under TSCA section 6 that would be codified under 40 CFR part 751.

D. Why is the Agency taking this action?

Under TSCA section 6(a), "[i]f the Administrator determines in accordance with subsection (b)(4)(A) that the manufacture, processing, distribution in commerce, use or disposal of a chemical substance or mixture, or that any combination of such activities, presents an unreasonable risk of injury to health or the environment, the Administrator shall by rule . . . apply one or more of the [section 6(a)] requirements to such substance or mixture to the extent necessary so that the chemical substance no longer presents such risk." Methylene chloride was the subject of a risk evaluation under TSCA section 6(b)(4)(A) that was issued in June 2020 (Ref. 1). In addition, EPA issued a revised unreasonable risk determination for methylene chloride in November 2022 (Ref. 2) determining that methylene chloride, as a whole chemical substance, presents an unreasonable risk of injury to health under the conditions of use. On May 3, 2023, EPA issued a proposed rule (88 FR 28284) (FRL-8155-02-OCSP) under TSCA section 6(a) to regulate methylene chloride, so that it no longer presents unreasonable risk. The Agency received public comment on the proposal. With this action, EPA is finalizing with modifications the May 2023 proposed rule so that methylene chloride no longer presents an unreasonable risk. The conditions of use that contribute to the unreasonable risk from methylene chloride are described in Unit III.B.1. of the proposed rule (88 FR 28284) (FRL-8155-02-OCSP).

EPA emphasizes that some of the adverse effects from methylene chloride exposure, including sudden death, can be both immediately experienced and after only a short duration (Ref. 1). Other effects may result in long-term human health impacts which are also considered significant, including liver effects and cancer. Fatalities from acute methylene chloride exposures have been documented and pose a serious public health threat; these fatalities led the agency to prohibit the manufacture, processing, and distribution of methylene chloride for use in consumer paint and coating removers in 2019 (84 FR 11420, March 27, 2019) (FRL-9989-29). This final rule will eliminate the unreasonable risk to human health from the remaining conditions of use of methylene chloride, as identified in the 2020 Risk Evaluation for Methylene Chloride (Ref. 1) and the Revised Unreasonable Risk Determination for Methylene Chloride in November 2022 (Ref. 2).

Although EPA is prohibiting many conditions of use of the chemical where it cannot be used without continuing to present unreasonable risk as described in Unit IV., EPA is not finalizing a complete ban on methylene chloride. While addressing the unreasonable risk, this final rule allows methylene chloride's limited and controlled continued use in tandem with additional worker protections for several purposes, including the production of hydrofluorocarbon-32 (HFC-32), one of the regulated substances that are subject to a phasedown under the American Innovation and Manufacturing (AIM) Act of 2020. For many of the conditions of use for which EPA is finalizing workplace controls under a WCPP, data to support the industry's position that certain uses could meet the exposure limit and ancillary requirements of an effective WCPP in addressing unreasonable risk were submitted during the risk evaluation, Small Business Advocacy Review (SBAR) Panel process, the comment period following publication of the proposed rule, or during stakeholder outreach, and are available in the corresponding public dockets (EPA-HQ-OPPT-2020-0465; EPA-HQ-OPPT-2019-0437; EPA-HQ-OPPT-2016-0742).

E. What are the estimated incremental impacts of this action?

EPA has prepared an Economic Analysis of the potential incremental impacts associated with this rulemaking that can be found in the rulemaking docket (Ref. 3). As described in more detail in the Economic Analysis (Ref. 3), EPA's analysis of the incremental, non-closure-related costs of this rule is estimated to be \$37.0 million annualized over 20 years at a 3% discount rate and \$39.5 million annualized over 20 years at a 7% discount rate. In response to the updated Circular A-4 published in November 2023, the incremental, non-closure related costs of this rule at a 2% discount rate (\$36.4 million annualized over 20 years) is provided in appendix D of the Economic Analysis (Ref. 3). These costs take compliance with implementation of a WCPP for certain conditions of use into consideration, which would include an Existing Chemical Exposure Limit (ECEL) of 2 ppm (8 mg/m³) for inhalation exposures as an 8-hour time-weighted average (TWA), applicable personal protective equipment (PPE) requirements, and reformulation costs of numerous products.

In alignment with the goals of President Biden's Cancer Moonshot, the

rule will protect people from cancer and other adverse health effects of methylene chloride by prohibiting most uses of methylene chloride while ensuring essential uses can safely continue (Ref. 4). The actions in this final rule are expected to achieve health benefits for the American public, some of which can be monetized and others that, while tangible and significant, cannot be monetized. Although some benefits cannot be quantified, they are not necessarily less important than the quantified benefits. The incremental improvements in health outcomes achieved by given reductions in exposure cannot be quantified for non-cancer health effects associated with methylene chloride exposure, and therefore cannot be converted into monetized benefits.

The monetized benefits of this rule are approximately \$24.8 million to \$25.1 million annualized over 20 years at a 3% discount rate and \$19.8 million to \$20.0 million annualized over 20 years at a 7% discount rate. In response to the updated Circular A-4 published in November 2023, the incremental benefits at a 2% discount rate (\$27.1 to \$27.5 million annualized over 20 years) are provided in appendix D of the Economic Analysis (Ref. 3). The monetized benefits only include potential reductions in risk of liver cancer and lung cancer associated with chronic exposures, and potential deaths avoided from acute methylene chloride exposure. Non-monetized benefits include potential reductions in central nervous system depressant effects; these effects include loss of consciousness and respiratory depression that may result in irreversible coma and hypoxia. Risks from acute exposures to methylene chloride can lead to workplace accidents and are precursors to the more severe central nervous system effects (up to and including death). Other non-monetized benefits include reductions in liver disease (including vacuolization, necrosis, hemosiderosis and hepatocellular degeneration), immune system compromise, and irritation and burns (Ref. 3).

II. Background

A. Overview of Methylene Chloride

As described in more detail in the May 2023 proposed rule (88 FR 28284, May 3, 2023) (FRL-8155-02-OCSP), methylene chloride is acutely lethal, a neurotoxicant, and a carcinogen. This final rule is specifically intended to address the unreasonable risk of injury to health that EPA has identified in the 2020 Risk Evaluation for methylene

chloride (Ref. 1) and 2022 Revised Unreasonable Risk Determination (Ref. 2), as described in Unit II.C.3. Methylene chloride is a colorless liquid and a volatile chemical with a sweet odor resembling chloroform. It is both produced in and imported into the United States. Methylene chloride is manufactured, processed, distributed in commerce, used, and disposed of as part of many industrial, commercial, and consumer conditions of use. As outlined in Unit II.C.4., methylene chloride is a widely used solvent in a variety of consumer and commercial applications including adhesives and sealants, automotive products, and paint and coating removers. Some evidence suggests that in recent years, use of methylene chloride has been declining in certain sectors (Ref. 3), particularly for consumer products, as the hazards of methylene chloride are well known, and certain uses are highly regulated. As further described in Unit II.B. and in the regulatory appendix (Ref. 5), these regulations include EPA's 2019 final rule addressing unreasonable risk to consumers from methylene chloride use in consumer paint and coating removal by prohibiting manufacturing, processing, and distribution in commerce of methylene chloride for consumer use in paint and coating removal (84 FR 11420, March 27, 2019) (FRL-9989-29).

The total annual aggregate production volume of methylene chloride was between 100 million to 500 million pounds between 2016 and 2019 according to Chemical Data Reporting (CDR) (Ref. 6). One notable high-volume use accounting for approximately one-fifth of all methylene chloride annual production volume is processing as a reactant, which includes the manufacture of HFCs (Ref. 1). This condition of use is described in Unit II.B.1. of the proposed rule, with a description of final requirements to address unreasonable risk in Units II.D.1. and IV. An estimated 35% of the annual production volume of methylene chloride is for pharmaceutical uses, which are not subject to TSCA and will not be regulated by this rule (15 U.S.C. 2602(2)(B)(vi); 21 U.S.C. 321(g)(1)).

B. Regulatory Actions Pertaining to Methylene Chloride

Because of its adverse health effects, methylene chloride is subject to numerous State, Federal, and international regulations restricting and regulating its use. A summary of EPA regulations pertaining to methylene chloride, as well as other Federal, State, and international regulations, is in the docket (Refs. 1, 5).

As described in more detail in EPA's proposed rule (88 FR 28284, May 3, 2023) (FRL-8155-02-OCSP), and the Response to Public Comments document (Ref. 7), EPA considered the adequacy of the current standard for methylene chloride from the Occupational Safety and Health Administration (OSHA) (29 CFR 1910.1052) for protection of workers. EPA notes that the standards for chemical hazards that OSHA promulgates under the Occupational Safety and Health (OSH) Act share a broadly similar purpose with the worker protection-related standards that EPA promulgates under TSCA section 6(a). The control measures OSHA and EPA require to satisfy the objectives of their respective statutes may also, in many circumstances, overlap or coincide. However, there are important differences between EPA's and OSHA's regulatory approaches and jurisdiction, and EPA considers these differences when deciding whether and how to account for OSHA requirements when evaluating and addressing potential unreasonable risk to workers so that compliance requirements are clearly explained to the regulated community. Additional considerations of OSHA standards in the revised unreasonable risk determination are discussed further in the 2022 Revised Unreasonable Risk Determination for Methylene Chloride, published in the **Federal Register** of November 10, 2022 (87 FR 67901) (Ref. 2).

EPA intends for this regulation to be as consistent as possible with the current OSHA standard for methylene chloride, with additional requirements as necessary to address the unreasonable risk. Consistent with TSCA section 9(d), EPA consults and coordinates TSCA activities with OSHA and other relevant Federal agencies for the purpose of achieving the maximum enforcement of TSCA while imposing the least burdens of duplicative requirements.

C. Summary of EPA's Risk Evaluation Activities on Methylene Chloride

In July 2017, EPA published the scope of the methylene chloride risk evaluation (82 FR 31592, July 7, 2017) (FRL-9963-57), and, after receiving public comments, published the problem formulation in June 2018 (83 FR 26998, June 11, 2018) (FRL-9978-40). In October 2019, EPA published a draft risk evaluation (84 FR 57866, October 29, 2019) (FRL-9999-69), and, after public comment and peer review by the Science Advisory Committee on Chemicals (SACC), EPA issued the 2020 Risk Evaluation for Methylene Chloride

in June 2020 in accordance with TSCA section 6(b) (85 FR 37942, June 24, 2020) (FRL-10011-16). EPA subsequently issued a draft revised TSCA risk determination for methylene chloride (87 FR 39824, July 5, 2022) (9946-01-OCSP), and, after public notice and receipt of comments, published a Revised Risk Determination for Methylene Chloride in November 2022 (Ref. 2). The 2020 Risk Evaluation for Methylene Chloride and supplemental materials are in docket EPA-HQ-OPPT-2019-0437, and the November 2022 revised unreasonable risk determination and additional materials supporting the risk evaluation process are in docket EPA-HQ-OPPT-2016-0742, on <https://www.regulations.gov>.

1. 2020 Risk Evaluation

In the 2020 Risk Evaluation for Methylene Chloride, EPA evaluated risks associated with 53 conditions of use within the following categories: manufacture (including import), processing, distribution in commerce, industrial and commercial use, consumer use, and disposal (Ref. 1). Descriptions of these conditions of use are in Unit III.B.1. of the proposed rule. The 2020 Risk Evaluation for Methylene Chloride identified significant adverse health effects associated with short- and long-term exposure to methylene chloride. A further discussion of the hazards of methylene chloride is in Unit III.B.1. of the proposed rule (88 FR 28284, May 3, 2023) (FRL-8155-02-OCSP).

2. 2022 Revised Unreasonable Risk Determination

As described in more detail in EPA's proposed rule (88 FR 28284, May 3, 2023) (FRL-8155-02-OCSP), EPA revised the original unreasonable risk determination based on the 2020 Risk Evaluation for Methylene Chloride and issued a final revised unreasonable risk determination in November 2022 (Ref. 2). EPA revised the risk determination for the 2020 Risk Evaluation for Methylene Chloride pursuant to TSCA section 6(b) and consistent with Executive Order 13990, ("Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis") and other Administration priorities (Refs. 8, 9, 10). The revisions consisted of making the risk determination based on the whole-chemical substance instead of making risk determinations for each individual condition of use, which resulted in the revised risk determination superseding the prior "no unreasonable risk" determinations for specific conditions of

use (Ref. 2), the withdrawal of the associated TSCA section 6(i)(1) "no unreasonable risk" order, and clarification that the risk determination does not reflect an assumption that all workers are always provided and appropriately wear PPE (Ref. 2).

EPA determined that methylene chloride presents an unreasonable risk of injury to health, and did not identify risks of injury to the environment that contribute to the unreasonable risk determination for methylene chloride. The methylene chloride conditions of use that drive EPA's determination that the chemical substance poses unreasonable risk to health are listed in the unreasonable risk determination (Ref. 2) and also in Unit III.B.2. of the proposed rule, with descriptions to aid chemical manufacturers, processors, and users in determining how their particular use or activity would be addressed under the final regulatory action.

3. Description of Unreasonable Risk

EPA has determined that methylene chloride presents an unreasonable risk of injury to health under the conditions of use, based on acute and chronic non-cancer risks and chronic cancer risks. As described in more detail in EPA's proposed rule (88 FR 28284, May 3, 2023) (FRL-8155-02-OCSP) and as described in the TSCA section 6(b) 2020 Risk Evaluation for Methylene Chloride, EPA identified non-cancer adverse effects from both acute and chronic inhalation and dermal exposures to methylene chloride, and cancer from chronic inhalation and dermal exposures to methylene chloride (Ref. 1). EPA identified neurotoxicity effects (central nervous system) as the most sensitive endpoint of the non-cancer adverse effects from acute inhalation and dermal exposures, and liver effects as the most sensitive endpoint of the non-cancer adverse effects from chronic inhalation and dermal exposures for all conditions of use. EPA identified additional risks associated with other adverse effects (e.g., other nervous system effects, immune system effects, reproductive and developmental effects, and irritation/burns) resulting from acute and chronic exposures. By targeting the sensitive chronic liver effects endpoint for risk management, EPA's final rule will also prevent the unreasonable risks from acute, chronic non-cancer and cancer endpoints associated with methylene chloride. EPA also recognizes the severity of the risks from acute inhalation exposures to methylene chloride, because relatively small increases in acute exposure can lead to extreme adverse effects

associated with central nervous system suppression, including coma and death. Occupational fatalities linked to methylene chloride have been recorded as recently as June 2020 (Ref. 11) and, most recently by OSHA, in March 2021 and July 2023 (Ref. 12). Eighty-five (85) fatalities between 1980 and 2018 have been documented from methylene chloride in paint and coating removal or adhesive and sealant use, and when methylene chloride is being used as a cleaning or degreasing solvent, 74 of which were in occupational settings; there has been no linear trend indicating a decrease in fatalities during that time period (Ref. 11). In some instances, while trained workers were wearing respirators, the respirators were inadequate to protect against methylene chloride inhalation exposure (Ref. 11).

EPA considered potentially exposed or susceptible subpopulations identified as relevant to the risk evaluation by the Agency, which are included in the quantitative and qualitative analyses described in the 2020 Risk Evaluation for Methylene Chloride (Ref. 1) and were considered in the determination of unreasonable risk for methylene chloride.

4. Conditions of Use Subject to This Regulatory Action

Conditions of use is defined in TSCA section 3(4) to mean the circumstances under which a chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of. Conditions of use descriptions are provided in Unit III.B.1. of the proposed rule (88 FR 28284, May 3, 2023) (FRL–8155–02–OCSPP) and were obtained from EPA sources such as CDR use codes, the 2020 Risk Evaluation for Methylene Chloride and related documents, as well as the Organisation for Economic Co-operation and Development harmonized use codes, and stakeholder engagements. EPA did not receive public comments identifying inaccuracies or necessitating changes to those descriptions; however, EPA received some comments requesting clarification for particular uses, which can be found in the response to comments document (Ref. 7). Additionally, to assist with implementation and compliance with the final rule, in Unit IV.B.1., EPA has provided a description of the conditions of use that are subject to the WCPP.

As in the proposed rule, for the purposes of this final rule, “occupational conditions of use” refers to the TSCA conditions of use described in Units III.B.1.a., b., c., and e. of the proposed rule. Although EPA identified

both industrial and commercial uses in the 2020 Risk Evaluation for Methylene Chloride (Ref. 1) for purposes of distinguishing scenarios, the Agency clarified then and clarifies now that EPA interprets the authority Congress gave to the Agency to “regulat[e] any manner or method of commercial use” under TSCA section 6(a)(5) to reach both industrial and commercial uses.

Additionally, as described in the proposed rule (88 FR 28284, May 3, 2023) (FRL–8155–02–OCSPP), in the 2020 Risk Evaluation for Methylene Chloride (Ref. 1), EPA identified and assessed all known, intended, and reasonably foreseen industrial, commercial, and consumer uses of methylene chloride (other than the use of methylene chloride in consumer paint and coating removers, which was subject to separate action under TSCA section 6 (84 FR 11420, March 27, 2019) (FRL–9989–29). EPA determined that all industrial, commercial, and consumer use of methylene chloride evaluated in the 2020 Risk Evaluation for Methylene Chloride contribute to the unreasonable risk of injury to health. As such, for purposes of this risk management rule, “consumer use” refers to all known, intended, or reasonably foreseen methylene chloride consumer uses. Likewise, for the purpose of this risk management rule, “industrial and commercial use” refers to all known, intended, or reasonably foreseen methylene chloride industrial and commercial use.

EPA further notes that this rule does not apply to any substance excluded from the definition of “chemical substance” under TSCA section 3(2)(B)(i) through (vi). Those exclusions include, but are not limited to, any pesticide (as defined by the Federal Insecticide, Fungicide, and Rodenticide Act) when manufactured, processed, or distributed in commerce for use as a pesticide; and any food, food additive, drug, cosmetic, or device, as defined in section 201 of the Federal Food, Drug, and Cosmetic Act, when manufactured, processed, or distributed in commerce for use as a food, food additive, drug, cosmetic or device.

D. EPA’s Proposed Rule Under TSCA Section 6(a) for Methylene Chloride

1. Description of TSCA Section 6(a) Requirements

Under TSCA section 6(a), if the Administrator determines through a TSCA section 6(b) risk evaluation that a chemical substance presents an unreasonable risk of injury to health or the environment, without consideration of costs or other non-risk factors,

including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the Agency’s risk evaluation, under the conditions of use, EPA must by rule apply one or more of the section 6(a) requirements to the extent necessary so that the chemical substance no longer presents such risk.

The TSCA section 6(a) requirements can include one or more of the following actions alone or in combination:

- Prohibit or otherwise restrict the manufacturing (including import), processing, or distribution in commerce of the substance or mixture, or limit the amount of such substance or mixture which may be manufactured, processed, or distributed in commerce (section 6(a)(1)).
- Prohibit or otherwise restrict the manufacturing, processing, or distribution in commerce of the substance or mixture for a particular use or above a specific concentration for a particular use (section 6(a)(2)).
- Limit the amount of the substance or mixture which may be manufactured, processed, or distributed in commerce for a particular use or above a specific concentration for a particular use specified (section 6(a)(2)).
- Require clear and adequate minimum warning and instructions with respect to the substance or mixture’s use, distribution in commerce, or disposal, or any combination of those activities, to be marked on or accompanying the substance or mixture (section 6(a)(3)).
- Require manufacturers and processors of the substance or mixture to make and retain certain records or conduct certain monitoring or testing (section 6(a)(4)).
- Prohibit or otherwise regulate any manner or method of commercial use of the substance or mixture (section 6(a)(5)).
- Prohibit or otherwise regulate any manner or method of disposal of the substance or mixture, or any article containing such substance or mixture, by its manufacturer or processor or by any person who uses or disposes of it for commercial purposes (section 6(a)(6)).
- Direct manufacturers or processors of the substance or mixture to give notice of the unreasonable risk determination to distributors, certain other persons, and the public, and to replace or repurchase the substance or mixture (section 6(a)(7)).

In the 2023 proposed rule for methylene chloride under TSCA section 6(a) (88 FR 28284, May 3, 2023) (FRL–8155–02–OCSPP), EPA analyzed how

the TSCA section 6(a) requirements could be applied to address the unreasonable risk from methylene chloride so that it no longer presents such risk. Unit II.D.1., summarizes the TSCA section 6 considerations for issuing regulations under TSCA section 6(a). Unit V. outlines how EPA applied these considerations while managing the unreasonable risk from methylene chloride.

As required, EPA developed a proposed regulatory action and one primary alternative regulatory action, which are described in Units IV.A. and IV.B., respectively, of the 2023 proposed rule for methylene chloride (88 FR 28284, May 3, 2023) (FRL–8155–02–OCSPP). To identify and select a regulatory action, EPA considered the two routes of exposure driving the unreasonable risk, inhalation and dermal, and the exposed populations. For occupational conditions of use, EPA considered how it could directly regulate manufacturing (including import), processing, distribution in commerce, industrial and commercial use, or disposal to address the unreasonable risk. EPA also considered how it could exercise its authority under TSCA to regulate the manufacturing (including import), processing, and/or distribution in commerce of methylene chloride at different levels in the supply chain to eliminate exposures or restrict the availability of methylene chloride and methylene chloride-containing products for consumer use in order to address the unreasonable risk.

As required by TSCA section 6(c)(2), EPA considered several factors, in addition to identified unreasonable risk, when selecting among possible TSCA section 6(a) regulatory requirements for the proposed rule. EPA's considerations regarding TSCA section 6(c)(2) and section 6(c)(2)(A) for methylene chloride are discussed in full in Unit VI. of the proposed rule (88 FR 28284, May 3, 2023) (FRL–8155–02–OCSPP), including the statement of effects with respect to these considerations. After review of the public comments received, EPA has revised its statement of effects considerations in Unit V. of this final rule.

As described in more detail in EPA's proposed rule (88 FR 28284, May 3, 2023) (FRL–8155–02–OCSPP), EPA also considered regulatory authorities under statutes administered by other agencies such as the OSH Act, the Consumer Product Safety Act (CPSA), and the Federal Hazardous Substances Act (FHSA), as well as other EPA-administered statutes, to examine 1) Whether there are opportunities to

address unreasonable risk under other statutes, such that a referral may be warranted under TSCA section 9(a) or 9(b); or 2) Whether TSCA section 6(a) regulation could include alignment of requirements and definitions in and under existing statutes and regulations to minimize confusion to the regulated entities and the general public.

Additionally, as described in more detail in EPA's proposed rule in Unit V.B. (88 FR 28284, May 3, 2023) (FRL–8155–02–OCSPP), EPA considered the availability of alternatives when finalizing a prohibition or a substantial restriction (TSCA section 6(c)(2)(C)) (Ref. 13), and in setting final compliance dates in accordance with the requirements in TSCA section 6(d)(1)(B)).

To the extent information was reasonably available, EPA considered pollution prevention strategies and the hierarchy of controls adopted by OSHA and the National Institute for Occupational Safety and Health (NIOSH) when developing its proposed rule, with the goal of identifying risk management control methods that would be permanent, feasible, and effective. EPA also considered how to address the unreasonable risk while providing flexibility to the regulated community where appropriate, and took into account the information presented in the 2020 Risk Evaluation for Methylene Chloride (Ref. 1), input from stakeholders, insight received during consultations, and anticipated compliance strategies from regulated entities.

Taken together, these considerations led EPA to the proposed regulatory action and primary alternative action described in this unit. Additional details related to how the requirements in this unit were incorporated into development of the proposed rule and primary alternative action are in Unit V. of the proposed rule.

2. Consultations and Other Engagement

a. Consultations

EPA conducted consultations and outreach as part of development of the May 2023 proposed rule (88 FR 28284, May 3, 2023) (FRL–8155–02–OCSPP). The Agency held a federalism consultation from October 22, 2020, until January 23, 2021, as part of the rulemaking process and pursuant to Executive Order 13132. (Ref. 14).

EPA also consulted with tribal officials during the development of the May 2023 proposed rule (88 FR 28284, May 3, 2023) (FRL–8155–02–OCSPP) (Ref. 15). The Agency held a tribal consultation from October 7, 2020, to

January 8, 2021, with meetings on November 12 and 13, 2020. (Ref. 15). EPA received no written comments as part of this consultation.

EPA's Environmental Justice (EJ) consultation occurred from November 4, 2020, through January 18, 2021. On November 16 through 19, 2020, EPA held public meetings as part of this consultation. These meetings were held pursuant to Executive Orders 12898 and 14008. EPA received three written comments following the EJ meetings, in addition to oral comments provided during the consultations (Refs. 16, 17, 18). The proposed rule presents a brief summary of the comments in Unit III.A.1. of that document (88 FR 28284, May 3, 2023) (FRL–8155–02–OCSPP).

As required by section 609(b) of the Regulatory Flexibility Act (RFA), EPA convened a SBAR Panel to obtain advice and recommendations from Small Entity Representatives (SERs) that potentially would be subject to the rule's requirements. EPA met with SERs before and during Panel proceedings, on November 4, 2020, and January 28, 2021. Panel recommendations were addressed in Unit X.C. of the proposed rule and in the Initial Regulatory Flexibility Analysis (IRFA) (Ref. 19); the Panel report is in the docket (Ref. 20). EPA has also prepared a Final Regulatory Flexibility Analysis (FRFA) (Ref. 21).

The May 2023 proposed rule presents more information regarding the consultations in Units III.A.1., X.C., X.E., X.F. and X.J. of that document (88 FR 28284, May 3, 2023) (FRL–8155–02–OCSPP).

b. Other Stakeholder Consultations

For development of the proposed rule, in addition to the formal consultations described in Unit X. of the proposed rule, EPA provided an overview of the TSCA risk management process and the findings in the 2020 Risk Evaluation for Methylene Chloride (Refs. 22, 23) during a Small Business Administration (SBA) Office of Advocacy Environmental Roundtable on September 11, 2020, and in a public webinar on September 16, 2020. Attendees of these meetings were given an opportunity to voice their concerns regarding the risk evaluation and risk management.

Furthermore, during development of the proposed rule, EPA engaged in discussions with representatives from different industries, non-governmental organizations, technical experts, organized labor, and users of methylene chloride. A list of external meetings held during the development of the May 2023 proposed rule is in the docket (Ref.

24); meeting materials and summaries are also in the docket. A summary of the topics discussed during the meetings is in Unit III.A.2. of the proposed rule (88 FR 28284, May 3, 2023) (FRL-8155-02-OCSPP).

c. Children's Environmental Health

The Agency's 2021 Policy on Children's Health (Ref. 25) requires EPA to protect children from environmental exposures by consistently and explicitly considering early life exposures (from conception, infancy, and early childhood and through adolescence until 21 years of age) and lifelong health in all human health decisions through identifying and integrating children's health data and information when conducting risk assessments. TSCA section 6(b)(4)(A) also requires EPA to conduct risk evaluations "to determine whether a chemical substance presents an unreasonable risk of injury to health or the environment . . . including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the risk evaluation by the Administrator, under the conditions of use." In addition, TSCA section 6(a) requires EPA to apply one or more risk management requirements so that methylene chloride no longer presents an unreasonable risk (which includes unreasonable risk to any relevant potentially exposed or susceptible subpopulations). Information on how the Policy was applied and on the health and risk assessments supporting this action is available under Units II.C., II.D. and V.A., as well as in the 2020 Risk Evaluation for Methylene Chloride, and the Economic Analysis for this rule (Refs. 1, 3).

3. Proposed Regulatory Action

EPA's proposed rule under TSCA section 6(a) to address the unreasonable risk presented by methylene chloride under its conditions of use (88 FR 28284, May 3, 2023) (FRL-8155-02-OCSPP) included the following:

- (i) Prohibition of the manufacture, processing, and distribution of methylene chloride for all consumer use;
- (ii) Prohibition of most industrial and commercial use of methylene chloride;
- (iii) Requirements for a WCPP, including inhalation exposure concentration limits and related workplace exposure monitoring and exposure controls, for ten conditions of use of methylene chloride (including manufacture; processing as a reactant; laboratory use; industrial or commercial use in aerospace and military paint and coating removal from safety-critical,

corrosion-sensitive components by Federal agencies and their contractors; industrial or commercial use as a bonding agent for acrylic and polycarbonate in mission-critical military and space vehicle applications, including in the production of specialty batteries for such by Federal agencies and their contractors; and disposal);

(iv) Requirements for recordkeeping and downstream notification requirements for manufacturing, processing, and distribution in commerce of methylene chloride;

(v) A 10-year time-limited exemption under TSCA section 6(g) for civilian aviation from the prohibition addressing the use of methylene chloride for paint and coating removal to avoid significant disruptions to critical infrastructure, with conditions for this exemption to include compliance with the WCPP; and

(vi) A 10-year time-limited exemption under TSCA section 6(g) for emergency use of methylene chloride in furtherance of the National Aeronautics and Space Administration's mission for specific conditions which are critical or essential and for which no technically and economically feasible safer alternative is available, with conditions for this exemption to include compliance with the WCPP.

EPA notes that all TSCA conditions of use of methylene chloride (other than the use of methylene chloride in consumer paint and coating removers, which was subject to separate action under TSCA section 6 (84 FR 11420, March 27, 2019) (FRL-9989-29) were subject to the May 2023 proposed rule (88 FR 28284, May 3, 2023) (FRL-8155-02-OCSPP) and are subject to this final rule.

The proposed rule included timeframes for implementation. The prohibitions EPA proposed would take effect in phases, beginning at the top of the supply chain, and coming into full effect after 450 days, as described in Units IV.A.2. and 3. of the proposal. Likewise, for the WCPP, EPA proposed timeframes for phases of compliance, beginning with monitoring at 180 days and full implementation after 360 days, as described in Unit IV.A.1. of the proposed rule.

Under TSCA section 6(c)(2)(A)(iv)(II) through (III), EPA is mandated to consider and propose an alternative regulatory action. This was included in the proposed rule in Unit IV.B. (88 FR 28284, May 3, 2023) (FRL-8155-02-OCSPP). Similar to the proposed regulatory action, it combined prohibitions and requirements for a WCPP to address the unreasonable risk from methylene chloride under its conditions of use, as well as time-

limited exemptions under TSCA section 6(g) for two uses. More specifically, the alternative regulatory action would allow for the WCPP, including requirements to meet an ECEL and EPA Short-Term Exposure Limit (STEL), for several additional conditions of use than would have been allowed under the proposed regulatory action. The alternative regulatory action additionally included longer compliance timeframes for prohibitions and a WCPP.

The alternative regulatory action considered would have allowed a WCPP for the following additional industrial and commercial conditions of use: industrial and commercial use in finishing products for fabric, textiles, and leather; industrial and commercial use as solvent that becomes part of a formulation or mixture; industrial and commercial use as a processing aid; industrial and commercial use for electrical equipment, appliance, and component manufacturing; industrial and commercial use for plastic and rubber products manufacturing; industrial and commercial use in cellulose triacetate film production; industrial and commercial use for oil and gas drilling, extraction, and support activities; and industrial and commercial use in paint or coating removal from safety-critical, corrosion-sensitive components of aircraft owned or operated by air carriers or commercial operators certificated under 14 CFR part 119. At the time of publication of the proposed rule for methylene chloride, EPA believed a WCPP had the potential to be a viable alternative to the proposed prohibition for these additional industrial and commercial conditions of use because these were generally industrial in nature; owners or operators were likely currently complying with the OSHA methylene chloride standard; and, as far as the Agency was aware, these conditions of use had not resulted in any documented fatalities. However, at the time of proposal, EPA did not have reasonably available information that could confirm that compliance with an ECEL of 2 ppm was possible (*e.g.*, monitoring data or detailed description of activities involving methylene chloride for these conditions of use). Therefore, EPA preliminarily proposed that these conditions of use be prohibited.

The alternative regulatory action also included longer timeframes for implementation of both the prohibitions and WCPP. Those timeframes are described in Unit IV.B. of the proposed rule, respectively (88 FR 28284, May 3, 2023) (FRL-8155-02-OCSPP).

For a comprehensive overview of the alternative regulatory action, refer to Unit IV.B. of the proposed rule, with the rationale for the primary alternative regulatory action provided in Unit V.B. of the proposed rule (88 FR 28284, May 3, 2023) (FRL–8155–02–OCSPP).

4. Public Comments Received

EPA requested comment on all aspects of the proposed rule (88 FR 28284, May 3, 2023) (FRL–8155–02–OCSPP) which published on May 3, 2023. The comment period closed on July 3, 2023. EPA received almost 40,000 public comments, with a vast majority received from individuals participating in mass mailer campaigns organized by non-governmental organizations. The public comments also include approximately 200 unique comments from industry stakeholders, trade associations, environmental groups, unions, non-governmental health advocacy organizations, academics, State and local governments, and members of the regulated community. A summary of the comments, as well as EPA's responses, is in the docket for this rulemaking (Ref. 7). Additionally, Unit III. contains summaries of public comments that informed EPA's regulatory approach in this final rule.

After the close of the public comment period for the proposed rule, EPA held meetings with stakeholders to receive clarifying information on their comments, including affected industry and interested groups, related to the use of methylene chloride. Topics of these meetings included exposure controls, process descriptions, monitoring data, and specific conditions of use. EPA received data as part of and following these stakeholder meetings and has made the information available to the public in the rulemaking docket (EPA–HQ–OPPT–2020–0465) (Ref. 24).

After review of the public comments received from the proposed rule (88 FR 28284, May 3, 2023) (FRL–8155–02–OCSPP) for methylene chloride, EPA revised certain preliminary considerations that impacted which conditions of use were proposed by EPA to be prohibited or that could continue under the WCPP (Ref. 7). Similarly, based on public comments received, EPA modified for this final rule several proposed compliance timeframes, with details in Unit III.

III. Changes From the Proposed Rule

This unit summarizes the main changes from the proposed rule to the final rule, based on the consideration of the public comments.

A. Changes to Conditions of Use Allowed To Continue Under WCPP

EPA's primary alternative regulatory action described in the proposed rule included several conditions of use under the WCPP, rather than prohibition. As described in Units III.A.1. through 5., EPA's final rule allows three additional conditions of use under the WCPP (Units III.A.1. through III.A.3.) and broadens the scope of two conditions of use allowed to continue under the WCPP, when compared to the proposed rule. The rationale for these changes is described in this unit and EPA notes that in the event that sensitive information relating to national security or critical infrastructure is submitted to EPA, the Agency will protect such information in accordance with applicable authorities. EPA's final rule also clarifies that this rule permits manufacturing and processing in compliance with the WCPP for export. More information is provided in Unit IV.A. regarding export.

EPA emphasizes that implementation of the WCPP can fully address the unreasonable risk from methylene chloride for the conditions of use allowed to continue, and that these changes do not significantly impact the production volume of methylene chloride expected to remain in commerce when compared to the proposed regulatory action. Taken together, the conditions of use described in Units III.A.1. through 5. account for less than an estimated 2% of the total production volume of methylene chloride.

1. Industrial and Commercial Use of Methylene Chloride as a Processing Aid

EPA is finalizing a WCPP for industrial and commercial use of methylene chloride as a processing aid, as included in the primary alternative regulatory action of EPA's proposal (88 FR 28284, May 3, 2023) (FRL–8155–02–OCSPP). While EPA proposed to prohibit industrial and commercial use of methylene chloride as a processing aid, this was due to insufficient information at the time of proposal to determine that the sector as a whole could comply with a WCPP. During the Small Business Advocacy Review Panel, EPA received data from a small business using methylene chloride as a processing aid, specifically as a heat transfer fluid, indicating they were able to meet an ECEL of 2 ppm. Initial data indicated that the occupational exposure scenario (cellulose triacetate film manufacturing) used to assess this condition of use in the 2020 Risk Evaluation of methylene chloride (Ref.

1) may not have been representative of the overall types of exposures expected for this condition of use. In the proposed rule, EPA specifically requested comment on the degree to which other entities using methylene chloride as a processing aid could comply with the proposed WCPP requirements for methylene chloride. Numerous commenters provided EPA with process descriptions, diagrams, and monitoring data, summarized in this unit and in the Response to Comments document, such that EPA is now confident that, in general, entities engaged in this condition of use can meet the requirements of the methylene chloride WCPP (Ref. 7).

Numerous commenters submitted information for use of methylene chloride as a processing aid, including as a heat transfer fluid and in the production of separators for lithium-ion batteries, as well as other processing aid uses (Refs. 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36). Many of the same commenters also submitted process descriptions indicating that this use of methylene chloride takes place in a closed system with little or no personnel interaction (Refs. 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37). Some commenters provided EPA with standard operating procedures and describe in detail the use of respiratory protection (including PPE, as well as other exposure controls), including during instances of infrequent maintenance or repair (Refs. 27, 31, 34, 36). Methylene chloride is often cycled continuously through the enclosed process or, in some cases, recovered through a distillation process and reused with high efficiency (Refs. 30, 34). Some companies indicated that they are in compliance with the existing OSHA standard, and though the WCPP requires lower exposure limits, the WCPP processes such as routine monitoring are similar and indicate likely success with regards to WCPP compliance (Refs. 26, 27, 28, 29, 30, 31, 35, 36). Of these companies, some supplied monitoring data that showed compliance levels below the existing OSHA safety standard and demonstrated the ability to measure at or near EPA's proposed methylene chloride WCPP 8-hr TWA of 2 ppm, indicating an ability to comply with the EPA level, and further indicating that the initial exposure data provided by small entity representatives (SERs) during EPA's SBAR process is more appropriately representative for this condition of use than the more general occupational exposure scenario used by EPA in the 2020 Risk Evaluation for

Methylene Chloride (Refs. 26, 27, 34, 36, 37, 38). Additionally, commenters noted that the National Emission Standard for Hazardous Air Pollutants (NESHAP) for Organic Hazardous Pollutants for Equipment Leaks at 40 CFR part 63, subpart H requires a robust leak detection and repair program (Ref. 31).

Use of methylene chloride in the manufacture of separators for lithium-ion batteries for electric vehicles also falls under use as a processing aid. Based on information reasonably available to the Agency at this time, methylene chloride is not currently used in the United States to manufacture lithium-ion battery separators, with some companies choosing to use trichloroethylene (TCE) in the production of battery separators instead (Refs. 39, 40, 41). During the comment period, at least five commenters described their plans to construct manufacturing plants for lithium-ion battery separators, specifically for electric vehicles, that would use methylene chloride as a processing aid (Refs. 42, 43, 44, 45, 46). Commenters described how this would strengthen critical supply chains by revitalizing domestic manufacturing and research and development in accordance with Executive Order on America's Supply Chains (E.O. 14017) (86 FR 11849, March 1, 2021). Commenters provided details about the process of using methylene chloride in the manufacture of battery separators. Methylene chloride is used in the wet manufacturing method of high-quality battery separators (Refs. 42, 45, 46). In wet manufacturing, polyethylene is treated to form a porous, monolayer film (Refs. 42, 46). This film is then treated with low molecular weight oil, stretched, and exposed to a high-performance solvent to form a uniform microporous structure while recovering and reusing oils in the manufacturing process (Refs. 42, 46). Methylene chloride works quickly at high temperatures, and is also desirable because of its low water solubility, and compatibility with manufacturing equipment (Refs. 42, 46).

Based on the information provided by commenters and other information reasonably available to the Agency, EPA understands that separators are fundamental components in batteries that provide the necessary separation between the internal anode and cathode components that make batteries work, and that restrictions on the production of battery separators could critically impact the United States battery manufacturing supply chain and impede the expansion of domestic battery production capacity (Refs. 40,

41, 42, 43, 44, 45, 46, 47). EPA understands that battery separator manufacturing processes are highly-engineered, specialty products designed precisely to meet stringent technical specifications that are essential in powering vehicles and systems in the United States' supply chain for multiple critical infrastructure sectors.

A commenter who intends to use methylene chloride in a closed system for battery separator manufacturing submitted monitoring information indicating exposure at or near the ECEL of 2 ppm (Ref. 42). Commenters indicate residual methylene chloride is often treated and recovered as part of this closed process (Refs. 42, 43, 46). EPA agrees that unreasonable risk from methylene chloride when used as a processing aid in the manufacture of lithium-ion battery separators, like other processing aid uses, can be addressed under the WCPP. Importantly, because companies have not yet begun production, they can build their plants with the WCPP requirements in mind (Refs. 42, 46).

On October 24, 2023, as part of a proposed regulation to address the unreasonable risk from TCE under the conditions of use, EPA proposed a 10-year time-limited TSCA section 6(g) exemption for the use of TCE in battery separator manufacturing (88 FR 74712, October 31, 2023). The period of the proposed exemption in the TCE proposed rule would provide sufficient time to transition from TCE to alternatives, such as methylene chloride. As noted by the commenters, methylene chloride is currently used overseas to manufacture high quality lithium-ion battery separators for electric vehicles (Ref. 42). EPA notes that while the use of methylene chloride in battery separator manufacturing appears to be analogous to use of TCE for the same function, based on reasonably available information, current applications result in different end-use battery products (e.g., lithium-ion battery separators manufactured with methylene chloride and lead acid batteries and lithium battery separators manufactured with TCE). EPA believes in some cases methylene chloride may soon be a technologically feasible safer alternative to the industrial use of TCE as a processing aid in battery separator manufacturing.

Based on information provided by commenters related to processes, current exposure information and exposure mitigation practices, and monitoring data, EPA has determined the unreasonable risk from methylene chloride when used as a processing aid (including as a heat transfer fluid and in

battery separator manufacture) could be addressed with a WCPP.

2. Industrial and Commercial Use of Methylene Chloride in Plastic and Rubber Products Manufacturing, Including Polycarbonate Manufacturing

EPA's primary alternative regulatory action described in the proposed rule included several conditions of use under the WCPP, rather than prohibition. EPA is finalizing a WCPP for industrial and commercial use of methylene chloride in plastic and rubber products manufacturing, including in interfacial polymerization for polycarbonate plastic manufacturing, as included in the primary alternative regulatory action of EPA's proposal (88 FR 28284, May 3, 2023) (FRL-8155-02-OCSP). While EPA proposed to prohibit industrial and commercial use of methylene chloride in plastic and rubber products manufacturing, this was due to insufficient information at the time of proposal to determine that compliance with the WCPP would be possible. For example, at the time of proposal, EPA was not aware of any monitoring data or detailed description of methylene chloride activities for this use to confirm that compliance with an ECEL of 2 ppm as an 8-hr TWA would be possible. EPA requested comment on the ability of facilities in this sector to successfully implement the WCPP for this particular use because of the industrial nature of the use.

Commenters submitted monitoring data for industrial and commercial use of methylene chloride in plastic and rubber products manufacturing, which aided EPA with a determination of whether users could comply with the WCPP. The data provided showed that some companies are close to or already meeting the proposed ECEL without additional measures being necessary (Refs. 26, 35, 36).

A commenter also submitted detailed descriptions of methylene chloride-related activities including for unloading, handling, and recycling; sample collection; PPE procedures and itemized requirements; and safety procedures (Ref. 36). The commenter submitted an OSHA Compliance Plan; training materials for OSHA requirements, PPE, and hazard recognition; and an Exposure Assessment Program guideline as well (Ref. 36). Furthermore, the commenter provided details regarding its interfacial polycarbonate production process using methylene chloride, which is controlled by an automatic distributed control system. As described by the commenter in their comment (and confirmed in a follow-up meeting), workers using the

system are in an isolated control room that is in a separate location from the reaction system (Refs. 36, 48). Another commenter stated that their closed reactor system adheres to recognized and generally accepted good engineering practices as referenced in OSHA's Process Safety Management Standard at 29 CFR 1910.119. The commenter also explained that the methylene chloride used within the reactor system is recycled within the processing equipment (Ref. 26).

One commenter explained that PPE, including a full chemical-resistant suit, supplied-air respirators, rubber boots, and chemical gloves are used where manual operations such as unloading, sampling and maintenance activities occur (Ref. 36). During the SBAR process, one SER explained that the methylene chloride is added into the reaction system directly from tank trailers with hard pipes and flange fittings, and the product is also packed under vacuum in a scrubber system to reduce employee exposures, creating little opportunity for exposures (Ref. 20). Another commenter stated that direct interactions, such as with sampling, are performed inside glove-box containment systems where methylene chloride is used within an enclosure and the user interacts with the sample via a viewing glass and isolation gloves affixed to the enclosure, similar to those used in laboratory settings and in industrial sandblasters (Refs. 26, 35).

The information submitted to EPA as part of the comment period regarding this condition of use, supported by subsequent discussions, demonstrate the users' ability to comply with the WCPP. For this reason, EPA has determined that the unreasonable risk from methylene chloride when used in plastic and rubber products manufacturing (including in polycarbonate manufacture) could be addressed with a WCPP.

3. Industrial and Commercial Use of Methylene Chloride in Paint and Coating Removal From Safety Critical, Corrosion Sensitive Components of Aircraft and Spacecraft

In the proposed rule, EPA proposed that industrial or commercial use of methylene chloride for paint and coating removal from safety-critical, corrosion-sensitive components of aircraft owned or operated by Federal agencies and their contractors could continue under the WCPP, and that other commercial use of methylene chloride for paint and coating removal would be prohibited. EPA also proposed to provide a 10-year exemption for

commercial aviation and commercial aerospace applications from the proposed prohibition on the use of methylene chloride in commercial paint and coating removal. Under the primary alternative regulatory action, EPA included the WCPP for industrial and commercial use in paint or coating removal from safety-critical, corrosion-sensitive components of aircraft owned or operated by air carriers or commercial operators certificated under 14 CFR part 119. After consideration of public comments, EPA has determined to eliminate the distinction between defense-related and commercial aircraft, and allow under the WCPP the continued commercial use of methylene chloride in paint and coating removal from safety critical, corrosion sensitive components of aircraft and spacecraft.

Several commenters argued for the removal of the distinction between defense-related, or Federal agencies, and commercial aircraft in the proposed rule (Refs. 49, 50, 51). As described by commenters, critical, corrosion-sensitive components are present and necessary for the function of all aircraft and spacecraft irrespective of the customer (Refs. 49, 50), and both defense-related and commercial aviation or aerospace currently continue to use methylene chloride for coating removal on these components. Commenters noted that both Federal and commercial sectors use the same repair and maintenance practices, maintenance facilities, and environmental health and safety practices, and that a typical repair or maintenance scenario is that certain parts are taken off the aircraft and sent to a facility owned and operated by the part/component manufacturer (Refs. 50, 51, 52). These commenters contend that the same standard of hazard and exposure control would therefore be ongoing for both the commercial and the Federal applications, and both would be likely to be equally equipped to comply with a WCPP. Both commercial and defense sectors share the same supply chain, and it is likely that any alternative developed by formulators will be evaluated by both commercial and defense sectors and, if found to be a suitable alternative, would be implemented under a similar timeframe (Ref. 49). For this reason, EPA has determined that the unreasonable risk from methylene chloride when used in paint and coating removal from safety critical, corrosion sensitive components of aircraft and spacecraft could be addressed with a WCPP.

EPA emphasizes that only a narrowly defined subset of commercial use of methylene chloride for paint and coating removal is allowed to continue

under the WCPP, due to the heavily industrialized and highly specialized exposure control systems EPA believes to be in place for both Federal and commercial aviation and aerospace coating removal from corrosion-sensitive safety-critical parts, such as landing gear, gear boxes, turbine engine parts, and other aircraft and spacecraft and components composed of metallic materials (specifically high-strength steel, aluminum, titanium, and magnesium) and composite materials. General paint and coating removal on aircraft and spacecraft with methylene chloride is prohibited. In EPA's view, persons availing themselves of the WCPP would need to have a reasonable basis to conclude that the components on which methylene chloride is used are corrosion-sensitive and safety critical components within the meaning of the definition. EPA believes such persons could rely, in part, on information supplied by the manufacturer of the component. A determination of whether a particular component of an aircraft or spacecraft is a safety-critical corrosion-sensitive component would be a fact-specific determination that takes into account the substrate and character of the component, the effects of methylene chloride paint or coating remover on the component, and other relevant factors.

4. Industrial and Commercial Use of Methylene Chloride as a Solvent That Becomes Part of a Formulation or Mixture and the Solvent Will Be Reclaimed

EPA's primary alternative regulatory action described in the proposed rule included several conditions of use under the WCPP, rather than prohibition. EPA is finalizing a WCPP for a sub use of industrial and commercial use of methylene chloride as a solvent that becomes part of a formulation or mixture, as included in the primary alternative regulatory action of EPA's proposal, namely, where that formulation or mixture will be used inside a manufacturing process, and the solvent (methylene chloride) will be reclaimed (88 FR 28284, May 3, 2023) (FRL-8155-02-OCSPP). While EPA proposed to prohibit industrial and commercial use of methylene chloride as a solvent that becomes part of a formulation or mixture, this was due to insufficient information at the time of proposal to determine that the use as a whole could comply with a WCPP. EPA included this condition of use under the WCPP in the primary alternative regulatory action, and requested comment on additional information that could increase the Agency's certainty

that entities engaged in this use could comply with a WCPP.

EPA received numerous comments describing uses of methylene chloride in industrial processes which take place in mostly enclosed systems, such as use of methylene chloride as a processing aid (see Unit III.A.1.) and in plastic product manufacturing (see Unit III.A.2.). Likewise, commenters describe some uses of methylene chloride as a solvent which becomes part of a formulation or mixture where that mixture is used in a manufacturing process and the solvent is reclaimed.

Two commenters describe a process in which methylene chloride is used to dissolve a polycarbonate coating, and then the mixture is run over a surface where the coating is deposited and the solvent is reclaimed (Refs. 53, 54, 55). Another commenter describes the use of methylene chloride in plastic manufacturing processes as a solvent (Ref. 56). As with the other commercial uses, commenters described scenarios where methylene chloride is used in a closed system, and identified that the primary points of exposure in these processes are the periodic and relatively infrequent loading of methylene chloride. As described by commenters, the system is enclosed and the methylene chloride is recovered; the processes are highly industrial and often remotely performed. One company was able to supply monitoring data that indicated exposure levels nearly meeting the proposed ECEL (Ref. 54).

In this way, these commenters' uses of methylene chloride are similar to processing methylene chloride as a reactant, industrial and commercial use of methylene chloride as a processing aid, and industrial and commercial use of methylene chloride in plastic product manufacturing. Namely, when the commercial use of methylene chloride as a solvent that becomes part of a formulation or mixture results in that formulation or mixture used inside a manufacturing process, the methylene chloride is used functionally in the manufacturing process, frequently in a closed system, and is reclaimed, such that it is not present in the final manufacturing product. Identification of this narrowly described use of methylene chloride within a condition of use, together with information provided by commenters on their specific processes, led EPA to determine that unreasonable risk from methylene chloride when used as a solvent that becomes part of a formulation or mixture, where that formulation will be used in a manufacturing process and the solvent (methylene chloride) will be

reclaimed, could be addressed with a WCPP.

5. Industrial and Commercial Use of Methylene Chloride as a Bonding Agent for Solvent Welding

In the proposed rule, EPA proposed that industrial and commercial use of methylene chloride as a bonding agent for acrylic and polycarbonate in mission-critical military and space vehicle applications be allowed to continue under the WCPP. EPA included within this condition of use the use of methylene chloride in the production of specialty batteries, and identified the WCPP as an appropriate means for addressing the unreasonable risk after a specialty battery manufacturer submitted information on its use of methylene chloride in chemical welding of acrylic and polycarbonate (Ref. 57). This application of methylene chloride, unlike adhesives used to bind two distinct substrates together, dissolves plastic surfaces including, but not limited to, acrylic or polycarbonate and fuses the substrates into one continuous unit with increased strength, durability, and seal integrity (Refs. 58, 59). Mission-critical applications potentially include fabrication of fixtures and enclosures for scientific research; production of optically clear articles such as space vehicle windows, space suit helmet components, or elements of extraterrestrial habitats; or hermetically sealing the plastic cases of specialty batteries. Following publication of the 2023 proposed rule, EPA received additional public comments describing other applications of methylene chloride used in a similar fashion; however, these applications were not in mission-critical military and space vehicle applications, or in the production of specialty batteries for such applications (Refs. 58, 60, 61).

Bonding agents used to chemically weld acrylics or polycarbonates with methylene chloride do not have a technically or economically feasible safer alternative available. This application is uniquely different from adhesives which do have technically or economically feasible safer alternatives available. Commenters that described their use of methylene chloride indicated that they require low quantities of methylene chloride for its effect and stated that they are currently in compliance with the OSHA methylene chloride standard at 29 CFR 1910.1052 (Refs. 59, 60). Based on the information received, and the similarities across multiple uses of methylene chloride as a bonding agent—but not as an adhesive—EPA

believes that the WCPP will address the unreasonable risk for use of methylene chloride as a bonding agent in general, and is therefore expanding its initial scope of this allowed use under the WCPP from mission-critical military and space vehicle applications to general industry.

B. Delayed Compliance Dates for Prohibitions

1. Commercial Use of Methylene Chloride in Refinishing for Wooden Furniture, Decorative Pieces, and Architectural Fixtures of Artistic, Cultural or Historic Value

EPA proposed to prohibit the commercial use of methylene chloride for paint and coating removal, including for all commercial furniture refinishing. While EPA proposed to exclude commercial furniture refinishing from the regulation of the use of methylene chloride in commercial paint and coating removal in 2017, the 2023 proposed rule did not exclude commercial furniture refinishing from the proposed prohibition on the use of methylene chloride for commercial paint and coating removal, because EPA determined that this use contributes to the unreasonable risk presented by methylene chloride.

EPA's proposed rule included an analysis for an exemption under TSCA section 6(g) for industrial and commercial use of methylene chloride as a paint and coating remover in furniture refinishing, and preliminarily determined that an exemption was not warranted. EPA solicited comment on its analysis, including information on the availability of alternatives, the time needed to implement alternatives, and other information related to this condition of use. After reviewing comments and conducting additional outreach, EPA found, as in the proposed rule, that a broad exemption for commercial use of methylene chloride in paint and coating removal for all types of furniture refinishing uses under TSCA section 6(g)(1)(A) is not warranted because the use of methylene chloride for all types of furniture refinishing is not a critical or essential use for which no technically and economically feasible safer alternative is available, taking into consideration hazard and exposure.

However, EPA acknowledges that for particular circumstances, such as removing coatings from wooden furniture and other items that are of artistic, historic or cultural significance, there is no technically or economically feasible safer alternative to methylene chloride currently available. Therefore,

to provide a reasonable and appropriate transition period in the final rule (consistent with TSCA sections 6(c)(2)(C) and 6(d)(1)(E)), EPA is delaying compliance with the prohibition for commercial users engaged in those activities, with certain interim requirements to reduce worker exposures.

As discussed in this unit, while in some cases alternatives are available for commercial use of methylene chloride in refinishing wooden furniture, decorative pieces, and architectural fixtures, this is not the case for wooden pieces that are of artistic, cultural or historic value. These pieces tend to have increased value because of their age; their association to significant cultural figures, buildings, or events; or due to a combination of these factors. Additionally, they may contain complex geometries, such as hand-carved, ornate embellishments and grooves or other intricate patterns. The aesthetic and structural integrity of these pieces contributes to their value, function, or both, and therefore must be preserved during the refinishing process. In other words, to the extent that alternative methods or formulations may be able to remove a coating, if they affect the underlying substrate's appearance, structural integrity, or functionality, those are not feasible alternatives for wooden pieces that are of artistic, cultural, or historic value. In the absence of such viable alternatives, cultural items such as religious articles of virtue, musical instruments, and ceremonial utensils would be degraded or rendered non-functional. In some cases, these wood pieces may be original, priceless, or irreplaceable and cannot be remade by simply commissioning an artisan to craft a replacement. Examples of these types of artistic, cultural, or historic pieces include but are not limited to: Library furniture and architectural woodwork at Harvard University (Ref. 62); the Reredos at St. Paul's School (Ref. 62); the John F. Kennedy (JFK) Podium at the JFK Library (Ref. 62); and the Arlington Cemetery Old Guard Caisson (Ref. 63).

Based on information provided to EPA, these types of wooden pieces would be aesthetically or structurally compromised by alternative refinishing techniques or chemicals other than methylene chloride (Ref. 64). Alternatives, both chemical and mechanical, can damage the underlying substrate; present flammability hazards; and take much longer to work such that they are prohibitively expensive. This section provides additional details from commenters and other sources on each

of these three qualities, which led EPA to determine there are no technically or economically feasible, safer alternatives for use of methylene chloride to refinish wooden pieces of artistic, cultural, or historic value.

At the time of proposal, EPA identified many alternative products to methylene chloride for paint and coating removal, and noted that some may require adjustments to equipment and processes for furniture refinishing or longer periods of time, or may not be appropriate alternatives for use on wood substrates (88 FR 28313). In public comments, commenters emphasized that these alternatives present their own risks, and that they are more likely to be used in paint and coating removal where the integrity and aesthetics of the substrate may be less critical to the refinished product. Commenters emphasized that for the highly complex geometries which may be common in wooden furniture, decorative pieces, and architectural fixtures of artistic, cultural, or historic value, methylene chloride-containing paint and coating removers are the only products that can remove coatings without damaging the underlying wood (Refs. 62, 65, 66). Similar issues arise when utilizing mechanical or thermal methods, because—while they may be useful for some types of paint and coating removal—they may damage the underlying structure, take so long to work that they are prohibitively expensive, and cannot reach into the grooves of complex geometries (*i.e.*, sanding, media blasting, or heat guns) (Refs. 20, 66, 67, 68, 69).

There are significant challenges to replacing methylene-chloride based paint and coating removers in furniture refinishing; these challenges are exacerbated with wood compositions of artistic, cultural, or historic value, since the integrity or character of the piece would be compromised by alternatives to methylene chloride. Methylene chloride-based formulations are the paint removers of choice for furniture refinishers in part because they are not flammable (Ref. 20). Based on the public comments received, EPA also understands that an abrupt prohibition on use of methylene chloride in this sector could push furniture refinishers to adopt less safe alternatives, notably substances that are flammable. Currently, based on information available to EPA and provided in public comments, some alternative paint and coating removal formulations are flammable (Ref. 3). EPA's alternatives analysis identified 47 chemicals in paint and coating remover formulations with reasonably available hazard

information; of those, 33 are flammable to varying degrees (Ref. 13). EPA notes concern from commenters about the strong likelihood of regrettable substitutions in instances where combustible materials and flammable liquids may be used in tandem and result in a combined Class-A and Class-B fire, as defined by OSHA in 29 CFR 1910.155 (Refs. 62, 66, 70, 71), in workshops where environmental conditions are likely to contain fine, combustible particulates in larger quantities such as saw dust or wood shavings.

Additionally, based on information provided by commenters, currently available alternative paint and coating removers used in furniture refinishing can take significantly longer for the desired effect and may require multiple applications and scraping to carefully remove the coating, adding additional time and labor to the process (Refs. 66, 70). Multiple applications and manual removal of coatings from artistic, cultural, or historic pieces—particularly those with irregular or intricate shapes—increases the likelihood of damaging the underlying wood substrate and presents increasing labor and cost challenges for this practice. Additionally, an abrupt prohibition of methylene chloride use resulting in additional time and labor would result in a price increase in this sector; as EPA noted in the proposed rule, this may result in significant financial challenges in a sector where profit margins are already narrow at about 3.8% of sales (Ref. 67). Due to the added time, labor, and cost that an alternative would pose, commenters contend that the likelihood of this sector remaining viable would be minimal and, as commenters describe, may result in immediate furniture disposal to landfills that would have otherwise been recycled through refinishing (Refs. 64, 66). As discussed earlier in this unit, commenters have noted that that while alternative chemicals or substitute methods could be used where the integrity and aesthetics of the substrate may be less critical to the refinished product, they also emphasized that methylene chloride is uniquely suitable for removing coatings and refinishing complex pieces made of wood that cannot be replaced if damaged, due to its artistic, cultural, or historic value.

While EPA believes that in many instances, furniture refinishing can be successfully accomplished with alternatives to methylene chloride, in consideration of public comments, EPA has determined that there is no technically or economically feasible alternative that benefits health for

commercial use of methylene chloride in paint and coating removal for the refinishing of wooden compositions of artistic, cultural, or historic value, since the integrity or character of the piece would be compromised by alternatives to methylene chloride. Therefore, to provide a reasonable and appropriate transition period, EPA's final rule will delay, until five years after the publication of this final rule, compliance with prohibitions for commercial use of methylene chloride for refinishing wooden pieces which are of artistic, cultural, or historic value, with interim requirements for exposure controls, based on best practices described by furniture refinishers.

Commenters provided information on engineering and exposure controls, allowing EPA to identify how risks could be reduced before prohibitions went into effect, even if the unreasonable risk could not be completely addressed. Based on information received, entities engaged in the use of methylene chloride for commercial furniture refinishing have a number of options for engineering and administrative controls to reduce exposure; some commenters noted that exposures may currently be under the OSHA action level of 12.5 ppm (Ref. 72). Types of controls that facilitate low levels of exposure include engineering controls with linear airflow, such as some spray booths typically used for painting, but which can also be used for paint and coating removal (Ref. 73). Other examples include custom engineering controls where fans bring in fresh exterior air, while an additional ventilation system pulls methylene chloride vapors down and away from the user's personal breathing zone (Refs. 64, 72). Because methylene chloride vapors are heavier than air and naturally flow downward, the intake that removes methylene chloride vapors is intentionally positioned below the working station, and in some instances incorporated into the refinishing equipment, such as at the base of a flow-over tray, to draw the volatilized methylene chloride vapors down and away from the user quickly (Ref. 72). Additionally, as commenters noted, it is common practice for refinishing shops to conduct their refinishing activities in batches, so that, for example, methylene chloride is only present in the workplace once a week or month, rather than every day (Refs. 64, 66).

EPA recognizes the challenges of developing and transitioning to technologically and economically feasible alternative paint and coating removers for some applications. However, while some furniture

refinishing businesses have successfully implemented custom engineering controls for their operations, EPA remains concerned about the feasibility of long-term WCPP compliance for many businesses in this sector. Custom ventilation systems, as well as equipment and training for the use of supplied-air respiratory protection are burdensome to procure and implement, but would be necessary to ensure protection of human health from this use. Because of the magnitude of exposure for this application, which is primarily conducted in flow over trays and dip tanks, air supplied respirators—and associated monitoring—would likely be a key part of reaching an ECEL of 2 ppm, adding additional expense. While EPA expects a majority of commercial users of methylene chloride to be familiar with the OSHA standard, and therefore familiar with many of the requirements of a successful WCPP, in the furniture refinishing sector many workshops are run by self-employed artisans, who would not be subject to OSHA regulations. EPA has encountered furniture refinishers who were using cartridge respirators, despite the fact that, as specified in the OSHA methylene chloride standard at 29 CFR 1910.1052, only supplied air respirators are effective against methylene chloride, since cartridges are quickly eroded by methylene chloride vapors. Since 1985, at least seven deaths have been attributed to use of methylene chloride for paint stripping in the Reupholstery and Furniture Repair Sector (Ref. 11). While EPA acknowledges the commitment of furniture refinishers that aim to protect workers while providing a high-quality service, EPA remains concerned that WCPP implementation could present significant and widespread difficulties in this sector, resulting in high non-compliance rates that would undermine the health-protectiveness of the rule and leave unreasonable risks of injury to health unmitigated. In the preamble to the proposed rule, EPA sought public comments regarding the commercial use of methylene chloride in furniture refinishing, as well as detailed information as part of any comments requesting that EPA consider a regulatory alternative that would subject more conditions of use to the WCPP, instead of prohibition. EPA requested that these comments provide “monitoring data and detailed descriptions of methylene chloride involving activities for these conditions of use to determine whether these additional conditions of use could comply with the WCPP such that risks

are no longer unreasonable” (88 FR 28284, May 3, 2023) (FRL–8155–02–OCSPP). For commercial use of methylene chloride in furniture refinishing, EPA did not receive this information and the information provided by commenters did not provide EPA with adequate information to establish that furniture refinishers could successfully comply with the WCPP, or that could serve as roadmap for how furniture refinishers might adapt their processes to reduce exposures such that the risks were no longer unreasonable (EPA–HQ–OPPT–2020–0465–0228, –0233, –0285). For example, commenters did not provide monitoring data for this condition of use, or detailed estimates of the quantity of methylene chloride used. Information that would have helped EPA to evaluate whether commercial use of methylene chloride in furniture refinishing could continue under the WCPP would have included: monitoring information indicating compliance with the OSHA Permissible Exposure Limit (PEL) or a lower threshold such as the EPA ECEL, potential process changes that could mitigate exposure to methylene chloride, typical administrative and engineering controls, and other occupational, environmental, safety, or health practices that are currently implemented. EPA notes that other industries, such as those engaged in the industrial and commercial use of methylene chloride as a processing aid and industrial and commercial use of methylene chloride in plastic product manufacturing, were able to provide such data during the comment period. Additionally, while commenters did emphasize the importance of methylene chloride in furniture refinishing, they did not provide specific information regarding EPA's solicitation on comments “on how costs and economic impacts from firm closure may be reduced with longer compliance timeframes.”

As described in the proposed rule (88 FR 28284, May 3, 2023) (FRL–8155–02–OCSPP), EPA identified the commercial use of methylene chloride in furniture refinishing as contributing to the unreasonable risk and, despite extensive stakeholder engagement (described in Units III.B.1. and V.A.4. of the proposed rule) (88 FR 28284, May 3, 2023) (FRL–8155–02–OCSPP), could not conclude that work practices could be modified to such an extent that exposures could be reduced sufficiently to address the unreasonable risk. Based on stakeholder interest in continuing this use of methylene chloride, EPA solicited comments in the proposed rule

specifically to increase the information available to EPA to inform for this final rule, whether the use could move to the WCPP rather than prohibition. While EPA appreciates the public comments provided, they did not supply the information necessary.

However, in recognition of the challenging and particular circumstances faced by furniture refinishers engaged in restoring and removing coatings from wooden pieces of artistic, cultural, or historic value, and to address the unreasonable risk from methylene chloride contributed by this condition of use, EPA is finalizing a delayed compliance date of five years for the use of methylene chloride in a subset of furniture refinishing for these specialty wood pieces where workshops can meet a minimum standard of exposure control.

In order to participate in the delayed compliance with the prohibition, owners/operators must meet a minimum standard of exposure control. That includes: (1) use of a regulated area; (2) use of local exhaust ventilation, both bringing air in from outside of the workspace where methylene chloride is being used and pulling methylene chloride vapors away from the potentially exposed persons; and (3) use of any NIOSH Approved® Supplied-Air Respirator (SAR) or airline respirator in a demand mode equipped with a full facepiece (Assigned Protection Factor (APF) 50) or any NIOSH Approved® Self-Contained Breathing Apparatus (SCBA) in demand-mode equipped with a full facepiece or helmet/hood (APF 50) or the appropriate respirator based on initial monitoring as outlined in Unit IV.B.4.b. or 40 CFR 751.109(d) of the regulatory text. EPA expects that within five years, either new alternatives to methylene chloride for paint and coating removal for refinishing wooden pieces of artistic, cultural, or historic value will be identified and put into use, similar to how alternatives to methylene chloride for consumer paint and coating removal were developed and marketed quickly in advance of EPA's 2019 prohibitions, or facilities will be able to refine processes and workshop equipment to incorporate alternative methods for chemical paint and coating removal. EPA emphasizes that the Agency would also continue to be willing to review data on exposures to methylene chloride in furniture refinishing, and in particular any data indicating that furniture refinishers could meet the ECEL of 2 ppm over an 8-hr TWA, the EPA STEL of 16 ppm as a 15-minute TWA, or otherwise consistently comply with the WCPP,

and could revise this final rule accordingly if such data were provided.

2. Industrial and Commercial Use of Methylene Chloride in Adhesives and Sealants

EPA proposed to prohibit the industrial and commercial use of methylene chloride in adhesives, sealants, and caulks; paints and coatings; paints and coating removers for non-corrosion sensitive parts; and lubricants. TSCA section 6(d) requires EPA to specify mandatory compliance dates for all requirements of a TSCA section 6(a) rule. The mandatory compliance dates must be “as soon as practicable” and “provide for a reasonable transition period.” Except for full implementation of a ban or phase-out of a chemical substance, the mandatory compliance date for a requirement in a TSCA section 6(a) rule, including the start of ban or phase-out requirements, must be no later than five years after the date of promulgation of the final rule. EPA proposed that the prohibitions on commercial use of methylene chloride—in adhesives, sealants, and caulks as well as nearly all other commercial uses—take effect 450 days after publication of the final rule in the **Federal Register**. In public comments, regulated entities in the aerospace sector described anticipated challenges with the proposed timeframe for the prohibitions, and requested a 10-year delayed compliance date for their uses of methylene chloride within these conditions of use (Refs. 49, 51, 52). While EPA partially agrees with some aspects of the rationale provided by commenters, EPA maintains that technically and economically feasible alternatives to methylene chloride are currently available for a majority of these applications, and formulations containing methylene chloride are not uniquely specified to industry or military standards for paints and coatings; paints and coating removers for non-corrosion sensitive parts; and lubricants. Therefore, the prohibition timeframes in this final rule, which take full effect after two years as described in Unit III.E., should be sufficient for regulated entities to identify and implement alternatives for paints and coatings; paints and coating removers for non-corrosion sensitive parts; and lubricants.

Two additional commenters requested that EPA consider delayed compliance for use of methylene chloride in adhesives and sealants in the aerospace and defense sectors; one commenter provided rationale in support of a delayed compliance date of five years (Refs. 50, 61). The commenter described

how certain methylene chloride adhesives and sealants used in turbine engines and aircraft systems do not currently have methylene chloride-free alternatives identified, including applications such as: use in bonding critical turbine engine hardware, use as a jointing compound in engine parts, adhesive to bond capacitors, transformers, components, military printed circuit (PC) boards and subassemblies, and gasket sealant in aerospace systems (Ref. 50). The commenter estimated that properly qualifying these products may take as long as five years and requested delayed compliance (Ref. 50). EPA agrees that five years is a reasonable compliance timeframe for the identification and qualification of methylene chloride-free alternatives to both industry and Federal standards for these uses, and is therefore finalizing delayed compliance of five years before prohibition for industrial and commercial use of methylene chloride in adhesives and sealants when that adhesive or sealant is used in aircraft, space vehicle, or turbine applications for structural and safety critical non-structural applications.

In contrast to the delayed compliance with the prohibition for a subset of furniture refinishers as described in Unit III.B.1., EPA is not requiring interim controls during the period of delayed compliance for this subset of adhesive and sealant users. This is because for industrial and commercial use of methylene chloride in adhesives and sealants when that adhesive or sealant is used in aircraft, space vehicles, or turbine applications for structural and safety critical non-structural applications, EPA does not have the same concerns for magnitude of risk that could result in occupational fatalities from acute exposures as EPA has for furniture refinishing. In other words, while unreasonable risk as a result of either acute or chronic exposures exists for industrial and commercial use of methylene chloride in adhesives and sealants when that adhesive or sealant is used in aircraft, space vehicles, or turbine applications for structural and safety critical non-structural applications, the magnitude of those risks in comparison to the benchmark, as well as information about existing controls in this sector, did not lead EPA to determine that prescribing minimum interim controls for the duration of the phaseout was necessary for this use. This is in contrast to commercial use of methylene chloride in furniture refinishing, for which EPA has concerns for fatalities due to acute

exposures, as a result of the magnitude of risk for that condition of use. For these adhesive and sealant applications, the volume of adhesive used, the percent formulation of methylene chloride, as well as the proportion of industrial (as opposed to commercial) workspaces, is much less compared to the furniture refinishing sector, which is reflected by the risk characterization driving the unreasonable risk determination for both furniture refinishing and adhesive and sealant conditions of use (Ref. 1). While interim exposure controls are not required by EPA during the delayed prohibition for this use, EPA expects that owners or operators will continue to comply with OSHA's methylene chloride standard under 29 CFR 1910.1052 until either a successful transition to an alternative has been achieved, or the delayed prohibition timeframe has been exhausted, whichever is sooner.

C. De Minimis Threshold

In the proposed rule, EPA requested comment on whether the Agency should consider a de minimis threshold of methylene chloride in formulations when finalizing prohibitions, and, if so, what threshold should be considered de minimis. EPA received numerous comments in support of the inclusion of a de minimis threshold (Refs. 30, 37, 49, 51, 52, 55, 56, 65, 74, 75, 76, 77, 787, 79). Of those, a majority of commenters agreed with the EPA suggestion of using 0.1% by weight as the de minimis threshold for the applicability of prohibitions and restrictions on methylene chloride; in some cases, commenters noted that this threshold would be consistent with the requirements under the OSHA Hazard communication standard at 29 CFR 1910.1200 (Refs. 30, 31, 37, 38, 49, 51, 53, 55, 65, 74, 75, 78, 79, 80).

The OSHA Hazard communication standard at 29 CFR 1910.1200 defines "health hazard," and provides criteria for determining whether a chemical is classified as a health hazard in Appendix A to 29 CFR 1910.1200—Health Hazard Criteria. Appendix A of 29 CFR 1910.1200 indicates that a substance is considered a health hazard if it includes greater than 0.1% of a substance that, like methylene chloride, is classified as a carcinogen (Ref. 81). Other EPA programs, such as the Toxics Release Inventory (TRI) program, have adopted a de minimis threshold of 0.1% for chemicals which are defined as carcinogens or as a potential carcinogen under the National Toxicology Program, International Agency for Research on Cancer, or OSHA (see 40 CFR 372.38(a)).

Some commenters, rather than suggesting a particular de minimis threshold, suggested EPA identify a de minimis that is risk protective (Refs. 82, 83). For methylene chloride, due to the type and quantity of reasonably available information, EPA conducted an analysis using input parameters and exposure scenarios from the 2020 Risk Evaluation for Methylene Chloride to confirm that methylene chloride, when present at a threshold of 0.1% by weight, does not contribute to unreasonable risk under the conditions of use (Ref. 84). EPA's final rule includes a de minimis threshold of 0.1%. The adoption of a de minimis threshold in this final rule means that products in which methylene chloride is present below 0.1% by weight are not subject to the restrictions outlined in this rulemaking.

D. Changes to Timeframes

1. Changes to the WCPP Timeframe

For the conditions of use for which EPA proposed the WCPP, EPA proposed several compliance timeframes, including requirements that initial exposure monitoring be conducted within 180 days of publication of the final rule in the **Federal Register**, that each owner or operator ensure that the airborne concentration of methylene chloride does not exceed the ECEL or EPA STEL for all potentially exposed persons within 270 days of publication of the final rule in the **Federal Register**, and that owners and operators implement an exposure control plan within 360 days of publication of the final rule in the **Federal Register**. In the primary alternative regulatory action described in the proposed rule, EPA described longer timeframes: initial exposure monitoring under the WCPP within 360 days; that each owner or operator ensure that the airborne concentration of methylene chloride does not exceed the ECEL or EPA STEL for all potentially exposed persons within 450 days of publication of the final rule in the **Federal Register**, and that owners and operators implement an exposure control plan within 540 days of publication of the final rule in the **Federal Register**.

After considering comments regarding timeframes needed for implementing the WCPP, EPA has determined that the timeframes in the alternative regulatory action would ensure that the regulated community has adequate time to assess, formulate, procure, and implement the required chemical safety program for methylene chloride.

EPA's proposed rule included an analysis of the alternative regulatory

action and preliminarily determined that the proposed timeframes for compliance with the WCPP were appropriate. For the proposed regulatory action compliance timeframe, EPA adopted timeframes similar to those previously promulgated by OSHA in the 1997 update to the methylene chloride standard at 29 CFR 1910.1052. However, public comments indicated that OSHA's compliance timeframes are not universally appropriate, especially when considering that the proposed ECEL and EPA STEL are an order of magnitude lower than the current OSHA PEL and would require additional time to execute properly, in some instances requiring the adoption of new methods (see section 5.1.2 in the Response to Comments document (Ref. 7) for a full discussion of methylene chloride monitoring methods and the PEL). Commenters also stated an additional concern that the proposed timeframes would be insufficient to document the novel efforts required under the WCPP to document the use of the hierarchy of controls (Ref. 55, 70).

Other commenters highlighted additional challenges with the proposed timeframes. For example, one commenter anticipated an increasing need for professional services from industrial hygienists, engineers, or others in order to implement and maintain the WCPP as proposed (Ref. 19). To this end, a commenter stated that the proposed regulation could put an unintended strain on the safety industry and laboratories required to analyze monitoring samples due to the sudden increase in demand for such services (Ref. 85). The commenter expressed concern that the increased demand for safety professional services may result in lowered standards and practices (Ref. 85). Other commenters added that facilities would need to determine if a corporate exposure assessment strategy would need to be reassessed for the proposed ECEL and EPA STEL (Refs. 55, 70). Moreover, because the current OSHA standard contains criteria for the discontinuation of air monitoring for methylene chloride, it is likely that some entities have not monitored for inhalation exposures for an extended period of time. For situations such as this, a corporate exposure assessment strategy or similar mechanism would necessitate the procurement of professional services, adding logistical demand for these specialized services.

In consideration of the challenges of initiating the WCPP, even for facilities with industrial hygiene programs in place, and given the difference in the occupational exposure limits between

the OSHA PEL and the EPA ECEL that may spur an increase in the need for monitoring or other exposure control assessment infrastructure, EPA determined that a longer compliance deadline of 12 months, as provided in the primary alternative regulatory action described in the proposal, would be an appropriate timeframe to conduct initial monitoring, which likely would require regulated entities to contract new services or realign current industrial hygiene professionals toward WCPP compliance. Adopting this timeframe from the alternative approach (providing 12 months for initial monitoring) is intended to (1) prevent professional safety service sectors from being overwhelmed by new EPA requirements; (2) provide time to procure the necessary services while ensuring the preservation of safety quality, standards, and practices; and (3) provide additional time for a comprehensive exposure evaluation, increasing the likelihood of successful implementation of the WCPP.

As noted by commenters, the proposed 180-day compliance timeframe would not provide a sufficient amount of time to identify similar exposure groups and facilitate effective initial exposure monitoring, and as a result, this raised concern regarding the successful implementation of the WCPP for regulated entities. When EPA initially proposed compliance timeframes for the WCPP, beginning with initial monitoring at 180 days and requiring full implementation of the WCPP for methylene chloride by 360 days, EPA pursued similar approaches to OSHA's 1997 revision of the methylene chloride standard in an effort to swiftly address unreasonable risk to workers. While EPA expected some processes to be streamlined given the familiarity of its proposed regulatory structure, information submitted to EPA stated that delayed compliance is necessary to identify staffing needs, to properly evaluate facilities for exposures using the ECEL and EPA STEL, and to fully implement the WCPP (Refs. 55, 70). Furthermore, in addition to the possible service professionals identified by EPA in the IRFA (Ref. 19), commenters noted that an expanded scope of individuals would be required to implement a WCPP, including operations managers, process engineers, and process safety management engineers (Refs. 19, 55, 70).

Information was also provided to EPA during the comment period detailing evaluation steps that would be required to assess a facility and fully implement a WCPP, specifically to perform appropriate initial monitoring. The

steps noted by commenters included development of an exposure assessment strategy (which requires the identification of stakeholders), the development of methods to gather information, the use of similar exposure groups, the determination of analytical methods, and the training for proper execution of monitoring, including the assessment strategy and exposure characterization (Refs. 55, 70). Another commenter provided information on its process for establishing monitoring to the EPA exposure level, which substantiated the steps identified by the trade associations. This stakeholder was already in the process of refining its monitoring approach for its unique exposures. The stakeholder claimed that additional time is warranted for targeted exposure evaluations that would be most representative of tasks performed in its facilities (Ref. 48). Given the precedent of existing OSHA methylene chloride standards, EPA recognizes that much of the infrastructure and methods needed for monitoring may already be in place; however, EPA also acknowledges concerns expressed by commenters that adequate time would be needed to monitor to EPA's lower exposure levels (Refs. 55, 70). After consideration of comments and outreach conducted following publication of the 2023 proposed rule, due to the increased scope of exposure evaluation processes and required personnel, EPA determined that a delayed compliance date of 360 days to conduct initial monitoring and 540 days to fully implement the WCPP as described in the proposed primary alternative regulatory action is necessary, and is finalizing such a timeframe in this rule.

Although stakeholders commented that a minimum of 720 days to 1,080 days would be necessary to fully implement the WCPP (Refs. 55, 58, 70), EPA considers that suggested change to the proposed timeframe to be excessively lengthy for methylene chloride and would not be in compliance with the TSCA section 6(d) requirement that implementation dates be as soon as practicable (Refs. 55, 58, 70). EPA recognizes that certain provisions in the Final Rule are new and diverge from existing OSHA regulatory requirements for methylene chloride, and that additional time is warranted to fulfill those requirements. This could include, but is not limited to, the need to formulate an exposure sampling strategy, consult with specialized service providers, contract with specialty service providers or sampling laboratories, purchase PPE

and respirators, procure capital for facility retrofitting, train workers on new types of PPE and administrative procedures, calibrate equipment, or design and install new engineering controls (Refs. 35, 55, 70). Based on comments, outreach, reasonably available information, and long-established OSHA standards for methylene chloride, EPA maintains that the majority of the exposure reduction and worker safety infrastructure needed for compliance is currently in place, but recognizes the fundamental challenge of monitoring to new, lower EPA exposure thresholds. Therefore, EPA determined that, as outlined in the proposed primary alternative regulatory action, providing additional time for the initial monitoring step with staggered requirements following in three-month increments will be sufficient for much of the regulated community and provide significant benefit towards the successful implementation of the WCPP. Specifically, for the private sector, EPA is finalizing the proposed primary alternative regulatory timeframes for WCPP implementation, including 360 days for initial monitoring, 450 days to ensure that no person is exposed to an airborne concentration of methylene chloride that exceeds the ECEL or EPA STEL, and 540 days to implement an exposure control plan.

However, EPA remains concerned about the ability of certain departments and agencies of the Federal Government, as well as Federal contractors acting for or on behalf of the Federal Government, to comply with these timeframes. The importance of methylene chloride to mission-critical Department of Defense and National Aeronautics and Space Administration (NASA) operations and overall military readiness is discussed in Units III.A.5. and III.B.1., as well as throughout the proposed rule. While, for example, 29 CFR part 1960 sets forth procedures and guidelines for ensuring that Federal workers are protected in comparable ways to their private sector counterparts, EPA believes that compliance with this final rule will require increased and different preparations on the part of Federal agencies. For example, Federal agencies must follow procurement requirements which will likely result in increased compliance timelines. In addition, these requirements will require support in the Federal budget, which, for some agencies, is a multi-year process. Therefore, EPA is providing an additional year for agencies of the Federal Government and their contractors, when acting for or on behalf

of the Federal Government, to comply with the WCPP, including 915 days for initial monitoring, 1,005 days to ensure that no person is exposed to an airborne concentration of methylene chloride that exceeds the ECEL or EPA STEL, and 1,095 days to implement an exposure control plan.

2. Changes to Prohibition Timeframes

For occupational conditions of use subject to a prohibition, EPA proposed that prohibitions would become effective in a staggered schedule for each stage of the supply chain and would come into effect in 90 days for manufacturers, 180 days for processors, 270 days for distributors to retailers, 360 days for all other distributors and retailers, and 450 days for industrial and commercial uses after the publication date of the final rule in the **Federal Register**. For consumer uses, EPA proposed that the prohibitions of manufacturing, processing, and distribution in commerce of methylene chloride for consumer use would occur in 90 days for manufacturers, 180 days for processors, 270 days for distributing to retailers, and 360 days for all other distributors and retailers after the publication date of the final rule in the **Federal Register**. The EPA proposed primary alternative regulatory action included longer timeframes, which begin at 360 days for manufacturing, 450 days for processors, 630 days for all other distributors and retailers, and 720 days for industrial and commercial users.

Several commenters raised concerns on the timeframe for complying with prohibitions from the proposed regulatory action, stating that it does not allow sufficient time to identify, research, test, qualify, and implement alternative substances or processes (Refs. 75, 83, 86, 87). A commenter also noted that adopting use of alternatives would involve making engineering changes to allow for the manufacturing, processing, and use of alternatives (Ref. 87). Another commenter highlighted the general challenges in implementing shifts to alternative chemicals or formulations for industries with multi-tiered supply chains (Ref. 83). EPA acknowledges and agrees that there likely will be circumstances in which chemical alternatives may not be an exact, drop-in replacement for conditions of use, or in which new, additional, or modifications to existing engineering equipment could be required, and that coordination with suppliers or customers across the supply chain (including with certifying entities in circumstances where a formulation change may require

recertifying a product to meet performance standards, for example) may require a transitioning process. This point was expanded upon by a commenter who stated that the identification, testing, and implementation of alternatives would not only affect the commercial users of methylene chloride, but would also impact their distributors and customers downstream (Ref. 86). Due to these and other concerns, some commenters supported the proposed alternative timeframe for prohibition, which would provide additional time that commenters described as necessary for seeking alternatives, successfully implementing their use, and mitigating supply chain impacts (Refs. 50, 60, 70, 83). After reviewing all of the comments, EPA is modifying the proposed prohibition compliance timeframe for industrial and commercial uses to lengthen it in this final rule, to allow for successful implementation of the prohibitions, as outlined in the proposed alternative regulatory action. This extension will also provide additional time for industry to consult with their upstream suppliers and downstream customers and to make necessary adjustments, thereby mitigating immediate concerns for operational continuity for conditions of use identified in Unit IV.C.

Regarding consumer use of methylene chloride, while many commenters that provided input emphasized the need for a longer prohibition compliance timeframe for manufacturers, formulators, or distributors of these products, other commenters believed EPA should maintain or expedite the timeline for prohibitions related to consumer use (Refs. 88, 89). Commenters emphasized the severity of the hazards posed by methylene chloride (including to consumer users and bystanders to consumer use), particularly the acute hazards which can include death. Commenters cited the available alternatives for consumer uses, which EPA also noted in the proposed rule (Ref. 13). EPA has not found that transitions to alternatives to methylene chloride for consumer use involve the same considerations or the need for extended timeframes as for commercial use. Therefore, EPA is finalizing the prohibition implementation timeframe from the proposed regulatory action for retailer restrictions to expeditiously restrict access by consumers, while allowing additional transition time for the commercial sector. EPA is finalizing this with the proposed alternative action timeframes for manufacture, processing,

use, and all other distribution (*i.e.*, non-retailer) for industrial and commercial use, while finalizing the proposed timeframes for distribution to and by retailers for consumers. As described in the proposal, and in Unit IV.C., a retailer is any person or business entity that distributes or makes available products to consumers, including through e-commerce internet sales or distribution.

EPA acknowledges that the final approach potentially allows for manufacturing and processing of methylene chloride and methylene chloride-containing products for three to six months beyond when they could be distributed to or by retailers. EPA took this approach to expeditiously remove methylene chloride-containing products from the consumer market. While EPA acknowledges that, in some cases, upstream manufacturers and processors may lack awareness of the downstream uses of their products, in the case of methylene chloride, manufacturers and processors should be aware of restrictions downstream (distributing to and by retailers) that would make them unable to distribute products that end up on the consumer market, as a result of the 2019 rulemaking prohibiting methylene chloride in paint and coating removers for consumer use because that regulation required manufacturers of methylene chloride, regardless of downstream uses, to revise their SDS effective August 26, 2019 (84 FR 11420, March 27, 2019) (FRL-9989-29). EPA intends to conduct outreach with the regulated community and particularly manufacturers of methylene chloride, who have been actively engaged throughout the rulemaking and risk evaluation process, to address this issue.

With a combination of proposed timeframes and primary alternative timeframes presented in the proposed rule, the prohibitions under this finalized regulatory action will take effect in 270 days for distributing to retailers, 360 days for retailers distributing more broadly, 360 days for manufacturers, 450 days for processors, 630 days for all other distributors and 720 days for industrial and commercial users following this publication of the final rule in the **Federal Register**. EPA is also finalizing downstream notification requirements in accordance with these changes; details of these changes are outlined in Unit IV.D.2.

E. Changes to WCPP Requirements: Exposure Monitoring Requirements

As part of the WCPP, EPA proposed to require that owners or operators meet certain documentation requirements for

each instance of monitoring of methylene chloride, including compliance with the Good Laboratory Practice (GLP) Standards in accordance with 40 CFR part 792.

Numerous commenters expressed concern regarding the requirement that the WCPP include compliance with the GLP Standards at 40 CFR part 792. Commenters stated that it is atypical, for industrial hygiene purposes, to use this standard for air sampling of methylene chloride (Refs. 65, 70, 75, 78). According to the commenters, it is common practice within the industrial hygiene community to have analyses performed by American Industrial Hygiene Association (AIHA) accredited labs (Refs. 65, 78). A commenter further reasoned that because labs in the United States are usually certified by ISO/IEC 17025 Testing and Calibration Laboratories, a standard that differs from the proposed GLP, they recommended that provisions of monitoring results and recordkeeping in the final rule be allowed from any accredited laboratory, without regard to a specific type (Ref. 65).

EPA agrees with the commenter that the WCPP for methylene chloride is incompletely served by solely relying on the GLP standard initially put forth in the 2023 proposed rule. Given the concern from commenters regarding potential increases in demand for professional safety services and sampling laboratories having a negative impact due to anticipated industry strain and sampling limitations (Refs. 70, 85), EPA is inclined to broaden the scope of laboratory accreditation accordingly. EPA has considered this laboratory capacity issue, in addition to other revisions for finalization in this rule, so that the additional infrastructure is in place for the regulated community to successfully implement the WCPP. Therefore, EPA is finalizing a provision that expands monitoring results and associated recordkeeping requirements to any accredited lab including GLP, AIHA (AIHA Laboratory Accreditation Programs (LAP), LLC Policy Module 2A/B/E of Revision 17.3), or other analogous industry-recognized program.

Another commenter noted that EPA omitted a provision from the OSHA methylene chloride standard that they stated is important for air monitoring and protections to potentially exposed persons. More specifically, the commenter referred to 29 CFR 1910.1052(b) where OSHA defines employee exposure to mean that airborne concentration of methylene chloride that either occurs, or would occur, in the absence of respiratory

protection (Ref. 90). EPA agrees with the commenter that exposure monitoring should be conducted without regard to respiratory protection to inform engineering control options and respiratory protection considerations. Therefore, EPA is finalizing this rule to explicitly state that air sampling is required to measure ambient concentrations for methylene chloride without taking respiratory protections into account when being performed. This will ensure the highest degree of protection to potentially exposed persons by logging accurate ambient air concentrations of methylene chloride, thus empowering owners or operators to appropriately consider the hierarchy of controls.

F. Other Changes

EPA is also adding a definition of “article” and a definition of “product” to the definitions that EPA proposed to add to 40 CFR part 751, subpart A. In order to provide additional clarity on the de minimis provision in this final rule, as well as the provisions relating to the refinishing of wooden furniture, decorative pieces, and architectural fixtures of artistic, cultural, or historic value, EPA is incorporating into subpart A the definitions of “article” and “product” that already exist in 40 CFR part 751, subpart E. The article definition is consistent with other article definitions in regulations under TSCA. The product definition makes it clear that when EPA uses the term “product” in this regulation, EPA is not referring to articles. These definitions are consistent with the usage of these terms in previously promulgated TSCA regulations, including the 2021 regulation on 2,4,6-tris(tert-butyl)phenol (86 FR 866, January 6, 2021 (FRL–10018–90), which incorporated the same definitions into 40 CFR part 751, subpart B, and the 2019 regulation prohibiting the manufacture, processing, and distribution of methylene chloride for use in consumer paint and coating removers (84 FR 11420, March 27, 2019) (FRL–9989–29), which does not refer to articles, but uses the term “product” to refer to methylene chloride and mixtures containing methylene chloride. EPA is also promulgating the proposed definitions of “ECEL” and “EPA STEL” in 40 CFR 751.103 rather than in subpart A to allow EPA the flexibility to tailor the definitions to address unique circumstances with future chemicals. Lastly, EPA has revised its proposed description of industrial and commercial use as a laboratory chemical condition of use to provide additional clarity as suggested

by a commenter (Ref. 77). The revised description appears in Unit IV.B.1.c.iv.

IV. Provisions of the Final Rule

EPA intends that each provision of this rulemaking be severable. In the event of litigation staying, remanding, or invalidating EPA’s risk management approach for one or more conditions of use in this rule, EPA intends to preserve the risk management approaches in the rule for all other conditions of use to the fullest extent possible. The Agency evaluated the risk management options in TSCA section 6(a)(1) through (7) for each condition of use and generally EPA’s regulation of one condition of use to address its contribution to the unreasonable risk from methylene chloride functions independently from EPA’s regulation of other conditions of use, which may have different characteristics leading to EPA’s risk management decisions. Further, the Agency crafted this rule so that different risk management approaches are reflected in different provisions or elements of the rule that are capable of operating independently. Accordingly, the Agency has organized the rule so that if any provision or element of this rule is determined by judicial review or operation of law to be invalid, that partial invalidation will not render the remainder of this rule invalid.

There are many permutations of this. For example, as discussed in Unit IV.C., this final rule prohibits commercial use of paint and coating removal products that contain methylene chloride and are used in furniture refinishing (though a subset of this use has a delayed compliance date, as described in Unit III.B.1.), and also adhesives and sealants that contain methylene chloride (also with a subset of this use having a delayed compliance date as described in Unit III.B.2.). To the extent that a court were to find that EPA lacked substantial evidence to support its prohibition of paint and coating removal products used in furniture refinishing or otherwise found legal issues with EPA’s approach to that condition of use, it would have no bearing on other similarly situated conditions of use such as adhesives and sealants unless the specific issue also applies to the particular facts associated with adhesives and sealants. This is reflected in the structure of the rule, which describes the specific prohibitions separately by compliance date.

As another example, for commercial use of methylene chloride in paint and coating removal products used in furniture refinishing and industrial and commercial use of methylene chloride as a laboratory chemical, EPA took

different risk management approaches—prohibition for paint and coating removal products used in furniture refinishing (though a subset of this use has a delayed compliance date, as described in Unit III.B.1.) and application of the WCPP for the industrial and commercial use of methylene chloride as a laboratory chemical. To the extent that a court were to find a legal issue with EPA's approach to the WCPP, impacting industrial and commercial use of methylene chloride as a laboratory chemical, it would have no bearing on EPA's decision to prohibit paint and coating removal products used in furniture refinishing, and vice versa. This is reflected in the structure of the rule, which organizes the prohibitions and the WCPP into different sections of the regulation.

In some circumstances, EPA also intends certain portions of the WCPP to be severable from the rest of the WCPP. For example, EPA intends the methods of compliance with the ECEL and EPA STEL described in paragraph (e)(1) to function somewhat independently. The provisions in paragraph (e)(1)(i) through (iii) are generally applicable to all impacted owners or operators. However, paragraph (e)(1)(iv) is specifically applicable to a scenario where the Department of Defense, based on ongoing or planned military construction that requires Congressional authorization and appropriation prior to start of construction, may need additional time to comply with the requirements of paragraph (e)(1)(i). Since the Department of Defense is also covered by the more general provision in paragraph (e)(1)(i), if a court were to find a legal issue with EPA's decision to provide the independently functioning paragraph (e)(1)(iv) to provide the Department of Defense with additional time in a particular circumstance, it would not have any bearing on EPA's broader regulatory approach reflected in paragraph (e)(1)(i) through (iii) to strike that provision.

EPA also intends all TSCA section 6(a) risk management elements in this rule to be severable from each TSCA section 6(g) exemption. EPA has the authority to promulgate TSCA section 6(g) exemptions "as part of a rule promulgated under [TSCA section 6(a)]." However, EPA's risk management decisions under TSCA sections 6(a) and 6(c) are independent from EPA's consideration of whether it is appropriate, based on the factors in TSCA section 6(g), to exempt specific conditions of use from the requirements of the TSCA section 6(a) risk management elements in the rule. In

other words, EPA first decides whether and how to regulate each condition of use, per TSCA sections 6(a) through (c), and only then determines whether an exemption under TSCA section 6(g) is appropriate. Accordingly, the underlying TSCA section 6(a) risk management elements would not be impacted if a TSCA section 6(g) exemption is determined by judicial review or operation of law to be invalid. Rather, the exempted condition of use would become subject to the underlying TSCA section 6(a) risk management element(s).

To that end, EPA acknowledges that after the issuance of this rule, Federal agencies, their contractors, and other related entities may become aware of important information which indicates a particular use, that would otherwise be prohibited, could meet the criteria of section 6(g) or the requirements of a WCPP. EPA also notes that there are multiple avenues to ask EPA to revisit issues in this TSCA section 6(a) rulemaking, both before and after the mandatory compliance dates are set consistent with TSCA section 6(d). EPA has the authority under TSCA section 6(g) to consider whether a time limited exemption is appropriate and, consistent with TSCA section 6(g)(1), could expeditiously promulgate such exemptions independently from this rulemaking, including consideration of emergency or interim rulemaking. EPA will initiate a notice of proposed rulemaking for public comment on this topic and will add this to the Spring 2024 Regulatory Agenda. Additionally, any person could petition EPA to request that EPA issue or amend a rule under TSCA section 6.

A. Applicability

This final rule sets prohibitions and restrictions on the manufacture (including import), processing, distribution in commerce, commercial use, and disposal of methylene chloride to prevent unreasonable risk of injury to health in accordance with TSCA section 6(a), 15 U.S.C. 2605(a).

Additionally, pursuant to TSCA section 12(a)(2), this rule applies to methylene chloride even if being manufactured, processed, or distributed in commerce solely for export from the United States because EPA has determined that methylene chloride presents an unreasonable risk to health within the United States. A commenter expressed concern that distribution for export would be prohibited under the proposed rule if the intended use in the destination country is prohibited in the United States, even if it is permissible under other risk mitigation rules in the

destination country (Ref. 91). Because distribution in commerce did not contribute to EPA's unreasonable risk determination for methylene chloride, and because this final rule permits manufacturing and processing for various uses under the WCPP, EPA intends this final rule to permit manufacturing and processing in compliance with the WCPP for export, as well as distribution in commerce for export, without regard for the intended use in the destination country. EPA has clarified the regulatory text accordingly.

As discussed in Unit III.C., EPA's final rule is adopting a *de minimis* threshold of 0.1% to account for impurities and the unintended presence of methylene chloride. In other words, the provisions of this rulemaking only apply when methylene chloride is present in a formulation at 0.1% or greater. Additionally, the provisions of this final rule only apply to chemical substances as defined under TSCA section 3. Notably, TSCA section 3(2) excludes from the definition of chemical substance "any food, food additive, drug, cosmetic, or device (as such terms are defined in section 201 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 321]) when manufactured, processed, or distributed in commerce for use as a food, food additive, drug, cosmetic, or device" and "any pesticide (as defined in the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C. 136 *et seq.*]) when manufactured, processed, or distributed in commerce for use as a pesticide." Additional details regarding TSCA statutory authorities can be found in section 2 of the Response to Comments document (Ref. 7).

B. Workplace Chemical Protection Program (WCPP)

1. Applicability

EPA is finalizing the WCPP for the conditions of use for which it was proposed, as well as for additional conditions of use for which either prohibition was proposed, or for which the WCPP was proposed only for a subset of uses within the condition of use. EPA has not removed from the WCPP any conditions of use proposed to be included. EPA's descriptions of changes from the proposed rule are in Unit III. and EPA's rationale for why the WCPP addresses the unreasonable risk for certain conditions of use is in Unit V. of the proposed rule (88 FR 28284, May 3, 2023) (FRL-8155-02-OCSP). EPA is additionally requiring that uses receiving an exemption under TSCA section 6(g), as outlined in Unit IV.E., comply with the WCPP.

EPA is finalizing the WCPP for the following conditions of use: domestic manufacturing; import; processing as a reactant; processing for incorporation into a formulation, mixture, or reaction product; processing in repackaging; processing in recycling; industrial and commercial use as a laboratory chemical; industrial and commercial use as a paint and coating remover from safety critical, corrosion-sensitive components of aircraft and spacecraft; industrial or commercial use as a bonding agent for solvent welding; industrial and commercial use as a processing aid; industrial and commercial use for plastic and rubber products manufacturing; industrial and commercial use as a solvent that becomes part of a formulation or mixture, where that formulation or mixture will be used inside a manufacturing process, and the solvent (methylene chloride) will be reclaimed; and disposal. This unit provides a description of the uses subject to the WCPP in order to assist with compliance.

a. Manufacturing (Includes Import)

i. Domestic Manufacturing

This condition of use refers to manufacturing, or producing, a chemical substance within the United States (including manufacturing for export). Manufacture includes the extraction of a component chemical substance from a previously existing chemical substance or complex combination of chemical substances.

ii. Import

This condition of use refers to the act of causing a chemical substance or mixture to arrive within the customs territory of the United States.

b. Processing

i. Processing as a Reactant

This condition of use refers to processing methylene chloride in chemical reactions for the manufacturing of another chemical substance or product, *e.g.*, difluoromethane, also known as HFC-32, which is used in fluorocarbon blends for refrigerants, and bis-2,2-dinitropropyl-acetal/formal.

ii. Processing: Incorporation Into a Formulation, Mixture, or Reaction Product

This condition of use refers to when methylene chloride is added to a product (or product mixture) prior to further distribution of the product.

iii. Processing: Repackaging

This condition of use refers to the preparation of methylene chloride for distribution in commerce in a different form, state, or quantity. This includes transferring the chemical from a bulk container into smaller containers.

iv. Processing: Recycling

This condition of use refers to the process of treating generated waste streams (*i.e.*, which would otherwise be disposed of as waste) that are collected, either on-site or transported to a third-party site, for commercial purpose. Waste solvents can be restored to a condition that permits reuse via solvent reclamation/recycling. The recovery process may involve an initial vapor recovery or mechanical separation step followed by distillation, purification, and final packaging.

c. Industrial and Commercial Uses

i. Industrial and Commercial Use as a Solvent That Becomes Part of a Formulation or Mixture, Where That Formulation or Mixture Will Be Used Inside a Manufacturing Process, and the Solvent (Methylene Chloride) Will Be Reclaimed

This condition of use refers to industrial or commercial use of methylene chloride added to a product (or product mixture) in an industrial or commercial setting for use inside a closed-loop manufacturing process, where the solvent will be reclaimed and reused.

ii. Industrial and Commercial Use as a Processing Aid

This condition of use refers to the industrial or commercial use of methylene chloride to improve the processing characteristics or the operation of process equipment or to alter or buffer the pH of the substance or mixture, when added to a process or to a substance or mixture to be processed. Processing agents do not become a part of the reaction product and are not intended to affect the function of a substance or article created. For methylene chloride, the use as a processing aid condition of use also encompasses use of methylene chloride as a heat transfer fluid, and use in the manufacture of battery separators. Use of methylene chloride as a processing aid also refers to use of methylene chloride in blending powder for flashtube and ignition booster pellets and as a de-sensitizer for nitroglycerine shipment. Additionally, the use of methylene chloride in a closed-loop chiller system that supports performance of FAA-required aviation

fuel testing, these are considered under the condition of use industrial and commercial use as a processing aid. The analogous use of methylene chloride in a chiller system in the Department of Defense McKinley Climatic Laboratory would likewise be considered industrial and commercial use as a processing aid. (EPA notes that these chiller uses were identified under "Industrial and commercial use as a laboratory chemical" under the proposed rule. However, EPA has determined they are more accurately categorized under the condition of use "industrial and commercial use as a processing aid," as with other heat transfer fluid uses).

iii. Industrial and Commercial Use as a Laboratory Chemical

This condition of use refers to the industrial or commercial use of methylene chloride in a laboratory process or in specialized laboratory equipment for instrument calibration/maintenance chemical analysis, chemical synthesis, extracting and purifying other chemicals, dissolving other substances, executing research, development, test and evaluation methods, and similar activities, such as use as a solvent, reagent, analytical standard, or other experimental use. For the purposes of this rulemaking, EPA emphasizes that industrial and commercial use of methylene chloride as a laboratory chemical applies to research, government, and academic institutions, as well as to industrial and commercial laboratories. Laboratory use of methylene chloride includes Department of Defense sampling, examining, and testing of solid propellants, detail specifications of nitrocellulose, and laboratory analysis for TNT conformity with TNT acidity requirements.

iv. Industrial and Commercial Use for Plastic and Rubber Products Manufacturing

This condition of use refers to the industrial or commercial use of methylene chloride in the manufacture and processing of plastic and rubber products, including in interfacial polymerization for polycarbonate plastic manufacturing.

v. Industrial and Commercial Use as a Paint and Coating Remover From Safety Critical, Corrosion-Sensitive Components of Aircraft and Spacecraft

This condition of use refers to the industrial or commercial use of methylene chloride or methylene chloride-containing products applied to corrosion-sensitive surfaces to remove paint, coatings, and other finishes and

to clean the underlying surface in safety critical components of aircraft and spacecraft.

vi. Industrial or Commercial Use as a Bonding Agent for Solvent Welding

This condition of use refers to the industrial or commercial use of methylene chloride or a solvent blend including methylene chloride to chemically bond polymer substrates including, but not limited to, acrylic or polycarbonate, creating an airtight, waterproof, and in some cases seamless joint.

d. Disposal

This condition of use refers to the process of disposing generated waste streams of methylene chloride that are collected either on-site or transported to a third-party site for disposal.

2. Overview

A WCPP encompasses inhalation exposure thresholds, includes monitoring and recordkeeping requirements to verify that those thresholds are not exceeded, and may include other components, such as dermal protection, to ensure that the chemical substance no longer presents unreasonable risk. Under a WCPP, owners or operators have some flexibility, within the parameters outlined in this unit, regarding how they prevent exceedances of the identified EPA exposure limit thresholds. In the case of methylene chloride, meeting the EPA exposure limit thresholds for certain occupational conditions of use would address the unreasonable risk to potentially exposed persons from inhalation exposure.

EPA is finalizing these requirements to begin taking effect on May 5, 2025 for the private sector and on November 9, 2026 for Federal agencies and Federal contractors acting for or on behalf of the Federal Government, at which point entities would be required to conduct initial monitoring (as described in Unit IV.B.4.b.). Additionally, EPA requires that each owner or operator ensure that the airborne concentration of methylene chloride does not exceed the ECEL or EPA STEL for all potentially exposed persons no later than August 1, 2025 for the private sector, or no later than February 8, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal Government. Implementation of any needed exposure controls based on initial monitoring and development of an exposure control plan would be required no later than October 30, 2025, for the private sector, or May 10, 2027 for Federal agencies and Federal contractors acting for or on

behalf of the Federal Government (as described in Unit III.D.1.).

EPA uses the term “potentially exposed person” in this unit and in the regulatory text to include workers, occupational non-users, employees, independent contractors, employers, and all other persons in the work area where methylene chloride is present and who may be exposed to methylene chloride under the conditions of use for which a WCPP would apply. One important reason to define a potentially exposed person for the purposes of a WCPP as any person who may be exposed in the workplace is to emphasize the broad scope of exposures which must be categorized when implementing a WCPP. EPA notes that this definition is intended to apply only in the context of risk management, and specifically in the context of a WCPP (e.g., workers directly using the chemical, workers in the vicinity of the use, students in a laboratory setting). The term is not intended as a replacement for the term Potentially Exposed or Susceptible Subpopulation as defined by TSCA section 3(12). EPA additionally recognizes that other individuals or communities may be exposed to methylene chloride as consumers, members of fence-line communities, or members of the general population, which is separate and apart from those potentially exposed for the purposes of the regulatory requirements of the WCPP. In those instances, where regulatory requirements address exposures unrelated to a WCPP EPA would use distinct terminology to refer to those other populations. EPA requires a comprehensive WCPP to address the unreasonable risk from methylene chloride to workers directly handling the chemical or in the area where the chemical is being used. Similarly, the 2020 Risk Evaluation for Methylene Chloride (Ref. 1) did not distinguish between employers, contractors, or other legal entities or businesses that manufacture, process, distribute in commerce, use, or dispose of methylene chloride. For this reason, EPA uses the term “owner or operator” to describe the entity responsible for implementing the WCPP in any workplace where an applicable condition of use identified in the following paragraph and subject to the WCPP is occurring. The term includes any person who owns, leases, operates, controls, or supervises such a workplace. While owners or operators remain responsible for ensuring compliance with the WCPP requirements in the workplace, they may contract with others to provide

training or implement a respiratory protection program, for example.

EPA emphasizes that this approach is essential for addressing the unreasonable risk presented by methylene chloride, including to individuals who may not be covered by OSHA requirements, such as university students, volunteers, self-employed persons, and state and local government workers who are not covered by a state plan. EPA uses the term “owner or operator” in TSCA programs because the term is used in other EPA programs to describe persons with responsibilities for implementing statutory and regulatory requirements at particular locations. See, for example, section 113 of the Clean Air Act (CAA), 42 U.S.C. 7412, which defines “owner or operator” as a person who owns, leases, operates, controls, or supervises a stationary source. There is a similar definition in section 306 of the Clean Water Act (CWA), 33 U.S.C. 1316. EPA understands that the use of this term may result in multiple persons bearing responsibility for complying with provisions of this final rule, including the WCPP. However, this is also the case for workplaces regulated by OSHA, including those regulated under OSHA’s general industry standards at 29 CFR part 1910. OSHA’s 1999 Multi-Employer Citation Policy explains which employers should be cited for a hazard that violates an OSHA standard (Ref. 92). The Policy describes four different roles that employers may fill at a workplace and describes who should be cited for a violation based on factors such as whether the employer created the hazard, had the ability to prevent or correct the hazard, and knew or should have known about the hazard. More than one employer may be cited for the same hazard. This final rule will have similar results, in that more than one owner or operator may be responsible for compliance.

The OSHA multi-employer citation policy is an example of a guidance governing situations where more than one regulated entity is present. EPA has received several requests for clarification of the applicability of the term “owner or operator” to sites where more than one entity owns, leases, or controls a workplace where a methylene chloride condition of use is ongoing and where implementation of the WCPP is required. EPA understands that there are a wide variety of situations where these questions could arise, and plans to issue guidance consistent with TSCA authorities that explains how EPA will approach the issue of responsibility for implementation of, and compliance

with, the WCPP requirements in practice.

EPA's implementation of the ECEL as part of a WCPP aligns with, to the extent possible, certain elements of the existing OSHA standard for regulating methylene chloride under 29 CFR 1910.1052. However, EPA is finalizing new, lower exposure thresholds, derived from the TSCA 2020 Risk Evaluation for Methylene Chloride, while aligning with existing requirements wherever possible (Refs. 1, 93). For methylene chloride, this final rule will eliminate the unreasonable risk from methylene chloride contributed to by the conditions of use subject to the WCPP, enable continued industry use where appropriate, and provide the familiarity of a pre-existing framework for the regulated community.

EPA's requirements include specific exposure limits and ancillary requirements necessary for successful implementation of an ECEL as part of a WCPP. Taken together, these WCPP requirements apply to the extent necessary so that the unreasonable risk from methylene chloride under the conditions of use listed earlier in this unit would no longer be presented.

This unit includes a summary of the WCPP, including a description of the finalized exposure limits including an ECEL, ECEL action level, and EPA STEL; implementation requirements including monitoring requirements; a description of potential exposure controls, including engineering controls, administrative controls, and PPE as it relates to dermal protections and respirator selection; and additional finalized requirements for recordkeeping, workplace participation, and notification in accordance with the hierarchy of controls. This unit also describes compliance timeframes revised from the proposed rule, changes by EPA to certain provisions of the WCPP based on public comments, and addition of new provisions in the WCPP based on public comments used to inform this final rule.

3. Existing Chemical Exposure Limit (ECEL), EPA Action Level, Short-Term Exposure Limit (STEL)

EPA is finalizing as proposed an ECEL under TSCA section 6(a) of 2 ppm (8 mg/m³) as an 8-hour TWA based on the chronic non-cancer human equivalent concentration for liver toxicity. EPA has determined that ensuring exposures remain at or below the 8-hour TWA ECEL of 2 ppm will eliminate the unreasonable risk of injury to health resulting from acute and chronic inhalation exposures for certain

occupational conditions of use of methylene chloride (Ref. 93).

If ambient exposures are kept at or below the 8-hour TWA ECEL of 2 ppm and at or below the 15-minute TWA EPA STEL of 16 ppm also finalized in this unit, a potentially exposed person will be protected against the effects described in this unit, including effects resulting from acute exposure (central nervous system depression), chronic non-cancer effects (liver toxicity), and cancer. Using the TWA concept, as long as the 8-hr TWA or 15-min EPA STEL are not exceeded, airborne concentrations could temporarily exceed the ECEL.

EPA is finalizing as proposed an ECEL action level at half of the 8-hour ECEL, or 1 ppm (4 mg/m³) as an 8-hour TWA. Below the ECEL action level, certain compliance activities, such as periodic monitoring, would be required once every five years as described further in this unit. In this way, EPA's WCPP for methylene chloride aligns with the familiar framework that is in place in 29 CFR 1910.1052 and many other occupational settings where the action level is half the relevant occupational exposure level. OSHA explained that its decision to set the action level at one-half the PEL was based on its successful experience using this fraction as the action level in many standards (e.g., arsenic, ethylene oxide, vinyl chloride and benzene); for most workplaces, the agency found that variability in employee exposures is normally such that an action level set at one-half the TWA PEL is appropriate (Ref. 94).

In addition to the 8-hour TWA ECEL, EPA is finalizing as proposed a STEL of 16 ppm (57 mg/m³) as a 15-minute TWA. This STEL is based on the non-cancer endpoint of central nervous system depression resulting from acute exposures. EPA has also determined that ensuring exposures remain at or below the EPA STEL will eliminate the unreasonable risk of injury to health from methylene chloride due to acute inhalation exposures in an occupational setting. EPA is finalizing the EPA STEL as a 15-minute TWA for the protection of potentially exposed persons to methylene chloride for shorter durations and at higher concentrations that fall outside the parameters of the ECEL 8-hour TWA.

In summary, EPA is finalizing as proposed that owners or operators must ensure the airborne concentration of methylene chloride within the personal breathing zone of potentially exposed persons remains at or below 2 ppm as an 8-hour TWA ECEL, with an action level finalized as 1 ppm as an 8-hour TWA. OSHA defines the personal

breathing zone as a hemispheric area forward of the shoulders within a six-to-nine-inch radius of a worker's nose and mouth and requires that exposure monitoring air samples be collected from within this space (Ref. 95). EPA is finalizing as proposed that owners or operators must also ensure the airborne concentration of methylene chloride within the personal breathing zone of potentially exposed persons remains at or below a 15-minute TWA, or EPA STEL, of 16 ppm. EPA is finalizing the ECEL and EPA STEL for certain occupational conditions of use to ensure that no person is exposed to inhalation of methylene chloride in excess of these concentrations resulting from those conditions of use. For the identified conditions of use for which the concentration thresholds are being finalized, EPA recognizes that the regulated community has the ability to detect the values for the ECEL, ECEL action level, and EPA STEL because of viable detection limits and analytical methods of methylene chloride for monitoring devices that are widely available in commerce, currently in use, and approved by OSHA and NIOSH, which generally range from 0.2 to 0.4 ppm (Ref. 93). EPA also recognizes that analytical methods for monitoring are available from OSHA and NIOSH that are capable of detecting the exposure limits with a higher degree of accuracy (Refs. 96, 97).

4. Monitoring Requirements

a. In General

Initial monitoring for methylene chloride is critical for establishing a baseline of exposure for potentially exposed persons; similarly, periodic exposure monitoring assures continued compliance over time so that potentially exposed persons are not exposed to levels that would result in an unreasonable risk of injury to health. Exposure monitoring could be suspended if certain conditions described in this unit are met. Also, in some cases, a change in workplace conditions with the potential to impact exposure levels would warrant additional monitoring, which is also described.

EPA is finalizing as proposed its requirement that owners or operators determine each potentially exposed person's exposure by taking a personal breathing zone air sample, or by taking personal breathing zone air samples that are representative of each potentially exposed person's exposure. Owners or operators will be permitted to consider personal breathing zone air samples to be representative of each potentially

exposed person's exposure when one or more samples are taken for at least one potentially exposed person in each job classification in a work area during every work shift, and the person sampled is expected to have the highest methylene chloride exposure; or when one or more samples are taken which indicate the highest likely 15-minute exposures during such operations for at least one potentially exposed person in each job classification in the work area during every work shift, and the person sampled is expected to have the highest methylene chloride exposure. Personal breathing zone air samples taken during one work shift may be used to represent potentially exposed person exposures on other work shifts where the owner or operator can document that the tasks performed and conditions in the workplace are similar across shifts. Additionally, air sampling is required to measure ambient concentrations for methylene chloride without taking respiratory protections into account as sampling is being performed. These final requirements align with the approach taken for characterization of employee exposure in the 1997 OSHA standard for methylene chloride (see 29 CFR 1910.1052(b), (d)(1)(i) and (ii)). EPA is also finalizing requirements that the owner or operator ensure, for initial and periodic monitoring, that their exposure monitoring methods are accurate to a confidence level of 95% and are within (plus or minus) 25% of airborne concentrations of methylene chloride above the 8-hour TWA ECEL or the 15-minute TWA EPA STEL, or within (plus or minus) 35% for airborne concentrations of methylene chloride at or above the ECEL action level but at or below the 8-hour TWA ECEL. These requirements, including the 35%, would align with the approach taken in the 1997 OSHA standard for methylene chloride (see 29 CFR 1910.1052(d)(1)(iii)). Though EPA is finalizing the accuracy range as proposed, EPA recognizes that more recent monitoring methods and technologies currently exist and allow for greater accuracy, and thus a narrower accuracy range for monitoring results such as the NIOSH 3900 method and the OSHA 1025 method (Refs. 96, 97). To ensure compliance for monitoring activities, EPA is finalizing recordkeeping requirements and will require that owners or operators document their choice of monitoring method outlined in this unit.

b. Initial Exposure Monitoring

Under the final regulation, each owner or operator of a facility in the private sector that is engaged in one or

more of the conditions of use listed earlier in Unit IV.B.1. will be required to perform initial exposure monitoring within 360 days after publication of the final rule to determine the extent of exposure of potentially exposed persons to methylene chloride. In consideration of public comments, EPA has changed the timeframe for completion of initial monitoring from 180 days after publication of the final rule to 360 days after publication of the final rule in the **Federal Register**. As discussed in Unit III.D.1., EPA is providing additional time for Federal agencies and Federal contractors acting for or on behalf of the Federal Government to comply with the provisions of the WCPP, so they will be required to conduct initial monitoring within 915 days after publication. Initial monitoring will notify owners and operators of the magnitude of possible exposures to potentially exposed persons with respect to their work conditions and environments. Based on the magnitude of possible exposures in the initial exposure monitoring, the owner or operator may need to increase or decrease the frequency of future periodic monitoring, adopt new exposure controls (such as engineering controls, administrative controls, and/or a respiratory protection program), or to continue or discontinue certain compliance activities such as periodic monitoring. In addition, the initial monitoring will be required when and where the operating conditions are best representative of each potentially exposed person's work-shift exposures. If the owner or operator chooses to use a sample that is representative of potentially exposed persons' full shift exposures (rather than monitor every individual), such sampling should be representative of the most highly exposed persons in the workplace. Additionally, EPA expects that owners and operators will conduct initial exposure monitoring representative to determine the extent of methylene chloride exposure for potentially exposed persons. EPA understands that certain tasks may occur less frequently or may reflect upset conditions (for example, due to malfunction).

EPA also recognizes that the values for the ECEL action level and EPA STEL may mean that some owners or operators currently in compliance with the OSHA standard would have to establish a new monitoring baseline for EPA's Final Rule for methylene chloride. Aligning with the existing OSHA standard (29 CFR 1910.1052(d)(2)) to the extent possible, EPA is finalizing as proposed that an

owner or operator may temporarily forgo initial exposure monitoring if:

(i) An owner or operator could provide EPA with objective data generated during the last five years demonstrating that methylene chloride cannot be released in the workplace in airborne concentrations at or above the ECEL action level (1-ppm 8-hour TWA) and above the EPA STEL (16 ppm 15-minute TWA), and that the data represent the highest methylene chloride exposures likely to occur under reasonably foreseeable conditions of manufacturing, processing, use, or disposal, as applicable, including handling of methylene chloride during those activities. Owners or operators who rely on objective data must maintain records including the use of methylene chloride evaluated, the source of the objective data, the measurement methods, measurement results, and measurement analysis of the use of methylene chloride, and any other data relevant to the operations, processes, or person's exposure. The oldest objective data used to demonstrate that exposures are below the ECEL action level and EPA STEL will indicate the beginning of the five-year cycles of recurring exposure monitoring as described in Unit IV.B.4.b.;

(ii) Where potentially exposed persons are exposed to methylene chloride for fewer than 30 days per year and the owner or operator has measurements by direct-metering devices that give immediate results and provide sufficient information regarding potentially exposed persons' exposures to determine and implement the control measures that are necessary to reduce exposures to below the ECEL action level and EPA STEL.

As described in more detail later in this unit, the owner or operator must conduct periodic monitoring at least once every five years since its last monitoring. This periodic monitoring must be representative of all the potentially exposed persons in the workplace and the tasks that they are expected to do. Additionally, if a facility were to commence one or more conditions of use listed in Unit IV.B.1. after May 5, 2025, the owner or operator must perform an initial exposure monitoring within 30 days of commencing the condition(s) of use and would be required to conduct periodic monitoring in accordance with table 1 in Unit IV.B.4.c. For facilities that commence one or more conditions of use listed in Unit IV.B.1. after May 5, 2025, the owner or operator must ensure that the airborne concentration of methylene chloride does not exceed the

ECEL or EPA STEL for all potentially exposed persons within 90 days of the initial exposure monitoring.

c. Periodic Exposure Monitoring

EPA's final rule is aligned with elements of the existing OSHA standard (29 CFR 1910.1052(d)(3)) to the extent possible. Based on the results from the initial exposure monitoring, EPA is finalizing as proposed the following periodic monitoring for owners or operators. These finalized requirements are also outlined in table 1.

- If the initial exposure monitoring is below the ECEL action level (1 ppm 8-hour TWA) and at or below the EPA STEL (16 ppm 15-minute TWA), the ECEL and EPA STEL periodic monitoring would be required once every five years, except when additional exposure monitoring (Unit IV.B.4.e.) measurements require it.

- If the initial exposure monitoring concentration is below the ECEL action level (1 ppm 8-hour TWA) and above the EPA STEL (16 ppm 15-minute TWA), the ECEL periodic monitoring would be required once every five years or when additional monitoring (Unit IV.B.4.e.) measurements require it, but EPA STEL periodic monitoring would be required every three months.

- If the initial exposure monitoring concentration is at or above the ECEL action level (1 ppm 8-hour TWA) and at or below the ECEL (2 ppm 8-hour TWA), and at or below the EPA STEL (16 ppm 15-minute TWA), the ECEL

periodic monitoring would be required every six months.

- If the initial exposure monitoring concentration is at or above the ECEL action level (1 ppm 8-hour TWA) and at or below the ECEL (2 ppm 8-hour TWA), and above the EPA STEL, the ECEL periodic monitoring would be required every six months and EPA STEL periodic monitoring would be required every three months.

- If the initial exposure monitoring concentration is: Above the ECEL (2 ppm 8-hour TWA) and below, at, or above the EPA STEL (16 ppm 15-minute TWA), the ECEL and EPA STEL periodic monitoring would be required every three months.

- The owner or operator would be permitted to transition the ECEL periodic exposure monitoring frequency from every three months to every six months if two consecutive monitoring events taken at least seven days apart indicate that the potential exposure has decreased to or below the ECEL, but at or above the ECEL action level.

- The owner or operator would be permitted to transition from the ECEL periodic exposure monitoring frequency from every six months to once every five years if two consecutive monitoring events taken at least seven days apart indicate that the potential exposure has decreased below the ECEL action level and at or below the EPA STEL. The second consecutive monitoring event would delineate the new date from which the next five-year periodic exposure monitoring must occur.

In addition to the periodic monitoring standards described earlier, EPA is finalizing two additional provisions:

- Based on its monitoring results, if the owner or operator would be required to monitor either the ECEL or EPA STEL in a three-month interval but does not engage in any of the conditions of use listed in Unit IV.B.1. for which the WCPP is finalized over the entirety of those three months, the owner or operator would be permitted to forgo the upcoming periodic monitoring event. However, documentation of cessation of use of methylene chloride would be required, and initial monitoring would be required when the owner or operator resumes or starts any of the conditions of use listed in Unit IV.B.1. for which the WCPP is finalized.

- Based on its monitoring results, if the owner or operator would be required to monitor the ECEL in a six-month interval but does not engage in any of the conditions of use listed in Unit IV.B.1. for which the WCPP is finalized over the entirety of those six months, the owner or operator would be permitted to forgo the upcoming periodic monitoring event. However, documentation of cessation of use of methylene chloride would be required, and initial monitoring would be required when the owner or operator resumes or starts any of the conditions of use listed in Unit IV.B.1. for which the WCPP is finalized.

- Periodic monitoring would be required to occur at least once every five years if methylene chloride is present.

TABLE 1—PERIODIC MONITORING REQUIREMENTS BASED ON INITIAL EXPOSURE MONITORING RESULTS

Air concentration condition	Periodic monitoring requirement
If the initial exposure monitoring concentration is below the ECEL action level and at or below the EPA STEL.	ECEL and EPA STEL periodic monitoring at least once every 5 years.
If the initial exposure monitoring concentration is below the ECEL action level and above the EPA STEL.	ECEL periodic monitoring at least once every 5 years, and EPA STEL periodic monitoring required every 3 months.
If the initial exposure monitoring concentration is at or above the ECEL action level and at or below the ECEL; and at or below the EPA STEL.	ECEL periodic monitoring every 6 months.
If the initial exposure monitoring concentration is at or above the ECEL action level and at or below the ECEL; and above the EPA STEL.	ECEL periodic monitoring every 6 months and EPA STEL periodic monitoring every 3 months.
If the initial exposure monitoring concentration is above the ECEL and below, at, or above the EPA STEL.	ECEL periodic monitoring every 3 months and EPA STEL periodic monitoring every 3 months.
If 2 consecutive monitoring events have taken place at least 7 days apart that indicate that potential exposure has decreased from above the ECEL to at or below the ECEL, but at or above the ECEL action level.	Transition from ECEL periodic monitoring frequency from every 3 months to every 6 months.
If 2 consecutive monitoring events have taken place at least 7 days apart that indicate that potential exposure has decreased to below the ECEL action level and at or below the EPA STEL.	Transition from ECEL periodic monitoring frequency every 6 months to once every 5 years. The second consecutive monitoring event will delineate the new date from which the next 5-year periodic exposure monitoring must occur.
If the owner or operator engages in any of the conditions of use for which WCPP is finalized and is required to monitor either the ECEL or EPA STEL in a 3-month interval, but does not engage in any of those conditions of use for the entirety of the 3-month interval.	The owner or operator may forgo the upcoming periodic monitoring event. However, documentation of cessation of manufacture, processing, use, or disposal of methylene chloride must be maintained, and initial monitoring would be required when the owner or operator resumes or starts any of the conditions of use for which the WCPP is finalized.

TABLE 1—PERIODIC MONITORING REQUIREMENTS BASED ON INITIAL EXPOSURE MONITORING RESULTS—Continued

Air concentration condition	Periodic monitoring requirement
If the owner or operator engages in any of the conditions of use for which WCPP is finalized and is required to monitor the ECEL in a 6-month interval, but does not engage in any of those conditions of use for the entirety of the 6-month interval.	The owner or operator may forgo the upcoming periodic monitoring event. However, documentation of cessation of manufacture, processing, use, or disposal of methylene chloride must be maintained, and initial monitoring would be required when the owner or operator resumes or starts any of the conditions of use for which the WCPP is finalized.

Note: Additional scenarios in which monitoring may be required are discussed in Unit IV.B.4.e.

d. Minimum Frequency of Exposure Monitoring

EPA is finalizing the proposed requirement that a monitoring event be conducted at a minimum frequency of every five years by owners or operators using methylene chloride for any condition of use subject to the WCPP. To better reflect the periodic nature of such monitoring, the final rule describes it as a periodic monitoring requirement, rather than a requirement to re-conduct initial exposure monitoring every five years, as it was described in the proposed rule. EPA emphasizes that this monitoring must represent all potentially exposed persons in the workplace. Moreover, EPA is finalizing that monitoring requirements can only be made less frequent based on the results of the initial exposure monitoring or the periodic exposure monitoring outlined under Units IV.B.4.b. and IV.B.4.c., respectively.

e. Additional Exposure Monitoring

EPA is finalizing the requirement that the owner or operator complying with the WCPP must carry out an additional exposure monitoring after any change that may reasonably be expected to introduce additional sources of exposure, or result in a change in exposure levels, to methylene chloride. Examples include changes in the production, production volume, use rate, process, control equipment, or work practices that may reasonably be anticipated to cause additional sources of exposure or result in increased exposure levels to methylene chloride; and start-up, shutdown, or malfunction of the facility or facility equipment that may reasonably be anticipated to cause additional sources of exposure or result in increased exposure levels to methylene chloride. This additional exposure monitoring event may result in increased frequency of periodic monitoring. The required additional exposure monitoring should not delay implementation of any necessary cleanup or other remedial action to reduce the exposures to potentially exposed persons.

5. Exposure Control Plan

EPA is finalizing its requirement that entities implementing the WCPP use elimination and substitution, followed by the use of engineering controls, administrative controls, and work practices prior to requiring the use of PPE (*i.e.*, respirators) as a means of controlling inhalation exposures below EPA’s ECEL or STEL, in accordance with the hierarchy of controls (Ref. 98). If an owner or operator chooses to replace methylene chloride with a substitute, EPA recommends careful review of the available hazard and exposure information on the potential substitutes to avoid a substitute chemical that might later be found to present unreasonable risks or be subject to regulation (sometimes referred to as a “regrettable substitution”). EPA expects that, for conditions of use for which EPA is finalizing a WCPP, compliance at most workplaces would be part of an established industrial hygiene program that aligns with the hierarchy of controls.

EPA is finalizing its requirement that the owner or operator demarcate any area where airborne concentrations of methylene chloride are reasonably expected to exceed the ECEL or the EPA STEL. In response to comments requesting more clarity regarding how regulated areas must be demarcated, EPA has incorporated the language from the analogous OSHA requirement into this final rule. Owners and operators must demarcate regulated areas from the rest of the workplace in any manner that adequately establishes and alerts potentially exposed persons to the boundaries of the area and minimizes the number of authorized persons exposed to methylene chloride within the regulated area. This can be accomplished using administrative controls, *e.g.*, highly visible signifiers, in multiple languages as appropriate (*e.g.*, when potentially exposed persons who are primarily Spanish-speaking are present, owners and operators should post additional highly visible signifiers in Spanish), placed in conspicuous areas. The owner or operator is required to restrict access to the regulated area

from any potentially exposed person that lacks proper training or is otherwise unauthorized to enter.

EPA is finalizing the requirement that regulated entities use the hierarchy of controls, instituting one or a combination of controls to the extent feasible, and supplement such protections using PPE, where necessary, including respirators for potentially exposed persons at risk of inhalation exposure above the ECEL or EPA STEL. If efforts of elimination, substitution, engineering controls, and administrative controls are not sufficient to reduce exposures to or below the ECEL or EPA STEL for all potentially exposed persons in the workplace, EPA requires that the owner or operator use feasible controls to reduce methylene chloride concentrations in the workplace to the lowest levels achievable and supplement these controls with respiratory protection and PPE as needed to achieve the ECEL before potentially exposed persons enter a regulated area. In such cases, EPA requires that the owner or operator provide potentially exposed persons reasonably likely to be exposed to methylene chloride by inhalation to concentrations above the ECEL or EPA STEL with respirators affording sufficient protection against inhalation risk and appropriate training on the proper use of such respirators, to ensure that their exposures do not exceed the ECEL or EPA STEL, as described in this unit. As part of the training requirement, the owner or operator is required to provide information and comprehensive training in an understandable manner (*i.e.*, plain language), considering factors such as the skills required to perform the work activity and the existing skill level of the staff performing the work, and in multiple languages as appropriate (*e.g.*, based on languages spoken by potentially exposed persons) to potentially exposed persons. This training must be provided prior to or at the time of initial assignment to a job involving potential exposure to methylene chloride. Furthermore, EPA also requires that the owner or operator

document their efforts in using elimination, substitution, engineering controls, and administrative controls to reduce exposure to or below the ECEL or EPA STEL in an exposure control plan.

EPA is finalizing its requirement that the owner or operator include and document in the exposure control plan or through any existing documentation of the facility's safety and health program developed as part of meeting OSHA requirements or other safety and health standards, the following:

- Identification in the exposure control plan of available exposure controls and rationale for using or not using available exposure controls in the following sequence (*i.e.*, elimination and substitution, then engineering controls and administrative controls) to reduce exposures in the workplace to either at or below the ECEL or to the lowest level achievable, and the exposure controls selected based on feasibility, effectiveness, and other relevant considerations;

- For the exposure controls not selected, document the efforts identifying why these are not feasible, not effective, or otherwise not implemented;

- A description of actions the owner or operator must take to implement exposure controls selected, including proper installation, regular inspections, maintenance, training, or other steps taken;

- A description of regulated areas, how they are demarcated, and persons authorized to enter the regulated areas;

- A description of activities conducted by the owner or operator to review and update the exposure control plan to ensure effectiveness of the exposure controls, identify any necessary updates to the exposure controls, and confirm that all persons are properly implementing the exposure controls; and

- An explanation of the procedures for responding to any change that may reasonably be expected to introduce additional sources of exposure to methylene chloride, or otherwise result in increased exposure to methylene chloride, including procedures for implementing corrective actions to mitigate exposure to methylene chloride.

Under this final rule, owners or operators are prohibited from using rotating work schedules to comply with the ECEL 8-hour TWA. Owners or operators must maintain the effectiveness of any engineering controls, administrative controls, or work practices instituted as part of the exposure control plan. They must also

review and update the exposure control plan as necessary, but at least every five years, to reflect any significant changes in the status of the owner or operator's approach to compliance with the exposure control requirements. EPA intends that the exposure control plan identify the *available* exposure controls and, for the exposure controls not selected, document the efforts identifying why these are not feasible, not effective, or otherwise not implemented. For entities for which significant amounts of time are needed to verify suitability of alternatives or procure funds or authorization for additional engineering controls, for example, EPA expects that as those controls become available the exposure control plan would be updated accordingly. EPA requires that the exposure control plan be revisited under certain conditions (and at least every five years) and encourages updates as more sophisticated controls are available.

This final rule requires owners or operators to make the exposure control plan and associated records available to potentially exposed persons, at a reasonable time, place, and manner, within 15 working days of receiving a request. Owners or operators must also provide notice of the availability of the plan and associated records to potentially exposed persons.

6. Personal Protective Equipment (PPE)

Where elimination, substitution, engineering, and administrative controls are not feasible or sufficiently protective to reduce the air concentration to or below the ECEL, or if inhalation exposure above the ECEL is still reasonably likely, EPA is finalizing its minimum respiratory PPE requirements based on an owner or operator's measured air concentration for one or more potentially exposed persons and the level of PPE needed to reduce exposure to or below the ECEL. In those circumstances, EPA is finalizing its requirement that the owner or operator also comply with OSHA's General Requirements for PPE standard at 29 CFR 1910.132 for application of a PPE program. EPA is also requiring that the owner or operator comply with 29 CFR 1910.134 for proper use, maintenance, fit-testing, and training of respirators.

a. Required Dermal Protection

EPA is finalizing the provision and use of chemically resistant gloves in combination with specific activity training (*e.g.*, glove selection (type, material), expected duration of glove effectiveness, actions to take when glove integrity is compromised, storage

requirements, procedure for glove removal and disposal, chemical hazards) for tasks where dermal exposure can be expected to occur. Additionally, EPA is requiring that owners and operators comply with relevant sections of the methylene chloride OSHA standard to minimize and protect potentially exposed persons from dermal exposure, including 29 CFR 1910.1052(h) and (i). Additional information related to choosing appropriate gloves can be found in the NIOSH Hazard Alert (Ref. 99) and in appendix F of the 2020 Risk Evaluation for Methylene Chloride (Ref. 1).

b. Required Respiratory Protection

EPA is finalizing the following requirements for respiratory protection, based on the exposure monitoring concentrations measured as an 8-hour TWA that exceeds the ECEL (2 ppm) or 15-minute TWA that exceeds the EPA STEL (16 ppm); see also the following table (table 2). These requirements apply after all other feasible controls are exhausted or proven ineffective to control inhalation exposure (including elimination, substitution, engineering controls, and administrative controls in accordance with the hierarchy of controls). EPA is finalizing its minimum respiratory protection requirements, such that any respirator affording the same or a higher degree of protection than the following proposed requirements may be used. Under this final regulatory action, air-purifying respirators (in contrast to air-supplied respirators) are not permitted as a means of mitigating methylene chloride exposure, as they do not provide adequate respiratory protection against this chemical (Ref. 100). Additionally, EPA acknowledges that there may be respirator limitations dependent upon the nature of the activity in which methylene chloride is used (*e.g.*, a decreased range of motion or access to a small space could hinder PPE use). Nevertheless, owners and operators must provide respirators that are protective of the measured exposure concentration after all other feasible controls are considered.

- If the measured exposure concentration is at or below the ECEL (2 ppm 8-hour TWA) and EPA STEL (16 ppm 15-minute TWA): Respiratory protection is not required.

- If the measured exposure concentration is above 2 ppm and less than or equal to 50 ppm (25 times the ECEL): The required respirator protection is any NIOSH Approved® SAR or airline respirator in a continuous-flow mode equipped with a

loose-fitting facepiece or helmet/hood (APF 25).

- If the measured exposure concentration is above 50 ppm and less than or equal to 100 ppm (50 times the ECEL): The required respirator protection is: (i) Any NIOSH Approved® SAR or airline respirator in a demand mode equipped with a full facepiece (APF 50); or (ii) Any NIOSH Approved® SCBA in demand-mode equipped with

a full facepiece or helmet/hood (APF 50).

- If the measured exposure concentration is unknown or at any value above 100 ppm and up to 2,000 ppm (1,000 times the ECEL): The required respirator protection is: (i) Any NIOSH Approved® SAR or Airline Respirator in a continuous-flow mode equipped with a full facepiece or certified helmet/hood (APF 1,000)); or

(ii) Any NIOSH Approved® SAR or Airline Respirator in pressure-demand or other positive-pressure mode equipped with a full facepiece and an auxiliary self-contained air supply (APF 1,000)); or (iii) Any NIOSH Approved® SCBA in a pressure-demand or other positive-pressure mode equipped with a full facepiece or certified helmet/hood (APF 1,000+).

TABLE 2—RESPIRATORY PROTECTION CONDITIONS AND REQUIREMENTS

Concentration condition	Minimum required respirator protection
At or below the ECEL and EPA STEL	No respirator required.
Above ECEL (2 ppm) and less than or equal to 50 ppm (25 times the ECEL).	Any NIOSH Approved® supplied-air respirator (SAR) or airline respirator in a continuous-flow mode equipped with a loose-fitting facepiece or helmet/hood (APF 25).
Above 50 ppm and less than or equal to 100 ppm (50 times the ECEL)	Either (i) any NIOSH Approved® Supplied-Air Respirator (SAR) or airline respirator in a demand mode equipped with a full facepiece (APF 50); or (ii) any NIOSH Approved® Self-Contained Breathing Apparatus (SCBA) in demand-mode equipped with a full facepiece or helmet/hood (APF 50).
Unknown concentration or at any value above 100 ppm and up to 2,000 ppm (1,000 times the ECEL).	One of (i) any NIOSH Approved® Supplied-Air Respirator (SAR) or Airline Respirator in a continuous-flow mode equipped with a full facepiece or certified helmet/hood (APF 1,000); or (ii) any NIOSH Approved® Supplied-Air Respirator (SAR) or Airline Respirator in pressure-demand or other positive-pressure mode equipped with a full facepiece and an auxiliary self-contained air supply (APF 1,000); or (iii) any NIOSH Approved® Self-Contained Breathing Apparatus (SCBA) in a pressure-demand or other positive-pressure mode equipped with a full facepiece or certified helmet/hood (APF 10,000).

7. Additional Finalized Requirements

a. Workplace Participation

EPA encourages owners and operators to consult with potentially exposed persons and on the development and implementation of exposure control plans and PPE/respirator programs. EPA is finalizing its requirement that owners and operators provide potentially exposed persons regular access to the exposure control plans, exposure monitoring records, PPE program implementation, and respirator program implementation (such as fit-testing and other requirements) described in 29 CFR 1910.134(l). To ensure compliance with workplace participation, EPA is finalizing its requirement that the owner or operator document the notice to and ability of any potentially exposed person that may reasonably be affected by methylene chloride inhalation exposure to readily access the exposure control plans, facility exposure monitoring records, PPE program implementation, or any other information relevant to methylene chloride inhalation exposure in the workplace.

b. Notification of Monitoring Results

EPA is finalizing the requirement that when a potentially exposed person's exposure to methylene chloride exceeds

the ECEL action level within a regulated area, the owner or operator will be required to inform each potentially exposed person of the quantity, location, manner of use, release, and storage of methylene chloride and the specific operations in the workplace that could result in exposure to methylene chloride, particularly noting where exposures may be above the ECEL or EPA STEL. EPA further requires that the owner or operator must, within 15 working days after receipt of the results of any exposure monitoring, notify each potentially exposed person whose exposure is represented by that monitoring in writing, either individually to each potentially exposed person or by posting the information in an appropriate and accessible location, such as public spaces or common areas, for potentially exposed persons outside of the regulated area. The notice would be required to identify the ECEL, ECEL action level, and EPA STEL and what they mean in plain language, the exposure monitoring results, and any corresponding respiratory protection required. If the ECEL or STEL is exceeded, the notice would also be required to include a description of the actions taken by the owner or operator to reduce inhalation exposures to or

below the ECEL or EPA STEL which states the actions to be taken to reduce exposures. The notice must be posted in multiple languages if necessary (*e.g.*, notice must be in a language that the potentially exposed person understands, including a non-English language version representing the language of the largest group of workers who cannot readily comprehend or read English).

c. Recordkeeping

For each monitoring event of methylene chloride, EPA is requiring that the owner or operator record, similar to OSHA under 29 CFR 1910.1052(m), information including but not limited to, dates; operations involving exposure; sampling and analytical methods; the number of samples; durations, and results of each sample taken; the type of respirator and PPE worn (if any); the potentially exposed persons' names, work shifts, and job classifications; and exposure of all the potentially exposed persons represented by monitoring, indicating which potentially exposed persons were actually monitored. EPA further requires documentation of the following whenever monitoring for the WCPP is required under TSCA section 6(a):

(i) All measurements that may be necessary to determine the conditions

(e.g., work site temperatures, humidity, ventilation rates, monitoring equipment type and calibration dates) that may affect the monitoring results;

(ii) All other potentially exposed persons whose exposure was not measured but whose exposure is intended to be represented by the area or representative sampling monitoring;

(iii) Use of established analytical methods such as those outlined in appendix A of the ECEL memo (Ref. 93) with a limit of detection below the ECEL action level and accuracy of monitoring within 25% for the ECEL and 35% for the EPA STEL, as discussed in Unit IV.B.4.a., so that the owner or operator may identify when the implementation of additional exposure controls is necessary, determine the monitoring frequency according to the requirements described in this unit, and properly identify and provide persons exposed to methylene chloride with the required respiratory equipment and PPE in this unit;

(iv) Compliance with the GLP Standards at 40 CFR part 792 or any accredited lab including AIHA (e.g., AIHA LAP, LLC Policy Module 2A/B/E of Revision 17.3), or other analogous industry-recognized program;

(v) Information regarding air monitoring equipment, including: Type, maintenance, calibrations, performance tests, limits of detection, and any malfunctions.

For owners and operators to demonstrate compliance with the WCPP provisions, EPA is requiring that owners and operators must retain compliance records for five years (although this requirement does not supplant any longer recordkeeping retention time periods such as those required under 29 CFR 1910.1020, or other applicable regulations). EPA is requiring the owner or operator to retain records of:

- Exposure control plan;
- Regulated areas and authorized personnel;
- Facility exposure monitoring records;
- Notifications of exposure monitoring results;
- PPE and respiratory protection used and program implementation; and
- Information and training required under 29 CFR 1910.1052(l) and appendix A, provided by the owner or operator to each potentially exposed person prior to or at the time of initial assignment to a job involving potential exposure to methylene chloride.

EPA emphasizes that all records required to be maintained can be kept in the most administratively convenient form; electronic record form or paper form. The owner or operator is required

to document training or re-training of any potentially exposed person as necessary to ensure that, in the event of monitoring results that indicate exposure or possible exposures above the ECEL action level or the EPA STEL, the potentially exposed person has demonstrated understanding of how to safely use and handle methylene chloride and how to appropriately use required PPE. In addition, the owner or operator is required to update the training and requisite documentation when there is reasonable expectation that exposure may exceed the ECEL action level due to change in tasks or procedures.

8. Compliance Timeframes

With regard to the compliance timeframe for those occupational conditions of use which are subject to the WCPP, EPA is not finalizing the timeframes proposed. Rather, as discussed in Unit III.D.1., based on consideration of public comments, EPA is finalizing the timeframes considered in the primary alternative action for the private sector and is providing Federal agencies and Federal contractors acting for or on behalf of the Federal Government additional time to comply with each of the provisions of the WCPP. Specifically, EPA is finalizing its requirement that owners and operators in the private sector establish initial exposure monitoring according to the process outlined in this unit within 360 days after date of publication of the final rule in the **Federal Register**, while Federal agencies and Federal contractors acting for or on behalf of the Federal Government must conduct initial exposure monitoring within 915 days after the date of publication. EPA is also finalizing its requirement that each owner or operator in the private sector ensure that the airborne concentration of methylene chloride does not exceed the ECEL or EPA STEL for all potentially exposed persons within 450 days after the date of publication of the final rule in the **Federal Register**, while Federal agencies and Federal contractors acting for or on behalf of the Federal Government must comply with the ECEL and the EPA STEL within 1,005 days after the date of publication. If applicable, each owner or operator must provide respiratory protection sufficient to reduce inhalation exposures to below the ECEL or EPA STEL to all potentially exposed persons in the regulated area within three months after receipt of the results of any exposure monitoring. For the private sector, this will be within 15 months after the date of publication of the final rule in the **Federal Register**.

For Federal agencies and Federal contractors acting for or on behalf of the Federal Government, this will be within 33 months after the date of publication. For any new facilities, or any facility commencing one or more conditions of use listed in Unit IV.B.1. after May 5, 2025, the timeframe for the requirement for initial exposure monitoring is described earlier in Unit IV.B.4.b.; following that, the requirements and timeframes for periodic monitoring in Unit IV.B.4.c. would apply and owners and operators must ensure that no person is exposed to an airborne concentration of methylene chloride that exceeds the ECEL or EPA STEL within 90 days following the initial exposure monitoring). EPA is also finalizing the requirement that owners and operators demarcate a regulated area within three months after receipt of any exposure monitoring that indicates exposures exceeding the ECEL or EPA STEL. Owners and operators in the private sector shall proceed accordingly to implement an exposure control plan, including institution of feasible exposure controls other than PPE, within 540 days after date of publication of the final rule in the **Federal Register**, while Federal agencies and Federal contractors acting for or on behalf of the Federal Government must implement an exposure control plan within 1095 days after the date of publication.

C. Prohibition of Manufacture, Processing, Distribution, and Commercial Use of Methylene Chloride

In general, EPA is finalizing the prohibitions as proposed, with some modifications, including for compliance timeframes to provide for reasonable transitions, based on consideration of the public comments, as described in Unit III. The rule prohibits manufacture, processing, distribution, and all industrial and commercial use of methylene chloride and methylene chloride containing products, except for those uses which will continue under the WCPP, as identified in Unit IV.B.1. After consideration of public comments, EPA is finalizing timeframes longer than proposed for prohibition of manufacture, processing, distribution, and commercial use of methylene chloride broadly, as well as for particular uses such as commercial use of methylene chloride in adhesives and sealants in aircraft, space vehicles, and turbine applications; and commercial use of methylene chloride in paint and coating removal for the refinishing of wooden pieces of artistic, cultural, or historic value. The rationale for these changes from the proposed rule is in Unit III.B. and Unit III.D.2.

As discussed in Unit IV.A. and in the Response to Comments, the prohibitions do not apply to any substance that is excluded from the definition of “chemical substance” under TSCA section 3(2)(B)(ii) through (vi) (Ref. 7).

The final regulation will impose prohibitions in a staggered timeframe, beginning at the top of the supply chain, as proposed. As discussed in Unit III.D.2., in response to comments received, EPA is finalizing longer timeframes than proposed for prohibition of manufacturing, processing, distributing, or commercial use of methylene chloride, but finalizing as proposed for distribution to and by retailers, in order to expeditiously remove exposures to consumers. EPA is finalizing timeframes for prohibitions according to the following staggered timeframe:

- Within 270 days of publication of the final rule in the **Federal Register** for prohibitions on distributing to retailers;
- Within 360 days of publication of the final rule in the **Federal Register** for prohibitions on distribution by retailers;
- Within 360 days of publication of the final rule in the **Federal Register** for prohibitions on manufacturing;
- Within 450 days of publication of the final rule in the **Federal Register** for prohibitions on processors;
- Within 630 days of publication of the final rule in the **Federal Register** for prohibitions on all distributors other than retailers; and
- Within 720 days of publication of the final rule in the **Federal Register** for prohibitions on most industrial and commercial use after the publication date of the final rule in the **Federal Register**.

(Timeframes for prohibitions on distribution of methylene chloride and methylene-chloride containing products to retailers are provided in Unit IV.D., in relation to consumer use).

Additionally, for two conditions of use, EPA is finalizing prohibitions that would take effect in five years. Those two conditions of use are commercial use of methylene chloride in adhesives and sealants in aircraft, space vehicle, and turbine applications for structural and safety critical non-structural applications, and for commercial use of methylene chloride in refinishing wood pieces of artistic, cultural, or historic value (which also includes interim requirements for minimum exposure controls). While EPA had proposed that these prohibitions begin to be implemented within 90 days for manufacturers, 180 days for processors, 270 days for distributors to retailers, 360 days for all other distributors and retailers, and 450 days for industrial and

commercial uses after the publication date of the final rule, EPA is modifying the timeframes proposed based on the information received in public comment.

EPA is delaying compliance with the prohibition for a subset of the industrial and commercial use of methylene chloride in adhesives and sealants, namely when that adhesive or sealant is used in aircraft, space vehicle, or turbine applications for structural and safety critical non-structural applications. As described in Unit III.B.2., this use of methylene chloride includes applications such as use in bonding critical turbine engine hardware, use as a joining compound in engine parts, and adhesive to bond capacitors, transformers, components, military PC boards and subassemblies, and gasket sealants in aerospace systems. Based on information received in public comments, EPA is finalizing delayed compliance of five years before prohibition for industrial or commercial use of methylene chloride for adhesives and sealants in aircraft, space vehicle, and turbine applications for structural and safety critical non-structural applications.

Regarding commercial use of methylene chloride for paint and coating removal for wood furniture, decorative pieces, and architectural fixtures of artistic, cultural, or historic value, as discussed in Unit III.B.1., EPA is modifying the compliance dates proposed for prohibitions and is finalizing a compliance date of five years before prohibitions only for the narrowly described commercial use of methylene chloride in this unit: For refinishing wood pieces of artistic, cultural, or historic value, as discussed in Unit III.B.1.

During the interim period before prohibition, owners or operators must not only restrict refinishing using methylene chloride only to wooden furniture, decorative pieces, and architectural fixtures of artistic, cultural or historic value, but also must meet a minimum standard of exposure control. That includes: (1) Use of a regulated area; (2) use of local exhaust ventilation, both bringing air in from outside of the workspace where methylene chloride is being used and pulling methylene chloride vapors away from the potentially exposed person; and (3) use of any NIOSH Approved® SAR or airline respirator in a demand mode equipped with a full facepiece (APF 50) or any NIOSH Approved® SCBA in demand-mode equipped with a full facepiece or helmet/hood (APF 50) or the appropriate respirator based on initial monitoring as outlined in Unit

IV.B.4.b. and in the regulatory text under 40 CFR 751.109(d).

The owner or operator shall document each instance of refinishing wooden furniture, decorative pieces, and architectural fixtures of artistic, cultural or historic value. The documentation shall make record of the date of the refinishing activity, a description of the piece that was refinished and an explanation of its artistic, cultural, or historic value, the owner of the refinished piece, and the methylene chloride product used. EPA generally expects this information to be part of normal business records.

D. Prohibition of Manufacture, Processing, and Distribution in Commerce for Consumer Use of Methylene Chloride

The final rule prohibits the manufacture, processing, and distribution in commerce of methylene chloride and methylene chloride containing products for all consumer use. EPA is finalizing as proposed the prohibition on retailers from distributing in commerce methylene chloride and all methylene chloride-containing products, in order to prevent products intended for industrial and commercial use under the WCPP from being purchased by consumers. EPA is finalizing that the prohibition on distribution in commerce of methylene chloride within 270 days for distributing to retailers, and 360 days for retailers distributing in commerce after the publication date of the final rule in the **Federal Register**.

A retailer is any person or business entity that distributes or makes available products to consumers, including through e-commerce internet sales or distribution. If a person or business entity distributes or makes available any product to at least one consumer, then it is considered a retailer (40 CFR 751.103). For a distributor not to be considered a retailer, the distributor must distribute or make available products solely to commercial or industrial end-users or businesses. Prohibiting manufacturers (including importers), processors, and distributors from distributing methylene chloride, or any products containing methylene chloride, to retailers prevents retailers from making these products available to consumers, which addresses that part of the unreasonable risk from methylene chloride contributed by consumer use. EPA first promulgated this definition, with this rationale, in the earlier rule to regulate methylene chloride in consumer paint and coating removers (84 FR 11420, March 27, 2019) (FRL–

9989–29) and is finalizing as proposed for this regulation as well.

E. Other Requirements

1. Recordkeeping

For conditions of use that are not otherwise prohibited under this final rule, EPA is finalizing as proposed the requirement that manufacturers, processors, and distributors maintain ordinary business records, such as invoices and bills-of-lading, that demonstrate compliance with restrictions and other provisions of this final regulation; and that they maintain such records for a period of five years from the date the record is generated. This requirement begins at the effective date of the rule (60 days following publication of the final rule in the **Federal Register**). Recordkeeping requirements ensure that owners or operators can demonstrate compliance with the proposed regulations if necessary. Note that this requirement expands those recordkeeping requirements promulgated in 2019 at 40 CFR 751.109 affecting manufacturers, processors, and distributors of methylene chloride.

2. Downstream Notification

For conditions of use that are not otherwise prohibited under this final regulation, EPA is finalizing as proposed the requirements that manufacturers (including importers), processors, and distributors, excluding retailers, of methylene chloride and methylene chloride-containing products provide downstream notification of certain prohibitions through Safety Data Sheets (SDSs) by adding to sections 1(c) and 15 of the SDS the following language:

After February 3, 2025, this chemical substance (as defined in TSCA section 3(2))/product cannot be distributed in commerce to retailers. After January 28, 2026, this chemical substance (as defined in TSCA section 3(2))/product is and can only be distributed in commerce or processed with a concentration of methylene chloride equal to or greater than 0.1% by weight for the following purposes: (1) Processing as a reactant; (2) Processing for incorporation into a formulation, mixture, or reaction product; (3) Processing for repackaging; (4) Processing for recycling; (5) Industrial or commercial use as a laboratory chemical; (6) Industrial or commercial use as a bonding agent for solvent welding; (7) Industrial and commercial use as a paint and coating remover from safety critical, corrosion-sensitive components of aircraft and spacecraft; (8) Industrial and commercial use as a processing aid; (9) Industrial and commercial use for plastic and rubber products manufacturing; (10) Industrial and commercial use as a solvent that becomes

part of a formulation or mixture, where that formulation or mixture will be used inside a manufacturing process, and the solvent (methylene chloride) will be reclaimed; (11) Industrial and commercial use in the refinishing for wooden furniture, decorative pieces, and architectural fixtures of artistic, cultural or historic value until May 8, 2029; (12) Industrial and commercial use in adhesives and sealants in aircraft, space vehicle, and turbine applications for structural and safety critical non-structural applications until May 8, 2029; (13) Disposal; and (14) Export.

To provide adequate time to update the SDS and ensure that all products in the supply chain include the revised SDS, EPA's final rule requires manufacturers revise their SDS within 150 days of publication and processors and distributors revise their SDS within 210 days of publication of the final rule.

The intention of downstream notification is to spread awareness throughout the supply chain of the restrictions on methylene chloride under TSCA and to provide information to commercial end-users about allowable uses of methylene chloride. Note that this requirement would amend and add to the downstream notification requirements promulgated in 2019 at 40 CFR 751.107 for paint and coating removers for consumer use and additionally redesignate that section as 40 CFR 751.111. As they become effective, the new amended requirements will supersede those notification requirements promulgated in 2019.

F. TSCA Section 6(g) Exemptions

EPA is finalizing as proposed a 10-year exemption for emergency use of methylene chloride in furtherance of the National Aeronautics and Space Administration (NASA)'s mission for the following specific conditions of use: Industrial and commercial use as a solvent for cold cleaning; Industrial and commercial use as a solvent for aerosol spray degreaser/cleaner; Industrial and commercial use in adhesives, sealants and caulks; Industrial and commercial use in adhesive and caulk removers; Industrial and commercial use in metal non-aerosol degreasers; Industrial and commercial use in non-aerosol degreasers and cleaners; and Industrial and commercial use as a solvent that becomes part of a formulation or mixture. The exemption includes additional requirements, pursuant to TSCA section 6(g)(4), including required notification and controls for exposure, to the extent feasible: (1) NASA and its contractors must provide notice to the EPA Assistant Administrators of both the Office of Enforcement and Compliance Assurance and the Office of

Chemical Safety and Pollution Prevention of each instance of emergency use within 15 working days and; (2) NASA and its contractors would have to comply with the WCPP described in Unit IV.B. to the extent feasible.

Specifically, this regulation requires NASA and its contractors to notify the EPA Assistant Administrators of both the Office of Enforcement and Compliance Assurance and the Office of Chemical Safety and Pollution Prevention within 15 days of the emergency use. The notification must include a description of the specific use of methylene chloride in the context of one of the conditions of use for which this exemption is being finalized, an explanation of why the use described qualifies as an emergency, and an explanation with regard to the lack of availability of technically and economically feasible alternatives.

EPA expects NASA and its contractors have the ability to implement a WCPP as described in Unit IV.B. for the identified uses in the context of an emergency, to some extent even if not to the full extent of WCPP implementation. Therefore, NASA and its contractors must comply with the WCPP to the extent technically feasible in light of the particular emergency.

NASA and its contractors would still be subject to the general recordkeeping requirements discussed in Unit IV.B.7.c.

V. TSCA Section 6(c)(2) Considerations

A. Health Effects of Methylene Chloride and the Magnitude of Human Exposure to Methylene Chloride

EPA's analysis of the health effects of methylene chloride is in the 2020 Risk Evaluation for Methylene Chloride (Ref. 1). A summary is presented here.

The 2020 Risk Evaluation for Methylene Chloride identified six non-cancer adverse health effects: Effects from acute/short-term exposure, liver effects, immune system effects, nervous system effects, reproductive/developmental effects, and irritation/burns (Ref. 1). The 2020 Risk Evaluation for Methylene Chloride also identified cancer hazards from carcinogenicity as well as genotoxicity, particularly for liver and lung tumors (Ref. 1).

Among the non-cancer adverse health effects, the 2020 Risk Evaluation for Methylene Chloride identified neurotoxicity indicative of central nervous system depression as a primary effect of methylene chloride in humans following acute inhalation exposures (Ref. 1). Identified central nervous system depressive symptoms include drowsiness, confusion, headache,

dizziness, and neurobehavioral deficits when performing various tasks. Central nervous system depressant effects can result in loss of consciousness and respiratory depression, possibly resulting in irreversible coma, hypoxia, and eventual death (Ref. 1).

Additionally, the 2020 Risk Evaluation for Methylene Chloride identified the liver as a sensitive target organ for inhalation exposure (Ref. 1). For human health risks to workers and consumers, EPA identified cancer and non-cancer human health risks. Risks from acute exposures include central nervous system risks such as central nervous system depression and a decrease in peripheral vision, each of which can lead to workplace accidents and are precursors to more severe central nervous system effects such as incapacitation, loss of consciousness, coma, and death. For chronic exposures, EPA identified risks of non-cancer liver effects as well as liver and lung tumors (Ref. 1).

The 2020 Risk Evaluation for Methylene Chloride also identified several irritation hazards from methylene chloride exposure. Following exposures to methylene chloride vapors, irritation has been observed in the respiratory tract and eyes. Direct contact with liquid methylene chloride on the skin has caused chemical burns in workers and gastrointestinal irritation in individuals who accidentally ingested methylene chloride (Ref. 1).

Regarding the magnitude of human exposure, one factor EPA considers for the conditions of use that contribute to the unreasonable risk is the size of the exposed population, which, for methylene chloride, EPA estimates is 785,000 workers, 135,000 occupational non-users, and 15 million consumers (Ref. 1).

In addition to these estimates of numbers of workers, occupational non-users, consumers, and bystanders to consumer use directly exposed to methylene chloride, EPA recognizes there is exposure to the general population from air and water pathways for methylene chloride. (While bystanders are individuals in proximity to a consumer use of methylene chloride, fenceline communities are a subset of the general population who may be living in proximity to a facility where methylene chloride is being used in an occupational setting). EPA separately conducted a screening approach to assess whether there may be risks to the general population from these exposure pathways. This analysis is summarized in full in the proposed rule, which includes information on the SACC peer review (88 FR 28284, May 3,

2023) (FRL–8155–02–OCSPP). This unit addresses those areas where some risk was indicated at the fenceline, and the use will be continuing under the rule.

EPA's analysis was presented to the SACC peer review panel in March 2022, and EPA is including SACC recommendations, as appropriate, in assessing general population exposures in upcoming risk evaluations.

EPA's fenceline analysis for the water pathway for methylene chloride, based on methods presented to the SACC, did not find risks from incidental oral and dermal exposure to surface water, and while EPA found one facility which indicated acute risk from drinking water, additional assessment of this location identified that there are no source drinking water intakes for public drinking water systems in proximity to the facility estimated to have risk, thereby making risks to the general population through the drinking water pathway unlikely.

Although the initial analysis presented to SACC and the multi-year analysis conducted in response to SACC feedback for methylene chloride indicated exposure and associated risks to select populations within the general population living or working near particular facilities from the ambient air pathway, EPA is unable to formally determine with this screening methodology whether those risks contribute to the unreasonable risk, because the screening methodology was not developed for that purpose. However, EPA believes that the prohibitions being finalized for manufacturing (including importing), processing, and distribution in commerce for all consumer use and most commercial use would address the majority of exposures to the general population, including fenceline communities. Of the 14 facilities which indicated some risk for methylene chloride, under the final regulation, only six will continue to use methylene chloride (three facilities for processing: Incorporation into formulation, mixture, or reaction product, two facilities for plastic and rubber product manufacturing, and one facility for paint and coating remover), and thus exposures at the fenceline at the remainder of those facilities would be addressed.

Of those six facilities, the multi-year analysis indicated potential risk at 100 meters for only three facilities representing two conditions of use—two for plastic and rubber product manufacturing and one for processing: Incorporation into a formulation, mixture, or reaction process. Anticipated use trends for these three

conditions of use are discussed in this unit.

EPA anticipates processing into a formulation, mixture, or reaction product to decline because, while processing into a formulation, mixture, or reaction product will continue under a WCPP, all downstream distribution and use of formulations, mixtures, or reaction products will be prohibited except those handful of uses which will continue under the WCPP, a majority of which require the application of neat methylene chloride, rather than a formulated product. Additionally, the facility with identified risk at the fenceline for processing: Incorporation into formulation, mixture, or reaction product does not appear to have communities currently located at the fenceline based on land use analysis (Ref. 101). For use of methylene chloride in plastic and rubber product manufacturing, EPA does not have reason to believe the use of methylene chloride will increase, nor that there will be significant increase in fenceline exposures in this sector, which is heavily regulated by the CAA (Ref. 102).

For both processing: Incorporation into a formulation, mixture, or reaction product and plastic and rubber product manufacturing, the final rule would require exposure controls via implementation of a WCPP as described in Unit IV.B. While it is plausible that efforts to reduce exposures in the workplace to levels below the ECEL and EPA STEL could lead to adoption of engineering controls that ventilate more methylene chloride outside, EPA determined this outcome is unlikely, particularly for plastic and rubber product manufacturing. This is because, as discussed in Unit III.A.2., monitoring data submitted during the comment period indicates current exposure levels are already very near or below the ECEL so the addition of engineering controls that could, in theory, ventilate more methylene chloride outside is not expected to occur. Additionally, in a scenario where venting methylene chloride out of the work area and into the outside air, this potential exposure would be required to be limited as a result of the numerous existing NESHAPs for methylene chloride for these conditions of use under the CAA (applicable NESHAPs: 40 CFR part 63, subparts F, G, H, and I; 40 CFR part 63, subpart DD; 40 CFR part 63, subpart YY (79 FR 60898, October 8 2014); 40 CFR part 63, subpart VVV; and 40 CFR part 63 subpart VVVVVV, and any exceedances would be an enforcement issue. Thus, prohibition of manufacture, processing, and distribution in commerce of methylene chloride for all

consumer use and most industrial and commercial use, and prohibition of most industrial and commercial use of methylene chloride, is expected to largely address the risks identified in the screening analysis to any general population or fence-line communities close to facilities engaging in methylene chloride use. EPA therefore does not intend to revisit the air pathway for methylene chloride as part of a supplemental risk evaluation.

B. Environmental Effects of Methylene Chloride and the Magnitude of Environmental Exposure to Methylene Chloride

EPA's analysis of the environmental effects of and the magnitude of exposure of the environment to methylene chloride is in the 2020 Risk Evaluation for Methylene Chloride (Ref. 1). The unreasonable risk determination for methylene chloride is based solely on risks to human health; based on the 2020 Risk Evaluation for Methylene Chloride, EPA determined that exposures to the environment did not contribute to the unreasonable risk.

For all conditions of use, exposures via water for acute and chronic exposures to methylene chloride for amphibians, fish, and aquatic invertebrates do not contribute to the unreasonable risk. To characterize aquatic organisms' exposure to methylene chloride, modeled data were used to represent surface water concentrations near facilities actively releasing methylene chloride to surface water, and monitored concentrations were used to represent ambient water concentrations of methylene chloride. EPA considered the biological relevance of the species to determine the concentrations of concern for the location of surface water concentration data to produce risk quotients, as well as frequency and duration of the exposure. While some site-specific risk quotients, calculated from modeled release data from facilities conducting recycling, disposal, and wastewater treatment plant activities, exceeded risk benchmarks, uncertainties in the analysis were considered. These uncertainties include limitations in data, since monitoring data were not available near facilities where methylene chloride is released, and data incorporated from the Toxics Release Inventory, which does not include release data for facilities with fewer than ten employees. As an additional uncertainty, the model does not consider chemical fate or hydrologic transport properties and may not consider dilution in static water bodies. Additional analysis indicated that

model outputs, rather than monitoring estimates, may best represent concentrations found at the point of discharge from the facilities (Ref. 1).

The toxicity of methylene chloride to sediment-dwelling invertebrates is similar to its toxicity to aquatic invertebrates. Methylene chloride is most likely present in the pore waters and not absorbed to the sediment organic matter because methylene chloride has low partitioning to organic matter. The concentrations in sediment pore water are similar to or less than the concentrations in the overlying water, and concentrations in the deeper part of sediment are lower than the concentrations in the overlying water. Therefore, the risk estimates, based on the highest ambient surface water concentration, do not support an unreasonable risk determination to sediment-dwelling organisms from acute or chronic exposures. There is uncertainty due to the lack of ecotoxicity studies specifically for sediment-dwelling organisms and limited sediment monitoring data (Ref. 1).

Based on its physical-chemical properties, methylene chloride does not partition to or accumulate in soil. Therefore, the physical chemical properties of methylene chloride do not support an unreasonable risk determination to terrestrial organisms.

C. Benefits of Methylene Chloride for Various Uses

As described in the proposed rule, methylene chloride is a solvent used in a variety of industrial, commercial, and consumer use applications, including adhesives, pharmaceuticals, metal cleaning, chemical processing, and feedstock in the production of refrigerant HFC-32 (82 FR 7467). Specifically, methylene chloride use in commercial paint and coating removal provides benefits for some users because it is readily available and works quickly and effectively on nearly all coatings without damaging most substrates. For a variety of additional uses (e.g., adhesives, adhesive removers, cold pipe insulation, welding anti-spatter spray) methylene chloride is relatively inexpensive, highly effective, evaporates quickly, and is not flammable, making it a popular and effective solvent for many years. As of 2016, the leading applications for methylene chloride are as a solvent in the production of pharmaceuticals and polymers and paint removers, although recent regulations and voluntary industry actions are expected to decrease the chemical's use in the paint remover sector (40 CFR part 751, subpart B). The

total aggregate production volume ranged from 100 to 500 million pounds between 2016 and 2019 according to CDR (Ref. 6).

D. Reasonably Ascertainable Economic Consequences of the Final Rule

1. Likely Effect of the Rule on the National Economy, Small Business, Technological Innovation, the Environment, and Public Health

The reasonably ascertainable economic consequences of this final rule include several components, all of which are described in the Economic Analysis (Ref. 3). With respect to the anticipated effects of this final rule on the national economy, EPA considered the number of businesses and workers that would be affected and the costs and benefits to those businesses and workers and did not find that there would be an impact on the national economy (Ref. 3). The economic impact of a regulation on the national economy becomes measurable only if the economic impact of the regulation reaches 0.25% to 0.5% of Gross Domestic Product (GDP) (Ref. 103). Given the current GDP, this is equivalent to a cost of \$40 billion to \$80 billion. Therefore, because EPA has estimated that the non-closure-related cost of the proposed rule would range from \$37.0 million annualized over 20 years at a 3% discount rate and \$39.5 million annualized over 20 years at a 7% discount rate, EPA has concluded that this rule is highly unlikely to have any measurable effect on the national economy (Ref. 3). In response to the updated Circular A-4 published in November 2023, the incremental, non-closure related costs of this rule at a 2% discount rate (\$36.4 million annualized over 20 years) is provided in appendix D of the Economic Analysis (Ref. 3). In addition, EPA considered the employment impacts of this final rule, and found that the direction of change in employment is uncertain, but EPA expects the short-term and longer-term employment effects to be small.

Of the small businesses potentially impacted by this final rule, 99% (229,635 firms) are expected to have impacts of less than 1% to their firm revenues (rounded metric), 1% (1,668 firms) are expected to have impacts between 1 and 3% to their firm revenues (rounded metric), and 0.5% (1,148 firms) are expected to have impacts greater than 3% to their firm revenues (rounded metric). Excluding end-users, total estimated impacts on small businesses are \$9.3 million (annualized using a 7 percent discount rate). End users with economic and technologically feasible alternatives

available do not have economic impacts that are estimated beyond rule familiarization costs (\$1.8 million in total costs, annualized using a 7 percent discount rate).

With respect to this rule's effect on technological innovation, EPA expects this rule to spur more innovation than it will hinder. A prohibition or significant restriction on the manufacture, processing, and distribution in commerce of methylene chloride for uses covered in this final rule may increase demand for existing, as well as development of additional, safer chemical substitutes. In specifying delayed compliance with a restriction, EPA must specify a date as soon as practicable, and that period may be necessary to develop and implement alternatives to a restricted chemical. For example, the 5-year delayed compliance with the prohibition for certain furniture refinishers allows extra time for the continued development and implementation of alternative paint and coating removers to be developed and tested in the marketplace. Outreach with processors indicated some were working on paint and coating removers to fill the void from methylene chloride products in the event of a prohibition in commercial industries (e.g. EPA-HQ-OPPT-2020-0465-0181). This rule is not likely to have significant effects on the environment because, as discussed in Unit II.C.3., methylene chloride does not present an unreasonable risk to the environment, though this rule does present the potential for small reductions in air emissions and soil contamination associated with improper disposal of products containing methylene chloride. The effects of this rule on public health are estimated to be positive, due to the potential prevention of deaths from acute exposure and reduced risk of cancer from chronic exposure to methylene chloride, as well as other reduced risks from other effects which, while tangible and significant, cannot be monetized, as described in Unit V.D.2.

2. Costs and Benefits of the Regulatory Action and of the One or More Primary Alternative Regulatory Actions Considered by the Administrator

The costs and benefits that can be monetized for this rulemaking are described at length in the Economic Analysis (Ref. 3). The non-closure-related costs for this final rule are estimated to be \$37.0 million annualized over 20 years at a 3% discount rate and \$39.5 million annualized over 20 years at a 7% discount rate. The monetized benefits are estimated to be \$24.8 to \$25.1

million annualized over 20 years at a 3% discount rate and \$19.8 to \$20.0 million annualized over 20 years at a 7% discount rate. In response to the updated Circular A-4 published in November 2023, the incremental, non-closure related costs of this rule at a 2% discount rate (\$36.4 million annualized over 20 years) and benefits (\$27.1 to \$27.5 million annualized over 20 years) are provided in appendix D of the Economic Analysis (Ref. 3).

Due to unique circumstances in furniture refinishing, and, in particular, commercial use of methylene chloride in refinishing for wooden furniture, decorative pieces, and architectural fixtures of artistic, cultural or historic value (as discussed in detail in Unit III.B.1.), a prohibition of methylene chloride in this industry may result in firm closures for the sector as a whole. It is possible to estimate that profits for the 4,899 furniture refinishing firms that use methylene chloride are approximately \$63 million using the average estimated revenues per firm for NAICS 811420, Reupholstery and Furniture Repair (\$338,525 is average revenue) and an IRS (2013) estimate for profit in this sector of 3.8% of sales. Profit is related to, but not the same as producer surplus. Producer surplus is generally larger than profit since producer surplus is the difference between total revenue and marginal cost and profit is the difference between total revenue and total cost. Total revenue for the 4,899 furniture refinishing firms that use methylene chloride is estimated to be \$1.7 billion. Total revenue provides a measure of overall economic activity for these firms, but does not directly relate to the potential loss of producer and consumer surplus (*i.e.*, social cost) from potential closures or price increases in the furniture refinishing industry (Ref. 3). In addition, due to the uncertainty of the number and type of closures, EPA is unable to include these potential impacts in the monetized cost estimates for this action.

EPA considered the estimated costs to regulated entities as well as the cost to administer and enforce alternative regulatory actions. Estimated costs for regulatory alternatives can be found in the Economic Analysis for this final rule (Ref. 3).

This final rule is expected to achieve health benefits for the American public, some of which can be monetized and others that, while tangible and significant, cannot be monetized due to lack of dose-response data, as discussed in Unit I.E. At a discount rate of 2 percent over 20 years the monetized net benefits range from (\$9.3M) to (\$9.0) million (Ref. 3). EPA believes that the

balance of costs and benefits of this final rule cannot be fairly described without considering the additional, non-monetized benefits of mitigating the non-cancer adverse effects. The multitude of adverse effects from methylene chloride exposure can profoundly impact an individual's quality of life, as discussed in the proposed rule in Units II.A. (overview), III.B.2. (description of the unreasonable risk), V.A. (discussion of the health effects), and in the Risk Evaluation (85 FR 37942). Some of the adverse effects can be immediately experienced and can result in sudden death; others can have impacts that are experienced for a shorter portion of life but are nevertheless significant in nature. The incremental improvements in health outcomes achieved by given reductions in exposure cannot be quantified for non-cancer health effects associated with methylene chloride exposure, and therefore cannot be converted into monetized benefits. The qualitative discussion throughout this rulemaking and in the Economic Analysis highlights the importance of these non-cancer effects, which are not able to be monetized in the way that EPA is able to for cancer and death. These effects include not only cost of illness but also personal costs such as emotional and mental stress that are hard to measure appropriately. Considering only monetized benefits significantly underestimates the impacts of methylene chloride adverse outcomes and underestimates the benefits of this final rule.

The 2020 Risk Evaluation for Methylene Chloride identified two non-cancer health effects in reviewed scientific literature relevant to children, namely reproductive and developmental hazards (Ref. 1). The 2020 Risk Evaluation for Methylene Chloride summarizes human health hazards identified in the review of scientific literature, including studies investigating methylene chloride exposure and reproductive and developmental effects as well as developmental neurotoxicity. Some epidemiological studies identified effects that include reduced fertility, spontaneous abortions, oral cleft defects, heart defects, and autism spectrum disorder (ASD). For ASD, due to methodological reasons including confounding by other chemicals and lack of temporal specificity, the 2020 Risk Evaluation for Methylene Chloride did not advance this hazard to a dose response calculation. Additionally, EPA did not carry reproductive/developmental effects forward for dose-

response, because epidemiological studies lacked controls for co-exposures and animal studies observed effects mostly at higher methylene chloride concentrations. EPA also did not identify relevant mechanistic information, which informed this decision (Ref. 1). Nonetheless, additional health benefits may be achieved by reducing the incidence of reproductive effects for workers in commercial facilities or companies that use methylene chloride for the commercial uses proposed to be regulated (Ref. 3).

EPA was unable to estimate either the precise reduction in individual risk of these reproductive and developmental effects from reducing exposure to methylene chloride or the total number of cases avoided can be estimated due to a lack of necessary data. Nevertheless, reproductive hazards such as reduced fertility are important considerations. These health effects are serious and can have impacts throughout a lifetime; for example, infertility and fertility treatment can have deleterious social and psychological consequences such as mental distress (Ref. 104).

The potential impacts of these effects include monetary impacts from associated healthcare costs such as fertility treatments, as well as complications from fertility treatments (e.g., higher multiple birth rates), mental stress and emotional suffering, which cannot be quantified or monetized but should not be ignored.

3. Cost Effectiveness of the Regulatory Action and of One or More Primary Alternative Regulatory Actions Considered by the Administrator

Cost effectiveness is a method of comparing certain actions in terms of the expense per item of interest or goal. A goal of this regulatory action is to prevent user deaths resulting from exposure to methylene chloride. While preventing potential deaths due to methylene chloride exposure is not the only benefit of this regulatory action, it was the goal selected to use for the cost effectiveness calculations. The final rule regulatory option costs \$27 million per potential prevented death while the alternative option costs \$151 million per potential prevented death (using the 3 percent discount rate), indicating that the final rule option is more cost effective compared to the alternative option (Ref. 3). The primary difference between the final and alternative option is that the alternative includes prohibitions on some uses which fall under WCPP in the final rule, most notably the use of methylene chloride as a processing aid. EPA received multiple

public comments providing detailed cost information on the impacts of a prohibition of methylene chloride for this condition of use. This information was incorporated into the cost estimates for the alternative option (Ref. 3).

VI. TSCA Section 9 Analysis and Section 14 and 26 Considerations

A. TSCA Section 9(a) Analysis

TSCA section 9(a) provides that, if the Administrator determines, in the Administrator's discretion, that an unreasonable risk may be prevented or reduced to a sufficient extent by an action taken under a Federal law not administered by EPA, the Administrator must submit a report to the agency administering that other law that describes the risk and the activities that present such risk. TSCA section 9(a) describes additional procedures and requirements to be followed by EPA and the other Federal agency after submission of the report. As discussed in this Unit, the Administrator does not determine that unreasonable risk from methylene chloride under the conditions of use may be prevented or reduced to a sufficient extent by an action taken under a Federal law not administered by EPA. EPA's section 9(a) analysis can be found in full in Unit VII.A. of the proposed rule, and responses to comments on that 9(a) analysis can be found in the Response to Comments, section 8.5.1 (Ref. 7).

TSCA section 9(d) instructs the Administrator to consult and coordinate TSCA activities with other Federal agencies for the purpose of achieving the maximum enforcement of TSCA while imposing the least burden of duplicative requirements. For this rulemaking, EPA has coordinated with appropriate Federal executive departments and agencies including but not limited to OSHA, CPSC, and NIOSH to, among other things, identify their respective authorities, jurisdictions, and existing laws with regard to the risk evaluation and risk management of methylene chloride.

As discussed in more detail in the proposed rule, OSHA requires that employers provide safe and healthful working conditions by setting and enforcing standards and by providing training, outreach, education, and assistance. OSHA has established health standards for methylene chloride covering employers in General Industry, Shipyards, and Construction (29 CFR 1910.1052(a)). Gaps exist between OSHA's authority to set workplace standards under the OSH Act and EPA's obligations under TSCA section 6 to eliminate unreasonable risk presented

by chemical substances under the conditions of use. OSHA lacks direct jurisdiction over state and local government workers, and does not cover self-employed workers, military personnel, and uniquely military equipment, systems, and operations, and workers whose occupational safety and health hazards are regulated by another Federal agency (for example, the Mine Safety and Health Administration, the Department of Energy, or the Coast Guard) (Ref. 105). The U.S. Consumer Product Safety Commission (CPSC), under authority provided to it by Congress in the CPSA, protects the public from unreasonable risk of injury or death associated with consumer products. Under the CPSA, CPSC has the authority to regulate methylene chloride in consumer products, but not in other sectors such as automobiles, some industrial and commercial products, or aircraft, for example.

Therefore, EPA maintains that TSCA is the only vehicle to deliver broad protections to consumers who may use formulations that contain methylene chloride and whose use contributes to the unreasonable risk of injury to health from methylene chloride. An action under TSCA is also able to address occupational unreasonable risk and would reach entities that are not subject to OSHA. The timeframe and any exposure reduction as a result of updating OSHA or CPSC regulations for methylene chloride cannot be estimated, while TSCA imposes a much more accelerated two-year statutory timeframe for proposing and finalizing requirements to address unreasonable risk. Regulating methylene chloride's unreasonable risk utilizing TSCA authority will also avoid the situation where a patchwork of regulations amongst several Agencies using multiple laws and differing legal standards would occur and is therefore a more efficient and effective means of addressing the unreasonable risk of methylene chloride. Finally, as discussed in greater detail in the proposed rule, the 2016 amendments to TSCA altered both the manner of identifying unreasonable risk and EPA's authority to address unreasonable risk, such that risk management is increasingly distinct from provisions of the CPSA, FHSA, or OSH Act.

EPA therefore concludes that TSCA is the only regulatory authority able to prevent or reduce unreasonable risk of methylene chloride to a sufficient extent across the range of conditions of use, exposures, and populations of concern. For this reason, in the Administrator's discretion, the Administrator has

analyzed this issue and does not determine that unreasonable risk from methylene chloride may be prevented or reduced to a sufficient extent by an action taken under a Federal law not administered by EPA.

B. TSCA Section 9(b) Analysis

If EPA determines that actions under other Federal laws administered in whole or in part by EPA could eliminate or sufficiently reduce a risk to health or the environment, TSCA section 9(b) instructs EPA to use these other authorities to protect against that risk “unless the Administrator determines, in the Administrator’s discretion, that it is in the public interest to protect against such risk” under TSCA. In making such a public interest finding, TSCA section 9(b)(2) states “the Administrator shall consider, based on information reasonably available to the Administrator, all relevant aspects of the risk . . . and a comparison of the estimated costs and efficiencies of the action to be taken under this title and an action to be taken under such other law to protect against such risk.”

Although several EPA statutes have been used to limit methylene chloride exposure (Refs. 3,5), regulations under those EPA statutes largely regulate releases to the environment, rather than occupational or consumer exposures. While these limits on releases to the environment are protective in the context of their respective statutory authorities, regulation under TSCA is also appropriate for occupational and consumer exposures and in some cases can provide upstream protections that would prevent the need for release restrictions required by other EPA statutes (e.g., Resource Conservation and Recovery Act (RCRA), CAA, CWA). Updating regulations under other EPA statutes would not be sufficient to address the unreasonable risks from methylene chloride to workers, occupational non-users, consumers, and bystanders who are exposed under its conditions of use. EPA’s section 9(b) analysis can be found in full in Unit VII.B. of the proposed rule, and responses to comments on that 9(b) analysis can be found in the Response to Comments, section 8.5.2 (Ref. 7).

For these reasons, the Administrator does not determine that unreasonable risk from methylene chloride under its conditions of use, as evaluated in the 2020 Risk Evaluation for Methylene Chloride (Ref. 1), could be eliminated or reduced to a sufficient extent by actions taken under other Federal laws administered in whole or in part by EPA.

C. TSCA Section 14 Requirements

EPA is also providing notice to manufacturers, processors, and other interested parties about potential impacts to CBI. Under TSCA sections 14(a) and 14(b)(4), if EPA promulgates a rule pursuant to TSCA section 6(a) that establishes a ban or phase-out of a chemical substance, the protection from disclosure of any CBI regarding that chemical substance and submitted pursuant to TSCA will be “presumed to no longer apply,” subject to the limitations identified in TSCA section 14(b)(4)(B)(i) through (iii). Pursuant to TSCA section 14(b)(4)(B)(iii), the presumption against protection from disclosure will apply only to information about the specific conditions of use that this rule prohibits or phases out. Per TSCA section 14(b)(4)(B)(i), the presumption against protection will not apply to information about certain emergency uses that this rule exempts from a ban or phase-out pursuant to TSCA section 6(g). Manufacturers or processors seeking to protect such information may submit a request for nondisclosure as provided by TSCA sections 14(b)(4)(C) and 14(g)(1)(E). Any request for nondisclosure must be submitted within 30 days after receipt of notice from EPA under TSCA section 14(g)(2)(A) stating EPA will not protect the information from disclosure. EPA anticipates providing such notice via the Central Data Exchange (CDX).

D. TSCA Section 26 Considerations

As explained in the proposed rule, EPA fulfilled TSCA section 26(h) by using scientific information, technical procedures, measures, methods, protocols, methodologies, and models consistent with the best available science. Comments received on the proposed rule about whether EPA adequately assessed reasonably available information under TSCA section 26 on the risk evaluation, and responses to those comments, can be found in section 8.5.3 of the Response to Comments document (Ref. 7).

VII. References

The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not itself physically located in the docket. For assistance in locating these other documents, please consult

the person listed under **FOR FURTHER INFORMATION CONTACT**.

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VIII. Statutory and Executive Order Reviews

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

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review

This action is a “significant regulatory action” as defined under section 3(f)(1) of Executive Order 12866 (58 FR 51735, October 4, 1993), as amended by Executive Order 14094 (88 FR 21879, April 11, 2023). Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for Executive Order 12866 review. Documentation of any changes made in response to Executive Order 12866

review is available in the docket. EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis (Ref. 3), is available in the docket and summarized in Unit I.E.

B. Paperwork Reduction Act (PRA)

The information collection activities in this final rule have been submitted to OMB for approval under the PRA, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document that EPA prepared has been assigned EPA ICR No. 2735.02 and OMB Control No. 2070–0229 (Ref. 106). You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here. The information collection requirements are not enforceable until OMB approves them.

There are three primary provisions of the final rule that are expected to increase burden under the PRA.

The first is downstream notification, which will be carried out by updates to the relevant SDS and which is required for manufacturers, processors, and distributors in commerce of methylene chloride, who will provide notice to companies downstream upon shipment of methylene chloride about the prohibitions. The information submitted to downstream companies through the SDS will provide knowledge and awareness of the restrictions to these companies.

The second primary provision of the rule that is expected to increase burden under the PRA is WCPP-related information generation, recordkeeping, and notification requirements (including development of exposure control plans; exposure level monitoring and related recordkeeping; development of documentation for a PPE program and related recordkeeping; development of documentation for a respiratory protection program and related recordkeeping; development and notification to potentially exposed persons (employees and others in the workplace) about how they can access the exposure control plans, exposure monitoring records, PPE program implementation documentation, and respirator program documentation; and related recordkeeping).

The third primary provision of the rule that is expected to increase burden under the PRA is recordkeeping for interim requirements for commercial use of methylene chloride for refinishing wood pieces of artistic, historic or cultural significance (including documentation of details related to the refinishing activity and records demonstrating compliance with the exposure reduction controls).

Respondents/affected entities:

Persons that manufacture, process, use, distribute in commerce, or dispose of methylene chloride or products containing methylene chloride. See also Unit I.A.

Respondent's obligation to respond:

Mandatory (TSCA section 6(a) and 40 CFR part 751).

Estimated number of respondents:

237,969.

Frequency of response: On occasion.*Total estimated burden:* 149,090

hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: \$16,563,299 (per year), includes \$4,451,405 annualized capital or operation and maintenance costs.

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 OMB control numbers for the EPA regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

C. Regulatory Flexibility Act (RFA)

Pursuant to sections 603 and 609(b) of the RFA, 5 U.S.C. 601 *et seq.*, EPA prepared an IRFA for the proposed rule and convened a SBAR Panel to obtain advice and recommendations from SER that potentially would be subject to the rule's requirements. Summaries of the IRFA and Panel recommendations are presented in the proposed rule (88 FR 28284, May 3, 2023) (FRL-8155-02-OCSP).

As required by section 604 of the RFA, EPA prepared a FRFA for this action (Ref.21). The FRFA addresses the issues raised by public comments on the IRFA for the proposed rule. The complete FRFA is available for review in the docket and is summarized here.

1. Statement of Need and Rule Objectives

Under section 6(a) of TSCA (15 U.S.C. 2605(a)), if EPA determines after a TSCA section 6(b) risk evaluation that a chemical substance presents an unreasonable risk of injury to health or the environment, without consideration of costs or other non-risk factors, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the risk evaluation, under the conditions of use, EPA must by rule apply one or more requirements listed

in TSCA section 6(a) to the extent necessary so that the chemical substance or mixture no longer presents such risk. Methylene chloride was the subject of a risk evaluation under TSCA section 6(b)(4)(A) that was issued in June 2020. In addition, in November 2022, EPA issued a revised unreasonable risk determination that methylene chloride as a whole chemical substance presents an unreasonable risk of injury to health under the conditions of use. As a result, EPA is taking action to the extent necessary so that methylene chloride no longer presents such risk.

EPA developed this final rule after considering EPA's unreasonable risk determination for methylene chloride, information provided in public comments on the proposed rule, findings from and comments on the SBAR panel, other required consultations, and additional public outreach. For more information on the proposed rule, SBAR panel, and outreach efforts for this action, see the docket for this rulemaking (Docket ID Number EPA-HQ-OPPT-2020-0465).

To address the identified unreasonable risk, this rule: (1) Prohibits the manufacture, processing, and distribution in commerce of methylene chloride for consumer use; (2) prohibits most industrial and commercial uses of methylene chloride using the alternative timeframes from the proposed rule; (3) delays prohibition timeframes for two conditions of use of methylene chloride (including as a paint remover in furniture refinishing) to allow for reasonable transitions to alternatives; (4) requires a WCPP to be implemented within the alternative timeframes from the proposed rule for several occupational conditions of use, including three conditions of use for which the WCPP was not proposed; (5) removes the proposed distinction between Federal and commercial use of methylene chloride for two conditions of use under the WCPP; (6) allows for a de minimis threshold of methylene chloride in for products to account for impurities and non-intentional presence; (7) requires recordkeeping and downstream notification requirements for several conditions of use of methylene chloride; and (8) provides certain time-limited exemptions from requirements for uses of methylene chloride which are critical that have no technically feasible, safer alternative available.

2. Significant Issues Raised by the Public Comments in Response to the IRFA and EPA Response

An industry trade organization commented that the proposed rule "discriminates" against small businesses by providing them no opportunity to use methylene chloride under the proposed WCPP. The commenter also stated that the proposed rule contravenes the RFA by failing to discuss comments provided by small businesses. The commenter also faulted EPA for not discussing feedback received from small businesses regarding substitution costs prior to the proposed rule.

EPA Response: EPA's primary responsibility under TSCA is to address unreasonable risks presented by the chemical substance under the conditions of use, irrespective of the size of the business. Entities of any size under the conditions of use for which EPA is finalizing the WCPP, phaseouts, or time-limited exemptions may continue to process or use methylene chloride under the restrictions and requirements of the rule; EPA is not prohibiting or limiting participation due to firm size. Regarding the RFA, as required by the RFA, EPA convened a SBAR Panel, solicited input from SERs, used that feedback to generate Panel recommendations, incorporated those recommendations into the proposed rule, and published an IRFA and FRFA. EPA also identified the impacts of this rulemaking on small businesses (Ref. 19) and sought to identify flexibilities that could be provided. For the Economic Analysis, to the extent possible, EPA included specific and detailed substitution costs; however, most information the Agency received was not detailed enough to be incorporated.

3. SBA Office of Advocacy Comments and EPA Response

SBA Office of Advocacy provided comments on the proposed rule (EPA-HQ-OPPT-2020-0465). The comments below reflect a portion of the comments received by the SBA Office of Advocacy during the comment period. For the full list of comments and responses, see section 3 of the FRFA (Ref. 21).

Comment: SBA Office of Advocacy requested that EPA accept additional data after the close of the public comment period.

EPA Response: The Agency is working to finalize rules consistent with statutory timeframes under TSCA section 6(c)(1), which are to propose a risk management rulemaking within one year of a final risk evaluation for the

chemical substance, and to finalize the rulemaking within two years of the final risk evaluation. Should a late submission contain data that could be used to inform a future rulemaking, EPA may consider such information at that time.

Comment: SBA Office of Advocacy stated that, while EPA refers to uncertainty as to capacity for ECEL compliance as justification for proposed bans of methylene chloride, TSCA does not specify any level of certainty or compliance capability. TSCA simply requires that the unreasonable risk be addressed only to the extent necessary. SBA Office of Advocacy further stated that, by issuing the ECEL, EPA has identified the threshold at which the unreasonable risk is considered addressed, so if a user can comply with the ECEL, as proposed by EPA, there should be no unreasonable risk present. In the commenter's view, speculating about compliance capability goes beyond the scope of the statute.

EPA Response: EPA disagrees with the interpretation that TSCA requires EPA to ignore available information related to the ability of workplaces to successfully implement the WCPP for methylene chloride. The fact that there continue to be occupational deaths and nonfatal incidents related to methylene chloride exposure, as well as ongoing non-trivial levels of noncompliance with the OSHA Methylene Chloride Standard (Ref. 11), indicate that compliance with regulatory controls on workplace exposures to methylene chloride, including the WCPP, cannot be assumed. Moreover, if EPA were to regulate all workplaces via implementation of the WCPP, EPA believes that it would present significant and widespread implementation difficulties across multiple industry sectors, leading to high non-compliance rates that would undermine the health-protectiveness of the rule. EPA is aware that there remain ongoing non-trivial levels of noncompliance with the existing OSHA Methylene Chloride Standard. For example, between October 2022 through September 2023, OSHA issued 44 citations and conducted 14 inspections on their methylene chloride standard, spanning 11 industries including furniture manufacturing and automotive repair. In addition, OSHA has documented a fatality from methylene chloride as recently as July 2023 (Ref. 11, 12, 107, 108). Given this background, EPA does not believe it is reasonable to assume that entities with ongoing difficulty implementing the WCPP will cease use of methylene chloride because they are unable to

comply with the WCPP. Rather, EPA expects that those entities would instead continue attempting (albeit unsuccessfully) to implement such protections, leaving the unreasonable risk unmitigated. Accordingly, EPA's rule would fail to ensure that methylene chloride no longer presents an unreasonable risk to health, as required by TSCA section 6(a). Conversely, where EPA has information demonstrating that companies can meet the WCPP reliably, there is a record basis upon which EPA can determine that the condition of use can continue under the WCPP without contributing to the unreasonable risk posed by methylene chloride. EPA notes that all industry sectors had numerous opportunities to provide the agency with monitoring or other data to indicate the ability for effective exposure reduction for their uses, but, in some cases, none were provided.

Comment: SBA Office of Advocacy asserted that EPA's proposal exceeds the statutory directive because it would prohibit the use of methylene chloride as a processing aid even for a business that provided data indicating that worker inhalation exposures were frequently below the ECEL or even the level of detection. SBA Office of Advocacy also argued that EPA's consideration in the alternative regulatory action of allowing the WCPP-controlled use of methylene chloride as a processing aid and for other uses indicates that such an option would address unreasonable risks.

EPA Response: In the proposed rule, EPA signaled its willingness to reconsider the proposed prohibition on the commercial use of methylene chloride as a processing aid should EPA receive adequate supporting information during the public comment period. As a result of the information provided by the business referenced by SBA Office of Advocacy, and additional information received during the comment period, the final rule permits the commercial use of methylene chloride as a processing aid to continue under the WCPP.

Comment: SBA Office of Advocacy stated that the proposed ECEL Action Level is too low and cannot be measured in real time on-site. SBA Office of Advocacy stated that the ECEL Action Level should be adjusted to account for the practical limitations faced by small businesses and ensure the ECEL Action Level is both feasible and accurately measurable in real-time.

EPA Response: EPA notes that while real-time monitoring is not required for rule compliance, EPA understands the practical benefits of real-time

occupational exposure monitoring. EPA notes that in the response to comments, multiple stakeholders acknowledged the viability of real-time detection for methylene chloride at 1 ppm. EPA acknowledges that some portable monitoring devices may not be able to reliably detect the action level in real-time. In conditions that may ideally benefit real-time monitoring measurements or expedited results, stationary monitoring devices such as mass spectrometers, as noted by another commenter, may be helpful. EPA may not always set the action level for a given chemical at one half the assigned ECEL value. In some situations, EPA may adjust the action level in a risk management rule as part of the WCPP.

4. Estimate of the Number of Small Entities to Which the Final Rule Applies

This final rule potentially affects small manufacturers (including importers), processors, distributors, retailers, users of methylene chloride or of products containing methylene chloride, and entities engaging in disposal. EPA estimates that the final rule would affect approximately 237,969 firms using methylene chloride, of which 232,451 small entities (based on SBA definitions published in March 2023) have estimated impacts. End users with economic and technologically feasible alternatives available do not have estimated cost impacts beyond rule familiarization costs except for vapor degreasing and furniture refinishing. For a full description of the estimated number of small entities affected by this rule, see the FRFA (Ref. 21).

5. Projected Reporting, Recordkeeping and Other Compliance Requirements of the Final Rule

a. Compliance Requirements

EPA is prohibiting most conditions of use of methylene chloride. As described in the final rule, EPA is prohibiting all manufacturing (including import), processing, and distribution in commerce of methylene chloride for consumer use. After the publication date of the final rule in the **Federal Register**, prohibitions on manufacturing, processing, and distribution in commerce of methylene chloride for consumer use will occur in 360 days for manufacturers, 450 days for processors, 270 days for distributing to retailers, and 360 days for all other distributors and retailers.

EPA is also prohibiting manufacturing (including import), processing, distribution in commerce of methylene chloride for commercial use, and all commercial use of methylene chloride

other than those conditions of use for which EPA is finalizing a WCPP or providing a time-limited exemption under TSCA section 6(g). The prohibitions for these commercial uses would become effective following prohibitions relevant to these uses in stages of the supply chain before the industrial and commercial use (e.g., manufacturing and processing). The restrictions follow a staggered schedule for each stage of the supply chain. Prohibitions come into effect in 360 days for manufacturers, 450 days for processors, 270 days for distributing to retailers, 630 days for all other distributors and retailers, and 720 days for industrial and commercial uses after the publication date of the final rule.

EPA is finalizing a prohibition compliance date delayed by five years after the publication date of the final rule for commercial use of methylene chloride in furniture refinishing for wood pieces of artistic, cultural, or historic value where workshops can meet a minimum standard of exposure control. Additionally, EPA is finalizing a delayed prohibition compliance date of five years for industrial and commercial use in adhesives and sealants in aircraft, space vehicle, and turbine applications for structural and safety critical non-structural applications after the publication date of the final rule.

For other conditions of use that contribute to the unreasonable risk from methylene chloride, EPA is finalizing a WCPP to address the unreasonable risk as outlined in Unit IV.

A WCPP encompasses inhalation exposure thresholds, includes monitoring and recordkeeping requirements to verify that those thresholds are not exceeded, and other components, such as dermal protection, to ensure that the chemical substance no longer presents unreasonable risk. In the case of methylene chloride, meeting the exposure thresholds finalized by EPA for certain occupational conditions of use would address unreasonable risk driven by inhalation exposure from those conditions of use for potentially exposed persons.

b. Classes of Small Entities Subject to the Compliance Requirements

The small entities that would be potentially directly regulated by this rule are small businesses that manufacture (including import), process, distribute in commerce, use, or dispose of methylene chloride, including retailers of methylene chloride for end-consumer uses.

c. Professional Skills Needed To Comply

Entities subject to this rule that manufacture (including import), process, or distribute methylene chloride in commerce for consumer use would be required to cease such activity. The entity would be required to modify their Safety Data Sheet to inform their customers of the prohibition on manufacture, processing, and distribution of methylene chloride for consumer use. They would also be required to keep records of how much methylene chloride they sold, and to whom, and maintain a copy of the method they use for notifying their customers. None of these activities require any special skills.

Entities that use methylene chloride in any of the industrial and commercial conditions of use that are prohibited would be required to cease those activities. Restriction or prohibition of these uses will likely require the implementation of an alternative chemical or the cessation of use of methylene chloride in a process or equipment that may require persons with specialized skills, such as engineers or other technical experts. Instead of developing an alternative method themselves, commercial users of methylene chloride may choose to contract with another entity to do so.

Entities that are permitted to continue to manufacture, process, distribute in commerce, use, or dispose of methylene chloride are required to implement a WCPP and would have to meet the provisions of the program for continued use of methylene chloride. Adaption to a WCPP may require persons with specialized skills such as an engineer, chemist, health and safety professional, or laboratory technicians to process monitoring samples. Instead of implementing the WCPP themselves, entities that use methylene chloride may choose to contract with another entity to do so. Records would have to be maintained for compliance with a WCPP. While this recording activity itself may not require a special skill, the airborne concentrations to be measured and recorded may require persons with specialized skills such as an industrial hygienist or laboratory technician. Additionally, potentially exposed persons reasonably likely to be exposed to methylene chloride by inhalation to concentrations above the ECEL or EPA STEL are required to be trained for the proper use of respirators. While this does not necessarily entail a specialized skill, it does require specialized training for those handling methylene chloride within regulated areas and includes

activity-specific training for proper PPE use such as gloves. EPA's respirator provision, in alignment with OSHA under 29 CFR 1910.134(c)(1)(ii), also requires medical qualification to employ the use of respirators. While this is also not a specialized skill, it is a specialized pre-qualifier for use of respirators.

Refinishers of wood pieces of artistic, cultural, or historic value using methylene chloride may need to exercise use of additional exposure controls such as engineering, administrative, and PPE/respirators. Establishing adequate controls for this use may require knowledgeable persons with specialized skills or equipment such as an engineer or a health and safety professional. Instead of developing the required exposure mitigation methods themselves to demonstrate compliance, commercial users of methylene chloride for this use may choose to contract with another entity to do so.

6. Steps Taken To Minimize Economic Impact to Small Entities

a. SBAR Panel

As required by section 609(b) of the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), EPA conducted outreach to small entities and convened a SBAR Panel on November 4, 2020, to obtain advice and recommendations of representatives of the small entities that potentially would be subject to the rule's requirements. The Panel solicited input on all aspects of these proposed regulations. Thirteen potentially impacted small entities served as small-entity representatives (SERs) to the Panel, representing a broad range of small entities from diverse geographic locations. The Panel Report was signed on October 28, 2021.

Consistent with the RFA/SBREFA requirements, the Panel evaluated the assembled materials and small-entity comments on issues related to elements of the regulatory flexibility analysis. It is important to note that the Panel's findings and discussion were based on the information available at the time the final report was prepared. For the full list of Panel recommendations, see section 8.A. of the FRFA (Ref.21).

EPA detailed the SBAR Panel's request for comment on these specific topics in the IRFA and proposed rule (88 FR 28284, May 3, 2023) (FRL-8155-02-OCSP) and solicited comment from the public. During the comment period, the public provided comment on some of these areas. Those comments and others received on the proposed rule and EPA's responses are in the

Response to Comments document in the docket (Ref. 7).

b. Alternatives Considered

To identify the regulatory approach that would address the unreasonable risk from methylene chloride, EPA analyzed alternative regulatory approaches to identify which would be feasible, reduce burden to small businesses, and achieve the objective of the statute (*i.e.*, applying one or more requirements list in TSCA section 6(a) to the extent necessary so that the chemical substance or mixture no longer presents an unreasonable risk). As described in more detail in Unit V. of the proposed rule (88 FR 28284, May 3, 2023) (FRL–8155–02–OCSP), and Unit II.D. of the final rule, EPA considered several factors, in addition to identified unreasonable risk, when selecting among possible TSCA section 6(a) requirements. To the extent practicable, EPA factored into its decisions: the effects of methylene chloride on health and the environment, the magnitude of exposure to methylene chloride of human beings and the environment, the benefits of methylene chloride for various uses, and the reasonably ascertainable economic consequences of the rule. As part of this analysis, EPA considered a wide variety of control measures to address the unreasonable risk from methylene chloride such as weight fractions, prescriptive controls, and a certification and limited access program. EPA's consideration of these alternative control measures is described in detail in the IRFA for the proposed rule, and throughout Unit V.A.4. of the proposed rule.

Based on consideration of public comments received on the proposed rule, EPA has made some changes from the proposed rule to the final rule. These changes include the finalization of additional conditions of use under the WCPP, rather than prohibition, and changes to timeframes for compliance for the WCPP and for prohibitions. Additional changes to the rule based on consideration of public comments are detailed in Unit III of the final rule and include identification of a de minimis threshold of methylene chloride in formulations, and modifications to provisions of the WCPP (including to exposure monitoring requirements). For additional information and rationale towards alternative actions, see Unit III.D. of this final rule and section 8.B. of the FRFA (Ref. 21).

In addition, EPA is preparing a Small Entity Compliance Guide to help small entities comply with this rule. EPA expects that this guide will be made

available on the EPA website prior to the effective date of this final rule.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action will affect entities that use methylene chloride. It is not expected to affect State, local, or Tribal governments because the use of methylene chloride by government entities is minimal. This action is not expected to result in expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more (when adjusted annually for inflation) in any 1 year. Accordingly, this action is not subject to the requirements of sections 202, 203, or 205 of UMRA.

E. Executive Order 13132: Federalism

EPA has concluded that this action has federalism implications, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because regulation under TSCA section 6(a) may preempt state law. EPA provides the following federalism summary impact statement. The Agency consulted with state and local officials early in the process of developing the proposed action to permit them to have meaningful and timely input into its development. This included a consultation meeting on October 22, 2020, and a background presentation on September 9, 2020. EPA invited the following national organizations representing State and local elected officials to these meetings: Association of State Drinking Water Administrators, National Association of Clean Water Agencies, Western States Water Council, National Water Resources Association, American Water Works Association, Association of Metropolitan Water Agencies, Association of Clean Water Administrators, Environmental Council of the States, National Association of Counties, National League of Cities, County Executives of America, U.S. Conference of Mayors, and National Association of Attorneys General. A summary of the meeting with these organizations, including the views that they expressed, is available in the docket (Ref. 14). As discussed in Unit VIII.E. and in the proposed rule, during Federalism consultation meetings EPA provided information on TSCA section 6 regulations and participants discussed preemption as well as the relationship between TSCA and existing statutes such as the CWA and Safe Drinking

Water Act (SDWA) (Ref. 14). EPA provided an opportunity for these organizations to provide follow-up comments in writing but did not receive any such comments.

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

This action does not have Tribal implications as specified in Executive Order 13175 (65 FR 67249, November 9, 2000) because it will not have substantial direct effects on Tribal governments, on the relationship between the Federal Government and the Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Methylene chloride is not manufactured, processed, or distributed in commerce by Tribes and, therefore, this rulemaking would not impose substantial direct compliance costs on Tribal governments. Thus, Executive Order 13175 does not apply to this action.

Notwithstanding the lack of Tribal implications as specified by Executive Order 13175, EPA consulted with Tribal officials during the development of this action, consistent with the EPA Policy on Consultation and Coordination with Indian Tribes, which EPA applies more broadly than Executive Order 13175.

The Agency held a Tribal consultation from October 7, 2020, to January 8, 2021, with meetings on November 12 and 13, 2020. Tribal officials were given the opportunity to meaningfully interact with EPA concerning the current status of risk management. During the consultation, EPA discussed risk management under TSCA section 6(a), findings from the 2020 Risk Evaluation for Methylene Chloride, types of information to inform risk management, principles for transparency during risk management, and types of information EPA sought from Tribal officials (Ref. 15). EPA briefed Tribal officials on the Agency's risk management considerations and Tribal officials raised no related issues or concerns to EPA during or in follow-up to those meetings (Ref. 15). EPA received no written comments as part of this consultation.

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

Executive Order 13045 (62 FR 19885, April 23, 1997) directs Federal agencies to include an evaluation of the health and safety effects of the planned regulation on children in Federal health and safety standards and explain why the regulation is preferable to

potentially effective and reasonably feasible alternatives. This action is not subject to Executive Order 13045 because EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children as reflected by the conclusions of the methylene chloride risk evaluation (Ref. 1). EPA did not find that the adverse health impacts for children and for men and women of reproductive age was disproportionate in comparison to other populations. While there is some evidence of an association between methylene chloride and developmental neurological effects, the literature contains methodological limitations in human studies and concentration limitations in animal studies, and thus reproductive/development effects were not carried forward to dose-response. However, EPA's Policy on Children's health applies to this action. Information on how the Policy was applied is available under "Children's Environmental Health" in Unit II.D.2.c.

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

This action is not a "significant energy action" under Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution or use of energy and has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

I. National Technology Transfer and Advancement Act (NTTAA)

Pursuant to the NTTAA section 12(d), 15 U.S.C. 272, the Agency has determined that this rulemaking involves environmental monitoring or measurement, specifically for occupational inhalation exposures to methylene chloride. Consistent with the Agency's Performance Based Measurement System (PBMS), EPA has decided not require the use of specific, prescribed analytic methods. Rather, the Agency will allow the use of any method that meets the prescribed performance criteria. The PBMS approach is intended to be more flexible and cost-effective for the regulated community; it is also intended to encourage innovation in analytical technology and improved data quality. EPA is not precluding the use of any method, whether it constitutes a voluntary consensus standard or not, as long as it meets the performance criteria specified.

For this rulemaking, the key consideration for the PBMS approach is the ability to accurately detect and measure airborne concentrations of methylene chloride at the ECEL, the ECEL action level, and the EPA STEL. Some examples of methods which meet the criteria are included in appendix A of the ECEL memo (Ref. 93). EPA recognizes that there may be voluntary consensus standards that meet the criteria (Ref. 109).

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All

EPA believes that the human health and environmental conditions that exist prior to this action do not result in or have the potential to result in disproportionate and adverse human health or environmental effects on communities with environmental justice concerns in accordance with Executive Order 12898 (59 FR 7629, February 16, 1994) and Executive Order 14096 (88 FR 25251, April 26, 2023). As described more fully in the Economic Analysis for this rulemaking (Ref. 3), EPA conducted an analysis to characterize the baseline conditions faced by communities and workers affected by the regulation to identify the potential for disproportionate impacts on communities with EJ concerns using information about the facilities, workforce, and communities potentially affected by the regulatory options under current conditions, before the regulation would go into effect. The analysis drew on publicly available data provided by EPA, U.S. Census Bureau, and Centers for Disease Control and Prevention (CDC), including data from TRI, EPA Enforcement and Compliance History Online (ECHO), National Air Toxics Assessment (NATA), the American Community Survey, and the Behavioral Risk Factor Surveillance System. The baseline characterization suggests that workers in affected industries and regions, as well as residents of nearby communities, are not more likely to be people of color than the general population in affected states, although this varied by use assessed.

Based on reasonably available information, EPA believes that there are not potential EJ concerns in communities surrounding facilities subject to this regulation (Ref. 3). Therefore, EPA believes that this action is likely to not result in new disproportionate and adverse effects on communities with EJ concerns. This

regulatory action would apply requirements to the extent necessary so that methylene chloride no longer presents an unreasonable risk. While this regulatory action will address unreasonable risks from methylene chloride under the conditions of use as required by TSCA section 6(a), EPA is not able to quantify the distribution of the change in risk for affected populations due to data limitations that prevented EPA from conducting a more comprehensive analysis of such a change.

EPA additionally identified and addressed potential EJ concerns by conducting outreach to advocates of communities that might be subject to disproportionate exposure to methylene chloride.

On November 16 and 19, 2020, EPA held public meetings as part of this consultation. (Ref. 110). See also Unit II.D. These meetings were held pursuant to Executive Order 12898 and Executive Order 14008, Tackling the Climate Crisis at Home and Abroad (86 FR 7619, February 1, 2021). EPA received three written comments following the EJ meetings, in addition to oral comments provided during the consultations (Refs. 16, 17, 18). In general, commenters supported strong regulation of methylene chloride to protect lower-income communities and workers. Commenters supported strong outreach to affected communities, encouraged EPA to follow the hierarchy of controls, favored prohibitions, and noted the uncertainty of use—and in some cases inadequacy—of PPE.

The information supporting this Executive order review is contained in Unit II.D., as well as in the Economic Analysis (Refs. 3, 110). EPA's presentations, a summary of EPA's presentation and public comments made, and fact sheets for the EJ consultations related to this rulemaking are available at <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/environmental-justice-consultations-methylene-chloride>. These materials are also available in the public docket for this rulemaking.

K. Congressional Review Act (CRA)

This action is subject to the CRA, 5 U.S.C. 801 *et seq.*, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action meets the criteria set forth in 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 751

Environmental protection, Chemicals, Export notification, Hazardous

substances, Import certification, Reporting and recordkeeping.

Michael S. Regan,
Administrator.

Therefore, for the reasons stated in the preamble, 40 CFR chapter I is amended to read as follows:

PART 751—REGULATION OF CERTAIN CHEMICAL SUBSTANCES AND MIXTURES UNDER SECTION 6 OF THE TOXIC SUBSTANCES CONTROL ACT

■ 1. The authority citation for part 751 continues to read as follows:

Authority: 15 U.S.C. 2605, 15 U.S.C. 2625(l)(4).

■ 2. Amend § 751.5 by adding in alphabetical order the definitions for “Article”, “Authorized person”, “Owner or operator”, “Potentially exposed person”, “Product”, “Regulated area”, and “Retailer” to read as follows:

§ 751.5 Definitions.

* * * * *

Article means a manufactured item:

- (1) Which is formed to a specific shape or design during manufacture;
- (2) Which has end use function(s) dependent in whole or in part upon its shape or design during end use; and
- (3) Which has either no change of chemical composition during its end use or only those changes of composition which have no commercial purpose separate from that of the article, and that result from a chemical reaction that occurs upon end use of other chemical substances, mixtures, or articles; except that fluids and particles are not considered articles regardless of shape or design.

Authorized person means any person specifically authorized by the owner or operator to enter, and whose duties require the person to enter, a regulated area.

* * * * *

Owner or operator means any person who owns, leases, operates, controls, or supervises a workplace covered by this part.

* * * * *

Potentially exposed person means any person who may be exposed to a chemical substance or mixture in a workplace as a result of a condition of use of that chemical substance or mixture.

Product means the chemical substance, a mixture containing the chemical substance, or any object that contains the chemical substance or mixture containing the chemical substance that is not an article.

Regulated area means an area established by the regulated entity to

demarcate areas where airborne concentrations of a specific chemical substance exceed, or there is a reasonable possibility they may exceed, the applicable Existing Chemical Exposure Limit (ECEL) or the EPA Short Term Exposure Limit (EPA STEL).

Retailer means a person who distributes in commerce or makes available a chemical substance or mixture to consumer end users, including e-commerce internet sales or distribution. Any distributor with at least one consumer end user customer is considered a retailer. A person who distributes in commerce or makes available a chemical substance or mixture solely to commercial or industrial end users or solely to commercial or industrial businesses is not considered a retailer.

■ 3. Revise § 751.101 to read as follows:

§ 751.101 General.

(a) *Applicability.* This subpart sets certain restrictions on the manufacture (including import), processing, distribution in commerce, use, and disposal of methylene chloride (CASRN 75–09–2) to prevent unreasonable risks of injury to health.

(b) *De minimis threshold.* Unless otherwise specified in this subpart, the prohibitions and restrictions of this subpart do not apply to products containing methylene chloride at thresholds less than 0.1 percent by weight. This provision does not apply to § 751.105.

■ 4. Amend § 751.103 by:

- a. Revising the definition of “Distribution in commerce”; and
- b. Adding in alphabetical order definitions for “ECEL”, “ECEL action level”, and “EPA STEL”.

The revision and additions read as follows:

§ 751.103 Definitions.

* * * * *

Distribution in commerce has the same meaning as in section 3 of the Act, except that the term does not include retailers for purposes of §§ 751.111 and 751.113.

ECEL is an Existing Chemical Exposure Limit, and means an airborne concentration calculated as an eight (8)-hour time-weighted average (TWA).

ECEL action level means a concentration of airborne methylene chloride of 1 part per million (1 ppm) calculated as an 8-hour time weighted average (TWA).

EPA STEL is a Short Term Exposure Limit, which is an EPA regulatory limit on workplace exposure to an airborne concentration of a chemical substance,

based on an exposure of less than eight hours.

* * * * *

■ 5. Amend § 751.105 by revising the section heading to read as follows:

§ 751.105 Prohibition of manufacturing (including import), processing, and distribution in commerce related to consumer paint and coating removal.

§ 751.107 [Redesignated as § 751.111]

■ 6. Redesignate § 751.107 as § 751.111.

■ 7. Add new § 751.107 to read as follows:

§ 751.107 Other prohibitions of manufacturing (including import), processing, distribution in commerce, and use.

(a) *Applicability.* (1) This section applies to all manufacturing (including import), processing, and distribution in commerce of methylene chloride for consumer use other than for the paint and coating removal use addressed under § 751.105.

(2) This section applies to:

(i) All manufacturing (including import), processing, and distribution in commerce of methylene chloride for industrial or commercial use, other than for the conditions of use addressed under § 751.109(a); and

(ii) All commercial or industrial use of methylene chloride, other than the conditions of use addressed under § 751.109(a).

(3) This section does not apply to manufacturing, processing, or distribution in commerce of methylene chloride solely for export that meets the conditions described in TSCA section 12(a)(1)(A) and (B).

(b) *Prohibitions.* (1) After February 3, 2025, all persons are prohibited from distributing in commerce (including making available) methylene chloride, including any methylene chloride-containing products, to retailers for any use.

(2) After May 5, 2025, all retailers are prohibited from distributing in commerce (including making available) methylene chloride, including any methylene chloride-containing products, for any use.

(3) After May 5, 2025, all persons are prohibited from manufacturing (including import) methylene chloride, for the uses listed in paragraphs (a)(1) and (2) of this section except for those uses specified in paragraphs (b)(7) through (9) of this section.

(4) After August 1, 2025, all persons are prohibited from processing methylene chloride, including any methylene chloride-containing products, for the uses listed in

paragraphs (a)(1) and (2) of this section except for those uses specified in paragraphs (b)(7) through (9) of this section.

(5) After January 28, 2026, all persons are prohibited from distributing in commerce (including making available) methylene chloride, including any methylene chloride-containing products, for any use described in paragraphs (a)(1) and (2) of this section except for those uses specified in paragraphs (b)(7) through (9) of this section.

(6) After April 28, 2026, all persons are prohibited from industrial or commercial use of methylene chloride, including any methylene chloride containing products, for the uses listed in paragraph (a)(2) of this section except for those uses specified in paragraphs (b)(7) through (9) of this section.

(7) After May 8, 2024, all persons are prohibited from manufacturing (including import), processing, distribution in commerce, or use of methylene chloride, including any methylene chloride containing products, for industrial or commercial use in an emergency by the National Aeronautics and Space Administration or its contractors as described in § 751.115(b).

(8) After May 8, 2029, all persons are prohibited from manufacturing (including import), processing, distribution in commerce, or use of methylene chloride, including any methylene chloride containing products, for industrial or commercial use for paint and coating removal for refinishing of wooden furniture, decorative pieces and architectural fixtures of artistic, cultural, or historic significance, with interim requirements as described in § 751.117.

(9) After May 8, 2029, all persons are prohibited from manufacturing (including import), processing, distribution in commerce, or use of methylene chloride, including any methylene chloride-containing products, for industrial or commercial use for adhesives and sealants in aircraft, space vehicle, and turbine applications for structural and safety critical non-structural applications.

§ 751.109 [Redesignated as § 751.113]

■ 8. Redesignate § 751.109 as § 751.113.

■ 9. Add new § 751.109 to read as follows:

§ 751.109 Workplace Chemical Protection Program.

(a) *Applicability.* The provisions of this section apply to the following conditions of use of methylene chloride, including manufacturing and processing

for export, except to the extent the conditions of use are prohibited by §§ 751.105 and 751.107:

- (1) Manufacturing (domestic manufacture);
- (2) Manufacturing (import);
- (3) Processing: as a reactant;
- (4) Processing: incorporation into a formulation, mixture, or reaction product;
- (5) Processing: repackaging;
- (6) Processing: recycling;
- (7) Industrial and commercial use as a laboratory chemical;
- (8) Industrial or commercial use for paint and coating removal from safety-critical, corrosion-sensitive components of aircraft and spacecraft;
- (9) Industrial or commercial use as a bonding agent for solvent welding;
- (10) Industrial and commercial use as a processing aid;
- (11) Industrial and commercial use for plastic and rubber products manufacturing;
- (12) Industrial and commercial use as a solvent that becomes part of a formulation or mixture, where that formulation or mixture will be used inside a manufacturing process, and the solvent (methylene chloride) will be reclaimed; and
- (13) Disposal.

(b) *Relationship to other regulations.* For purposes of this section:

- (1) Any provisions applying to “employee” in 29 CFR 1910.132, 1910.134, and 1910.1052 also apply equally to potentially exposed persons; and
- (2) Any provisions applying to “employer” in 29 CFR 1910.132, 1910.134, and 1910.1052 also apply equally to any owner or operator for the regulated area.

(c) *Exposure limits*—(1) *ECEL.* The owner or operator must ensure that no person is exposed to an airborne concentration of methylene chloride in excess of 2 parts of methylene chloride per million parts of air (2 ppm) as an 8-hour TWA after February 8, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal Government, August 1, 2025 for other owners and operators, or beginning 4 months after introduction of methylene chloride into the workplace if methylene chloride use commences after May 5, 2025, consistent with paragraphs (d) through (f) of this section.

(2) *EPA STEL.* The owner or operator must ensure that no person is exposed to an airborne concentration of methylene chloride in excess of 16 parts of methylene chloride per million parts of air (16 ppm) as determined over a sampling period of 15 minutes after

February 8, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal Government, August 1, 2025 for other owners and operators, or beginning 4 months after introduction of methylene chloride into the workplace if methylene chloride use commences after May 5, 2025, consistent with paragraphs (d) through (f) of this section.

(3) *Regulated areas.* The owner or operator must:

(i) Establish and maintain regulated areas in accordance with 29 CFR 1910.1052(e)(2) and (4) through (7) by February 8, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal Government, August 1, 2025 for other owners and operators, or within 3 months after receipt of the results of any monitoring data consistent with paragraph (d) of this section.

(ii) Establish a regulated area wherever a potentially exposed person's exposure to airborne concentrations of methylene chloride exceeds or can reasonably be expected to exceed either the ECEL or EPA STEL.

(iii) Demarcate regulated areas from the rest of the workplace in any manner that adequately establishes and alerts potentially exposed persons to the boundaries of the area and minimizes the number of authorized persons exposed to methylene chloride within the regulated area.

(iv) Restrict access to the regulated area by any potentially exposed person who lacks proper training, personal protective equipment, or is otherwise unauthorized to enter.

(d) *Exposure monitoring*—(1) *In general*—(i) *Characterization of exposures.* Owners or operators must determine each potentially exposed person's exposure, without regard to respiratory protection, by either:

(A) Taking a personal breathing zone air sample of each potentially exposed person's exposure; or

(B) Taking personal breathing zone air samples that are representative of each potentially exposed person's exposure.

(ii) *Representative samples.* Owners or operators are permitted to consider personal breathing zone air samples to be representative of each potentially exposed person's exposure, without regard to respiratory protection, when they are taken as follows:

(A) *ECEL.* The owner or operator has taken one or more personal breathing zone air samples for at least one potentially exposed person in each job classification in a work area during every work shift, and the person sampled is expected to have the highest methylene chloride exposure.

(B) *EPA STEL*. The owner or operator has taken one or more personal breathing zone air samples which indicate the highest likely 15-minute exposures during such operations for at least one potentially exposed person in each job classification in the work area during every work shift, and the person sampled is expected to have the highest methylene chloride exposure.

(C) *Exception*. Personal breathing zone air samples taken during one work shift may be used to represent potentially exposed person exposures on other work shifts where the owner or operator can document that the tasks performed and conditions in the workplace are similar across shifts.

(iii) *Accuracy of monitoring*. Owners or operators must ensure that the methods used to perform exposure monitoring produce results that are accurate to a confidence level of 95%, and are:

(A) Within plus or minus 25% for airborne concentrations of methylene chloride above the ECEL or the EPA STEL; or

(B) Within plus or minus 35% for airborne concentrations of methylene chloride at or above the ECEL action level but at or below the ECEL.

(iv) *Currency of monitoring data*. Owners or operators are not permitted to rely on monitoring data that is more than 5 years old to demonstrate compliance with initial or periodic monitoring requirements for either the ECEL or the EPA STEL.

(2) *Initial monitoring*. By November 9, 2026 for Federal agencies and Federal contractors acting for or on behalf of the Federal Government, by May 5, 2025 for other owners and operators, or within 30 days of introduction of methylene chloride into the workplace, whichever is later, each owner or operator covered by this section must perform an initial exposure monitoring to determine each potentially exposed person's exposure, unless:

(i) An owner or operator has objective data generated within the last 5 years prior to May 8, 2024 that demonstrates to EPA that methylene chloride cannot be released in the workplace in airborne

concentrations at or above the ECEL action level (1-ppm 8-hour TWA) or above the EPA STEL (16 ppm 15-minute TWA) and that the data represents the highest methylene chloride exposures likely to occur under conditions of use described in paragraph (a) of this section; or

(ii) Where potentially exposed persons are exposed to methylene chloride for fewer than 30 days per year, and the owner or operator has measurements by direct-metering devices which give immediate results and which provide sufficient information regarding exposures to determine and implement the control measures that are necessary to reduce exposures to below the ECEL action level and EPA STEL.

(3) *Periodic monitoring*. The owner or operator must establish an exposure monitoring program for periodic monitoring of exposure to methylene chloride in accordance with table 1.

TABLE 1 TO PARAGRAPH (d)(3)—PERIODIC MONITORING REQUIREMENTS BASED ON INITIAL EXPOSURE MONITORING RESULTS

Air concentration condition observed during initial exposure monitoring	Periodic monitoring requirement
If the initial exposure monitoring concentration is below the ECEL action level and at or below the EPA STEL.	ECEL and EPA STEL periodic monitoring at least once in every 5 years.
If the initial exposure monitoring concentration is below the ECEL action level and above the EPA STEL.	ECEL periodic required at least once every 5 years, and EPA STEL periodic monitoring required every 3 months.
If the initial exposure monitoring concentration is at or above the ECEL action level and at or below the ECEL; and at or below the EPA STEL.	ECEL periodic monitoring every 6 months.
If the initial exposure monitoring concentration is at or above the ECEL action level and at or below the ECEL; and above the EPA STEL.	ECEL periodic monitoring every 6 months and EPA STEL periodic monitoring every 3 months.
If the initial exposure monitoring concentration is above the ECEL and below, at, or above the EPA STEL.	ECEL periodic monitoring every 3 months and EPA STEL periodic monitoring every 3 months.
If 2 consecutive monitoring events have taken place at least 7 days apart that indicate that potential exposure has decreased from above the ECEL to at or below the ECEL, but at or above the ECEL action level.	Transition from ECEL periodic monitoring frequency from every 3 months to every 6 months.
If 2 consecutive monitoring events have taken place at least 7 days apart that indicate that potential exposure has decreased to below the ECEL action level and at or below the EPA STEL.	Transition from ECEL periodic monitoring frequency from every 6 months to once every 5 years. The second consecutive monitoring event will delineate the new date from which the next 5-year periodic exposure monitoring must occur.
If the owner or operator engages in any conditions of use described in paragraph (a) of this section and is required to monitor either the ECEL or EPA STEL in a 3-month interval, but does not engage in any of those uses for the entirety of the 3-month interval.	The owner or operator may forgo the upcoming periodic monitoring event. However, documentation of cessation of use of methylene chloride must be maintained, and initial monitoring is required when the owner or operator resumes or starts any of the conditions of use described in paragraph (a) of this section.
Owner or operator engages in any conditions of use described in paragraph (a) of this section and is required to monitor the ECEL in a 6-month interval, but does not engage in any of those uses for the entirety of the 6-month interval.	The owner or operator may forgo the upcoming periodic monitoring event. However, documentation of cessation of the condition(s) of use must be maintained until periodic monitoring resumes, and initial monitoring is required when the owner or operator resumes or starts any of the conditions of use described in paragraph (a) of this section.

(4) *Additional monitoring*. The owner or operator must conduct the exposure monitoring required by paragraph (d)(2) of this section within 30 days after any

change that may reasonably be expected to introduce additional sources of exposure to methylene chloride, or otherwise result in increased exposure

to methylene chloride compared to the most recent monitoring event. Examples of situations that may require additional monitoring include changes in

production, process, control equipment, or work practices, or a leak, rupture, or other breakdown.

(5) *Notification of monitoring results.*

(i) The owner or operator must inform potentially exposed persons of monitoring results within 15 working days.

(ii) This notification must include the following:

(A) Exposure monitoring results;

(B) Identification and explanation of the ECEL, ECEL Action Level, and EPA STEL;

(C) Whether the airborne concentration of methylene chloride exceeds the ECEL action level, ECEL or the EPA STEL;

(D) If the ECEL or EPA STEL is exceeded, descriptions of actions taken by the owner or operator to reduce exposure in accordance with paragraph (e)(1)(i) of this section;

(E) Explanation of any required respiratory protection provided in accordance with as paragraphs (e)(1)(ii) and (f) of this section;

(F) Quantity of methylene chloride in use at the time of monitoring;

(G) Location of methylene chloride use at the time of monitoring;

(H) Manner of methylene chloride use at the time of monitoring; and

(I) Identified releases of methylene chloride.

(iii) Notice must be provided in plain language writing, in a language that the person understands, to each potentially exposed person or posted in an appropriate and accessible location outside the regulated area with an English-language version and a non-English language version representing the language of the largest group of workers who do not read English.

(6) *Observation of monitoring.* (i) The owner or operator must provide affected potentially exposed persons an opportunity to observe exposure monitoring conducted in accordance with this paragraph (d) that is representative of the potentially exposed person's exposure.

(ii) The owner or operator must ensure that potentially exposed persons are provided with personal protective equipment appropriate for the observation of monitoring.

(e) *ECEL control procedures and plan—(1) Methods of compliance.* (i) By May 10, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal Government, or by October 30, 2025 for other owners and operators, the owner or operator must institute one or a combination of elimination, substitution, engineering controls, work practices, or administrative controls to reduce

exposure to or below the ECEL and EPA STEL except to the extent that the owner or operator can demonstrate that such controls are not feasible.

(ii) If the feasible controls, required by paragraph (e)(1)(i) of this section that can be instituted do not reduce exposures for potentially exposed persons to or below the ECEL or EPA STEL, then the owner or operator must use such controls to reduce exposure to the lowest levels achievable by these controls and must supplement those controls with the use of respiratory protection that complies with the requirements of paragraph (f) of this section to reduce exposures to or below the ECEL or EPA STEL.

(iii) Where an owner or operator cannot demonstrate exposure below the ECEL, including through the use of all feasible engineering controls, work practices, or administrative controls as described in paragraph (e)(1)(i) of this section, and, has not demonstrated that it has appropriately supplemented with respiratory protection that complies with the requirements of paragraphs (e)(1)(ii) and (f) of this section, this will constitute a failure to comply with the ECEL.

(iv) For the Department of Defense and Federal contractors acting for or on behalf of the Department of Defense, in the event that ongoing or planned construction is necessary to implement the feasible controls required by paragraph (e)(1)(i) of this section such that no one is exposed above the ECEL or EPA STEL, the deadlines in paragraph (e)(1)(i) of this section are extended to May 7, 2029. Ongoing or planned construction efforts to address exposures above the ECEL and EPA STEL must be documented in the exposure control plan required by paragraph (e)(2) of this section.

(2) *Exposure control plan.* By May 10, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal Government, or by October 30, 2025 for other owners and operators, the owner or operator must develop and implement an exposure control plan.

(i) *Exposure control plan contents.* The exposure control plan must include documentation of the following:

(A) Identification of exposure controls that were considered, including those that were used or not used to meet the requirements of paragraph (e)(1)(i) of this section, in the following sequence—elimination, substitution, engineering controls, and work practices and administrative controls;

(B) For each exposure control considered, a rationale for why the exposure control was selected or not selected based on feasibility,

effectiveness, and other relevant considerations;

(C) A description of actions the owner or operator must take to implement the exposure controls selected, including proper installation, regular inspections, maintenance, training, or other actions;

(D) A description of regulated areas, how they are demarcated, and persons authorized to enter the regulated areas;

(E) A description of activities conducted by the owner or operator to review and update the exposure control plan to ensure effectiveness of the exposure controls, identify any necessary updates to the exposure controls, and confirm that all persons are properly implementing the exposure controls; and

(F) An explanation of the procedures for responding to any change that may reasonably be expected to introduce additional sources of exposure to methylene chloride, or otherwise result in increased exposure to methylene chloride, including procedures for implementing corrective actions to mitigate exposure to methylene chloride.

(ii) *Exposure control plan requirements.* (A) The owner or operator must not implement a schedule of personnel rotation as a means of compliance with the ECEL.

(B) The owner or operator must maintain the effectiveness of any controls, instituted under paragraph (e) of this section.

(C) The exposure control plan must be reviewed and updated as necessary, but at least every 5 years, to reflect any significant changes in the status of the owner or operator's approach to compliance with paragraphs (c) through (e) of this section.

(iii) *Availability of exposure control plan.* (A) Owners or operators must make the exposure control plan and associated records, including exposure monitoring, respiratory protection program implementation, and dermal protection program implementation records, available to potentially exposed persons.

(B) Owners or operators must notify potentially exposed persons of the availability of the plan and associated records within 30 days of the date that the exposure control plan is completed and at least annually thereafter. The notification must be provided in accordance with the requirements of paragraph (d)(5)(iii) of this section.

(C) Upon request by the potentially exposed person, the owner or operator must provide the specified records at a reasonable time, place, and manner. If the owner or operator is unable to provide the requested records within 15

days, the owner or operator must, within those 15 days, inform the potentially exposed person requesting the record(s) of the reason for the delay and the earliest date when the record can be made available.

(3) *Respirator requirements.* The owner or operator must supply a respirator, selected in accordance with paragraph (f) of this section, to each potentially exposed person who enters a regulated area and must ensure each potentially exposed person uses that respirator whenever methylene chloride exposures may exceed the ECEL or EPA STEL.

(f) *Respiratory protection—(1) Respirator conditions.* After February 8, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal Government, after August 1, 2025 for other owners and operators, or within 3 months after receipt of the results of any exposure monitoring as described in paragraph (d) of this section, owners or operators must provide respiratory protection to all potentially exposed persons in the regulated area as outlined in paragraph (c)(3) of this section, and according to the provisions outlined in 29 CFR 1910.134(a) through (l) (except 29 CFR 1910.134(d)(1)(iii)) and as specified in this paragraph (f) for potentially exposed persons exposed to methylene chloride in concentrations above the ECEL or the EPA STEL. For the purpose of this paragraph (f), the maximum use concentration (MUC) as used in 29 CFR 1910.134 must be calculated by multiplying the assigned protection factor (APF) specified for a respirator by the ECEL or EPA STEL.

(2) *Respirator selection criteria.* The type of respiratory protection that regulated entities must select and provide to potentially exposed persons in accordance with 29 CFR 1910.1052(g)(3)(i), is directly related to the monitoring results, as follows:

(i) If the measured exposure concentration is at or below the ECEL or EPA STEL: no respiratory protection is required.

(ii) If the measured exposure concentration is above 2 ppm and less than or equal to 50 ppm: the respirator protection required is any NIOSH Approved® supplied-air respirator (SAR) or airline respirator in a continuous-flow mode equipped with a loose-fitting facepiece or helmet/hood (APF 25).

(iii) If the measured exposure concentration is above 50 ppm and less than or equal to 100 ppm the respirator protection required is:

(A) Any NIOSH Approved® Supplied-Air Respirator (SAR) or airline

respirator in a demand mode equipped with a full facepiece (APF 50); or

(B) Any NIOSH Approved® Self-Contained Breathing Apparatus (SCBA) in demand-mode equipped with a full facepiece or helmet/hood (APF 50).

(iv) If the measured exposure concentration is unknown or at any value above 100 ppm and up to 2,000 ppm the respirator protection required is:

(A) Any NIOSH Approved® Supplied-Air Respirator (SAR) or airline respirator in a continuous-flow mode equipped with a full facepiece or certified helmet/hood that has been tested to demonstrate performance at a level of a protection of APF 1,000 or greater. (APF 1,000); or

(B) Any NIOSH Approved® Supplied-Air Respirator (SAR) or airline respirator in pressure-demand or other positive-pressure mode equipped with a full facepiece and an auxiliary self-contained air supply (APF 1,000); or

(C) Any NIOSH Approved® Self-Contained Breathing Apparatus (SCBA) in a pressure-demand or other positive-pressure mode equipped with a full facepiece or certified helmet/hood (APF 10,000).

(3) *Minimal respiratory protection.* Requirements outlined in paragraph (e)(2) of this section represent the minimum respiratory protection requirements, such that any respirator affording a higher degree of protection than the required respirator may be used.

(g) *Dermal protection.* (1) After February 8, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal Government, or after August 1, 2025 for other owners and operators, owners or operators must require the donning of gloves that are chemically resistant to methylene chloride with activity-specific training where dermal contact with methylene chloride is possible, after application of the requirements in paragraph (e) of this section, in accordance with the NIOSH hierarchy of controls.

(2) Owners or operators must minimize and protect potentially exposed persons from dermal exposure in accordance with 29 CFR 1910.1052(h) and (i).

(h) *Training.* Owners or operators must provide training in accordance with 29 CFR 1910.1052(l)(1) through (6) to potentially exposed persons prior to or at the time of initial assignment to a job involving potential exposure to methylene chloride. In addition, if respiratory protection or PPE must be worn within a regulated area, owners or operators must provide training in accordance with 29 CFR 1910.132(f) to

potentially exposed persons within that regulated area.

■ 10. Revise newly redesignated § 751.111 to read as follows:

§ 751.111 Downstream notification.

(a) After August 26, 2019, and before October 7, 2024, each person who manufactures (including imports), and before December 4, 2024 processes or distributes in commerce methylene chloride for any use must, prior to or concurrent with the shipment, notify companies to whom methylene chloride is shipped, in writing, of the restrictions described in § 751.105. Notification must occur by inserting the following text in section 1(c) and section 15 of the SDS provided with the methylene chloride or with any methylene chloride-containing product:

This chemical/product is not and cannot be distributed in commerce (as defined in TSCA section 3(5)) or processed (as defined in TSCA section 3(13)) for consumer paint or coating removal.

(b) Beginning on October 7, 2024, each person who manufactures (including import) methylene chloride for any use must, prior to or concurrent with the shipment, notify companies to whom methylene chloride is shipped, in writing, of the restrictions described in this subpart in accordance with paragraph (d) of this section.

(c) Beginning on December 4, 2024, each person who processes or distributes in commerce methylene chloride or methylene chloride-containing products for any use must, prior to or concurrent with the shipment, notify companies to whom methylene chloride is shipped, in writing, of the restrictions described in this subpart in accordance with paragraph (d) of this section.

(d) The notification required under paragraphs (b) and (c) of this section must occur by inserting the following text in section 1(c) and section 15 of the SDS provided with the methylene chloride or with any methylene chloride-containing product:

After February 3, 2025, this chemical substance (as defined in TSCA section 3(2))/product cannot be distributed in commerce to retailers. After January 28, 2026, this chemical substance (as defined in TSCA section 3(2))/product is and can only be distributed in commerce or processed with a concentration of methylene chloride equal to or greater than 0.1% by weight for the following purposes: (1) Processing as a reactant; (2) Processing for incorporation into a formulation, mixture, or reaction product; (3) Processing for repackaging; (4) Processing for recycling; (5) Industrial or commercial use as a laboratory chemical; (6) Industrial or commercial use as a bonding agent for solvent welding; (7) Industrial and

commercial use as a paint and coating remover from safety critical, corrosion-sensitive components of aircraft and spacecraft; (8) Industrial and commercial use as a processing aid; (9) Industrial and commercial use for plastic and rubber products manufacturing; (10) Industrial and commercial use as a solvent that becomes part of a formulation or mixture, where that formulation or mixture will be used inside a manufacturing process, and the solvent (methylene chloride) will be reclaimed; (11) Industrial and commercial use in the refinishing of wooden furniture, decorative pieces, and architectural fixtures of artistic, cultural or historic value until May 8, 2029; (12) Industrial and commercial use in adhesives and sealants in aircraft, space vehicle, and turbine applications for structural and safety critical non-structural applications until May 8, 2029; (13) Disposal; and (14) Export.

■ 11. Revise newly redesignated § 751.113 to read as follows:

§ 751.113 Recordkeeping requirements.

(a) *General records.* Each person who manufactures (including imports), processes, or distributes in commerce any methylene chloride after August 26, 2019, must retain in one location at the headquarters of the company, or at the facility for which the records were generated beginning July 8, 2024, documentation showing:

- (1) The name, address, contact, and telephone number of companies to whom methylene chloride was shipped;
- (2) A copy of the notification provided under § 751.111; and
- (3) The amount of methylene chloride shipped.

(b) *Exposure control records.* Owners or operators must retain records of:

- (1) The exposure control plan as described in § 751.109(e)(2);
- (2) Implementation of the exposure control plan described in § 751.109(e)(2), including:
 - (i) Any regular inspections, evaluations, and updating of the exposure controls to maintain effectiveness; and
 - (ii) Confirmation that all persons are properly implementing the exposure controls.
- (3) Personal protective equipment (PPE) and respiratory protection used by potentially exposed persons and program implementation, including fit-testing, pursuant to § 751.109(f) and (g);
- (4) Information and training provided pursuant to § 751.109(h); and
- (5) Occurrence and duration of any start-up, shutdown, or malfunction of exposure controls or of facility equipment that causes air concentrations to be above the ECEL or EPA STEL and subsequent corrective actions taken during start-up, shutdown, or malfunctions to mitigate exposures to methylene chloride.

(c) *Objective data.* Objective data generated during the previous 5 years, when used to forgo the initial exposure monitoring, must include:

- (1) The use of methylene chloride being evaluated;
- (2) The source of objective data;
- (3) The measurement methods, measurement results, and measurement analysis of the use of methylene chloride; and
- (4) Any other relevant data to the operations, processes, or person's exposure.

(d) *Exposure monitoring records.* (1) Owners or operators are required to retain monitoring records that include, at minimum, the information described at 29 CFR 1910.1052(m)(2)(ii)(A) through (F). For the purposes of this paragraph (d)(1), cross-referenced provisions in 29 CFR 1910.1052(m)(2)(ii) applying to an "employee" apply equally to potentially exposed persons and cross-referenced provisions applying to an "employer" also apply equally to owners or operators.

(2) For each monitoring event of methylene chloride required under this subpart, owners or operators must also document the following:

- (i) All measurements that may be necessary to determine the conditions that may affect the monitoring results;
- (ii) The identity of all other potentially exposed persons whose exposure was not measured and whose exposure is intended to be represented by the area or representative sampling monitoring;
- (iii) Use of established analytical methods;
- (iv) Compliance with the Good Laboratory Practice Standards in accordance with 40 CFR part 792 or use of a laboratory accredited by the AIHA or another industry-recognized program; and
- (v) Information regarding air monitoring equipment including: Type, maintenance, calibrations, performance tests, limits of detection, and any malfunctions.

(3) Owners or operators must maintain copies of exposure monitoring notifications provided pursuant to § 751.109(d)(5).

(e) *Availability of exposure control plans.* Owners or operators must document the notice to and ability of any potentially exposed persons to access the exposure control plan and other associated records in accordance with § 751.109(e)(2)(iii).

(f) *Records related to exemptions.* To maintain eligibility for an exemption described in § 751.115, the records maintained by the owners or operators

must demonstrate compliance with the specific conditions of the exemption.

(g) *Records related to the refinishing of wooden furniture, decorative pieces, and architectural fixtures.* (1) Owners and operators of workplaces engaged in the industrial or commercial use of methylene chloride for the refinishing of wooden furniture, decorative pieces, and architectural fixtures of artistic, cultural, or historic value must document each instance of refinishing such pieces.

(2) The documentation required by paragraph (g)(1) of this section must include:

- (i) The date of the refinishing activity;
- (ii) A description of the wooden piece that was refinished and an explanation of its artistic, cultural, or historic value;
- (iii) The name of the owner of the refinished wooden piece;
- (iv) The name of the individual(s) that refinished the wooden piece;
- (v) A description of the methylene chloride product used and the quantity of the product used to perform the refinishing; and
- (vi) Records demonstrating compliance with the requirements of § 751.117.

(h) *Minimum record retention period.* The records required under this section must be retained for at least 5 years from the date that such records were generated.

■ 12. Add § 751.115 to read as follows:

§ 751.115 Exemptions.

(a) *In general.* (1) Time-limited exemptions described in this section are established in accordance with 15 U.S.C. 2605(g)(1).

(2) To be eligible for the exemptions established in this section, regulated parties must comply with all conditions promulgated in this section for such exemptions in accordance with 15 U.S.C. 2605(g)(4).

(b) *Exemption for emergency use by the National Aeronautics and Space Administration.* Under 15 U.S.C. 2605(g)(1)(A), the use of methylene chloride or methylene chloride-containing products in an emergency by the National Aeronautics and Space Administration and its contractors operating within the scope of their contracted work for the conditions of use identified in paragraph (b)(1) of this section is exempt from the requirements of § 751.107(b)(3) through (6) until May 8, 2034.

(1) *Applicability.* This exemption shall apply to the following specific conditions of use:

- (i) Industrial and commercial use as solvent for cold cleaning;

(ii) Industrial and commercial use as a solvent for aerosol spray degreaser/cleaner;

(iii) Industrial and commercial use in adhesives, sealants, and caulks;

(iv) Industrial and commercial use in adhesive and caulk removers;

(v) Industrial and commercial use in metal non-aerosol degreasers;

(vi) Industrial and commercial use in non-aerosol degreasers and cleaners; and

(vii) Industrial and commercial use as solvent that becomes part of a formulation or mixture.

(2) *Emergency use.* (i) *In general.* An emergency is a serious and sudden situation requiring immediate action, within 15 days or less, necessary to protect:

(A) Safety of the National Aeronautics and Space Administration's or their contractors' personnel;

(B) The National Aeronautics and Space Administration's missions;

(C) Human health, safety, or property, including that of adjacent communities; or

(D) The environment.

(ii) *Duration.* Each emergency is a separate situation; if use of methylene chloride exceeds 15 days, then justification must be documented.

(3) *Eligibility.* To be eligible for the exemption, the National Aeronautics and Space Administration and its contractors must:

(i) Select methylene chloride because there are no technically and economically feasible safer alternatives available during the emergency.

(ii) Perform the emergency use of methylene chloride at locations

controlled by the National Aeronautics and Space Administration or its contractors.

(iii) Comply with the following conditions:

(A) *Notification.* Within 15 working days of the emergency use by the National Aeronautics and Space Administration or its contractors, the National Aeronautics and Space Administration and its contractors must provide notice to the EPA Assistant Administrators of both the Office of Enforcement and Compliance Assurance and the Office of Chemical Safety and Pollution Prevention that includes the following:

(1) Identification of the condition of use detailed in paragraph (b)(1) of this section to which the emergency use applies;

(2) An explanation for why the emergency use met the definition of emergency in paragraph (b)(2)(i) of this section; and

(3) An explanation of why methylene chloride was selected, including why there were no technically and economically feasible safer alternatives available in the particular emergency.

(B) *Exposure.* The owner or operator must comply with and document such compliance efforts under the Workplace Chemical Protection Program provisions in § 751.109, to the extent technically feasible in light of the particular emergency.

(C) *Recordkeeping.* The owner or operator of the location where the use takes place must comply with the recordkeeping requirements in § 751.113.

■ 13. Add § 751.117 to read as follows:

§ 751.117 Interim requirements for paint and coating removal for the refinishing of wooden furniture, decorative pieces, and architectural fixtures of artistic, cultural, or historic value.

Beginning July 8, 2024, and notwithstanding the timeframes identified in § 751.109, all persons using methylene chloride, including any methylene chloride containing products, for industrial and commercial use for the refinishing of wooden furniture, decorative pieces and architectural fixtures of artistic, cultural, or historic value must:

(a) Establish a regulated area in accordance with § 751.109(c)(3);

(b) Use local exhaust ventilation, both bringing air in from outside and pulling methylene chloride vapors away from the potentially exposed person; and

(c) Provide minimum respiratory protection:

(1) Use any NIOSH Approved® Supplied-Air Respirator (SAR) or airline respirator in a demand mode equipped with a full facepiece (APF 50) or any NIOSH Approved® Self-Contained Breathing Apparatus (SCBA) in demand-mode equipped with a full facepiece or helmet/hood (APF 50); or

(2) Use the appropriate respirator based on initial monitoring as identified in § 751.109(f)(2).

(d) Comply with the recordkeeping requirements in § 751.113(g).

[FR Doc. 2024-09606 Filed 5-7-24; 8:45 am]

BILLING CODE 6560-50-P



FEDERAL REGISTER

Vol. 89

Wednesday,

No. 90

May 8, 2024

Part VI

Environmental Protection Agency

40 CFR Parts 60 and 63

National Emission Standards for Hazardous Air Pollutants: Gasoline

Distribution Technology Reviews and New Source Performance Standards

Review for Bulk Gasoline Terminals; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 60 and 63

[EPA-HQ-OAR-2020-0371; FRL-8202-02-OAR]

RIN 2060-AU97

National Emission Standards for Hazardous Air Pollutants: Gasoline Distribution Technology Reviews and New Source Performance Standards Review for Bulk Gasoline Terminals

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing the technology reviews (TR) conducted for the national emission standards for hazardous air pollutants (NESHAP) for gasoline distribution facilities and the review of the new source performance standards (NSPS) for bulk gasoline terminals pursuant to the requirements of the Clean Air Act (CAA). The final NESHAP amendments include revised requirements for storage vessels, loading operations, and equipment to reflect cost-effective developments in practices, processes, or controls. The final NSPS reflect the best system of emission reduction for loading operations and equipment leaks. In addition, the EPA is: finalizing revisions related to emissions during periods of startup, shutdown, and malfunction (SSM); adding requirements for electronic reporting; revising monitoring and operating requirements for control devices; and making other minor technical improvements. The EPA estimates that this final action will reduce hazardous air pollutant emissions from gasoline distribution facilities by over 2,200 tons per year (tpy) and volatile organic compound (VOC) emissions by 45,400 tpy.

DATES: The final rule is effective July 8, 2024.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2020-0371. All documents in the docket are listed on the <https://www.regulations.gov/> website. Although listed, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy. Publicly available docket materials are available

electronically through <https://www.regulations.gov/>.

FOR FURTHER INFORMATION CONTACT: For questions about this final action, contact U.S. EPA, Attn: Ms. Jennifer Caparoso, Mail Drop: E143-01, 109 T.W. Alexander Drive, P.O. Box 12055, RTP, NC 27711; telephone number: (919) 541-4063; and email address: caparoso.jennifer@epa.gov.

SUPPLEMENTARY INFORMATION:

Preamble acronyms and abbreviations. Throughout this document the use of “we,” “us,” or “our” is intended to refer to the EPA. The EPA uses multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

AVO audio, visual, or olfactory
 BACT best available control technology
 BSE best system of emission reduction
 CAA Clean Air Act
 CDX Central Data Exchange
 CEDRI Compliance and Emissions Data Reporting Interface
 CEMS continuous emission monitoring system
 CFR Code of Federal Regulations
 CO carbon monoxide
 CO₂ carbon dioxide
 CPMS continuous parametric monitoring system
 EAV equivalent annual value
 EJ environmental justice
 E.O. Executive Order
 EPA Environmental Protection Agency
 ERT Electronic Reporting Tool
 FR Federal Register
 GACT generally available control technology
 HAP hazardous air pollutant(s)
 ICR information collection request
 km kilometer
 LAER lowest achievable emission rate
 LDAR leak detection and repair
 LEL lower explosive limit
 MACT maximum achievable control technology
 mg/L milligrams per liter
 mph miles per hour
 NAICS North American Industry Classification System
 NESHAP national emission standards for hazardous air pollutants
 NHV_{cz} combustion zone net heating value
 NHV_{dil} net heating value dilution
 NO_x nitrogen oxides
 NSPS new source performance standards
 O₃ ozone
 OGI optical gas imaging
 OMB Office of Management and Budget
 ppmv parts per million volume
 psig pounds per square inch gauge
 PRA Paperwork Reduction Act
 PV present value
 RACT reasonably available control technology
 RFA Regulatory Flexibility Act
 RIA regulatory impact analysis
 RTR risk and technology review

SO₂ sulfur dioxide
 SSM startup, shutdown, and malfunction
 TOC total organic carbon
 tpy tons per year
 TR technology review
 U.S. United States
 U.S.C. United States Code
 VOC volatile organic compound(s)
 VRU vapor recovery unit

Background information. On June 10, 2022, the EPA proposed revisions to both the major source and area source Gasoline Distribution NESHAP and the Bulk Gasoline Terminals NSPS based on the TR and NSPS review. In this action, the EPA is finalizing decisions and revisions for these rules. The EPA summarized some of the more significant comments we timely received regarding the proposed rules and provides responses in this preamble. A summary of all other public comments on the proposals and the EPA's responses to those comments is available in *National Emission Standards for Hazardous Air Pollutants for Gasoline Distribution Facilities and New Source Performance Standards for Bulk Gasoline Terminals, Background Information for Final Amendments, Summary of Public Comments and Responses*, Docket ID No. EPA-HQ-OAR-2020-0371. “Track changes” versions of the regulatory language that incorporates the changes in these rules are available in the docket.

Organization of this document. The information in this preamble is organized as follows:

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I. General Information

A. Executive Summary

1. Purpose of the Regulatory Action

The source categories that are the subject of this final action are Gasoline Distribution regulated under 40 CFR part 63, subparts R and BBBBBB, and Bulk Gasoline Terminals¹ regulated under 40 CFR part 60, subparts XX and XXa. The EPA set maximum achievable control technology (MACT) standards for the gasoline distribution major source category in 1994 and conducted the residual risk and technology review (RTR) in 2006. The sources affected by the major source NESHAP for the gasoline distribution source category (40 CFR part 63, subpart R) are bulk gasoline terminals and pipeline breakout stations. The EPA set generally available control technology (GACT) standards for the gasoline distribution area source category in 2008. The sources affected by the area source NESHAP for the gasoline distribution source category (40 CFR part 63, subpart BBBBBB) are bulk gasoline terminals, bulk gasoline plants, and pipeline facilities. The EPA set the first NSPS for bulk gasoline terminals in 1983. Bulk

gasoline terminals that commenced construction or modification after December 17, 1980, and on or before June 10, 2022, are regulated under the NSPS codified at 40 CFR part 60, subpart XX. Bulk gasoline terminals that commenced construction or modification after June 10, 2022, will be regulated under the NSPS codified at 40 CFR part 60, subpart XXa.

The statutory authority for these final rulemakings is sections 111 and 112 of the CAA. Section 111(b)(1)(B) of the CAA requires the EPA to “at least every 8 years review and, if appropriate, revise” the NSPS. Section 111(a)(1) of the CAA provides that performance standards are to “reflect the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.” We refer to this level of control as the best system of emission reduction or “BSER.” Section 112(d)(6) of the CAA requires the EPA to review standards promulgated under CAA section 112(d) and revise them “as necessary (taking into account developments in practices, processes, and control technologies)” no less often than every 8 years following promulgation of those standards. This is referred to as a “technology review.”

The NSPS for Bulk Gasoline Terminals and the amendments to the NESHAP for Gasoline Distribution facilities finalized in this action fulfill the Agency's requirements, respectively, to review and, if appropriate, revise the NSPS and to review and revise as necessary the NESHAP at least every 8 years.

2. Summary of the Major Provisions of the Regulatory Action in Question

a. NESHAP Subpart R

The EPA is finalizing the requirement of a graduated vapor tightness certification from 0.5 to 1.25 inches of water pressure drop over a 5-minute period, depending on the cargo tank compartment size for gasoline cargo tanks. The EPA is also finalizing the requirement of fitting controls for external floating roof tanks consistent with the requirements in 40 CFR part 60, subpart Kb (NSPS subpart Kb). In addition, the EPA is finalizing the requirement of semiannual instrument monitoring for equipment leaks at major source gasoline distribution facilities.

b. NESHAP Subpart BBBBBB

The EPA is finalizing an area source emission limit of 35 milligrams of total organic carbon (TOC) per liter of gasoline loaded (mg/L) at large bulk gasoline terminals and vapor balancing² requirements for loading storage vessels and gasoline cargo tanks at bulk gasoline plants with actual throughput of 4,000 gallons per day or more. The EPA is also finalizing the requirement of a graduated vapor tightness certification from 0.5 to 1.25 inches of water pressure drop over a 5-minute period, depending on the cargo tank compartment size for gasoline cargo tanks. Additionally, the EPA is finalizing the requirement of fitting controls for external floating roof tanks consistent with the requirements in NSPS subpart Kb. Also, the EPA is finalizing the requirement of annual instrument monitoring for equipment leaks at area source gasoline distribution facilities.

c. NSPS Subpart XXa

The EPA is finalizing a new NSPS subpart XXa applicable to affected facilities that commence construction, modification, or reconstruction after June 10, 2022. For loading operations, the EPA is finalizing standards of performance for VOC that require new facilities to meet a 1.0 mg/L TOC emission limit and modified and reconstructed facilities to meet a 10 mg/L TOC emission limit. The EPA is also finalizing the requirement for gasoline cargo tanks of a graduated vapor tightness certification from 0.5 to 1.25 inches of water pressure drop over a 5-minute period, depending on the cargo tank compartment size. In addition, the EPA is finalizing the requirement of quarterly instrument monitoring for equipment leaks.

3. Costs and Benefits

In accordance with Executive Order (E.O.) 12866 and 13563, the guidelines of the Office of Management and Budget (OMB) Circular A–4, and the EPA's *Guidelines for Preparing Economic Analyses*, the EPA prepared a Regulatory Impact Analysis (RIA) for the proposal of the rules included in this action. The RIA analyzed the benefits and costs associated with the projected emissions reductions under the proposed requirements, a less stringent set of requirements, and a more stringent set of requirements. Prior to the amendments made by E.O. 14094, the proposal of the area source NESHAP

¹ Petroleum Transportation and Marketing is the listed source category. Bulk Gasoline Terminals are the affected facilities regulated by the NSPS addressing the Petroleum Transportation and Marketing source category.

² When using a vapor balancing system, displaced vapors from a cargo tank are captured and routed through piping back to a storage vessel or vice-versa.

rule was significant under E.O. 12866, section 3(f)(1) due to its likely annual effect on the economy of \$100 million or more in any one year on the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities. Specifically, monetized health benefits from projected VOC reductions associated with the proposed area source NESHAP rule amendments exceeded \$100 million per year.

On April 6, 2023, President Biden issued E.O. 14094, Modernizing Regulatory Review, which increased the annual effect threshold for significance under E.O. 12866, section 3(f)(1) from \$100 million to \$200 million. This final action is significant under E.O. 12866, section 3(f)(1) as amended by E.O. 14094. Accordingly, the EPA has prepared a Regulatory Impact Analysis (RIA).

The EPA projected the emissions reductions, costs, and benefits that may result from the rules included in this final action, which are presented in detail in the RIA. We present these results for each of the three rules included in this final action, and also cumulatively. The RIA focuses on the elements of the final action that are likely to result in quantifiable cost or emissions changes compared to a baseline without the final NESHAP and NSPS amendments. We estimated the cost, emissions, and benefit impacts for the 2027 to 2041 period. We also show the present value (PV) and equivalent annual value (EAV) of costs, benefits, and net benefits of this action in 2021 dollars. The year 2019 was used as the base year in the cost analyses at proposal. However, based on comments received, we updated our analyses to use 2021 as the base year.

The EPA also updated costs and emissions impacts in the RIA to incorporate changes to the economic environment since the proposal. Specifically, the interest rate used to annualize capital costs rose from 3.25 percent to 7.75 percent to reflect changes in the bank prime rate, the VOC recovery credit used to value gasoline product recovery was updated to reflect

the 2021 wholesale price of gasoline, and the dollar-year was updated from 2019 to 2021 to reflect recent inflation.³

The initial analysis year in the RIA is 2027, as we assume the large majority of impacts associated with the final action will begin in that year. The most significant impacts of this final action are due to the regulation of existing sources under the major and area source NESHAP rules. These two rules, NESHAP subparts R and BBBBBB, require compliance with the existing source standards 3 years after the promulgation date of these final rules. As a result, compliance with the standards for existing sources will occur in 2027. The final analysis year is 2041, which allows us to present 15 years of projected impacts after all three of these rules are assumed to take effect.

The cost analysis presented in the RIA reflects a nationwide engineering analysis of compliance cost and emissions reductions, of which there are two main components. The first component is a set of representative or model plants for each regulated facility, segment, and control option. The characteristics of a model plant include typical equipment, operating characteristics, and representative factors including baseline emissions and the costs, emissions reductions, and product recovery of gasoline resulting from each control option. The second component is a set of projections of data for affected facilities, distinguished by vintage, year, and other necessary attributes (e.g., precise content of material in storage vessels). Impacts are calculated by setting parameters on how and when affected facilities are assumed to respond to a particular regulatory regime, multiplying data by model plant cost and emissions estimates, differencing from the baseline scenario,

³ The EPA used the wholesale price of gasoline in this analysis to provide a focus on the rulemaking's cost impacts to affected firms, including the impact of product recovery upon the cost to these firms. Use of the consumer price of gasoline would introduce market interactions that may make analysis of product recovery more difficult to estimate given passthrough of costs by firms to consumers. More explanation on the use of wholesale price of gasoline is found in Chapter 3 of the RIA.

and then summing to the desired level of aggregation. In addition to emissions reductions, some control options result in recovered gasoline, which can then be sold where possible. Where applicable, we present projected compliance costs with and without the projected revenues from product recovery.

The EPA expects health benefits as a result of the emissions reductions projected under this final action. We expect that hazardous air pollutants (HAP) emission reductions will improve health and welfare associated with those affected by these emissions. In addition, the EPA expects that VOC emission reductions that will occur concurrent with the reductions of HAP emissions will improve air quality and are likely to improve health and welfare associated with reduced exposure to ozone, particulate matter with a diameter less than 2.5 microns (PM_{2.5}), and HAP. The EPA expects disbenefits from secondary increases of carbon dioxide (CO₂), nitrogen oxides (NO_x), sulfur dioxide (SO₂), and carbon monoxide (CO) emissions associated with the control options included in the cost analysis. The benefits of reduced premature mortality and morbidity associated with reduced exposure to VOC emissions and climate disbenefits associated with increased CO₂ emissions have been monetized for this final action. Our discussion of both the benefits and disbenefits, monetized and non-monetized, associated with this action are included in chapter 4 of the RIA.

Tables 1 through 3 of this document present the emission changes and the PV and EAV of the projected monetized benefits, compliance costs, and net benefits over the 2027 to 2041 period under the final action for each subpart. Table 4 of this document presents the same results for the cumulative impact of these rulemakings. Climate disbenefits are discounted using a 3 percent social discount rate. All other discounting of impacts presented uses social discount rates of 3 and 7 percent.

Table 1—Monetized Benefits, Costs, Net Benefits, and Emissions Reductions of the Final NESHAP Subpart BBBBBB Amendments, 2027 Through 2041
[Dollar Estimates in Millions of 2021 Dollars] ^a

	3 Percent Discount Rate		7 Percent Discount Rate	
	PV	EAV	PV	EAV
Benefits ^b	\$200 and \$1,600	\$17 and \$140	\$120 and \$980	\$13 and \$110
Climate Disbenefits (3%) ^c	\$30	\$2.5	\$30	\$2.5
Net Compliance Costs ^d	-\$70	-\$6.0	-\$50	-\$5.0
<i>Compliance Costs</i>	\$230	\$19	\$160	\$18
<i>Value of Product Recovery</i>	\$300	\$25	\$210	\$23
Net Benefits	\$240 and \$1,600	\$21 and \$140	\$140 and \$1,000	\$16 and \$110
Emissions Reductions (short tons)	2027–2041 Total			
VOC	605,000			
HAP	31,000			
Secondary Emissions Increases (short tons)	2027–2041 Total			
CO ₂	490,000			
NO _x	280			
SO ₂	0.67			
CO	1,300			
	HAP benefits from reducing 31,000 short tons of HAP from 2027–2041			

Non-monetized Benefits in this table

Climate and health disbenefits from increasing nitrogen oxides (NO_x) emissions by 280 short tons, sulfur dioxide (SO₂) by 0.67 short tons, and carbon monoxide (CO) by 1,300 short tons from 2027–2041

Visibility benefits

Reduced vegetation and ecosystem effects

^a Discounted to 2024. Values rounded to two significant figures. Totals may not appear to add correctly due to rounding. Short tons are standard English tons (2,000 pounds).

^b Monetized benefits include ozone related health benefits associated with reductions in VOC emissions. The health benefits are associated with several point estimates and are presented at real discount rates of 3 and 7 percent. The two benefits estimates are separated by the word “and” to signify that they are two separate estimates. The estimates do not represent lower- and upper-bound estimates. Disbenefits from additional CO₂ emissions resulting from application of control options are monetized and included in the table as climate disbenefits. Benefits from HAP reductions and VOC reductions outside of the ozone season remain unmonetized and are thus not reflected in the table. The unmonetized effects also include disbenefits resulting from the secondary impact of an increase in NO_x, SO₂, and CO emissions. Please see section 4.6 of the RIA for more discussion of the climate disbenefits.

^c Climate disbenefits are based on changes (increases) in CO₂ emissions and are calculated using four different estimates of the social cost of carbon (SC-CO₂) (model average at 2.5 percent, 3 percent, and 5 percent discount rates; 95th percentile at 3 percent discount rate). For the presentational purposes of this table, we show the disbenefits associated with the average SC-CO₂ at a 3 percent discount rate, but the Agency does not have a single central SC-CO₂ point estimate. We emphasize the importance and value of considering the disbenefits calculated using all four SC-CO₂ estimates; the additional disbenefit estimates range from PV (EAV) \$6.1 million (\$0.6 million) to \$91 million (\$7.6 million) from 2027–2041 for the final amendments. Please see table 4-10 of the RIA for the full range of SC-CO₂ estimates. As discussed in chapter 4 of the RIA, a consideration of climate disbenefits calculated using discount rates below 3 percent, including 2 percent and lower, is also warranted when discounting intergenerational impacts.

^d Net compliance costs are the engineering control costs minus the value of recovered product. A negative net compliance cost occurs when the value of the recovered product exceeds the compliance costs.

Table 2—Monetized Benefits, Compliance Costs, Net Benefits, and Emissions Reductions of the Final NESHAP Subpart R Amendments, 2027 Through 2041
[Dollar Estimates in Millions of 2021 Dollars] ^a

	3 Percent Discount Rate		7 Percent Discount Rate	
	PV	EAV	PV	EAV
Benefits ^b	\$11 and \$87	\$0.89 and \$7.3	\$6.3 and \$52	\$0.70 and \$5.8
Net Compliance Costs ^c	\$22	\$1.9	\$16	\$1.6
<i>Compliance Costs</i>	\$38	\$3.2	\$27	\$2.9
<i>Value of Product Recovery</i>	\$16	\$1.3	\$11	\$1.3
Net Benefits	-\$11 and \$65	-\$1.0 and \$5.4	-\$9.7 and \$36	-\$0.9 and \$4.2
Emissions Reductions (short tons)	2027–2041 Total			
VOC	32,000			
HAP	2,000			
Non-monetized Benefits in this table	HAP benefits from reducing 2,000 short tons of HAP from 2027–2041			
	Visibility benefits			
	Reduced vegetation and ecosystem effects			

^a Discounted to 2024. Values rounded to two significant figures. Totals may not appear to add correctly due to rounding. Short tons are standard English tons (2,000 pounds).

^b Monetized benefits include ozone related health benefits associated with reductions in VOC emissions. The health benefits are associated with several point estimates and are presented at real discount rates of 3 and 7 percent. The two benefits estimates are separated by the word “and” to signify that they are two separate estimates. The estimates do not represent lower- and upper-bound estimates. Benefits from HAP reductions and VOC reductions outside of the ozone season remain unmonetized and are thus not reflected in the table.

^c Net compliance costs are the engineering control costs minus the value of recovered product. A negative net compliance cost occurs when the value of the recovered product exceeds the compliance costs.

Table 3—Monetized Benefits, Costs, Net Benefits, and Emissions Reductions of the Final NSPS
Subpart XXa, 2027 Through 2041
[Dollar Estimates in Millions of 2021 Dollars] ^a

	3 Percent Discount Rate		7 Percent Discount Rate	
	PV	EAV	PV	EAV
Benefits ^b	\$34 and \$280	\$2.8 and \$24	\$19 and \$160	\$2.1 and \$17
Climate Disbenefits (3%) ^c	\$4.9	\$0.41	\$4.9	\$0.41
Net Compliance Costs ^d	\$2.0	\$0.20	\$2.0	\$0.10
<i>Compliance Costs</i>	\$52	\$4.4	\$34	\$3.8
<i>Value of Product Recovery</i>	\$50	\$4.2	\$33	\$3.7
Net Benefits	\$27 and \$270	\$2.2 and \$23	\$13 and \$150	\$1.6 and \$16
Emissions Reductions (short tons)	2027–2041 Total			
VOC	110,000			
HAP	4,400			
Secondary Emissions Increases (short tons)	2027–2041 Total			
CO ₂	77,000			
NO _x	45			
SO ₂	48			
CO	0			
Non-monetized Benefits in this table	HAP benefits from reducing 4,020 short tons of HAP from 2027–2041			
	Climate and health disbenefits from increasing nitrogen oxides (NO _x) emissions by 45 short tons and sulfur dioxide (SO ₂) by 48 short tons from 2027–2041.			
	Visibility benefits			
	Reduced vegetation and ecosystem effects			

^a Discounted to 2024. Values rounded to two significant figures. Totals may not appear to add correctly due to rounding. Short tons are standard English tons (2,000 pounds).

^b Monetized benefits include ozone related health benefits associated with reductions in VOC emissions. The health benefits are associated with several point estimates and are presented at real discount rates of 3 and 7 percent. The two benefits estimates are separated by the word “and” to signify that they are two separate estimates. The estimates do not represent lower- and upper-bound estimates. Disbenefits from additional CO₂ emissions resulting from application of control options are monetized and included in the table as climate disbenefits. Benefits from HAP reductions and VOC reductions outside of the ozone season remain unmonetized and are thus not reflected in the table. The unmonetized effects also include disbenefits resulting from the secondary impact of an increase in NO_x, SO₂, and CO emissions. Please see section 4.6 of the RIA for more discussion of the climate disbenefits.

^c Climate disbenefits are based on changes (increases) in CO₂ emissions and are calculated using four different estimates of the social cost of carbon (SC-CO₂) (model average at 2.5 percent, 3 percent, and 5 percent discount rates; 95th percentile at 3 percent discount rate). For the presentational purposes of this table, we show the disbenefits associated with the average SC-CO₂ at a 3 percent discount rate, but the Agency does not have a single central SC-CO₂ point estimate. We emphasize the importance and value of considering the disbenefits calculated using all four SC-CO₂ estimates; the additional disbenefit estimates range from PV (EAV) \$0.93 million (\$0.09 million) to \$15 million (\$1.2 million) from 2027–2041 for the final amendments. Please see table 4-10 of the RIA for the full range of SC-CO₂ estimates. As discussed in chapter 4 of the RIA, a consideration of climate disbenefits calculated using discount rates below 3 percent, including 2 percent and lower, is also warranted when discounting intergenerational impacts.

^d Net compliance costs are the engineering control costs minus the value of recovered product. A negative net compliance cost occurs when the value of the recovered product exceeds the compliance costs.

Table 4—Cumulative Monetized Benefits, Costs, Net Benefits, and Emissions Reductions of the Final Action, 2027 Through 2041
[Dollar Estimates in Millions of 2021 Dollars] ^a

	3 Percent Discount Rate		7 Percent Discount Rate	
	PV	EAV	PV	EAV
Benefits ^b	\$240 and \$2,000	\$20 and \$170	\$140 and \$1,200	\$16 and \$130
Climate Disbenefits (3%) ^c	\$35	\$2.9	\$35	\$2.9
Net Compliance Costs ^d	-\$46	-\$3.9	-\$35	-\$2.9
<i>Compliance Costs</i>	\$320	\$27	\$220	\$25
<i>Value of Product Recovery</i>	\$370	\$31	\$250	\$28
Net Benefits	\$250 and \$2,000	\$21 and \$170	\$140 and \$1,200	\$16 and \$130
Emissions Reductions (short tons)	2027–2041 Total			
VOC	740,000			
HAP	38,000			
Secondary Emissions Increases (short tons)	2027–2041 Total			
CO ₂	570,000			
NO _x	330			
SO ₂	49			
CO	1,300			
Non-monetized Benefits in this table	HAP benefits from reducing 37,000 short tons of HAP from 2027–2041			
	Climate and health disbenefits from increasing nitrogen oxides (NO _x) emissions by 320 short tons, sulfur dioxide (SO ₂) by 41 short tons, and carbon monoxide (CO) by 1,300 short tons from 2027–2041			
	Visibility benefits			
	Reduced vegetation and ecosystem effects			

^a Discounted to 2024. Values rounded to two significant figures. Totals may not appear to add correctly due to rounding. Short tons are standard English tons (2,000 pounds).

^b Monetized benefits include ozone related health benefits associated with reductions in VOC emissions. The health benefits are associated with several point estimates and are presented at real discount rates of 3 and 7 percent. The two benefits estimates are separated by the word “and” to signify that they are two separate estimates. The estimates do not represent lower- and upper-bound estimates. Disbenefits from additional CO₂ emissions resulting from application of control options are monetized and included in the table as climate disbenefits. Benefits from HAP reductions and VOC reductions outside of the ozone season remain unmonetized and are thus not reflected in the table. The unmonetized effects also include disbenefits resulting from the secondary impact of an increase in NO_x, SO₂, and CO emissions. Please see section 4.6 of the RIA for more discussion of the climate disbenefits.

^c Climate disbenefits are based on changes (increases) in CO₂ emissions and are calculated using four different estimates of the social cost of carbon (SC-CO₂) (model average at 2.5 percent, 3 percent, and 5 percent discount rates; 95th percentile at 3 percent discount rate). For the presentational purposes of this table, we show the disbenefits associated with the average SC-CO₂ at a 3 percent discount rate, but the Agency does not have a single central SC-CO₂ point estimate. We emphasize the importance and value of considering the disbenefits calculated using all four SC-CO₂ estimates; the additional disbenefit estimates range from PV (EAV) \$7.1 million (\$0.7 million) to \$110 million (\$8.8 million) from 2027–2041 for the final amendments. Please see table 4-10 of the RIA for the full range of SC-CO₂ estimates. As discussed in chapter 4 of the RIA, a consideration of climate disbenefits calculated using discount rates below 3 percent, including 2 percent and lower, is also warranted when discounting intergenerational impacts.

^d Net compliance costs are the engineering control costs minus the value of recovered product. A negative net compliance cost occurs when the value of the recovered product exceeds the compliance costs.

B. Does this action apply to me?

The source categories that are the subject of this final action are Gasoline Distribution regulated under 40 CFR part 63, subparts R and BBBB, and Bulk Gasoline Terminals regulated under 40 CFR part 60, subparts XX and XXa. The 2022 North American Industry Classification System (NAICS) codes for the gasoline distribution industry are 324110, 493190, 486910, and 424710. The NAICS codes are not intended to be exhaustive but rather to serve as a guide for readers regarding entities likely to be affected by this final action. The NSPS codified in 40 CFR part 60, subpart XXa, are directly applicable to affected facilities that begin construction, reconstruction, or modification after June 10, 2022. If you have any questions regarding the applicability of these rules to a particular entity, you should carefully examine the applicability criteria found in the appropriate NESHAP and NSPS, and consult with the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this preamble, your State air pollution control agency with delegated authority, or your EPA Regional Office.

C. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this final action is available on the internet at <https://www.epa.gov/stationary-sources-air-pollution/gasoline-distribution-mact-and-gact-national-emission-standards>. Following publication in the **Federal Register**, the EPA will post the **Federal Register** version and key technical documents at this same website.

Additional information is available on the RTR website at <https://www.epa.gov/stationary-sources-air-pollution/risk-and-technology-review-national-emissions-standards-hazardous>. This information includes an overview of the RTR program and links to project websites for the RTR source categories.

D. Judicial Review and Administrative Review

Under CAA section 307(b)(1), judicial review of this final action is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit by July 8, 2024. Under CAA section 307(b)(2), the requirements established by these final rules may not be challenged separately in any civil or criminal proceedings brought by the EPA to enforce the requirements.

Section 307(d)(7)(B) of the CAA further provides that “[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.” This section also provides a mechanism for the EPA to reconsider the rules, “[i]f the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.” Any person seeking to make such a demonstration should submit a Petition for Reconsideration to the Office of the

Administrator, U.S. Environmental Protection Agency, Room 3000, WJC West Building, 1200 Pennsylvania Ave. NW, Washington, DC 20460, with a copy to both the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

II. Background

A. What is the statutory authority for this action?

1. NESHAP

The statutory authority for this action is provided by CAA sections 112 and 301, as amended (42 U.S.C. 7401 *et seq.*). Section 112 of the CAA establishes a two-stage regulatory process to develop standards for HAP from stationary sources. Generally, the first stage involves establishing technology-based standards and the second stage involves evaluating those standards that are based on MACT to determine whether additional standards are needed to address any remaining risk associated with HAP emissions. This second stage is commonly referred to as the “residual risk review.” In addition to the residual risk review, the CAA also requires the EPA to review standards set under CAA section 112 every 8 years and revise the standards as necessary taking into account any “developments in practices, processes, or control technologies.” This review is commonly referred to as the “technology review” and is the subject of this final action. The discussion that

follows identifies the most relevant statutory sections and briefly explains the contours of the methodology used to implement these statutory requirements.

In the first stage of the CAA section 112 standard setting process, the EPA promulgates technology-based standards under CAA section 112(d) for categories of sources identified as emitting one or more of the HAP listed in CAA section 112(b). Sources of HAP emissions are either major sources or area sources, and CAA section 112 establishes different requirements for major source standards and area source standards. “Major sources” are those that emit or have the potential to emit 10 tons per year (tpy) or more of a single HAP or 25 tpy or more of any combination of HAP. All other sources are “area sources.” For major sources, CAA section 112(d)(2) provides that the technology-based NESHAP must reflect the maximum degree of emission reductions of HAP achievable (after considering cost, energy requirements, and nonair quality health and environmental impacts). These standards are commonly referred to as MACT standards. CAA section 112(d)(3) also establishes a minimum control level for MACT standards, known as the MACT “floor.” In certain instances, as provided in CAA section 112(h), the EPA may set work practice standards in lieu of numerical emission standards. The EPA must also consider control options that are more stringent than the floor. Standards more stringent than the floor are commonly referred to as beyond-the-floor standards. For categories of major sources and any area source categories subject to MACT standards, the second stage in standard-setting focuses on identifying and addressing any remaining (i.e., “residual”) risk pursuant to CAA section 112(f) and concurrently conducting a technology review pursuant to CAA section 112(d)(6). For categories of area sources subject to GACT standards, there is no requirement to address residual risk, but, similar to the major source categories, the technology review is required.

A technology review is required for all standards established under CAA section 112(d) including GACT standards that apply to area sources.⁴ In conducting the technology review, the EPA is not required to recalculate the MACT floors that were established in earlier rulemakings. *Natural Resources*

Defense Council (NRDC) v. EPA, 529 F.3d 1077, 1084 (D.C. Cir. 2008). *Association of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667 (D.C. Cir. 2013). The EPA may consider cost in deciding whether to revise the standards pursuant to CAA section 112(d)(6). The EPA is required to address regulatory gaps, such as missing MACT standards for listed air toxics known to be emitted from the major source category, and any new MACT standards must be established under CAA sections 112(d)(2) and (3), or, in specific circumstances, CAA sections 112(d)(4) or (h). *Louisiana Environmental Action Network (LEAN) v. EPA*, 955 F.3d 1088 (D.C. Cir. 2020). For information on how EPA conducts a technology review, see 87 FR 35616 (June 10, 2022).

Several additional CAA sections are relevant as they specifically address regulation of hazardous air pollutant emissions from area sources. Collectively, CAA sections 112(c)(3), (d)(5), and (k)(3) are the basis of the Area Source Program under the Urban Air Toxics Strategy, which provides the framework for regulation of area sources under CAA section 112.

Section 112(k)(3)(B) of the CAA requires the EPA to identify at least 30 HAP that pose the greatest potential health threat in urban areas with a primary goal of achieving a 75 percent reduction in cancer incidence attributable to HAP emitted from stationary sources. As discussed in the Integrated Urban Air Toxics Strategy (64 FR 38706, 38715; July 19, 1999), the EPA identified 30 HAP emitted from area sources that pose the greatest potential health threat in urban areas, and these HAP are commonly referred to as the “30 urban HAP.”

Section 112(c)(3), in turn, requires the EPA to list sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the emissions of the 30 urban HAP are subject to regulation. The EPA implemented these requirements through the Integrated Urban Air Toxics Strategy by identifying and setting standards for categories of area sources including the Gasoline Distribution source category that is addressed in this action.

CAA section 112(d)(5) provides that for area source categories, in lieu of setting MACT standards (which are generally required for major source categories), the EPA may elect to promulgate standards or requirements for area sources “which provide for the use of generally available control technology or management practices [GACT] by such sources to reduce emissions of hazardous air pollutants.”

In developing such standards, the EPA evaluates the control technologies and management practices that reduce HAP emissions that are generally available for each area source category. Consistent with the legislative history, we can consider costs and economic impacts in determining what constitutes GACT.

GACT standards were set for the Gasoline Distribution area source category in 2008. MACT standards were set for the Gasoline Distribution major source category in 1994 and the residual risk review and initial technology review for the major source category were completed in 2006. As noted above, this action finalizes the required CAA section 112(d)(6) technology reviews for the standards for major and area sources in that source category.

2. NSPS

The EPA’s authority for the final NSPS rule is CAA section 111, which governs the establishment of standards of performance for stationary sources. Section 111(b)(1)(A) of the CAA requires the EPA Administrator to list categories of stationary sources that in the Administrator’s judgment cause or contribute significantly to air pollution that may reasonably be anticipated to endanger public health or welfare. The EPA must then issue performance standards for new (and modified or reconstructed) sources in each source category pursuant to CAA section 111(b)(1)(B). These standards are referred to as new source performance standards, or NSPS. The EPA has the authority to define the scope of the source categories, determine the pollutants for which standards should be developed, set the emission level of the standards, and distinguish among classes, types, and sizes within categories in establishing the standards.

CAA section 111(b)(1)(B) requires the EPA to “at least every 8 years review and, if appropriate, revise” new source performance standards. However, the Administrator need not review any such standard if the “Administrator determines that such review is not appropriate in light of readily available information on the efficacy” of the standard. When conducting a review of an existing performance standard, the EPA has the discretion and authority to add emission limits for pollutants or emission sources not currently regulated for that source category.

In setting or revising a performance standard, CAA section 111(a)(1) provides that performance standards are to reflect “the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into

⁴ For categories of area sources subject to GACT standards, CAA sections 112(d)(5) and (f)(5) provide that the EPA is not required to conduct a residual risk review under CAA section 112(f)(2). However, the EPA is required to conduct periodic technology reviews under CAA section 112(d)(6).

account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.” The term “standard of performance” in CAA section 111(a)(1) makes clear that the EPA is to determine both the BSER for the regulated sources in the source category and the degree of emission limitation achievable through application of the BSER. The EPA must then, pursuant to CAA section 111(b)(1)(B), promulgate standards of performance for new sources that reflect that level of stringency. CAA section 111(b)(5) generally precludes the EPA from prescribing a particular technological system that must be used to comply with a standard of performance. Rather, sources can select any measure or combination of measures that will achieve the standard. CAA section 111(h)(1) authorizes the Administrator to promulgate “a design, equipment, work practice, or operational standard, or combination thereof” if in his or her judgment, “it is not feasible to prescribe or enforce a standard of performance.” CAA section 111(h)(2) provides the circumstances under which prescribing or enforcing a standard of performance is “not feasible,” such as when the pollutant cannot be emitted through a conveyance designed to emit or capture the pollutant or when there is no practicable measurement methodology for the particular class of sources.

Pursuant to the definition of “new source” in CAA section 111(a)(2), standards of performance apply to facilities that begin construction, reconstruction, or modification after the date of publication of the proposed standards in the **Federal Register**. Under CAA section 111(a)(4), “modification” means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted. Changes to an existing facility that do not result in an increase in emissions are not considered modifications. Under the provisions in 40 CFR 60.15, “reconstruction” means the replacement of components of an existing facility such that: (1) The fixed capital cost of the new components exceeds 50 percent of the fixed capital cost that would be required to construct a comparable entirely new facility; and (2) it is technologically and economically feasible to meet the applicable standards.

The NSPS were promulgated for Bulk Gasoline Terminals in 1983. As noted earlier in this preamble, this action finalizes the required NSPS review for that source category. For information on how the EPA conducts a NSPS review, see 87 FR 35616 (June 10, 2022).

B. What are the source categories regulated in this final action?

1. NESHAP Subpart R

The EPA promulgated the major source Gasoline Distribution NESHAP on December 14, 1994 (59 FR 64303). The standards are codified at 40 CFR part 63, subpart R. The major source gasoline distribution industry consists of bulk gasoline terminals and pipeline breakout stations. The source category covered by this MACT standard currently includes 210 facilities.

The primary sources of HAP emissions at bulk gasoline terminals are gasoline loading racks, gasoline cargo tanks, gasoline storage vessels, and equipment in gasoline service. The primary sources of HAP emissions at pipeline breakout stations are gasoline storage vessels and equipment in gasoline service. Emissions from loading racks at major source gasoline terminals under NESHAP subpart R are required to be controlled by a vapor collection and processing system to meet a TOC emission limit of 10 mg/L. Gasoline cargo tanks must be certified to be vapor tight using a graduated vapor tightness requirement of 1.0 to 2.5 inches of water pressure drop over a 5-minute period, depending on the cargo tank compartment size for gasoline cargo tanks. Emissions from storage vessels with a design capacity greater than or equal to 75 cubic meters must be controlled by equipment designed to suppress emissions (*i.e.*, use an internal or external floating roof meeting certain requirements) or must capture and control emissions to a device achieving 95 percent reduction efficiency. Equipment leaks are subject to a leak detection and repair (LDAR) program using monthly inspections to identify leaks via audio, visual, or olfactory (AVO) methods and repair the leak identified.

2. NESHAP Subpart BBBBBB

The EPA promulgated the area source Gasoline Distribution NESHAP on January 10, 2008 (73 FR 1916). The standards are codified at 40 CFR part 63, subpart BBBBBB. The area source gasoline distribution industry consists of bulk gasoline terminals, bulk gasoline plants, pipeline breakout stations, and pipeline pumping stations. The source category covered by this GACT standard

currently includes approximately 9,000 facilities.

The primary sources of HAP emissions at bulk gasoline plants and bulk gasoline terminals are gasoline loading racks, gasoline cargo tanks, gasoline storage vessels, and equipment components in gasoline service. The primary sources of HAP emissions at pipeline breakout stations are gasoline storage vessels and equipment components in gasoline service; the HAP emissions at pipeline pumping stations are from equipment components in gasoline service. Emissions from loading racks at area source gasoline terminals with throughput of 250,000 gallons per day or greater are required under NESHAP subpart BBBBBB to reduce emissions of TOC to less than or equal to 80 mg/L of gasoline. Small bulk gasoline terminals (terminals with a combined throughput between 20,000 and 250,000 gallons per day) and bulk gasoline plants (facilities with gasoline throughput of 20,000 gallons per day or less) are required to use submerged filling with a submerged fill pipe that is no more than 6 inches from the bottom of the cargo tank. Gasoline cargo tanks must be certified to be vapor tight using a maximum allowable pressure loss of 3 inches of water pressure drop over a 5-minute period.

At bulk gasoline terminals and pipeline breakout stations, emissions from storage vessels with a design capacity greater than or equal to 75 cubic meters and a gasoline throughput greater than 480 gallons per day and all storage vessels with a design capacity greater than or equal to 151 cubic meters must be controlled by equipment designed to suppress emissions (*i.e.*, use an internal or external floating roof meeting certain requirements) or must capture and control emissions to a device achieving 95 percent reduction efficiency. Storage vessels below these thresholds must have fixed roofs and must maintain all openings in a closed position at all times when not in use.

Equipment leaks at all area source gasoline distribution facilities are subject to an LDAR program using monthly AVO methods.

3. NSPS

The EPA first promulgated new source performance standards for Bulk Gasoline Terminals on August 18, 1983 (48 FR 37578). These standards of performance are codified in 40 CFR part 60, subpart XX, and are applicable to sources that commence construction, modification, or reconstruction after December 17, 1980, and on or before June 10, 2022. These standards of

performance regulate VOC emissions from bulk gasoline terminals.

The affected facility to which the provisions of NSPS subpart XX apply is the total of all the loading racks at a bulk gasoline terminal. The primary sources of VOC emissions subject to NSPS subpart XX are gasoline loading racks, gasoline cargo tanks, and equipment associated with the loading rack and associated vapor collection and processing system. Emissions from gasoline storage vessels are subject to separate NSPS (see 40 CFR part 60, subparts K, Ka, and Kb). VOC emissions from loading racks at gasoline terminals subject to NSPS subpart XX must meet a TOC emission limit of 35 mg/L, except for modified affected facilities with an existing vapor processing system (as of December 17, 1980), which must meet a TOC emission limit of 80 mg/L. Gasoline cargo tanks must be certified to be vapor tight using a maximum allowable pressure loss of 3 inches of water pressure drop over a 5-minute period. Leaks from equipment associated with the loading rack and associated vapor collection and processing system are subject to an LDAR program using monthly AVO methods.

C. What changes were proposed for the gasoline distribution NESHAP and for the bulk gasoline terminals NSPS in the June 10, 2022, proposal?

On June 10, 2022, the EPA published proposed rules in the **Federal Register** for the Gasoline Distribution NESHAP, 40 CFR part 63, subparts R and BBBBBB, and Bulk Gasoline Terminal NSPS, 40 CFR part 60, subpart XXa, that took into consideration the TR and NSPS review and respective analyses.

1. NESHAP Subpart R

In the proposed rule for the major source Gasoline Distribution NESHAP, 40 CFR part 63, subpart R, the EPA for new and existing sources proposed to:

- Retain the 10 mg/L TOC emission limit for gasoline loading racks controlled by thermal oxidation systems.
- Provide a 5,500 ppmv TOC emission limit for gasoline loading racks controlled by vapor recovery units (VRUs), which was determined to be equivalent to the 10 mg/L emission limit.
- Reduce the allowable pressure drop for certifying gasoline cargo tanks as vapor tight to a graduated vapor tightness requirement of 0.5 to 1.25 inches of water, depending on the cargo tank compartment size for gasoline cargo tanks.

- Include additional fitting requirements for storage vessels with external floating roofs.
- Add a requirement for storage vessels with internal floating roofs to maintain the concentrations of vapors inside a storage vessel above the floating roof to less than 25 percent of the lower explosive limit (LEL).
- Require semiannual monitoring using either optical gas imaging (OGI) or EPA Method 21 and repair leaks identified from these monitoring events or leaks identified by AVO methods during normal duties.
- Revise certain requirements to clarify that the emission limits apply at all times.
- Add electronic reporting requirements.

2. NESHAP Subpart BBBBBB

In the proposed rule for the area source Gasoline Distribution NESHAP, 40 CFR part 63, subpart BBBBBB, the EPA proposed for new and existing sources to:

- Reduce the TOC emission limit for loading racks at large bulk gasoline terminals from 80 mg/L to 35 mg/L.
- Provide a 19,200 ppmv TOC emission limit for loading racks at large bulk gasoline terminals controlled by VRUs, which was determined to be equivalent to the 35 mg/L emission limit.
- Reduce the allowable pressure drop for certifying gasoline cargo tanks as vapor tight to a graduated vapor tightness requirement of 0.5 to 1.25 inches of water, depending on the cargo tank compartment size for gasoline cargo tanks.
- Include additional fitting requirements for storage vessels with external floating roofs.
- Add a requirement for storage vessels with internal floating roofs to maintain the concentrations of vapors inside a storage vessel above the floating roof to less than 25 percent of the LEL.
- Add requirements for bulk gasoline plants with a capacity over 4,000 gallons per day to use vapor balancing between gasoline cargo tanks and gasoline storage vessels.
- Require pressure relief valves on fixed roof tanks to have opening pressures set to no less than 2.5 pounds per square inch gauge (psig).
- Require annual monitoring using either OGI or EPA Method 21 and repair leaks identified from these monitoring events or leaks identified by AVO methods during normal duties.
- Revise certain requirements to clarify that the emission limits apply at all times.
- Add electronic reporting requirements.

3. NSPS Subpart XXa

In the proposed rule for Bulk Gasoline Terminal NSPS, 40 CFR part 60, subpart XXa, the EPA proposed for new, modified, and reconstructed sources to:

- Define the affected facility to include all equipment in gasoline service at the bulk gasoline terminal.
- Limit VOC emissions as TOC from loading racks at new bulk gasoline terminals controlled with thermal oxidation systems to 1.0 mg/L and limit TOC emissions from loading racks controlled with thermal oxidation systems at modified or reconstructed bulk gasoline terminals to 10 mg/L.
- Provide 550 ppmv and 5,500 ppmv TOC emission limits for loading racks at bulk gasoline terminals controlled with VRUs, which were determined to be equivalent to the 1.0 mg/L and 10 mg/L proposed TOC emission limits, respectively.
- Require certification of gasoline cargo tanks as vapor tight using a graduated vapor tightness requirement 0.5 to 1.25 inches of water, depending on the cargo tank compartment size for gasoline cargo tanks.
- Require quarterly monitoring using either OGI or EPA Method 21 and repair leaks identified from these monitoring events or leaks identified by AVO methods during normal duties.
- Clarify that the emission limits apply at all times.
- Include electronic reporting requirements.

D. What outreach was conducted following the proposal?

As part of these rulemakings and pursuant to multiple EOs addressing environmental justice (EJ), the EPA engaged and consulted with pertinent stakeholders and the public, including communities with environmental justice concerns. The EPA provided interactions such as conducting a public hearing, offering information on the websites for these rules, and informing the public of the proposed action by sending notifications with summaries of the action and information on how to comment to pertinent stakeholders. These opportunities gave the EPA a chance to hear directly from pertinent stakeholders and the public, especially communities potentially impacted by this final action. Summaries of the public hearing and comments received can be found in the docket for this action.

III. What is included in these final rules and what is the rationale for the final decisions and amendments?

This action finalizes the EPA's determinations pursuant to the TR

provisions of CAA section 112 for the Gasoline Distribution major and area source categories and amends both Gasoline Distribution NESHAPs based on those determinations. This action also finalizes the removal of SSM exemptions in the NESHAP. The EPA is further finalizing determinations of its review of the Bulk Gasoline Terminals NSPS pursuant to CAA section 111(b)(1)(B). In addition, this action finalizes electronic reporting, monitoring and operating requirements for control devices, and other minor technical improvements. This action also reflects several changes to the June 10, 2022, proposal in consideration of comments received during the public comment period. For each issue, this section provides a description of what the EPA proposed and what the EPA is finalizing for the issue, the EPA's rationale for the final decisions and amendments, and a summary of key comments and responses. For all comments not discussed in this preamble, comment summaries and the EPA's responses can be found in the comment summary and response document available in the docket.

A. What are the final rule amendments based on the technology reviews for the gasoline distribution NESHAP and NSPS review for bulk gasoline terminals?

The EPA determined that there are developments in practices, processes, and control technologies for loading operations, storage vessels, and equipment leaks that warrant revisions to NESHAP subpart R and NESHAP subpart BBBBBB.

Therefore, to satisfy the requirements of CAA section 112(d)(6), the EPA is revising the NESHAP to include: a more stringent standard for gasoline loading racks at area sources, including requirements for vapor balancing for bulk gasoline plants with actual throughput of greater than 4,000 gallons per day; for both major and area sources, more stringent requirements for gasoline cargo tank vapor tightness; more stringent fitting control requirements for guidepoles on external floating roofs; the use of LEL monitoring to ensure the effectiveness of internal floating roofs; and instrument monitoring for equipment leaks. The final revisions are similar to those proposed. The most significant change from what was proposed is that we revised the throughput threshold requirement for which bulk gasoline plants must use vapor balancing to be determined by actual throughput rather than by maximum design capacity. Considering the analysis conducted to develop the

4,000 gallons per day threshold, provisions in NESHAP subpart BBBBBB, and comments received, the use of actual daily throughput and an annual averaging time is consistent with the analysis conducted and other provisions in NESHAP subpart BBBBBB. Upon consideration of public comments received, we also included an allowance to subtract methane from the TOC emission limit.

Pursuant to the requirements of CAA section 111(b)(1)(B), the EPA determined that updates to the BSEER are warranted and is revising the standards of performance for loading operations and equipment leaks. The EPA is finalizing the revisions to the NSPS in a new subpart, 40 CFR part 60, subpart XXa, applicable to affected sources constructed, modified, or reconstructed after June 10, 2022. The NSPS subpart XXa includes: more stringent VOC standards (as TOC emission limits) for new, modified, or reconstructed gasoline loading racks; more stringent requirements for gasoline cargo tank vapor tightness; and instrument monitoring for equipment leaks. The final requirements in NSPS subpart XXa are similar to those proposed. The most significant change from what was proposed, after considering public comments received, is to define separate affected facilities: one specific to the loading rack and one specific to the equipment. Upon consideration of public comments received, we are also including an allowance to subtract methane from the TOC emission limit consistent with the most stringent emission limitations identified for new sources.

1. Standards for Loading Racks

Because most of the standards proposed for loading racks were primarily in NSPS subpart XXa, we discuss our review of the loading racks NSPS provisions first, and then cover additional technology review issues specific to NESHAP subparts R and BBBBBB.

a. NSPS Subpart XXa

i. What did the EPA propose pursuant to CAA section 111 for loading racks at new, modified, or reconstructed bulk gasoline terminals?

Based on the review of NSPS subpart XX requirements for loading racks at bulk gasoline terminals, we proposed to revise the TOC emission limit from loading racks at new bulk gasoline terminals controlled with thermal oxidation systems to 1.0 mg/L and to revise the TOC emission limit from loading racks at modified or

reconstructed bulk gasoline terminals controlled with thermal oxidation systems to 10 mg/L. For thermal oxidation systems, we proposed continuous compliance with a temperature operating limit established as the lowest 3-hour average temperature from a compliant performance test. We also proposed enhanced provisions for flares to ensure good combustion efficiency.

For loading racks controlled with VRUs, we proposed corresponding emission limits of 550 ppmv and 5,500 ppmv TOC (as propane) for loading racks at new bulk gasoline terminals and for loading racks at modified or reconstructed bulk gasoline terminals, respectively. We determined that these concentration emission limits are, respectively, equivalent to the 1.0 mg/L and 10 mg/L proposed TOC emission limits for bulk gasoline terminals controlled with thermal oxidation systems. We proposed to express the concentration limit of 550 ppmv and 5,500 ppmv TOC (as propane) on a 3-hour rolling average because this provides an equivalent emission limit that is directly enforceable with the common monitoring systems used for VRUs. To prevent dilution, we proposed that only vacuum breaker valves can be used to introduce ambient air into the VRU control system.

We also proposed revisions to the affected facility defined in NSPS subpart XXa at 40 CFR 60.500a to include additional equipment at the gasoline distribution facility beyond just that at the loading racks or vapor processing system.

ii. How did the NSPS review change for gasoline loading racks at new, modified, or reconstructed bulk gasoline terminals?

We are finalizing the standards of performance for gasoline loading racks as proposed, except that we are including provisions to exclude the contribution of methane from the measured TOC emissions (as propane). As such, the final emission limits in NSPS subpart XXa are effectively 1.0 mg/L non-methane TOC for new sources and 10 mg/L non-methane TOC for modified and reconstructed sources, but facilities may choose to comply using direct TOC measurements without correcting for methane content.

We are also finalizing in the NSPS subpart XXa separate affected facility definitions for the loading racks and equipment. However, the loading rack affected facility definition in NSPS subpart XXa is similar to the provisions of NSPS subpart XX.

iii. What key comments did the EPA receive and what are the EPA's responses?

(A) Proposed Affected Facility

Comment: Several commenters recommended that the EPA retain the NSPS subpart XX affected facility definition and not expand the affected facility under NSPS subpart XXa to include pumps and lines from storage vessels or the vapor collection and processing systems. One commenter stated that NSPS subpart XXa should be revised to clarify that a modification is triggered only by changes to the facility that result in an emissions increase associated with the loading rack itself, and not by changes to other equipment at the bulk gasoline terminal.

Response: At proposal, we expanded the affected facility definition in NSPS subpart XXa to ensure that all gasoline service equipment at the bulk gasoline terminal is subject to the equipment leak monitoring requirements. However, we did not intend the result of adding a pump or valve in gasoline service to trigger additional loading rack control requirements. Therefore, in the final rule, we are instead defining two separate affected facilities: a "gasoline loading rack affected facility" and a "collection of equipment at a bulk gasoline terminal affected facility." First, the gasoline loading rack affected facility is being defined as "the total of all the loading racks at a bulk gasoline terminal that deliver liquid product into gasoline cargo tanks including the gasoline loading racks, the vapor collection systems, and the vapor processing system." This definition is similar to the affected facility definition in NSPS subpart XX. The loading rack emission limits apply specifically to the gasoline loading rack affected facility; therefore, new equipment in the tank farm area would not trigger NSPS applicability for the loading rack requirements. The collection of equipment at a bulk gasoline terminal affected facility is being defined as "all equipment associated with the loading of gasoline at a bulk gasoline terminal including the lines and pumps transferring gasoline from storage vessels, the gasoline loading racks, the vapor collection systems, and the vapor processing system." This definition is consistent with our proposal and will ensure that all equipment associated with loading of gasoline at the bulk gasoline terminal is subject to the equipment leak provisions. The result of this finalized definition is that new equipment in the tank farm area would trigger NSPS subpart XXa applicability for the equipment leak requirements.

(B) Proposed Emission Limits

Comment: Several commenters suggested that the 1 mg/L TOC emission limit for new facilities in NSPS subpart XXa is not cost-effective and has not been adequately demonstrated in practice. The commenters stated that the limit has not been demonstrated in practice because the permits impose a 1 mg/L non-methane hydrocarbon standard and the EPA did not propose to exclude methane from the TOC measurement. The commenters recommended that the EPA adopt a 10 mg/L TOC emission limit (or some lower limit but higher than 1 mg/L) that has been adequately demonstrated. According to one commenter, the only permits that they identified with a 1 mg/L limit were for sources in nonattainment areas subject to "lowest achievable emission rate" (LAER) requirements, which do not consider cost. The BSEER, on the other hand, allows costs to be considered and the commenter stated that the 1 mg/L emission limit is not cost-effective. A commenter provided an example cost estimate, calculated cost effectiveness for each model plant, then averaged those to indicate that the "average" cost effectiveness was approximately \$35,000 per ton VOC. Because the EPA noted that a cost of \$8,300 per ton VOC is not cost-effective, the commenter concluded that the 1 mg/L emission limit is not cost-effective. One commenter suggested that the assumption of 8,760 hours of operation for the RACT/BACT/LAER Clearinghouse facility used to establish the 1.0 mg/L emission limit for new sources is overly conservative and should be re-evaluated and a lower new source emission limit should be established.

Response: First, we recognize that NSPS subpart XX allows methane and ethane to be excluded from TOC as they are not VOC. However, based on the typical composition of gasoline, we did not expect that there would be appreciable quantities of methane or ethane in the gasoline vapors and thus concluded that the emission limit would be the same with or without the allowance to exclude methane and ethane. We also understand that the non-dispersive infrared (NDIR) monitor, which is a commonly used monitoring system for VRUs, can correct for methane concentration but not for ethane concentration. In reviewing the test and monitoring data for facilities meeting the 1.0 mg/L emission limit as well as the 10 mg/L emission limit, we concluded that it is possible, if not likely, that the reported TOC emissions

already exclude methane, because the applicable limits allow the exclusion of methane from the TOC value and the instrument used to make the TOC measurements can simultaneously assess methane concentration and output non-methane TOC. These data are available in the docket. Because the source test summaries we have likely do not report the methane concentration measured, we cannot assess the impacts of including methane in the TOC. However, given the high removal efficiencies of VRUs achieving the 1.0 mg/L or 10 mg/L emission limit and the fact that methane is not well-controlled by carbon adsorption, it is possible that small quantities of methane in the gasoline vapors can significantly contribute to the TOC in the VRU exhaust. We also recognize that the 1.0 mg/L permit limit, upon which the new source emission limit in the proposed NSPS subpart XXa was established, is in terms of total non-methane hydrocarbon. While the contribution of ethane can be excluded from TOC based on provisions in NSPS subpart XX, the instruments commonly used to measure TOC cannot independently measure and correct for the contribution of ethane in TOC. Considering all of these factors, we are finalizing that the TOC emission limits may exclude methane content if measured according to EPA approved methods. We are not including provisions to exclude ethane content from measured TOC. We are also finalizing recordkeeping and reporting requirements that correspond to the revisions for excluding methane content from the TOC emission limits.

With the allowance to exclude methane, we disagree that the 1.0 mg/L TOC emission limit is not achievable. For example, the Buckeye Perth Amboy Terminal's U24 gasoline loading racks have had a 1 mg/L emission limit for nearly 10 years and we have two different source tests conducted several years apart that indicate that the system readily achieves a level of less than 1.0 mg/L non-methane TOC. In fact, while the facility is achieving the 1.0 mg/L emission limit, one of the tests indicated emissions of 0.6 mg/L non-methane TOC. However, considering process and ambient temperature variability, this source test suggests that a limit lower than 1.0 mg/L may not be achievable at all times. As such, we conclude that the 1.0 mg/L (non-methane) TOC limit is achievable and appropriate for new sources.

With respect to our cost analysis, we maintain, as detailed in the June 10, 2022, proposal (87 FR 35622), that the 1.0 mg/L TOC emission limit for new sources is cost-effective. The commenter

indicated that a VRU used to meet 1 mg/L rather than 10 mg/L would be \$300,000 more for all model plants. We disagree this is accurate for all model plants. The information we received from a control device manufacturer⁵ indicates that the smallest unit they make is essentially for model plant 3. Nonetheless, we added \$100,000 to the cost of these smaller units when projecting the costs to meet 1 mg/L. Additionally, we note that smaller facilities will likely use a thermal oxidation system or flare instead of a VRU. For the largest facility (model plant 5), we estimated increased costs of \$150,000. If we accept that a VRU for the largest model plant would cost an extra \$300,000, the cost effectiveness from 10 mg/L to 1 mg/L is under \$3,000 per ton of VOC, which we find cost-effective. We also note that the method used by the commenter to calculate the average cost effectiveness is not the way we calculate average cost effectiveness. We assess the total costs across all affected facilities and divide by the cumulative emission reductions across all affected facilities. Due to recent trends in inflation, interest rates, and gasoline prices, we re-evaluated our costs from 2019 dollars to 2021 dollars (the most recent year for which wage and other cost factors are available). While costs increased, product recovery credits also increased so the reanalysis did not alter our conclusions (see memorandum *Updated New Source Performance Standards Review for Bulk Gasoline Terminals* included in Docket ID No. EPA-HQ-OAR-2020-0371). Therefore, we maintain that 1.0 mg/L (non-methane) TOC is the standard of performance that reflects the BSER for new sources.

Comment: One commenter noted that the EPA-proposed loading rack TOC emission limit of 10 mg/L for modified and reconstructed sources is less stringent than requirements for reconstructed sources that have been successfully implemented in some States, such as Massachusetts where loading rack emissions are limited to 2 mg/L in the permits for five reconstructed bulk gasoline terminals. According to the commenter, these standards should be viewed by the EPA as evidence of the cost effectiveness of those requirements. On the other hand, one commenter suggested that 35 mg/L is an appropriate standard for modified sources. The commenter noted that the EPA concluded that it was not cost-effective to require area source facilities to upgrade to 10 mg/L for the NESHAP

and the EPA failed to demonstrate why it would be cost-effective for modified sources subject to the NSPS.

Response: Based on our cost analysis as provided in the proposal (June 10, 2022; 87 FR 35622), we determined that it was not cost-effective to require existing sources that are modified or reconstructed to meet a 1 mg/L TOC emission limit. While we did not specifically evaluate a 2 mg/L limit, we expect that the upgrades needed to meet a 2 mg/L limit would be essentially the same as those needed to meet a 1 mg/L limit and would likewise not be cost-effective. With respect to differences in conclusion for modified and reconstructed sources in NSPS subpart XXa as compared to the revised standards for NESHAP subpart BBBBBB, the assessment that a 35 mg/L limit was the appropriate level for NESHAP subpart BBBBBB was based on the cost effectiveness of the HAP emission reductions, which were estimated to be only 4 percent of the VOC emission reductions. However, for the NSPS subpart XXa analysis, we found, when considering the VOC emission reductions, that it was cost-effective for modified and reconstructed sources to require control system upgrades to meet a 10 mg/L TOC limit. We therefore maintain that, when considering VOC emission reductions, a 10 mg/L TOC limit is cost-effective and is the standard of performance that reflects the BSER for modified and reconstructed sources.

(C) Proposed Monitoring Requirements

Comment: Several commenters stated that the flare monitoring provisions to meet the requirements in the Refinery NESHAP at 40 CFR 63.670 and that were proposed as an alternative for NESHAP subpart BBBBBB are also appropriate for meeting the 10 mg/L TOC limit for modified and reconstructed sources and therefore should be allowed as a compliance alternative to continuous temperature monitoring for thermal oxidation systems in NSPS subpart XXa and NESHAP subpart R subject to the 10 mg/L emission limit. One commenter recommended that the following revisions be made for “flare provisions” if added for thermal oxidation systems meeting the 10 mg/L limit:

- Eliminate the flare tip velocity limit or allow its determination using an engineering assessment.
- Eliminate the net heating value dilution (NHV_{dil}) operating parameter requirement because of differences in refinery flares and gasoline distribution thermal oxidation systems.

On the other hand, one commenter stated that the proposed flare monitoring requirements were inadequate to demonstrate continuous compliance. According to the commenter, net heating values of the gas streams at gasoline distribution facilities exhibit significant variability and 2 weeks of sampling cannot capture this variability. Furthermore, the commenter noted, the proposed sampling allowance incentivizes gasoline distribution facilities to sample when net heating values are higher than normal to minimize (or eliminate) the need to add supplemental fuel. Similarly, the commenter noted, the proposed single sample collected when loading a single gasoline cargo tank was not sufficient to determine compliance with the NHV_{dil} parameter. According to the commenter, continuous composition or net heating value monitoring must be required for flares (or grab sampling every 8 hours).

Response: We agree with the commenters who suggest that the flare monitoring provisions are appropriate and can be allowed for thermal oxidation systems subject to the 10 mg/L TOC emission limit, because the thermal oxidation systems used in the gasoline distribution industry are largely enclosed combustors. The flare monitoring provisions are commensurate with meeting a 10 mg/L emission limit and that is why we proposed that flares could be used to meet the 10 mg/L emission limit for modified and reconstructed sources, but not for new sources subject to the 1 mg/L emission limit.

We also agree that, because gasoline loading must be conducted at low pressures (less than 18 inches of water pressure), it is very unlikely that the flare tip velocity limits would ever be exceeded and that a design evaluation could be conducted to assess the maximum loading rate (vapor displacement rate) to determine if, based on the flare tip diameter (and number of flare tips, if staged flare tip design is used), the flare tip velocity would always be below 60 feet per second. If so, net heating value measurements and continuous flow monitoring would not be needed to demonstrate compliance with the flare tip velocity limit. Therefore, we are including in the final NSPS subpart XXa at 40 CFR 60.502a(c)(3)(ix) provisions to comply with the flare tip velocity limit using the provisions as described earlier. We are also specifying that records of these one-time flare tip velocity assessment must be maintained for as long as the owner or operator is using this compliance provision.

⁵ See Docket ID No. EPA-HQ-OAR-2020-0371-0041.

We disagree that these enclosed combustors cannot be over-assisted and maintain that the proposed NHV_{dil} operating limit is needed. The air-assist operating parameter was developed based on a flare manufacturer testing facility using propane or propylene as the fuel with flare tips ranging from 1.5 inches to 24 inches in diameter. As such, we consider these test data to be widely applicable to a variety of industrial flares. We understand that the burner tips in most thermal oxidation systems are staged with air-assist at each tip. This would be similar to the 1.5-inch flare tip included in the study data. The wind speeds during the test of this small flare were low, typically under 5 miles per hour (mph), and the performance of the flare was not a function of wind speed. The commenter provided no data or reasonable argument to support the idea that enclosed combustors cannot be over-assisted. Therefore, we are retaining the requirements to meet the NHV_{dil} operating limit.

While we agree that the flare monitoring requirements in the Refinery NESHAP at 40 CFR 63.670 are reasonable for sources subject to the 10 mg/L TOC emission limit, we also agree that the operating limits included in 40 CFR 63.670 must be met at all times when liquid product is loaded into gasoline cargo tanks. Based on the comments received, we considered the impacts of different relative loading rates of gasoline and diesel fuel (or other non-gasoline products) and agree that the net heating value of vapors directed to the flare or thermal oxidation system can vary significantly based on the types and the relative volumes of products loaded. We expect that the provisions in 40 CFR 63.670(j)(6) are reasonable for flare gas streams that “. . . have consistent composition (or a fixed minimum net heating value) . . .” and we expect that gasoline loading operations (loading only gasoline products) would meet this criterion regardless of the grade of gasoline loaded (regular, premium, or non-ethanol) as the net heating value of the vapors would always be well above 270 Btu/scf. However, if other liquid products are loaded into non-gasoline cargo tanks and the displaced vapors from these loading operations are also sent to the same flare, then the vapors discharged to the flare would not have a consistent composition or a fixed minimum net heating value. Therefore, we are clarifying in 40 CFR 60.502a(c)(3)(vii) that, for the purposes of NSPS subpart XXa, the application for an exemption from monitoring

required under 40 CFR 63.670(j)(6) must include a minimum ratio of gasoline loaded to total liquid product loaded and, if perimeter air-assisted, a minimum gasoline loading rate. We consider this to be part of the explanation of conditions that ensure that the flare gas net heating value is consistent and of conditions expected to produce the flare gas with lowest net heating value as required in 40 CFR 63.670(j)(6)(i)(C). We are also clarifying that, as required in 40 CFR 63.670(j)(6)(i)(D), samples must be collected at the conditions expected to produce the flare gas with lowest net heating value as identified in 40 CFR 63.670(j)(6)(i)(C), which includes the applicable minimum gasoline loading rates identified in the application.

Furthermore, we are specifying that the affected source must operate at or above the minimum values specified in its application at all times when liquid product is loaded into cargo tanks for which vapors collected are sent to the flare or, if applicable, to a thermal oxidation system. We consider that the provisions of 40 CFR 63.670(j)(6) are reasonable and can be used to demonstrate that the net heating value of the vapors collected and sent to the flare (or thermal oxidation system) are sufficient to comply with the flare net heating value operating limits. However, given the variability in net heating values expected with the loading of different liquid products, we determined that clarifying how the provisions of 40 CFR 63.670(j)(6) should be applied for the gasoline distribution industry was appropriate. We also concluded that it was critical to set these minimum gasoline loading rates as operating limits to ensure continuous compliance with the conditions tested as part of the application. For flares (or thermal oxidation systems) that are unassisted or perimeter air-assisted, the vent gas net heating value is the same as the combustion zone net heating value (NHV_{cz}). If the testing conducted under 40 CFR 63.670(j)(6) as specified in 40 CFR 60.502a(c)(3)(vii) shows that the vent gas net heating value meets or exceeds the NHV_{cz} operating limit, compliance with the minimum ratio of the volume of gasoline loaded to total liquid products loaded can be used directly to demonstrate compliance with the NHV_{cz} operating limit. Similarly, for perimeter air-assisted flares (or thermal oxidation systems), if the testing conducted under 40 CFR 63.670(j)(6) as specified in 40 CFR 60.502a(c)(3)(vii) shows that the device meets or exceeds the NHV_{dil} operating limit at the highest fixed or highest air-assist rate used, then

compliance with the minimum gasoline loading rate can be used directly to demonstrate compliance with the NHV_{dil} operating limit.

We considered using the 15-minute block periods as specified in the cross-referenced requirements in 40 CFR 63.670(e) and (f) for these loading ratio or loading rate operating limits. However, we expected there may be issues at the end of a loading event if gasoline loading ended 1-minute into the next 15-minute block if the owner or operator was required to meet a minimum gasoline loading rate for that 15-minute block. Considering comments received on the 3-hour rolling average, which suggested using 36 5-minute periods, we are finalizing provisions at 40 CFR 60.502a(c)(3)(vii)(E) that the loading rate operating limit will be monitored on 5-minute block periods and calculated on a rolling 15-minute period across three contiguous 5-minute block periods. We used the term “contiguous” here to highlight that these periods are connected without a break, unlike the “consecutive” periods used in the definition of 3-hour rolling average. We also note that the operating limits in 40 CFR 63.670(e) and (f), as modified in 40 CFR 60.502a(c)(3)(i), apply when “vapors displaced from gasoline cargo tanks during product loading is routed to the flare for at least 15-minutes.” For the liquid product loading operating limits used as an alternative to meet 40 CFR 63.670(e) and (f), we are requiring these limits be calculated on a rolling 15-minute period basis considering only those periods when liquid product is loaded into gasoline cargo tanks for any portion of three contiguous 5-minute block periods. The phrase “any portion of three contiguous 5-minute block periods” reflects, in practice, how one would determine when “vapors displaced from gasoline cargo tanks during product loading is routed to the flare for at least 15-minutes.” If there is a 5-minute block when no liquid product was loaded into gasoline cargo tanks, then the previous rolling 15-minute period would end and the next rolling 15-minute period would not be calculated until there are three contiguous 5-minute block periods in which liquid product was loaded into gasoline cargo tanks for at least some portion of each of the three contiguous 5-minute block periods. With these clarifications and added operating limits, we conclude that the provisions allowing a one-time net heating value determination according to the provisions of 40 CFR 63.670(j)(6) are sufficient for demonstrating continuous

compliance with the net heating value operating limits.

With respect to the comment received opposing the proposed use of a single sample while loading only gasoline to assess the NHV_{dil} operating limit, we note that this operating parameter is an issue primarily when the waste gas flow rate is low. Therefore, we sought to assess whether auxiliary fuel was needed to ensure combustion at these low flow rates, which would occur when loading a single gasoline cargo tank. However, upon further review, we expect the NHV_{dil} operating limit to be most difficult to meet when the gasoline loading rate is at its minimum and the net heating value is low (as when the ratio of the volume of gasoline loaded to total liquid product loaded is at its minimum). Therefore, we stipulated that facility owners or operators would have to establish these minimums in their application and test the net heating value of the vent gas under those circumstances. With these conditions clearly delineated in the final provisions at 40 CFR 60.502a(c)(3)(vii), no additional sampling requirements are needed in the proposed requirements at 40 CFR 60.502a(c)(3)(ix), which are now included within 40 CFR 60.502a(c)(3)(viii) of the final rule. Consistent with the flare provisions at 40 CFR 63.670(j)(6)(i)(F), a single value for the vent gas net heating value (either the lowest single value or the 95th percent confidence value) must be used for all vent gas flow rates. Therefore, consistent with the provisions at 40 CFR 63.670(j)(6)(i)(F), flare (or thermal oxidation system) owners or operators must use the net heating value as determined based on the sampling conducted consistent with their application under 40 CFR 63.670(j)(6). With the elimination of the separate sampling protocol, we are combining the revisions proposed at 40 CFR 60.502a(c)(3)(ix) with those proposed at 40 CFR 60.502a(c)(3)(viii). Thus, 40 CFR 60.502a(c)(3)(viii) now contains a single assessment of the quantity of natural gas needed in order to demonstrate continuous compliance with the NHV_{cz} operating limit and, if applicable, with the NHV_{dil} operating limit. Because the net heating value parameter used under 40 CFR 60.502a(c)(3)(viii) is now the one determined under 40 CFR 60.502a(c)(3)(vii), facilities electing this option would also have to monitor and comply with the minimum ratio of gasoline to total liquid products loaded and, if applicable, the minimum gasoline loading rate. We also note that we expect far fewer facilities will use the minimum supplemental gas

addition rate option in 40 CFR 60.502a(c)(3)(viii) because this option would only be needed if the owner or operator cannot demonstrate compliance with the flare operating limits based solely on the vent gas net heating value and the minimum ratio of gasoline to total liquid products loaded and, if applicable, the minimum gasoline loading rate as determined under 40 CFR 60.502a(c)(3)(vii).

Because the provisions in the final rule more clearly account for the variability of the net heating value of the vapors sent to the flare based on the different liquid products loaded, we consider the final provisions to be more robust than those initially proposed and we consider them reasonable and appropriate for demonstrating continuous compliance with the flare provisions or for a thermal oxidation system subject to a 10 mg/L TOC emission limit. Therefore, we are finalizing the flare monitoring alternative for thermal oxidation systems for modified or reconstructed gasoline loading rack affected facilities under NSPS subpart XXa. Because NESHAP subpart R also has a 10 mg/L emission limit, we determined that the flare monitoring alternative in NSPS subpart XXa can be used for thermal oxidation systems used to control emissions from loading racks at bulk gasoline terminals subject to NESHAP subpart R. We are also retaining the proposed provisions that thermal oxidation systems used to control emissions from loading racks at bulk gasoline terminals subject to NESHAP subpart R can use these flare monitoring alternatives in NSPS subpart XXa.

Comment: Several commenters objected to the proposed definition of a “3-hour rolling average.” According to the commenters, regulated parties cannot comply with the proposed definition because they cannot determine the point in time when “all emissions from the loading event have cleared the control device” particularly for VRUs. According to the commenter, vapors from loading may be processed and recovered in a VRU well after active loading is completed. The commenters recommended that this phrase be deleted from the proposed definition of “3-hour rolling average.” One commenter noted that the proposed definition of “3-hour rolling average” differs significantly from industry practice and, thus, would require a reprogramming of the programmable logic controllers for virtually all existing units, as well as likely revision of thousands of permits. One commenter noted that the clause, “periods when

gasoline loading is not being conducted are not considered valid data,” is inconsistent with the definition of gasoline cargo tank, where diesel fuel loading into a cargo tank that previously had gasoline should be counted, and so the entire sentence should be deleted. The commenter also suggested that the 3-hour average should be clarified to consist of thirty-six 5-minute periods of valid data. One commenter noted that data from periods when gasoline loading is not being conducted may be necessary to demonstrate compliance with permit or other requirements. Commenters also recommended that, because the performance test is a 6-hour test, the EPA should use a 6-hour rolling average for the proposed concentration limits for VRUs (rather than a 3-hour rolling average). According to commenters, the 3-hour averaging time makes the standard more stringent, and the longer 6-hour averaging period for the emission limit (or operating parameter) would be more representative of the conditions seen throughout the day. According to some commenters, the 3-hour average combined with the numerical limit established for VRUs will either require upgrades of control systems or result in either slowdowns or shutdowns of gasoline loading during the heat of the day, creating artificial fuel availability constraints.

Response: First, we agree with commenters that it is difficult to know when all vapors have cleared the control device system, particularly when a vapor recovery system is used. When a vapor recovery system is used, there may be emissions during carbon bed regeneration even when there is no liquid product being loaded into gasoline cargo tanks. For thermal oxidation systems, on the other hand, the vapors clear the control device in a matter of a minute or two. Therefore, rather than using this general phrase within the definition of “3-hour rolling average,” we are specifying within the control device-specific requirements in 40 CFR 60.502a what constitutes valid data that must be included in the 3-hour rolling average. For vapor recovery systems, the 3-hour rolling average concentration emission limit applies during all periods when the vapor recovery system is operating, which may include times when no liquid product is being loaded but the system is still online and capable of processing gasoline vapors. We also note that the vapor recovery system must be operating, at a minimum, whenever liquid product is loaded into gasoline cargo tanks. For thermal oxidation

systems, where the gasoline vapors quickly pass through the control system, the 3-hour rolling average applies specifically when liquid product is loaded into gasoline cargo tanks.

We agree with the commenter who noted that the definition of gasoline cargo tank includes tank trucks or railcars into which gasoline is being loaded or that contained gasoline on the immediately previous load. There are several places in the proposed rules where we used “loading gasoline” when the correct term is “loading liquid product into a gasoline cargo tank.” We are revising this terminology throughout each of the gasoline distribution rules. We also are clarifying (in the description of the monitored parameter, *i.e.*, combustion zone temperature) how the “previous load” impacts the valid data for the operating limit. If an owner or operator has information on previous cargo tank contents, then they may exclude from the 3-hour rolling average those periods when there is liquid product being loaded but there are no gasoline cargo tanks being loaded. If an owner or operator does not have information on previous cargo tank contents, then they must assume that liquid product loading is loaded into a gasoline cargo tank and must meet the operating limit during periods of liquid product loading, because the cargo tank could have contained gasoline on the immediately previous load. All owners or operators of thermal oxidizer systems must exclude from the 3-hour rolling average those periods when there is no liquid product being loaded. Because we acknowledge that liquid product loading can be very intermittent, we agree that the operating limit should be evaluated on 5-minute periods. If any liquid product is loaded into a gasoline cargo tank during a 5-minute period, that 5-minute period must be included in the 3-hour rolling average.

With respect to the stringency of the 3-hour rolling average combined with the concentration limit established for VRUs, we first note that we used direct calculation of vapors displaced during loading to determine the concentration limit equivalent to the 1.0 and 10 mg/L TOC emission limits. We also note that the current rules do not specify an averaging time for the operating parameters. As discussed in the preamble of the June 10, 2022, proposal (87 FR 35618), part of our motivation in setting numerical concentration standards and establishing specific timeframes for operating limits is to make requirements for all gasoline distribution facilities consistent. While we recognize that the performance test is 6 hours in duration

for thermal oxidation systems, there is no longer a performance test for VRUs. Owners or operators of VRUs must conduct performance evaluations of their TOC continuous emission monitoring system (CEMS). The performance evaluation consists of a minimum of nine test runs, with each test run being a sampling traverse of a minimum of 21 minutes in duration. Thus, the performance evaluation is a minimum of 189 minutes in duration, which is approximately 3 hours. We selected a 3-hour average to be consistent with the duration of the performance evaluation. We also proposed that the temperature operating limit for thermal oxidation systems will be determined on a 3-hour rolling average basis and provided specific requirements on how that 3-hour rolling average temperature operating limit must be developed.

Upon consideration of the comments received, we are maintaining the use of a 3-hour rolling average for CEMS and operating parameters used to demonstrate continuous compliance. However, we are revising and clarifying the definition of “3-hour rolling average” to more clearly delineate data that must be included in the 3-hour rolling average based on the type of control system used and more appropriately to use the phrase “gasoline cargo tank” and account for periods when a non-gasoline product is loaded into a cargo tank that contained gasoline during its previous load.

(D) Proposed VRU Operation To Minimize Air Intrusion

Comment: Several commenters expressed concern over the EPA’s proposed requirement that only vacuum breaker valves can be used to introduce ambient air into the VRU control system in order to prevent dilution of the emissions measurement. According to the commenters, the proposed rule could, if misinterpreted, impact the design and operation of carbon-based vapor recovery units. The use of pressure swing adsorption is the underlying basis for most, if not all, VRUs in operation in the U.S. According to the commenters, the use of purge air at the completion of a regeneration cycle (while the system is under vacuum) is a critical step in the operation of a VRU and is integral to its effectiveness.

Response: We understand the concern commenters have with the proposed requirements that only vacuum breaker valves can be used to introduce ambient air into the VRU. Both operators and control device manufacturers have indicated that the introduction of some

purge air (or nitrogen) while the unit is under vacuum is critical for effective VRU performance. Upon review of the information provided by commenters, we are revising 40 CFR 60.502a(b)(2)(iii) and (c)(2)(iii) to require the facility to “[o]perate the vapor recovery system to minimize air or nitrogen intrusion except as needed for the system to operate as designed for the purpose of removing VOC from the adsorption media or to break vacuum in the system and bring the system back to atmospheric pressure. Consistent with § 60.12, the use of gaseous diluents to achieve compliance with a standard which is based on the concentration of a pollutant in the gases discharged to the atmosphere is prohibited.”

iv. What is the rationale for the EPA’s final approach for the NSPS review?

As described in the preamble to the June 2022 proposal (87 FR 35622; June 10, 2022), we determined that the BSER was VRU with submerged loading for new bulk gasoline terminals and the TOC emission limitation that reflects the application of the BSER is 1.0 mg/L. For systems with a VRU, this is a concentration of 550 ppmv TOC (as propane), which we determined was equivalent to an emission limit of 1.0 mg/L. We also determined in the June 2022 proposal that the BSER for modified or reconstructed bulk gasoline terminals was VRU with submerged loading and the TOC emission limitation that reflects the application of the BSER is 10 mg/L. For systems using a VRU, this is a concentration of 5,500 ppmv TOC (as propane), which we determined was equivalent to an emission limit of 10 mg/L. Consistent with our proposed BSER analysis, we are finalizing our determination that the BSER is VRU and the loading rack TOC emission limits are 1.0 mg/L, or 550 ppmv TOC (as propane) for facilities controlled with vapor recovery systems, for new bulk gasoline terminals and 10 mg/L, or 5,500 ppmv TOC (as propane) for facilities controlled with vapor recovery systems, for modified or reconstructed bulk gasoline terminals, as proposed except that we are allowing the exclusion of methane from the measured TOC for reasons discussed in section III.A.1.a.iii of this preamble. With the exclusion of methane, we are finalizing additional test methods applicable for non-methane organic carbon and additional reporting requirements to indicate whether the measurement method used in the performance test or CEMS corrects for methane concentration. We are also finalizing recordkeeping and reporting requirements that correspond to the

revisions for excluding methane content from the TOC emission limits.

For reasons discussed in section III.A.1.a.iii of this preamble, we are finalizing two separate affected facilities definitions for NSPS subpart XXa: “gasoline loading rack affected facility” and “collection of equipment at a bulk gasoline terminal affected facility.” The “gasoline loading rack affected facility” definition being finalized is similar to the affected facility definition in NSPS subpart XX. We are providing separate affected facilities definitions to expand the equipment leak provisions to all equipment in gasoline service at the bulk gasoline terminal, so that the equipment changes that are remote from the loading racks and associated vapor processing system do not trigger a modification to the loading rack affected facility.

Because flares can be used to comply with the 10 mg/L TOC emission limit and because many thermal oxidation systems used in the gasoline distribution industry are enclosed combustors, we find that the flare monitoring alternatives are appropriate for thermal oxidation systems required to meet the 10 mg/L emission limit. We are clarifying in the final rule at 40 CFR 60.502a(c)(3)(vii) the requirements for using one-time assessment of net heating value for vapors with consistent composition or a minimum net heating value as provided in 40 CFR 63.670(j)(6) when vapors from loading of different liquid products are processed by the flare or thermal oxidation system. We are requiring facilities using this one-time assessment to monitor gasoline and total liquid product loading rates and maintain the ratio of gasoline to total liquid product loaded above the levels in their application under 40 CFR 63.670(j)(6). For perimeter air-assisted flares or thermal oxidation systems, gasoline loading rates must also be maintained as levels at or above the minimum gasoline loading rates specified in their application under 40 CFR 63.670(j)(6). We are also finalizing recordkeeping and reporting requirements that correspond to the requirements to maintain a minimum ratio of gasoline to total liquid product loaded and, if applicable, a minimum gasoline loading rate.

For reasons described in section III.A.1.a.iii.C of this preamble, we are finalizing a provision at 40 CFR 60.502a(c)(3)(ix) for conducting a one-time engineering assessment as a means to demonstrate compliance with the flare tip velocity operating limits. We are also finalizing recordkeeping requirements related to this one-time

assessment when this compliance method is used.

We are finalizing revised provisions at 40 CFR 60.502a(b)(2)(iii) and (c)(2)(iii) to allow some purge air or nitrogen to be introduced while the system is under vacuum and being regenerated as needed to effectively remove VOC from the adsorption media, based on evaluation of comments received. We based the final NSPS limits largely on the emission limits achieved by VRUs in practice. We found the description of the process, especially from the carbon adsorption system vendors, compelling, and we did not intend for our proposal to alter the regeneration methods used for the control systems upon which the BSER was established. Our final provision regarding the vacuum purge retains the limitation that, consistent with 40 CFR 60.12, the use of gaseous diluents to achieve compliance with a standard which is based on the concentration of a pollutant in the gases discharged to the atmosphere is prohibited.

After a review of all the comments, we are adding details of the time periods that must be included or excluded from the 3-hour rolling average as part of the requirements of the monitoring operating parameters. This allows us to specify the time periods applicable to different control devices rather than using the general phrase “all emissions from the loading event have cleared the control device.” For thermal oxidation systems, we are clarifying that the operating limits apply at all times when liquid product is loaded into gasoline cargo tanks. We are also finalizing requirements that, if the immediately previous load of a cargo tank is not known, then the cargo tank must be assumed to be a gasoline cargo tank. We are also finalizing requirements that periods when there is no liquid product loading must be excluded from the 3-hour rolling average. For vapor recovery systems, we are clarifying that the operating limits apply at all times that the vapor system is operating, because emissions can come from the regeneration of a carbon bed even though there is no liquid product loading. We are also adding recordkeeping and reporting requirements related to periods when gasoline cargo tanks are being loaded as well as an indication as to whether cargo tanks are assumed to be gasoline cargo tanks because the previous load of the cargo tank being loaded is unknown.

With these specific time frames moved to the description of the monitoring requirements for the monitored parameters, we are finalizing

the definition at 40 CFR 60.501a of “3-hour rolling average” as follows:

3-hour rolling average means the arithmetic mean of the previous thirty-six 5-minute periods of valid operating data collected, as specified, for the monitored parameter. Valid data excludes data collected during periods when the monitoring system is out of control, while conducting repairs associated with periods when the monitoring system is out of control, or while conducting required monitoring system quality assurance or quality control activities. The thirty-six 5-minute periods should be consecutive, but not necessarily continuous if operations or the collection of valid data were intermittent.

b. NESHAP Subpart R

i. What did the EPA propose pursuant to CAA section 112(d)(6) for the major source gasoline distribution source category?

Based on our technology review for loading racks at major sources, we proposed to retain the 10 mg/L TOC emission limit currently required in NESHAP subpart R. However, we proposed that the 10 mg/L TOC emission limit would apply to loading racks controlled by thermal oxidation systems or flares. For thermal oxidation systems, we proposed continuous compliance with a temperature operating limit established as the lowest 3-hour average temperature from a compliant performance test. For flares, we proposed enhanced provisions to ensure good combustion efficiency. For loading racks controlled by VRUs, we proposed to express this emission limit in terms of a concentration limit of 5,500 ppmv TOC (as propane) on a 3-hour rolling average because this provides an equivalent emission limit that is directly enforceable with the common monitoring systems used for VRUs. To prevent dilution, we proposed that only vacuum breaker valves can be used to introduce ambient air into the VRU control system.

ii. How did the technology review change for gasoline loading racks at major source gasoline distribution facilities?

The are no significant changes in the technology review conclusions for loading racks at major source gasoline distribution facilities.

iii. What key comments did the EPA receive and what are the EPA’s responses?

Several commenters supported the conclusion to maintain the 10 mg/L

TOC emission limit for major source gasoline distribution facilities.

iv. What is the rationale for the EPA's final approach for the technology review?

We are finalizing the loading rack emission limits as proposed. Because many of the specific monitoring requirements cross-reference provisions in NSPS subpart XXa, revisions related to allowing the exclusion of methane from measured TOC, allowance for thermal oxidation systems to use the flare monitoring provisions, use of vacuum purge gas for VRUs, and revisions to the definition of 3-hour rolling average also impact the final requirements and associated recordkeeping and reporting requirements for gasoline loading operations at major source facilities. Our rationale for these revisions is summarized in section III.A.1.a.iv of this preamble.

At proposal, we specifically excluded reference to 40 CFR 60.504a(d) at proposed 40 CFR 63.428(d) because we did not intend to require facilities subject to NESHAP subpart R to install pressure CPMS on existing loading racks. However, we note that the cross-referenced standards at 40 CFR 60.502(h) indicate that pressure must be monitored continuously as specified in 40 CFR 60.504a(d). In reviewing the final requirements, we determined that it was reasonable to allow facilities that have a pressure CPMS to use it for this compliance, but that additional language was needed to expressly provide pressure monitoring during performance tests or performance evaluations that we intended to allow. Therefore, we are adding an alternative monitoring provision at 40 CFR 63.427(f) that allows pressure monitoring during performances tests or performance evaluations following the provisions in 40 CFR 60.503(d) to determine that the system is appropriately designed and operated at or below a pressure of 18 inches of water during product loading as an alternative to using a pressure CPMS.

c. NESHAP Subpart BBBBBB

i. What did the EPA propose pursuant to CAA section 112(d)(6) for the area source gasoline distribution source category?

Based on our technology review for loading racks at area sources, we proposed to lower the allowable TOC emission limit from 80 mg/L to 35 mg/L for large bulk gasoline terminals in NESHAP subpart BBBBBB. We proposed that the 35 mg/L TOC

emission limit would apply to loading racks controlled by thermal oxidation systems or flares. For thermal oxidation systems, we proposed continuous compliance with a temperature operating limit established as the lowest 3-hour average temperature from a compliant performance test and proposed enhanced provisions for flares to ensure good combustion efficiency. We proposed to allow the use of a "flare monitoring alternative" as an alternative to the temperature operating limit for thermal oxidation systems. For loading racks controlled by VRUs, we proposed to express this emission limit in terms of a concentration limit of 19,200 ppmv TOC as propane on a 3-hour rolling average because this provides an equivalent emission limit that is directly enforceable with the common monitoring systems used for VRUs. To prevent dilution, we proposed that only vacuum breaker valves can be used to introduce ambient air into the VRU control system. For loading racks at small bulk terminals, we proposed to retain submerged filling currently required in NESHAP subpart BBBBBB.

For bulk gasoline plants, we proposed to add requirements to use vapor balancing between gasoline cargo tanks and gasoline storage vessels for bulk gasoline plants with a gasoline throughput over 4,000 gallons per day. We proposed to require pressure relief valves on fixed roof tanks used in vapor balancing to have opening pressures set no less than 2.5 psig.

ii. How did the technology review change for gasoline loading racks at area source gasoline distribution facilities?

We did not revise our proposed technology review for bulk gasoline terminals. We revised the proposed vapor balancing provisions to apply to bulk gasoline plants that have an actual throughput of 4,000 gallons per day or more on an annual average basis rather than using maximum calculated design throughput. We also revised the vapor balancing storage tank provisions regarding the minimum pressure relief device opening pressure, reducing it from 2.5 psig to 18 inches of water (0.65 psig).

iii. What key comments did the EPA receive and what are the EPA's responses?

Comment: Several commenters supported the EPA's proposal to reduce the emission limit for gasoline loading racks at large bulk gasoline terminals from 80 mg/L TOC to 35 mg/L TOC, noting that control systems to meet 35 mg/L TOC are "generally available" and cost-effective. One commenter further

noted that area source facilities are not large HAP emitters (by definition) and should not be subject to the 10 mg/L TOC emission limit that the EPA considered. Another commenter agreed that it is not cost-effective to require vapor collection and control for "small bulk gasoline terminals" and provided cost estimates for four example small terminals. A couple commenters also suggested that the EPA underestimated the costs for "large bulk gasoline terminals" to meet a 10 mg/L emission limit, so the EPA should retain the proposed 35 mg/L limit and not reduce it to 10 mg/L.

Response: The EPA appreciates the support for reducing the TOC emission limit for gasoline loading racks at large bulk gasoline terminals from 80 mg/L to 35 mg/L. As discussed in our June 2022 proposal, we agree that further reducing the emission limits for area source bulk gasoline terminals is not cost-effective (87 FR 35620; June 10, 2022). We are finalizing the 35 mg/L TOC emission limit for large bulk gasoline terminals at area source gasoline distribution facilities.

Comment: One commenter stated that the EPA significantly underestimated the economic impact of the proposed rule on small business energy marketers. Based on survey results presented in the comment, the commenter stated that dropping the current compliance threshold from a 20,000 gallon maximum daily design threshold to 4,000 gallons would pull virtually every small bulk gasoline plant into vapor balancing requirements, forcing small energy marketers out of the wholesale gasoline market. The commenter stated that using a maximum daily design throughput as a threshold for compliance is not an accurate or meaningful method to control emissions from bulk gasoline plants, which may be assessed based on the size of the storage tank at the facility, and suggested the actual daily throughput averaged over a longer time period, like a month, is a better method to establish a compliance threshold without placing a heavier burden on small bulk gasoline plants than necessary.

Response: We identified several states with these requirements and expected that many existing cargo tanks would be fitted with appropriate piping to accommodate vapor balancing, which would minimize the impacts of the proposed requirements. We note that the State requirements we reviewed each applied the vapor balancing requirement to bulk gasoline plants with daily throughputs of 4,000 gallons per day or more. In reviewing these requirements more closely, we found

that these daily averages were to be calculated on a monthly or annual average basis. When we evaluated the costs and cost effectiveness of requiring smaller bulk gasoline plants to use submerged loading and concluded that it was not cost-effective for them to do so, we based our analysis on the actual average throughput values, not design capacity values.

We used the maximum calculated design throughput to use consistent terminology with how a facility determines their gasoline distribution facility type (e.g., bulk gasoline plant or bulk gasoline terminal). Based on previous analyses, we estimated that there were 5,913 bulk gasoline plants, 1,715 of which already had vapor balancing for both deliveries and loading. We estimated that 270 bulk gasoline plants would need to add vapor balancing to either deliveries or loading, and 2,095 bulk gasoline plants would need to add vapor balancing to both deliveries and loading. The remaining 1,833 bulk gasoline plants were projected to be exempt from the vapor balancing requirement since their throughput is less than 4,000 gallons per day. Thus, we projected that at least 30 percent of bulk gasoline plants could use the throughput exemption. Consistent with our analysis and the State rule requirements used to support our proposal (87 FR 35621; June 10, 2022), we are revising the 4,000 gallon per day threshold to be based on an actual throughput basis. We note that table 1, item 1(ii), of NESHAP subpart BBBBBB contains a provision to calculate the average daily throughput of gasoline storage tanks using an annual averaging time. In addition, table 2 of NESHAP subpart BBBBBB uses annual averaging time to determine control requirements for bulk gasoline terminals. Therefore, because the State requirements we reviewed used an annual averaging time, and because NESHAP subpart BBBBBB already contains provisions using an annual averaging time, we are finalizing the requirement to use an annual averaging time. Additionally, we selected the annual averaging time because we expected an annual average to be more consistent, with less chance of facilities fluctuating from below to above the threshold than when a monthly or daily averaging time is used.

We also added requirements to maintain records of gasoline throughput and the time frame in which to add vapor balancing controls if a bulk gasoline plant newly triggers the requirement. With the revision to use actual throughput rather than capacity, we determined that the economic

impacts we estimated at proposal for bulk gasoline plants are reasonable and accurate. That is, we expected that a significant number of bulk gasoline plants will be below the applicability threshold we proposed, but our evaluations were based largely on applicability to State rules and other assessments that were based on actual throughputs. Therefore, we agree that we likely understated the impact of the proposed provisions for vapor balancing at bulk gasoline plants based on a maximum calculated design throughput. However, with the revision of the thresholds to an actual throughput basis, our previous projections of the number of facilities impacted by the vapor balancing requirements are now accurate and commensurate with the final rule requirements. Therefore, we are finalizing the proposed vapor balancing requirements, but only for bulk gasoline plants that have an actual throughput of 4,000 gallons per day assessed on an annual average basis.

Comment: Some commenters stated that the pressure relief device setting of no less than 2.5 psig for fixed roof storage tanks would exceed safe pressure for some storage tanks and should be removed from both the vapor balancing and fixed roof storage tank requirements in proposed NESHAP subpart BBBBBB.

Response: We understood most conservation (pressure relief) vents on atmospheric tanks use a release pressure of 2.5 psig or less. Considering the storage of gasoline, which has a partial pressure of over 3 psia, it would seem that fixed roof tanks would vent frequently if the conservation vents open at a pressure under 2.5 psig. In the proposal, we therefore expected 2.5 psig to be a reasonable requirement for pressure relief devices used for vapor balancing and on fixed roof storage tanks. However, based on our research concerning this comment, we now understand that “atmospheric tanks” are generally designed to operate between atmospheric pressure up to 2.5 psig and that “low pressure tanks” are designed to operate between 2.5 and 15 psig. Thus, the proposed requirement would be readily achievable for low-pressure tanks, but pressure relief devices on atmospheric tanks would generally begin to relieve pressure below 2.5 psig (typically between 0.8 and 1.5 psig). Essentially, the proposed requirement would require storage tanks at bulk gasoline plants subject to the proposed vapor balancing requirement and small, low throughput tanks at area source gasoline distribution facilities to replace some atmospheric storage tanks with low-pressure tanks. It is unclear

what fraction of existing gasoline storage tanks are of low-pressure design that may be able to meet this pressure requirement, but it is expected that a significant number of existing gasoline storage tanks are atmospheric tanks and would thus need to be replaced to meet this requirement. We had not considered these additional costs at proposal. Equipment costs are estimated to be about \$50,000 per tank, so installed costs (including removal of the old tank) are about \$100,000 per tank not considering business interruptions during tank replacement. We project that, for a 10,000 gallon per day throughput bulk gasoline plant, the vapor balancing requirement with a tank replacement to meet the 2.5 psig minimum pressure relief limit would have cost \$70,000 per ton of HAP reduced. This would not be cost-effective for the HAP emitted by these sources. The existing requirements in the gasoline distribution rules require that no pressure relief device open at pressures less than 18 inches of water, which is 0.65 psia. Based on this existing requirement, we expect that atmospheric storage vessels used at gasoline distribution facilities would not have devices opening at less than 0.65 psia. Therefore, we agree with commenters that the 2.5 psig requirement for pressure relief devices associated with fixed roof tanks and vapor balancing is not technically feasible without replacing numerous atmospheric storage tanks. We determined that replacing these atmospheric storage tanks is not cost-effective for the HAP emitted by these sources. Because our proposed standards required the vapor balancing system to be operated at pressures less than 18 inches of water column with no pressure relief device opening at pressures less than 18 inches of water column, and because fixed roof storage tanks are part of the vapor balancing system, we are finalizing that the appropriate minimum pressure relief device opening pressure for fixed roof storage tanks should be 18 inches of water column (0.65 psia).

Comment: Several commenters recommended that area sources using thermal oxidation systems should be able to utilize alternative monitoring protocols to temperature continuous parametric monitoring systems (CPMS) currently in NESHAP subpart BBBBBB. While temperature CPMS are required for major sources complying with the 10 mg/L TOC emission limit, according to the commenters, a temperature CPMS is not needed to demonstrate compliance with a 35 mg/L limit. The commenters

suggested that there would be no, or very small, emission reductions gained by a temperature CPMS, the emission reductions would not be worth the costs, and there would be additional secondary emissions resulting from increased fuel use to maintain temperatures during periods of low loading rates. The commenters stated that stack temperature monitoring is inappropriate and unnecessary to meet a 35 mg/L TOC limit. Temperatures often decrease during periods of low loading, but these low temperatures do not signal poor combustion efficiency, rather, low heat release rates due to lower flows. One commenter further indicated that temperature is not indicative of thermal oxidation system performance, providing a 2006 performance test, which, according to the commenter, demonstrated that high combustion efficiency and low emissions were achieved at low (as well as high) temperatures. The commenters suggested that the EPA should allow for the use of the existing thermal oxidation system monitoring alternative in NESHAP subpart BBBBBB.

According to the commenters, the EPA is on record indicating that pilot flame monitoring is sufficient for area sources [to meet 80 mg/L] and has not provided justification why it is not sufficient now. One commenter also stated that the EPA provided no justification as to why the flare requirements are applicable to these thermal oxidation systems or why they provide better assurance than the current alternative provisions. The commenter also stated that the cost impacts for this proposed “flare” alternative were understated. The commenter suggested that, if the EPA believes more continuous monitoring of proper operation of the air-assist blower and vapor line valve is needed, the EPA could revise existing language at 40 CFR 63.11092(b)(1)(iii)(B)(2)(i) to require only automated alarms and shutdown (rather than to perform daily visual observations).

One trade organization requested source test data from member facilities that are subject to emission limits above 10 mg/L and that do not use auxiliary fuel. Over 60 source tests were submitted and each one showed emissions meeting the 35 mg/L limit. The commenter concluded that this demonstrates that gasoline vapors are highly combustible and auxiliary fuel is not needed.

Response: While several commenters appeared to oppose the temperature operating limit, we note that the existing NESHAP subpart BBBBBB also has a temperature operating limit as a

compliance option. We disagree with the commenters suggesting that temperature is not a good indicator of performance. Based on the data provided by the commenter, while there are periods of high combustion efficiency and low emissions when the temperature is low, the temperature versus emission rate and temperature versus efficiency graphs showed that all exceedances of 35 mg/L (or control efficiencies less than 98 percent) were at temperatures under 900 °F. Thus, one can conclude from the data presented that operating at a minimum combustion temperature of 900 °F would ensure that the source would meet the 35 mg/L emission limit at all times. We therefore conclude that setting a minimum operating temperature is a reasonable continuous compliance method.

Second, we note that we proposed an alternative compliance option to the temperature operating limit. The key difference between the existing and our proposed alternative to temperature monitoring in NESHAP subpart BBBBBB is that the proposed alternative is designed to ensure that the combustion unit is not over assisted. We proposed this more rigorous compliance alternative because the applicable emission limit was lowered from 80 mg/L to 35 mg/L and due to our improved understanding of air-assisted combustion devices gained over the past 10 years. The proposed monitoring alternative is similar to the previous NESHAP subpart BBBBBB requirements with respect to continuous pilot flame monitoring. However, we found that the previous NESHAP subpart BBBBBB requirements, which included daily visual inspection to verify the proper operation of the air-assist blower and the vapor line valve, would not ensure good combustion during periods of low flow if the air blower is set at a high, fixed level to prevent smoking during periods of high gasoline vapor flow. That is, many of the vapor combustors used at gasoline distribution facilities are essentially enclosed air-assisted flares and the existing requirements in NESHAP subpart BBBBBB did not prevent over-assisting the combustor during low flow events. Therefore, we proposed a more substantive alternative to direct temperature monitoring to ensure that these combustors are meeting the applicable emission limit at all times, including periods of low gasoline vapor flow.

While the proposed requirements are more substantive, there are parallels with the existing requirements. For example, proper functioning of the air-assist blower could be simply an

assessment of whether the blower is on or not. This requirement would not prevent over-assisting the combustor. However, if a multispeed air blower is used, proper functioning of the air-assist blower could consider that the air-assist rates are low during low gasoline vapor flow rates and higher at higher vapor flow rates, which could help to prevent over-assisting. Proper functioning of the vapor line valve should prevent very low flows to the combustion unit, since the vapor line valve would remain closed until a set pressure is exceeded. Without the vapor line valve, the vapor flow rate could approach zero, such that the allowable air-assist rate would also approach zero. However, with the vapor line valve, the minimum vapor line flow is a step function above zero. This means the air-assist blower can remain on at some low flow setting because gasoline vapor flow will always be some step above zero based on the pressure setting for the vapor line valve. One can consider the proposed requirements to be a more detailed requirement of the provisions in 40 CFR 63.11092(b)(1)(iii)(B)(2)(i) “. . . the proper operation of the assist-air blower and the vapor line valve.” For low gasoline vapor flows, low air-assist rates are needed to prevent over-assisting the combustor. For higher gasoline vapor flows, higher air-assist rates may be needed to prevent smoking from the combustor. Thus, in context of the proposed rule, proper operation of the air-assist blower would translate to using an appropriate air-assist rate relative to the gasoline vapor flow rate, and the proper operation of the vapor line valve should prevent very low flows to the combustion unit, allowing a lower air-assist flow rate to be determined.

We proposed to allow an initial assessment of net heating values of gasoline vapors to see if auxiliary fuel is needed to meet the combustion zone net heating value. For unassisted or air-assisted flares, we expect gasoline vapors will routinely exceed the minimum required combustion zone net heating value. The combustion zone net heating value operating limit becomes more important if steam assist is used. For gasoline distribution facilities that use air-assisted thermal oxidation systems or flares, it is possible that the air-assist rate may be too high during periods of low gasoline vapor flow and overdilute the gasoline vapors prior to effective combustion. We proposed that facilities could use an assessment of the flow rate when only loading one cargo tank to project the low flow rate by which to assess whether the air-assist

flow rate is low enough not to over-assist the flare during low flow events. As noted in response to comments regarding the monitoring provisions for thermal oxidation systems and flares in section III.A.1.a.iii.C of this preamble, we have revised and clarified the requirements for the initial assessment of net heating values at 40 CFR 60.502a(c)(3)(vii) and allow owners or operators to establish a minimum gasoline loading rate operating limit, in addition to a minimum ratio of gasoline to total product loading rate, that can be used to ensure vapor flow rates are high enough for a set air-assist rate to demonstrate compliance with the $NH_{V_{dil}}$ operating parameter. If the air-assist rate is too high, facilities can lower the air-assist rate or add auxiliary fuel according to the provisions in 40 CFR 60.502a(c)(3)(viii) to ensure that enough heat release is provided to ensure high combustion efficiencies at low flow rates.

We appreciate the data collected and provided by the commenter that showed many facilities could meet the 35 mg/L TOC emission limit without the use of auxiliary fuel. We expect some facilities will conduct sampling of their heat content and assess their air addition rates and determine that no additional fuel is needed. Thus, we expect many facilities will be able to meet the 35 mg/L TOC emission limit without auxiliary fuel. However, the performance tests are typically done with high loading rates, and may not adequately reflect the performance for air-assisted combustion units when operated at low loading rates. Therefore, we are finalizing requirements to either continuously monitor the net heating value of the vapors discharged to the flare or thermal oxidation system or to perform an initial assessment to determine a minimum gasoline loading rate operating limit that ensures high combustion efficiencies. As proposed, facilities that cannot meet the $NH_{V_{dil}}$ operating limit based on the minimum gasoline loading rate operating limit can determine a minimum auxiliary fuel addition rate (perhaps with a dual speed or variable speed blower) needed to ensure good combustion efficiencies at these lower flow rates that might not be well-represented during the performance test. Without this assessment, we remain unconvinced that the mere presence of a pilot flame, along with daily inspections of the vapor line valve and air blower, are adequate to ensure a 35 mg/L TOC emission limit is met at all times.

Comment: One commenter recommended that sources using VRU should be able to implement alternative

monitoring protocols as set forth under 40 CFR 63.11092(b)(1)(i)(B)(1)(i)-(iii). According to the commenter, the EPA has not referenced any data suggesting that the alternative monitoring options would not be sufficient to ensure compliance with a 35 mg/L (or 19,200 parts per million by volume (ppmv) as propane) TOC emission limit. Alternatively, if the EPA believes that CEMS must be required at all bulk gasoline terminal facilities subject to NESHAP subpart BBBBBB, then the EPA should allow the alternative monitoring protocols for periods of shutdown or repairs to CEMS rather than requiring the loading racks to be taken out of service. A few additional commenters did not object to the requirement to use a CEMS, but similarly stated that the current alternative monitoring protocols should be allowed for periods of shutdown or repairs to CEMS. According to the commenter, there would be cost impacts that were not considered by the EPA if no alternative is provided when the CEMS is inoperable or out-of-control.

Response: We proposed the concentration limit specifically so that a CEMS could be used to demonstrate continuous compliance with the TOC emission limit for VRU. We proposed to require CEMS for all rules, including NESHAP subpart BBBBBB, because a CEMS can directly assess compliance with the emission limit and the design and operating parameters cannot provide this direct assessment. However, we did not estimate costs for back-up CEMS nor facility disruptions for periods of CEMS outages. Therefore, we sought to provide an alternative to using a CEMS that could be used for limited periods of CEMS outages, but not one that could be used indefinitely as an ongoing alternative to a CEMS.

In the cited alternative monitoring protocols in NESHAP subpart BBBBBB, the regeneration cycles were based largely on design considerations, with monthly measurements of the carbon bed outlet to ensure breakthrough had not occurred near the end of an adsorption cycle. With facilities using CEMS, they will have recent data on regeneration cycle times (that can be normalized by product loading quantities) by which to base the regeneration cycle times to use during CEMS outages. This method follows many of the requirements in the existing NESHAP subpart BBBBBB alternative, but the operating parameters are based on those used to meet the emission limit when the CEMS was operating, which provides better assurance that the VRU is meeting the emission limit than cycle times and other operating parameters

that are based solely on design considerations. We are providing specific provisions on how cycle times and other operating limits will be established based on operations just prior to the CEMS outages. We are setting a maximum number of hours for which the alternative monitoring method can be used at 240 hours in a calendar year. We consider this time period to be adequate to conduct maintenance on or to replace the CEMS, as needed. Because the operating parameters are specific to recent carbon adsorption system operating conditions, we determined that this alternative would provide compliance assurance during a 2-week period. We also selected this time period to emphasize that this is a limited use alternative and that CEMS should be used as the compliance method for all VRU. While most commenters requesting an alternative to CEMS cited the NESHAP subpart BBBBBB provisions, we find this limited alternative to the use of a CEMS would also provide adequate short-term compliance assurance for VRUs meeting more stringent emission limits in NESHAP subpart R and NSPS subpart XXa. Therefore, we are finalizing this alternative in all of the gasoline distribution rules as a temporary means to demonstrate compliance during periods of CEMS outages.

iv. What is the rationale for the EPA's final approach for the technology review?

We are finalizing the loading rack emission limits for area source bulk gasoline terminals as proposed. Because many of the specific monitoring requirements cross-reference provisions or contain similar provisions as in NSPS subpart XXa, revisions related to allowing the exclusion of methane from measured TOC, use of vacuum purge gas for VRUs, revisions to the definition of 3-hour rolling average, and associated revisions to the recordkeeping and reporting requirements also impact the final requirements for gasoline loading operations at area source facilities. Our rationale for these revisions is summarized in section III.A.1.a.iv of this preamble.

We are revising the proposed requirements for vapor balancing at bulk gasoline plants. First, for reasons discussed in section III.A.1.c.iii of this preamble, we are revising the threshold for bulk gasoline plants required to use vapor balancing from a maximum calculated design throughput of 4,000 gallons per day or more to an annual average actual throughput of 4,000 gallons per day or more, to better align

with the analysis conducted regarding the cost effectiveness of this threshold and other provisions in NESHAP subpart BBBBBB. We are also revising the minimum pressure setting for fixed roof storage vessels used in vapor balancing from 2.5 psig to 18 inches of water column.

For reasons as explained in section III.A.1.b.iv, we specifically referenced vapor tight provisions at 40 CFR 63.422(c) and (e) in proposed item 1(g) of table 2 to subpart BBBBBB because we did not intend to require facilities subject to NESHAP subpart BBBBBB to install pressure CPMS on existing loading racks. However, as discussed in section III.A.2.b.iii of this preamble, we received comment that the cross-referenced sections to the NESHAP subpart R requirements were incomplete and incorrect. As such, we are finalizing the vapor-tightness requirements by cross-referencing the provisions in NSPS subpart XXa. Therefore, similar to the final requirements we added in NESHAP subpart R, we are adding a monitoring alternative at 40 CFR 63.11092(h) to allow pressure measurements made during performances tests or performance evaluations following the provisions in 40 CFR 60.503(d) as an alternative to using a pressure CPMS to determine that the system is appropriately designed and operated at or below a pressure of 18 inches of water during product loading. We are also adding a cross-reference to 40 CFR 63.11092(h) in item 1(f) of table 2 (corresponding to proposed item 1(g) of table 2) to clarify that existing sources under NESHAP subpart BBBBBB have the option to either install a pressure CPMS or to periodically verify the appropriate design and operation of the system by measuring pressure of the system during performance tests or evaluations following the requirements in 40 CFR 60.503(d).

We are maintaining the compliance methods, as proposed, including provision for thermal oxidation systems to either monitor combustion zone temperature or use the flare monitoring alternative and for VRU to use a CEMS. However, in response to comments, as discussed in section III.A.1.c.iii of this preamble, we are providing a limited, short-term alternative to using a CEMS for bulk gasoline terminals using a VRU that can be used for periods of CEMS outages.

2. Standards for Cargo Tank Vapor Tightness

a. NESHAP Subpart R

i. What did the EPA propose pursuant to CAA section 112(d)(6) for the major source gasoline distribution source category?

The EPA proposed a graduated vapor tightness certification requirement ranging from 0.50 to 1.25 inches of water pressure drop over a 5-minute period, depending on the cargo tank compartment size for gasoline cargo tanks. The existing requirement in NESHAP subpart R is a graduated vapor tightness certification requirement ranging from 1.0 to 2.5 inches of water pressure drop over a 5-minute period, depending on the cargo tank compartment size for gasoline cargo tanks. We proposed that cargo tanks certified prior to 3 years from the promulgation date would have to certify to the existing levels and that cargo tanks certified on or after 3 years from the promulgation date would have to certify to the proposed lower levels.

ii. How did the technology review change for gasoline cargo tanks at major source gasoline distribution facilities?

We did not revise our proposed technology review for cargo tank vapor tightness requirement. However, we revised the timing of the new requirements so that all cargo tanks undergoing annual certification would be certified at the lower allowable pressure drop level within 3 years of promulgation of the final rule.

iii. What key comments did the EPA receive and what are the EPA's responses?

We received general support for the proposed cargo tank vapor tightness requirements, particularly the harmonizing of requirements across the three rules (NESHAP subparts R and BBBBBB and NSPS subpart XXa).

Comment: One commenter stated that compliance with a CAA section 112(d) rule must be "as expeditiously as practicable" and "in no event later than 3 years after the effective date of such standard." With respect to cargo tanks, the commenter stated that the Agency did not demonstrate why 3 years was needed to comply with the revised vapor tightness requirements. Specifically, the commenter noted that, if 3 years are provided before the new vapor tightness certification limits become effective and an additional year is then required for the entire fleet of gasoline cargo tanks to be certified at that lower level, then the proposal is effectively providing a 4-year compliance schedule, which is not

provided under CAA section 112(d). The commenter recommended that no more than 2 years be provided to implement the new limits and no more than 3 years provided to implement and certify the cargo tanks at that lower level.

Response: For cargo tanks, we agree that compliance with the revised vapor tightness requirements and annual certification can be implemented in 3 years. Therefore, within 3 years from the promulgation date of the rule, we are requiring that all cargo tanks loaded must be certified at the lower vapor tightness values. That way, the entire fleet of gasoline cargo tanks would have certifications at the lower level within 3 years of the promulgation date of this final rule rather than requiring that certifications at the lower level begin at 3 years after the promulgation date. Therefore, we have eliminated provisions that would allow an additional year to test and fully implement the new cargo tank vapor tightness requirements.

iv. What is the rationale for the EPA's final approach for the technology review?

We are finalizing the graduated vapor tightness certification requirement ranging from 0.50 to 1.25 inches of water pressure drop over a 5-minute period, depending on the cargo tank compartment size for gasoline cargo tanks, as proposed. We are finalizing a compliance schedule that ensures that all gasoline cargo tanks are certified at the lower levels within 3 years of the promulgation date of the final rule because the CAA requires compliance as expeditiously as practicable and no later than 3 years after the promulgation date.

b. NESHAP Subpart BBBBBB

i. What did the EPA propose pursuant to CAA section 112(d)(6) for the area source gasoline distribution source category?

The EPA proposed a graduated vapor tightness certification requirement ranging from 0.50 to 1.25 inches of water pressure drop over a 5-minute period, depending on the cargo tank compartment size for gasoline cargo tanks to harmonize gasoline cargo tank requirements with those in NESHAP subpart R.

ii. How did the technology review change for gasoline cargo tanks at area source gasoline distribution facilities?

We did not revise our proposed technology review for cargo tank vapor tightness requirement. However, since we cross-reference the vapor-tight certification requirements in NESHAP

subpart R, the timing of the final requirements was revised such that gasoline cargo tanks must be certified at the lower levels in order to be loaded no later than 3 years from the promulgation date of the final rule.

iii. What key comments did the EPA receive and what are the EPA's responses?

Comment: One commenter noted that the revisions to table 2 result in NESHAP subpart BBBBBB no longer expressly requiring the annual certification testing, in that table 2 item 1(g) now references paragraphs 40 CFR 63.422(c) and (e), neither of which specify conducting the annual certification test. The commenter recommended that the text of table 2 item 1(g) be edited to read, “. . . into vapor-tight gasoline cargo tanks using the procedures specified in § 63.11094(b).”

Response: We agree that the references to 40 CFR 63.422(c) and (e) are incorrect. However, 40 CFR 63.11094(b) addresses only recordkeeping requirements and not the requirements to not load non-vapor tight cargo tanks. Upon further review, the provisions in table 2, item 1(g) were intended to be similar to the current requirements in item 1(e). Therefore, we are revising the entry in table 2, proposed item 1(g) (which is now 1(f) in the final rule) to reference the NSPS subpart XXa requirements at 40 CFR 60.502a(e) through (i) and are also adding a cross-reference to 40 CFR 63.11092(g) and (h), which specifies the test methods for the annual certification and alternative monitoring requirements for pressure of the loading rack system, respectively. In addition, we are revising the provisions in table 2, item 2(c) to limit loading to vapor-tight gasoline cargo tanks using the procedures specified in 40 CFR 60.502a(e) and adding a cross reference to 40 CFR 63.11092(g).

iv. What is the rationale for the EPA's final approach for the technology review?

We are finalizing the graduated vapor tightness certification requirement ranging from 0.50 to 1.25 inches of water pressure drop over a 5-minute period, depending on the cargo tank compartment size for gasoline cargo tanks, as proposed. We are revising the entry in table 2, items 1(f) and 2(c), to reference the correct NSPS subpart XXa requirements and also adding a cross-reference to 40 CFR 63.11092(g), which specifies the test methods for the annual certification. Through these cross-references, we are finalizing

requirements that certification of a gasoline cargo tank at the lower levels be conducted within 3 years from the promulgation date of the final rule to ensure that all gasoline cargo tanks are certified at the lower levels within 3 years of the promulgation date of the final rule because the CAA requires compliance as expeditiously as practicable and no later than 3 years after the promulgation date.

c. NSPS Subpart XXa

i. What did the EPA propose pursuant to CAA section 111 for new, modified, or reconstructed bulk gasoline terminals?

The EPA proposed a graduated vapor tightness certification requirement ranging from 0.50 to 1.25 inches of water pressure drop over a 5-minute period, depending on the cargo tank compartment size for gasoline cargo tanks to harmonize gasoline cargo tank requirements with those in NESHAP subparts R and BBBBBB.

ii. How did the NSPS review change for gasoline cargo tanks at new, modified, or reconstructed bulk gasoline terminals?

We did not revise our proposed NSPS review for cargo tank vapor tightness requirement.

iii. What key comments did the EPA receive and what are the EPA's responses?

We received general support for the proposed cargo tank vapor tightness requirements, particularly the harmonizing of requirements across the three rules (NESHAP subparts R and BBBBBB and NSPS subpart XXa).

iv. What is the rationale for the EPA's final approach for the NSPS review?

For reasons detailed in our June 2022 proposal (87 FR 35622; June 10, 2022), we are finalizing the graduated vapor tightness certification requirement ranging from 0.50 to 1.25 inches of water pressure drop over a 5-minute period, depending on the cargo tank compartment size for gasoline cargo tanks, as proposed. We are finalizing requirements, as proposed, that all gasoline cargo tanks loaded at gasoline loading rack affected facilities subject to NSPS subpart XXa must be certified at the lower levels upon startup of the affected facility, as required under section 111 of the CAA. We are clarifying in 40 CFR 60.502a(e) that these provisions apply to the “gasoline loading rack affected facility” and that the applicable vapor-tight gasoline cargo certification methods are in 40 CFR 60.503a(f), consistent with the

definition of “vapor-tight gasoline cargo tanks” in 40 CFR 60.501a. We are also clarifying that if the previous contents of a cargo tank are not known, you must assume that cargo tank is a gasoline cargo tank. These revisions are being made to be consistent with the nomenclature revisions for the loading racks as described in section III.A.1.iv of this preamble. These revisions also help clarify the requirements that ensure loading occurs only in vapor-tight gasoline cargo tanks as defined in NSPS subpart XXa.

3. Standards for Gasoline Storage Vessels

a. NESHAP Subpart R

i. What did the EPA propose pursuant to CAA section 112(d)(6) for the major source gasoline distribution source category?

The EPA proposed additional fitting requirements for storage vessels with external floating roofs as specified in 40 CFR 60.112b(a)(2)(ii). We also proposed requirements for storage vessels with internal floating roofs to maintain the concentrations of vapors inside a storage vessel above the floating roof to less than 25 percent of the LEL. We proposed test method procedures for determining the LEL inside a storage vessel above the internal floating roof and corresponding recordkeeping and reporting requirements.

ii. How did the technology review change for gasoline storage vessels at major source gasoline distribution facilities?

We did not revise our proposed technology review for storage vessels. However, we have made minor revisions to the test method procedures associated with the 25 percent of the LEL level.

iii. What key comments did the EPA receive and what are the EPA's responses?

Comment: Several commenters opposed the 25 percent of the LEL level for various reasons. Two commenters stated that the EPA did not adequately demonstrate that LEL monitoring is an effective defect detection practice, and it should not be required. Two commenters stated that the EPA evaluated LEL as a monitoring enhancement, but proposed it as a standard and did not adequately identify controls, costs, or emission reductions for this standard. To assess if the LEL monitoring is warranted, the commenters recommended that the EPA fully account for costs of replacing the internal floating roof, not just the cost of

monitoring. One commenter cited the NSPS subpart Kb final rule preamble (52 FR 11420; April 8, 1987) that stated that “[t]he Agency is not aware of any method by which an annual concentration measurement could be used to establish the condition of the control equipment.” According to the commenters, the EPA has not provided sufficient data to alter that conclusion and should withdraw the proposed LEL monitoring requirement.

Response: As part of the notice of data availability (87 FR 49795; August 12, 2022) the EPA provided the background information used in the LEL analysis. It is clear that internal floating roofs that had visible inspection issues (e.g., liquid on top of the floating roof) had high LEL concentrations in the headspace (well over 25 percent of the LEL) and those that did not have visible inspection issues had lower LEL concentrations (generally well below 25 percent of the LEL). Our emission estimates from various storage vessel requirements assume proper seals and other equipment are in-place and operating as required. If these controls are not operating as intended, the emissions from these storage vessels can be much higher. We found that the visual inspections are subjective and may, at times, not be performed well. For example, although a hired contractor for BP’s Carson Refinery had reported no problems with the facility’s 26 floating roof storage vessels from 1994 to 2002, a South Coast Air Quality Management District inspection “revealed that more than 80 percent of the tanks had numerous leaks, gaps, torn seals, and other defects that caused excess emissions.”⁶ Therefore, at proposal, we sought a less subjective means to verify performance of the floating roofs. We concluded that, given the preponderance of internal floating roof storage vessels in this source category, periodic LEL monitoring could be used to ensure the floating roofs are performing as intended.

We acknowledge that it is difficult to estimate the emission impacts of these LEL requirements because we do not have data on the number of poorly functioning floating roofs. We note that the storage vessel standards for NESHAP subpart R (as well as NESHAP subpart BBBBBB) rely heavily on the NSPS subpart Kb requirements. NSPS subpart Kb already requires repair of floating roofs that fail inspection and failure of the LEL monitoring triggers the same repairs. As such, we consider that these repairs are already required

and the LEL requirement predominately makes the required inspections less subjective. In the worst-case scenario, a poorly operated internal floating roof can have emissions similar to those of a fixed roof storage vessel. In establishing the floating roof requirements, we already determined that installing a floating roof was cost-effective and that the costs of replacing a poorly functioning floating roof is not significantly different from the costs of retrofitting a fixed roof storage vessel. In our analysis, we used a 15-year life for the internal floating roof storage vessel. Thus, replacement of the internal floating roof every 15 years to ensure the emission reductions are achieved are inherent in the original costing assessment. Therefore, if an internal floating roof has failed to the point that 25 percent of the LEL is exceeded, and the LEL level cannot be reduced without making repairs to the internal floating roof, we see no reason that these storage vessels should remain in service. Thus, we have already considered that replacement of the internal floating roof, if it has reached its end of life and is no longer reducing emissions as intended, is reasonable. While most poorly performing floating roofs can be repaired, rather than replaced, we maintain that replacing a failing internal floating roof is a reasonable requirement when repairs are ineffective.

Since our statement in 1987 and as noted in our memorandum *Review of LEL Testing Requirements for Internal Floating Roof Tanks*, two States have developed rules that use LEL monitoring as a means to ensure that floating roofs are controlling emissions as intended. We note that these rules effectively set a maximum LEL limit that must be met—essentially an “emission limitation,” not just a monitoring requirement—and we modeled our proposed provision following these State rules. Furthermore, the National Fire Protection Association (NFPA) standard sets a maximum LEL limit of 25 percent for explosion prevention for internal floating roof storage vessels. Based on these developments, we concluded that establishing a maximum LEL level for internal floating roofs was reasonable and necessary when taking into account developments in practices, processes, and control technologies.

Comment: Several commenters suggested that, if the EPA finalizes the LEL monitoring requirement, the following revisions be made to the LEL monitoring requirements as proposed:

(1) Adopt higher LEL action levels: 50 percent for storage vessels installed prior to the effective date of the NSPS

in part 60, subpart Kb, and 30 percent for storage vessels constructed, reconstructed or modified after the effective date of NSPS subpart Kb. According to the commenter, these limits would be more consistent with State requirements.

(2) Allow calibration according to the manufacturer’s recommendations, which may specify a different calibration gas (other than methane) or different calibration methods. Some instruments use docking stations for calibration, so cannot attach tubing.

(3) Shorten LEL measurement period to a total of 10 minutes with 5 minutes of recorded measurement data (concentrations do not change significantly and minimize time needed to be on the roof). In addition, facilities should have the option to record the highest measured value in lieu of recording a 5-minute rolling average or allow operators flexibility in their recordkeeping based on their internal systems and operations.

(4) LEL should be a monitoring requirement, not a standard, so corrective action should be specified. Recommended that a failed LEL inspection should trigger the obligation to conduct a second confirmatory test within 30 days. If the second test shows that the initial inspection was an anomaly, no further action should be required. If the second inspection confirms an exceedance of the percentage LEL limit, then a third confirmatory test must be conducted within 30 days. If all inspections confirm the presence of gasoline vapors above the percentage LEL limit, then the tank must undergo repairs during the next regularly scheduled degassing event or inspected as specified in 40 CFR 63.1063(d)(1).

(5) Remove the requirement that LEL measurements not be taken when wind speeds exceed 10 mph, as this is unworkable for some locations according to the commenters. One commenter recommended that the EPA only require regulated entities to use best efforts to block wind from the inspection area, document wind speed and direction, and use best engineering judgment regarding whether wind speed would affect the validity of the measurements. Another commenter suggested revising the provision to be the greater of 10 mph or the average monthly wind speed at the site.

(6) State that the LEL monitoring is to be conducted while the internal floating roof is floating and with no product movement.

Response: Regarding the action level of the LEL requirement (item 1), we considered the State rule requirements

⁶ Mokhiber, Russell. *Multinational Monitor*; Washington Vol. 24, Iss. 4, (April 2003): 30.

in establishing the threshold. However, we expect these rules were established prior to the NFPA standard establishing a 25 percent of the LEL limit. From the data we collected, there were very few measurements that exceeded 25 percent of the LEL that did not also exceed 50 percent of the LEL. Thus, when failures occurred, the LEL was often very high. In the LEL measurements that we have, there were cases where LEL levels of 30 percent were observed, but the facilities conducted corrective actions and reduced the emissions from these tanks. Based on these observations and considering the NFPA standard, we maintain that the appropriate limit for LEL levels for internal floating roof storage vessels is 25 percent.

Regarding the calibration requirements (item 2), we agree that the use of other calibration gases is acceptable, provided appropriate correction factors are applied specifically to the calibration gas used. We have modified the monitoring method to incorporate this flexibility and added a corresponding recordkeeping and reporting requirement to indicate the gas used for calibration. However, we maintain that the calibration should be made with tubing attached. This will help to ensure no leaks in the tubing or other issues that may impact the LEL measurements when the tubing is attached. Therefore, we are not revising the proposed requirement to perform calibration with the tubing attached.

Regarding reducing the duration of the LEL monitoring (item 3), we find that a 10-minute testing period (5-minute stabilization + 5 minutes of reading) only provides one 5-minute average and is not as representative as the proposed 20-minute test period. However, if the LEL level is clearly exceeded in the first 5-minute average, we agree that continued monitoring is not necessary. Therefore, we have added a provision to the duration of the test provisions in 40 CFR 63.425(j)(3)(ii) that allows discontinuing testing when one 5-minute average exceeds the 25 percent of the LEL level.

Regarding an exceedance of the LEL requirement triggering corrective action (item 4), we note that the LEL monitoring does trigger corrective action as specified in 40 CFR 63.423(b)(2), “A deviation of the LEL level is considered an inspection failure under § 60.113b(a)(2) of this chapter or § 63.1063(d)(2) and must be remedied as such.” These sections require the storage vessels be repaired or taken out of service. We agree that re-monitoring should be done to confirm the repair has been successful, but some corrective

action is needed on the floating roof prior to the second monitoring event. We do not agree with the commenter that the only corrective action needed is to re-monitor the LEL in the storage vessel. As such, we are revising 40 CFR 63.423(b)(2) to clearly require re-monitoring of the LEL to confirm repair. Specifically, we are adding the following sentence at the end of 40 CFR 63.423(b)(2): “Any repairs made must be confirmed effective through re-monitoring of the LEL and meeting the level in this paragraph (b)(2) within the timeframes specified in § 60.113b(a)(2) or § 63.1063(e), as applicable.”

Regarding the maximum wind speed for the LEL monitoring test (item 5), we reviewed average wind speed data for various locations and agree that the 10 mph limit may be too restrictive at some locations. However, the inspections should be performed when the wind speeds are typically low, as in the morning hours. After review of the annual average wind speeds, as well as daily fluctuations in wind speed,⁷ we considered whether the inspections could be performed at wind speeds under 15 mph, even when the annual average wind speed exceeds this level. After considering the comment and wind speed data, we agree to amend the wind speed requirement as follows: “LEL measurements shall be taken when the wind speed at the top of the tank is 5 mph or less to the extent practicable, but in no case shall LEL measurements be taken when the sustained wind speed at top of tank is greater than the annual average wind speed at the site or 15 mph, whichever is less.”

Regarding specifications for the floating roof when the LEL monitoring test is performed (item 6), the test should be conducted under normal operations and the roof should not be resting on the support legs. Thus, we agree with the commenter that the roof should be floating and that testing should not be conducted when either the storage vessel is empty or the roof landed on the support legs. We recognize potential safety issues may occur if the storage vessel is being filled and significant vapors are being expelled, but we do not want to forbid any movement of liquid during the test, as that may disrupt plant operations. Therefore, we have included language in the final rule that outline that the test “. . . should be conducted when the

internal floating roof is floating with limited product movement . . .”

In considering the regulatory language proposed along with various needs to potentially re-monitor (due to high winds or to confirm repair) or to time inspections during periods of limited product movement, we found that the proposed requirement to monitor during each visual inspection required under 40 CFR 60.113b(a)(2) or 63.1063(d)(2) to be unnecessary. We intended that LEL monitoring would be conducted annually. While we anticipate that LEL monitoring would generally be conducted as part of the visual inspection requirements, mandating that they be conducted together will likely increase the number of LEL re-monitoring events required. Therefore, we are also revising 40 CFR 63.425(j)(1), as part of the revisions in response to these comments, to replace the proposed phrase “during each visual inspection required under § 60.113b(a)(2) or § 63.1063(d)(2)” with “at least once every 12 months” to clarify that the LEL monitoring is to be conducted annually, and that it may, but is not required to, be conducted during the visual inspection.

iv. What is the rationale for the EPA’s final approach for the technology review?

We are finalizing additional fitting requirements for storage vessels with external floating roofs as proposed because we determined these fitting requirements were cost-effective. We are also finalizing requirements for storage vessels with internal floating roofs to maintain the concentrations of vapors inside a storage vessel above the floating roof to less than 25 percent of the LEL, as proposed, because we determined that LEL monitoring is a development in practices that helps ensure the internal floating roof is operating effectively to reduce emissions. For reasons discussed in section III.A.3.a.iii of this preamble, we are making minor revisions to the proposed test method procedures for determining the LEL for storage vessels with internal floating roofs to clarify the test procedures and make them more flexible in response to public comments received. We are also adding and revising corresponding recordkeeping and reporting requirements.

b. NESHAP Subpart BBBBBB

i. What did the EPA propose pursuant to CAA section 112(d)(6) for the area source gasoline distribution source category?

We proposed requirements for storage vessels with internal floating roofs to

⁷ <https://windexchange.energy.gov/maps-data/325> for annual averages; <https://www.visualcrossing.com/weather-data> for hourly and daily averages.

maintain the concentrations of vapors inside a storage vessel above the floating roof to less than 25 percent of the LEL. We cross-referenced the proposed test method procedures for determining the LEL in NESHAP subpart R. We also proposed that fixed roof storage vessels must have pressure relief valves with opening pressures set no less than 2.5 psig.

ii. How did the technology review change for gasoline storage vessels at area source gasoline distribution facilities?

We did not revise our proposed technology review regarding the maximum 25 percent of the LEL for internal floating roof storage vessels. However, because we cross-reference the LEL testing requirements in NESHAP subpart R, there are minor revisions in the proposed LEL test method. We also revised the proposed fixed roof storage vessel provisions regarding the minimum pressure relief device opening pressure, reducing it from 2.5 psig to 18 inches of water (0.65 psig).

iii. What key comments did the EPA receive and what are the EPA's responses?

The key comments received regarding the LEL requirement are summarized in section III.A.3.a.iii of this preamble. The key comments received regarding the proposed 2.5 psig minimum pressure relief device opening pressure requirement for fixed roof storage vessels are summarized in section III.A.1.c.iii of this preamble.

iv. What is the rationale for the EPA's final approach for the technology review?

We are finalizing requirements for storage vessels with internal floating roofs to maintain the concentrations of vapors inside a storage vessel above the floating roof to less than 25 percent of the LEL, as proposed, because we determined that LEL monitoring is a development in practices that helps ensure the internal floating roof is operating effectively to reduce emissions. For reasons discussed in section III.A.3.a.iii of this preamble, we are making minor revisions to the proposed test method procedures for determining the LEL for storage vessels with internal floating roofs to clarify the test procedures and make them more flexible in response to public comments received. We are also adding and revising corresponding recordkeeping and reporting requirements. For reasons discussed in section III.A.1.c.iii of this preamble, we are revising the minimum

pressure setting for fixed roof storage vessels from 2.5 psig to 18 inches of water column.

4. Standards for Equipment Leaks

a. NESHAP Subpart R

i. What did the EPA propose pursuant to CAA section 112(d)(6) for the major source gasoline distribution source category?

We proposed to require semiannual instrument monitoring of all equipment in gasoline service using either OGI according to proposed appendix K to 40 CFR part 60 (appendix K) or EPA Method 21. We also proposed to require repair of any leaks identified from a monitoring event or any leaks identified by AVO methods during normal duties.

ii. How did the technology review change for equipment leaks at major source gasoline distribution facilities?

There are no significant changes in our proposed technology review conclusions for equipment leaks at major source gasoline distribution facilities.

iii. What key comments did the EPA receive and what are the EPA's responses?

Comment: Several commenters stated that the EPA's cost estimates for the proposed instrument monitoring provisions are understated for the reasons outlined below. If the EPA used the cost assumptions outlined below, the instrument cost effectiveness compared to AVO monitoring, using the EPA's emission estimates, would be \$40,000 to \$50,000 per ton HAP reduced, so instrument monitoring is not a cost-effective alternative to AVO.

- AVO inspections are part of normal walk around inspections, which would occur in the absence of the rule, so no cost savings should be applied for discontinuing monthly AVO inspections.

- Method 21 monitoring costs are low.

- Startup cost for a Method 21 instrument monitoring program is about \$15,000 to \$30,000. According to the commenter, the EPA did not include connectors in the number of components in the startup cost estimate.

- Quarterly leak detection and repair (LDAR) monitoring costs are typically \$10,000 to \$20,000 per year (2 to 4 times the EPA estimate). This may be due, in part, to the EPA using an idealized component monitoring rate of 75 components an hour (commenter suggested 80 percent of this rate, or 60 components per hour, is more realistic).

- Costs do not include license fees for enterprise software, which costs about

\$5,000 per year nor additional costs for monitoring difficult-to-monitor components (lifts, etc.).

- Optical gas imaging (OGI) monitoring costs are low:

- Startup costs are likely \$5,000 to \$10,000, (not \$1,000 to \$1,500).

- Monitoring rate of 750 components an hour is idealized and at the minimum time per component specified in proposed appendix K. Considering viewing from 2 angles and required breaks specified in appendix K, a more realistic average monitoring rate is 192 components per hour.

One commenter also stated that it may be technically infeasible with so many facilities having to do monitoring in 3 years. Also, the high demand for this service will likely increase costs.

Response: Regarding the commenter's note that AVO inspections are a part of normal walk around inspections, the EPA recognizes that this type of equipment leak monitoring is part of standard operations at gasoline distribution facilities. However, through discussions with industry, it was understood that the routine walk throughs are not performed with the same level of thoroughness as the monthly inspections. Additionally, the monthly inspections require time to document the inspection. To account for these more thorough AVO inspections, the EPA determined that it is appropriate to apply a cost savings for discontinuing the monthly AVO inspection requirement.

With respect to EPA Method 21 startup costs, we used the equipment counts for the model plant to estimate the startup costs. We assumed that only pumps and valves would need to be tagged, so connectors were excluded from the component count used in the startup costs. Facilities must know all equipment that need to be inspected via the current monthly AVO requirements, so the startup cost for Method 21 at gasoline distribution facilities is expected to be less than for facilities that have not had any LDAR requirements. As such, we consider the Method 21 startup costs we estimated to be reasonable for these facilities.

The EPA appreciates the commenter's feedback on lowering the monitoring rate used for Method 21 to 80 percent of the proposed value of 75 components per hour. The EPA notes that the comment does not include a rationale for why 80 percent of the proposed value is appropriate. The monitoring rate used in our analysis is based on discussions with LDAR contractors and is considered reasonable for these facilities.

If an owner or operator decided to perform instrument monitoring in-house, then we recognize that a software license would need to be purchased to manage the LDAR program. In our analysis, however, we assumed that all instrument monitoring is performed by an external contractor based on the size of typical gasoline distribution facilities (*i.e.*, considering equipment costs and number of equipment components to be monitored). We assumed that these contractors already have a software license for an LDAR management program and the LDAR contractor can output data for the facility in Excel or as a comma-separated values (CSV) file. As such, we assumed the cost of using the license is already built into the contractor's LDAR monitoring cost.

With respect to OGI startup costs, as noted previously, facilities must know all equipment that needs to be inspected via the current monthly AVO requirements, so the startup cost for OGI at gasoline distribution facilities is expected to be less than for facilities that have not had any LDAR requirements. We consider the OGI startup costs we estimated at proposal to be reasonable for these facilities.

The commenter's feedback on the OGI monitoring rate was based on the proposed appendix K; however, in light of public comments, the EPA subsequently issued a supplemental proposal with revised requirements in appendix K. Therefore, the EPA reviewed the OGI monitoring rate used in the equipment leak model compared to the requirements in appendix K, as reflected in the supplemental proposal. The OGI monitoring rate in the equipment leaks model was kept at 750 components per hour, which accounts for the amount of time needed to view each component (assumed 4 seconds per component based on the appendix K requirements in the supplemental proposal to view each component at 2 angles for 2 seconds per component per angle, and the breaks required for technicians, which require a 5-minute break after 30 minutes of viewing).

Based on our updated cost analysis in 2021 dollars, we determined that savings from not conducting monthly AVO monitoring and the value of the product not lost offsets the cost of semiannual instrument monitoring. We also found that the incremental cost of semiannual instrument monitoring compared to annual instrument monitoring was \$6,700 per ton of HAP reduced, which we consider to be reasonable. Therefore, we maintain that semiannual instrument monitoring is cost-effective for major source gasoline distribution facilities. For more

information regarding our revised costs analysis for instrument monitoring, see memorandum *Updated Control Options for Equipment Leaks at Gasoline Distribution Facilities* in Docket ID No. EPA-HQ-OAR-2020-0371.

With respect to the comment suggesting it may be technically infeasible to conduct monitoring in 3 years due to demand, we see no basis for this claim. The leak inspection service industry is mature and while there may be many gasoline distribution facilities, a semiannual monitoring requirement for these facilities will not overly stretch the capacity of the service providers. We provide up to 3 years to comply with the instrument monitoring requirements. Facilities may begin instrument monitoring prior to the end of the 3-year period to avoid any potential contractor supply issues if that is a concern.

iv. What is the rationale for the EPA's final approach for the technology review?

We are finalizing the equipment leak requirements for major source gasoline distribution facilities as proposed because we determined that semiannual instrument monitoring is cost-effective for major source gasoline distribution facilities. Facilities will have 3 years from the promulgation date of the rule to comply with the semi-annual equipment leaks instrument monitoring requirement.

b. NESHAP Subpart BBBBBB

i. What did the EPA propose pursuant to CAA section 112(d)(6) for the area source gasoline distribution source category?

We proposed to require annual instrument monitoring of all equipment in gasoline service using either OGI according to proposed appendix K or EPA Method 21. We also proposed to require repair of any leaks identified from a monitoring event or any leaks identified by AVO methods during normal duties.

ii. How did the technology review change for equipment leaks at area source gasoline distribution facilities?

There are no significant changes in the proposed technology review conclusions for equipment leaks at area source gasoline distribution facilities.

iii. What key comments did the EPA receive and what are the EPA's responses?

In addition to the general key comments received regarding the equipment leaks monitoring as summarized in section III.A.4.a.iii of

this preamble, the following comment was received specific to area source gasoline distribution facilities:

Comment: One commenter stated that the proposed LDAR requirement is particularly burdensome for bulk gasoline plants and pipeline pumping stations. These facilities have limited staff and are often remote. Also, many of the EPA's costs are assumed to be linear by number of components and some may be less linear, so the costs are further understated for these small facilities.

Response: With respect to higher burden for bulk gasoline plants and pipeline pumping stations, our cost estimates for instrument monitoring have two elements. One element is fixed costs per monitoring event; the second element is variable costs associated with the number of equipment components monitored. When considering both of these cost elements, we agree that the overall cost of monitoring (on a per component basis) is higher for bulk gasoline plants and pipeline pumping stations than it is for bulk gasoline terminals and pipeline breakout stations. However, our cost estimates take this into account because they consider the fixed costs associated with having a contractor perform instrument monitoring.

Based on our updated cost analysis in 2021 dollars, we determined that savings from not conducting monthly AVO monitoring and the value of the product not lost offsets the cost of annual instrument monitoring and results in a net cost savings compared to monthly AVO monitoring. We also found that the incremental cost of semiannual instrument monitoring compared to annual instrument monitoring was \$12,500 per ton of HAP reduced, which we determined was unreasonable. Therefore, we maintain that annual instrument monitoring is cost-effective for area source gasoline distribution facilities. For more information regarding our revised costs analysis for instrument monitoring, see memorandum *Updated Control Options for Equipment Leaks at Gasoline Distribution Facilities* in Docket ID No. EPA-HQ-OAR-2020-0371.

iv. What is the rationale for the EPA's final approach for the technology review?

We are finalizing the equipment leak requirements for area source gasoline distribution facilities as proposed because we determined that annual instrument monitoring is cost-effective for area source gasoline distribution facilities. Facilities will have 3 years from the promulgation date of the final

rule to comply with the annual equipment leak instrument monitoring requirement.

c. NSPS Subpart XXa

i. What did the EPA propose pursuant to CAA section 111 at new, modified, or reconstructed bulk gasoline terminals?

We proposed to require quarterly instrument monitoring of all equipment in gasoline service using OGI according to proposed appendix K or quarterly instrument monitoring of pumps, valves, and pressure relief devices and annual monitoring of connectors using EPA Method 21. We also proposed to require repair of any leaks identified from a monitoring event or any leaks identified by AVO methods during normal duties.

ii. How did the NSPS review change for equipment leaks at new, modified, or reconstructed bulk gasoline terminals?

There are no significant changes in the proposed BSER conclusions for equipment leaks at facilities subject to NSPS subpart XXa.

iii. What key comments did the EPA receive and what are the EPA's responses?

Key comments received regarding the NSPS affected facility definition for the equipment leak monitoring requirements are summarized in section III.A.1.a.iii of this preamble. General comments received on the cost assumptions used in the equipment leaks analysis are summarized in section III.A.4.a.iii of this preamble.

Comment: Several commenters stated that OGI monitoring cannot rely on appendix K because that has not been finalized and the gasoline distribution rules must have a public comment period after the finalization of appendix K on which to evaluate its inclusion in the rules.

Response: Appendix K was proposed prior to the proposal of the gasoline distribution technology and NSPS reviews, so it was available for comment. Commenters had both the opportunity to comment on appendix K by submitting comments to the Oil and Natural Gas Sector Climate review docket, Docket ID No. EPA-HQ-OAR-2021-0317, which it appears that the commenters did, and on our proposed use of appendix K in the gasoline distribution sector. Since commenters had the opportunity to comment on appendix K and on our proposed use of appendix K, we see no reason not to finalize the use of appendix K as proposed.

iv. What is the rationale for the EPA's final approach for the NSPS review?

We are finalizing the equipment leak monitoring frequency for NSPS subpart XXa as quarterly monitoring because, as described in the June 2022 proposal (87 FR 35627; June 10, 2022), we found this monitoring frequency cost-effective for VOC emission reductions at new, modified, and reconstructed affected facilities. We have also revised the affected facility definition, as described in section III.A.1.a.iv of this preamble, to separate the NSPS subpart XXa affected facility into a "gasoline loading rack affected facility" and a "collection of equipment at a bulk gasoline terminal affected facility."

B. Other Actions the EPA is Finalizing and the Rationale

1. SSM

In its 2008 decision in *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008), the United States Court of Appeals for the District of Columbia Circuit (the court) vacated portions of two provisions in the EPA's CAA section 112 regulations governing the emissions of HAP during periods of SSM. Specifically, the court vacated the SSM exemption contained in 40 CFR 63.6(f)(1) and 40 CFR 63.6(h)(1), holding that under section 302(k) of the CAA, emissions standards or limitations must be continuous in nature and that the SSM exemption violates the CAA's requirement that some section 112 standards apply continuously. The EPA has determined the reasoning in the court's decision in *Sierra Club* applies equally to CAA section 111 because the definition of emission or standard in CAA section 302(k), and the embedded requirement for continuous standards, also applies to the NSPS.

Periods of startup, normal operations, and shutdown are all predictable and routine aspects of a source's operations. Malfunctions, in contrast, are neither predictable nor routine. Instead, they are, by definition, sudden, infrequent, and not reasonably preventable failures of emissions control, process, or monitoring equipment (40 CFR 60.2 and 63.2) (definition of malfunction). As explained in the June 10, 2022, proposal preamble (87 FR 35628), the EPA interprets CAA sections 111 and 112 as not requiring emissions that occur during periods of malfunction to be factored into development of CAA sections 111 and 112 standards.

a. Elimination of the SSM Exemption in NESHAP Subpart R

The EPA proposed amendments to NESHAP subpart R to remove

provisions related to SSM that are not consistent with the requirement that the standards apply at all times. More information concerning the elimination of SSM provisions is in the preamble to the proposed rule (87 FR 35628; June 10, 2022). The EPA is finalizing removal of the SSM provisions in NESHAP subpart R as proposed with the exception that we are including language that follows the language in 40 CFR 63.8(d)(3) in two paragraphs instead of just one as proposed and revising the language to align with the language more closely in 40 CFR 63.8(d)(3). The EPA had proposed to add language at 40 CFR 63.428(d)(4), as renumbered in the proposal, that followed the language in 40 CFR 63.8(d)(3) with the last sentence replaced to eliminate reference to SSM plan. As described in section III.B.3.g.i of this preamble, the EPA is finalizing existing and new recordkeeping provisions for the loading rack provisions in 40 CFR 63.428(c) and (d), so the EPA is including this added language in both 40 CFR 63.428(c)(4) and (d)(4) in the final rule so that it applies to bulk gasoline terminals regardless of whether they are complying with the current or new loading rack provisions.

b. Revisions To Address SSM Provisions in NESHAP Subpart BBBBBB

The EPA proposed amendments to NESHAP subpart BBBBBB to remove references to malfunction and revise certain entries to Table 4 to Subpart BBBBBB of Part 63—Applicability of General Provisions (table 4 to subpart BBBBBB) that are not consistent with the requirement that the standards apply at all times. More information concerning the proposed amendments is available in the preamble to the proposed rule (87 FR 35630; June 10, 2022). The EPA is finalizing the amendments in NESHAP subpart BBBBBB as proposed with the exception that we are revising the language in 40 CFR 63.11094(m), which was proposed at 40 CFR 63.11094(k), to align with the language more closely in 40 CFR 63.8(d)(3).

c. Finalize NSPS Subpart XXa Without SSM Exemptions

The EPA proposed standards in NSPS subpart XXa that apply at all times. The EPA is finalizing in 40 CFR part 60, subpart XXa, specific requirements at 40 CFR 60.500a(c) that override the 40 CFR part 60 general provisions for SSM requirements. In finalizing the standards in this rule, the EPA has taken into account startup and shutdown periods and, for the reasons explained in the

preamble to the proposed rule (87 FR 35630; June 10, 2022), has not finalized alternate standards for those periods.

2. Electronic Reporting

To increase the ease and efficiency of data submittal and data accessibility, the EPA is finalizing, as proposed, a requirement that owners and operators of bulk gasoline terminals subject to the new NSPS at 40 CFR part 60, subpart XXa, and gasoline distribution facilities subject to NESHAP at 40 CFR part 63, subparts R and BBBBBB, submit electronic copies of required performance test reports, performance evaluation reports, semiannual reports, and Notification of Compliance Status reports through the EPA's Central Data Exchange (CDX) using the Compliance and Emissions Data Reporting Interface (CEDRI). A description of the electronic data submission process is provided in the memorandum, *Electronic Reporting Requirements for New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) Rules*, available in the docket for this action. The final rules require that performance test results collected using test methods that are supported by the EPA's Electronic Reporting Tool (ERT) as listed on the ERT website⁸ at the time of the test be submitted in the format generated through the use of the ERT or an electronic file consistent with the xml schema on the ERT website and that other performance test results be submitted in portable document format (PDF) using the attachment module of the ERT. Similarly, performance evaluation results of CEMS measuring relative accuracy test audit pollutants that are supported by the ERT at the time of the test must be submitted in the format generated through the use of the ERT or an electronic file consistent with the xml schema on the ERT website, and other performance evaluation results must be submitted in PDF using the attachment module of the ERT. For semiannual reports under NSPS subpart XXa and semiannual compliance reports under NESHAP subparts R and BBBBBB, the final rules require that owners and operators use the appropriate spreadsheet template to submit information to CEDRI. The final version of the template for these reports will be located on the CEDRI website.⁹ The final rules require that Notification

of Compliance Status reports be submitted as a PDF upload in CEDRI.

Furthermore, the EPA is finalizing, as proposed, provisions in NSPS subpart XXa that allow owners and operators the ability to seek extensions for submitting electronic reports for circumstances beyond the control of the facility, *i.e.*, for a possible outage in CDX or CEDRI or for a force majeure event, in the time just prior to a report's due date, as well as the process to assert such a claim. These extensions were not added specifically to NESHAP subparts R and BBBBBB because they are codified in 40 CFR part 63, subpart A, General Provisions, at 40 CFR 63.9(k).

3. Technical and Editorial Changes

a. Applicability Equations in NESHAP Subpart R

The EPA proposed amendments to NESHAP subpart R to remove applicability equations in 40 CFR 63.420 and have applicability determined solely based on major source determination. The EPA proposed a 3-year period for the removal of the use of the applicability equations. The Agency also proposed to remove two related definitions for "controlled loading rack" and "uncontrolled loading rack." The EPA received comment that the definitions of "controlled loading rack" and "uncontrolled loading rack," should not be deleted until the applicability equations can no longer be used. The EPA reviewed the use of these terms in NESHAP subpart R and confirmed those terms are only used in the applicability equations. The EPA agrees with commenters that the definitions of "controlled loading rack" and "uncontrolled loading rack" should remain in NESHAP subpart R to define the terms used in the applicability equations while they are still available for use. Therefore, the EPA is not finalizing the proposed deletion of the terms "controlled loading rack" and "uncontrolled loading rack" from 40 CFR 63.421. Otherwise, we are finalizing the transition away from using the applicability equations as proposed.

b. Definitions of Bulk Gasoline Terminal, Pipeline Breakout Station, and Pipeline Pumping Station

In NESHAP subparts R and BBBBBB, the EPA proposed to transition to new definitions of "bulk gasoline terminal" and "pipeline breakout station" over a 3-year period. We also proposed to revise the definition of "pipeline pumping station" in NESHAP subpart BBBBBB, effective on the effective date.

The proposed revision to the definition of "bulk gasoline terminal" was minor, clarifying that the facility ". . . subsequently loads all or a portion of the gasoline into gasoline cargo tanks for transport to bulk gasoline plants or gasoline dispensing facilities . . ." We did not receive any comments on the proposed definition of "bulk gasoline terminal," and we are finalizing the definition as proposed with the exception of the definition in NESHAP subpart BBBBBB. We are finalizing the definition of "bulk gasoline terminal" in NESHAP subpart BBBBBB to be consistent with the gasoline throughput requirements currently in the rule. The definition of "bulk gasoline terminal" in NESHAP subpart BBBBBB is "any gasoline facility which . . . has a gasoline throughput of 20,000 gallons per day (75,700 liter per day) or greater." The revisions to the definition of "pipeline pumping station" were proposed to clarify that pipeline pumping stations do not have gasoline loading racks. We did not receive any comments on the proposed definition of "pipeline pumping station," and we are finalizing the definition as proposed.

The proposed revisions to the "pipeline breakout station" definition added two sentences to clarify that facilities that have gasoline loading racks are to be considered bulk gasoline terminals rather than pipeline breakout stations. These two added sentences were: "Pipeline breakout stations do not have loading racks. If any gasoline is loaded into cargo tanks, the facility is a bulk gasoline terminal for the purposes of this subpart provided the facility-wide gasoline throughput (including pipeline throughput) exceeds the limits specified for bulk gasoline terminals."

Comment: A commenter stated that pipeline facilities may have loading racks, but these may not be used for gasoline loading (*i.e.*, for diesel fuel loading or other materials) or rarely used for gasoline loading (*e.g.*, used only when conducting maintenance on storage tanks). According to the commenter, these limited loading operations should not trigger the loading rack control requirements for bulk gasoline terminals. The commenter also indicated that the parenthetical phrase "including pipeline throughput" is confusing and suggested that the throughput threshold consider only the "gasoline loading design throughput."

Response: We agree that the first sentence added to the definition of "pipeline breakout station" was overly broad and should be revised to specify that the loading racks are for loading gasoline into cargo tanks. If only diesel fuel loading is conducted at the facility,

⁸ <https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert>.

⁹ <https://www.epa.gov/electronic-reporting-air-emissions/cedri>.

the facility should be considered a pipeline station. With respect to the parenthetical phrase “. . . (including pipeline throughput) . . .,” we intentionally included this phrase to require all pipeline breakout stations to use their total facility gasoline throughput so that facilities that have both pipeline breakout operations and co-located gasoline loading operations would be considered bulk gasoline terminals. We note that the definition of bulk gasoline terminal also refers to the facility and does not limit the referenced throughput to just that of the loading operations. We consider the parenthetical helps to clarify the definition and is consistent with our interpretation that the 20,000 gallon per day throughput threshold within the definition of “bulk gasoline terminal” is a facility-level throughput and not limited to the throughput of only the gasoline loading racks. If all of the gasoline managed by the facility is not loaded into cargo tanks, as in the case of co-located pipeline breakout operations and gasoline loading operations, then the 20,000-gallon throughput threshold is to be evaluated based on the facility’s total gasoline throughput and not just the throughput of the loading operations. For major sources of HAP emissions, this would require the loading operations to meet the 10 mg/L TOC limit in NESHAP subpart R. For area sources, the provisions for bulk gasoline terminals in NESHAP subpart BBBBBB have separate requirements based on the actual gasoline throughput of all loading racks at the facility. As such, area source facilities with co-located pipeline breakout operations and gasoline loading operations would be either subject to the proposed 35 mg/L TOC emission limit or the submerged fill requirements in NESHAP subpart BBBBBB based on the gasoline throughput of all loading racks.

We note that if only the loading rack throughput was used as suggested by the commenter, some co-located loading operations could be considered bulk gasoline plants. For major sources subject to NESHAP subpart R, these loading operations would have no control requirements, not even a submerged fill requirement. For area sources, the loading operations would be considered subject to the vapor balancing requirements proposed for bulk gasoline plants in NESHAP subpart BBBBBB if the gasoline throughput is 4,000 gallons per day or more. Because storage tanks at pipeline breakout stations are large and predominately controlled using floating roofs, the

proposed vapor balancing requirement would not be appropriate. We find that the 20,000-gallon per day threshold for bulk gasoline terminals is most appropriately determined based on the total gasoline throughput of the facility and that treating facilities that may have been previously considered a pipeline breakout station with gasoline loading operations as a bulk gasoline terminal in all cases provides a reasonable method to ensure all loading operations have an applicable requirement.

After considering the comments received, we are finalizing the definitions of “bulk gasoline terminal,” “pipeline breakout station,” and “pipeline pumping station” as proposed with an additional clarification in the definition of “pipeline breakout station” through the addition of the underlined phrase: “Pipeline breakout stations do not have loading racks *where gasoline is loaded into cargo tanks.*”

c. Definition of Gasoline

We proposed a minor revision to the definition of “gasoline” in NESHAP subpart BBBBBB to include the Reid vapor pressure in units of pounds per square inch (in addition to kilopascals) because those are the units of measure commonly used in the U.S. gasoline distribution industry. We proposed to directly include this same definition of “gasoline” in NESHAP subpart R, rather than rely on the definition of “gasoline” in NSPS subpart XX or XXa. We received no comment on these proposed revisions related to the definition of “gasoline” and are finalizing the revised or added definition as proposed.

d. Definition of Submerged Filling

Because we proposed to add submerged fill requirements in NESHAP subpart R, we also proposed to add a definition of “submerged filling” to NESHAP subpart R. The proposed definition of “submerged filling” was similar to the definition already included in NESHAP subpart BBBBBB. We received no comment on the proposed definition of “submerged filling” and are finalizing the added definition as proposed with the exception that we are removing the phrase “for the purposes of this subpart” from NSPS subpart XXa and NESHAP subpart R.

e. Definition of Flare and Thermal Oxidation System

We proposed a revision to the definitions of “flare” and “thermal oxidation system” in NESHAP subpart R. We proposed to include these same definitions of “flare” and “thermal oxidation system” to NESHAP subpart

BBBBBB. These proposed revisions were to clarify the distinction between control systems subject to performance testing as thermal oxidation systems because they emit pollutants through a conveyance suitable for performance testing and flares are exempt from performance testing because they do not emit pollutants through a conveyance suitable for performance testing.

Comment: Several commenters requested that the EPA change the definition and phrasing in the rule from “thermal oxidation system” to “vapor combustion unit” because this is the term commonly used by the industry. One commenter noted that the use of “thermal oxidation system” is broadly inconsistent with the way gasoline vapor combustion units, flares, and thermal oxidation systems have been treated previously in these and other rules and how they are treated by States and in facility permits. One commenter recommended that in the definition of “thermal oxidation system” the EPA replace “Auxiliary fuel may be used to heat air pollutants to combustion temperatures” with “Auxiliary fuel may be used to sustain combustion.” One commenter recommended revising “. . . device used to mix and ignite fuel, air pollutants, and air to provide a flame to heat and oxidize air pollutants . . .” to more simply state “device designed to mix air and vapors in direct contact with a flame to oxidize air pollutants” because vapor combustion units commonly do not use auxiliary fuel and because effective combustion does not require heating.

Response: These gasoline distribution rules have long used the term “thermal oxidation system.” As such, facilities complying with these regulations must already be familiar with this term. We reviewed the revisions that would be needed to change this term to “vapor combustion unit” and were concerned by the possibility of missing all references to this term. However, during our review, we identified that we had not revised the phrase “thermal oxidation system other than a flare” in 40 CFR 63.427(a)(3) and 63.11092(b)(1)(iii) and (e)(1) and (2), and in item 1 of table 3 to NESHAP subpart BBBBBB. We are revising these references by deleting “other than a flare” from this phrase. With respect to comments suggesting further revisions to the definition of “thermal oxidation system,” we did not propose to revise the phrasing within the definition of “thermal oxidation system” that describes the device largely because we did not want to change the long-used description of the system in order to minimize potential inconsistencies with

permits and other ancillary requirements for these control systems. Our proposed revisions were focused on including the phrase that “[t]hermal oxidation systems emit pollutants through a conveyance suitable to conduct a performance test.” Because we had not proposed additional revisions and did not intend to alter the historically used terms, we decided to not make additional revisions to the definition of “thermal oxidation system.”

Upon considering the comments received, we are finalizing the revisions to the definitions of “flare” and “thermal oxidation system” as proposed. We are also revising the instances where “thermal oxidation system other than a flare” was used to simply say “thermal oxidation system” because flares are not a subset of thermal oxidation systems based on the final definitions.

f. Additional Part 63 General Provision Revisions

We proposed to revise a number of entries in Table 1 to Subpart R of Part 63—General Provisions Applicability to This Subpart (table 1 to subpart R) and to table 4 to subpart BBBBBB in the proposed rule to correct paragraph references, correct a typographical error, and update certain entries to reflect proposed revisions to the rules. Upon further review of table 1 to subpart R, we are revising the entry for 40 CFR 63.9(f) to “no.” This provision is a notification for conducting visible emission observations. There is not a requirement in NESHAP subpart R to conduct routine visible emission observations. Upon further review of table 4 to subpart BBBBBB, we are revising the entry for 40 CFR 63.7(e)(3) to also include an exception for 40 CFR 63.11092(e). The performance test requirements in NSPS subpart XXa, which are referenced in NESHAP subpart BBBBBB, specify the test run duration. We are also revising the entry for 40 CFR 63.10(b)(2)(ii) to correct the cross-reference.

Comment: One commenter stated the addition of 40 CFR 63.11(c) through (e) to table 4 to subpart BBBBBB should be changed to “yes” because some bulk gasoline terminals may be using these equipment leak alternative monitoring provisions and they should not be required to change until appendix K provisions are finalized. The commenter noted that the NESHAP subpart R table includes “yes” for these paragraphs.

Response: We reviewed the alternative work practice equipment leak provisions in 40 CFR 63.11(c) through (e) and see no reason why these

provisions would apply after the full implementation of the revisions requiring OGI monitoring using the procedures in appendix K. We also note that the current Method 21 monitoring in NESHAP subparts R and BBBBBB is primarily limited to monitoring of the vapor collection system prior to a performance test to ensure the vapor collection system is operated with no detectable emissions. OGI is not approved as an alternative to Method 21 for no detectable emissions monitoring events. With that said, we agree that there is a discrepancy between the entries in table 1 to subpart R and table 4 to subpart BBBBBB and there should not be. There may be facilities, particularly for gasoline terminals co-located with other facilities, that may have Method 21 monitoring provisions for which this OGI alternative is applicable. As such, it is possible that some facilities could use the alternative work practice standards in 40 CFR 63.11(c) through (e) in lieu of the monthly AVO monitoring requirements. Considering these conditions, we are revising the entry for 40 CFR 63.11(c) through (e) in table 4 to subpart BBBBBB to “yes, except . . .” and indicating that the equipment leak alternative work practice is not applicable to Method 21 monitoring associated with performance testing and is not applicable upon compliance with the instrument monitoring equipment leak provisions in 40 CFR 63.11089(c). We are also adding a similar comment to the entry for 40 CFR 63.11(c), (d), and (e) in table 1 to subpart R to indicate that the equipment leak alternative work practice is not applicable to Method 21 monitoring associated with performance testing and is not applicable upon compliance with the instrument monitoring equipment leak provisions in 40 CFR 63.424(c).

Comment: One commenter stated that the proposed revision to the note for the entry at 40 CFR 63.11(b) in table 4 to subpart BBBBBB and for the entry 40 CFR 63.11(a) through (b) in table 1 to subpart R should not be finalized. According to the commenter, the provision is unnecessary for flares controlling loading, because the rule specifies the flare requirements for those flares, but the facility may have other flares not used to control gasoline loading, and those flares can still comply with the provisions at 40 CFR 63.11(b). A commenter also noted a cross-reference error for the entry 40 CFR 63.11(a) through (b) in table 1 to subpart R.

Response: The note helps to clarify the flare provisions applicable to the sources covered under NESHAP

subparts R and BBBBBB. We are revising the entry for 40 CFR 63.11(b) in table 4 to subpart BBBBBB by replacing “until compliance” with “except these provisions no longer apply for flares used to comply” and “Item 2.b” with “Item 2” to indicate that the exception applies for flares complying with the flare provisions in NSPS subpart XXa, which are referenced in NESHAP subpart BBBBBB. For table 4 to subpart BBBBBB, we are finalizing the table as proposed except for the revisions to the entries for 40 CFR 63.7(e)(3), 63.10(b)(2)(ii), 63.11(b), and 63.11(c) through (e).

In NESHAP subpart R, upon transition to the flare provisions in NSPS subpart XXa, which are referenced in NESHAP subpart R, flares at major source gasoline distribution facilities will no longer comply with the flare provisions in 40 CFR 63.11(b). We are retaining the note except, based on the comment about a cross-reference error in table 1 to subpart R, we are revising the reference to “. . . § 63.425(b)(2) . . .” in the note for the entry for 40 CFR 63.11(a) and (b) to “. . . § 63.422(b)(2) and 63.425(d)(2) . . .”

Comment: One commenter noted a typographical error in table 1 to subpart R, “. . . specifics . . .” in the row included for the entry for 40 CFR 63.8(d)(3).

Response: Based on the comments received, we are correcting the typographical error in the comment included for the entry for 40 CFR 63.8(d)(3) to “. . . specifies . . .” Except for the revisions to the entries for 40 CFR 63.8(d)(3), 63.9(f), 63.11(c), (d), and (e), and 63.11(a) and (b), we are finalizing table 1 to subpart R as proposed.

g. Editorial Corrections

We proposed a number of editorial and typographical corrections. We are finalizing these revisions as proposed. We are also making clarifying revisions to spell out acronyms at first use or to replace words with acronyms. In addition, we are making clarifying revisions to consistently refer to “liquid product” loaded into “gasoline cargo tanks.” We are also making conforming revisions between the three rules to ensure similar requirements. Additionally, we are clarifying current requirements and those requirements that take effect by the compliance date. We received comment regarding several cross-reference errors or other editorial corrections. After reviewing these comments, we are revising cross-references and also making the following corrections in the final rules:

i. NESHAP Subpart R

- At 40 CFR 63.422(a)(2), we are revising the term “affected facility” to “gasoline loading rack affected facility” commensurate with the final terms used in NSPS subpart XXa. We are also adding a sentence at the end of the paragraph based on a clarification requested by comments that, for the purposes of NESHAP subpart R, the definition of “vapor-tight gasoline cargo tanks” in 40 CFR 63.421 applies to the cross-referenced provisions in NSPS subpart XXa. Specifically, the added sentence reads: “For purposes of this subpart, the term “vapor-tight gasoline cargo tanks” used in § 60.502a(e) of this chapter shall have the meaning given in § 63.421.”

- At 40 CFR 63.422(c)(1), we are adding “or” after the semicolon as requested by a commenter to better clarify that the provisions in this paragraph are alternatives to those in 40 CFR 63.422(c)(2) and (3).

- At 40 CFR 63.425(d), we are adding the phrase “. . . and, if applicable, the provisions in paragraph (j) of this section” to the end of the first sentence to clarify that annual LEL monitoring must also be conducted for internal floating roof storage vessels in addition to the requirements in 40 CFR 60.113b.

- At 40 CFR 63.425(e)(1), we are redesignating the table as table 1 to paragraph (e)(1) because it is the first table in the section and immediately follows paragraph (e)(1).

- At 40 CFR 63.425(f), we are deleting the phrase, “except omit section 4.3.2 of Method 21” because Method 21 does not contain section 4.3.2.

- At 40 CFR 63.425(g)(3), we are revising the definition of the term “N” to refer to the fourth column of table 1 to paragraph (e)(1) because we added a column to table 1 to paragraph (e)(1) and did not update this cross-reference.

- We received comment that the proposed paragraph at 40 CFR 63.427(d) is confusing and appears to make operating both above and below the operating limits a deviation. We are revising 40 CFR 63.427(d) to indicate that the vapor processing system should be operated in a manner consistent with the minimum and/or maximum operating parameter value or required procedures. Operation in a manner that constitutes a period of excess emission or failure to perform required procedures are considered a deviation of the emissions standard.

- One commenter noted that 40 CFR 63.428(c) was renumbered as 40 CFR 63.428(d), but no new paragraph (c) was added. The commenter noted that a new paragraph (c) should be added and

marked as “Reserved.” Upon review, we noted that the paragraph we intended to add as paragraph (d) was not included in the redline/strikeout version of the regulatory text. Therefore, we are not revising the paragraph numbering at 40 CFR 63.428(c) as proposed. We are revising the introductory text in 40 CFR 63.428(c) to clarify that the recordkeeping requirements in that paragraph (c) are for bulk gasoline terminals subject to the provisions of 40 CFR 63.422(b)(1), which contains the current requirements that expire in 3 years. We are adding a new paragraph (d) that provides the recordkeeping requirements specific to 40 CFR 63.422(b)(2), which contains the updated monitoring requirements for thermal oxidation systems, vapor recovery systems, and flares used to control emissions from loading operations analogous to the recordkeeping requirements in NSPS subpart XXa.

- We are revising 40 CFR 63.428(h) by replacing “delegated air agency” with “delegated authority.”

- We are revising 40 CFR 63.428(l)(2)(ii) to clarify that the periodic reports referenced are those required as specified in 40 CFR 60.115b based on a comment received suggesting there was a cross-referencing error.

ii. NESHAP Subpart BBBBBB

- At 40 CFR 63.11083(c), we are adding “. . . § 63.11086(a) or in . . .” after “as specified in” to note that the 3-year compliance schedule also applies to bulk gasoline plants with an increase in daily throughput that exceeds the 4,000 gallons per day threshold for vapor balancing.

- We are revising 40 CFR 63.11092(i) to align the conduct of performance tests with the requirements in NESHAP subpart R and clarify how performance tests should be conducted.

- We are clarifying in 40 CFR 63.11094 that records must be maintained for at least 5 years unless otherwise specified.

- One commenter noted that inconsistencies in the phrasing of vapor tightness recordkeeping requirements between NESHAP subparts R and BBBBBB and NSPS XXa. The commenter suggested consistently adding the phrasing used at proposed 40 CFR 63.11094(b) with respect to provision that vapor tightness documentation may be made available “. . . during the course of a site visit, or within a mutually agreeable time frame” to all rules. Upon review, we find that this phrasing is a hold-over from when hardcopy documentation was required, and an electronic record

provided as an alternative. We have proposed the use of electronic records and have found that access to electronic records is sufficient. If an inspector wants to view the electronic records, these should be available for review at the time of the inspection and provided to the inspector. We are not requiring facilities to provide hardcopies of the records. The owner or operator may elect to use hardcopy records, but we are not requiring these. For consistency, we are not finalizing the proposed additions to 40 CFR 63.11094(b) in NESHAP subpart BBBBBB which includes the phrase cited by the commenter.

- One commenter noted that 40 CFR 63.11094(c) was deleted and no new paragraph (c) was added. The commenter recommended that a new paragraph (c) should be added and marked as “Reserved.” Upon review, we decided to renumber proposed 40 CFR 63.11094(d) to 40 CFR 63.11094(c) and similarly renumber the other paragraphs in this section in a sequential manner.

- One commenter noted that proposed 40 CFR 63.11094(e)(1) and (e)(2)(i) contain citations to 40 CFR 63.11092(f), which pertains to storage while 40 CFR 63.11094(e) pertains to control devices for the loading racks. Upon review, we are rewording proposed 40 CFR 63.11094(e), now paragraph (f), to include the storage vessel provisions in 40 CFR 63.11092(f).

- One commenter noted that 40 CFR 63.11094(f) cites paragraphs (f)(1) through (7) but the text only contains paragraphs (f)(1) through (4). With respect to the missing paragraphs in 40 CFR 63.11094(f)(5) through (7), these were intended to be the recordkeeping requirements for facilities complying with the new emission limits when using different control technologies. Through a clerical error, these requirements were not included in the proposed redline of the rule. We are adding these requirements to the final rule to specify the recordkeeping requirements for these control scenarios. These recordkeeping requirements are similar to those in NSPS subpart XXa and are commensurate with the reporting requirements that were included in the NESHAP subpart BBBBBB proposal.

iii. NSPS Subpart XXa

- At 40 CFR 60.501a, we are deleting the duplicative definition of “flare” that was inadvertently included at the end of the definition of “equipment.”

- At 40 CFR 60.502a(b) and (c), we are adding “. . . no later than the date on which § 60.8(a) requires a performance test to be completed” at the

end of the first sentence to clarify that, for sources for which a performance test or evaluation is required, full compliance cannot be assessed until the performance test or performance evaluation is conducted.

- One commenter noted that 40 CFR part 63, subpart BBBBBB, cross-references the provisions at 40 CFR 60.502a(c)(3) as an alternative for use for thermal oxidation systems, but the cross-referenced provisions appear to only apply to flares. The commenter recommended adding language at 40 CFR 60.502a(c)(3) to indicate that the paragraph also applies to thermal oxidation systems for which these provisions are specified. We agree with the commenter and note that this language is also needed based on the expanded use of these flare monitoring provisions as detailed in sections III.A.1.a.iii and iv of this preamble. We are adding “. . . or if a thermal oxidation system for which these provisions are specified as a monitoring alternative is used . . .” to 40 CFR 60.502a(c)(3) to clearly indicate that these provisions apply to certain thermal oxidation systems.

- At 40 CFR 60.502a(c)(3)(vi), we are deleting the word “gasoline” in reference to cargo tanks because the flow rate of vapors to the vapor collection systems is based on the total liquid loading rates of all cargo tanks for which vapors are displaced to the vapor collection systems and not just those that meet the definition of “gasoline cargo tank.” We are also rephrasing the introduction to more clearly indicate that “you may elect” to use this alternative to determine flare waste gas flow rates.

- At 40 CFR 60.502a(h), we are revising “450 millimeters” to “460 millimeters” to correct unit conversion from 18 inches.

- At 40 CFR 60.503a(a)(1), we are adding the sentence, “The three-run requirement of § 60.8(f) does not apply to this subpart.” to clarify that only one 6-hour test as described in 40 CFR 60.503a(c) must be conducted.

- At 40 CFR 60.503a(a)(2), we are replacing “. . . potential sources in the terminal’s vapor collection system equipment . . .” with “. . . equipment, including loading arms, in the gasoline loading rack affected facility . . .” to require that the pre-performance test leak monitoring include all equipment in the gasoline loading rack affected facility, which includes equipment at the loading racks and the vapor processing system.

- At 40 CFR 60.505a(a)(6), we are adding a requirement to maintain records for leaks identified under 40

CFR 60.503a(a)(2) similar to the requirement to maintain records for leaks identified under 40 CFR 60.502a(j).

- At 40 CFR 60.505a(c)(6)(ii)(A) and (B), we are removing a redundant reference to 40 CFR 60.502a(j)(2); 40 CFR 60.505a(c)(6)(ii) already indicated that the applicability of these paragraphs is limited to leaks identified under 40 CFR 60.502a(j)(2), which are leaks identified using AVO methods during normal activities.

iv. NSPS Subpart XX

- We are revising NSPS subpart XX at 40 CFR 60.500(b) to finalize the proposed amendments so that NSPS subpart XX applies to affected facilities that commence construction or modification after December 17, 1980, and on or before June 10, 2022.

C. What are the effective and compliance dates of the standards?

1. NESHAP Subpart R

The revisions to the MACT standards being promulgated in this action are effective on July 8, 2024.

The compliance date for existing gasoline distribution facilities subject to NESHAP subpart R is May 10, 2027, with the exception of the changes to table 1 of subpart R, the removal of the SSM exemptions, the finalized external floating roof storage vessel fitting controls, and performance test and performance evaluation reporting requirements. As explained in the preamble of the proposed action (87 FR 35634; June 10, 2022) and in section III.A.2.a.iv of this preamble, the EPA considers 3 years after the promulgation date of the final rule to be as expedient as practicable to implement the final requirements. The EPA does not expect any of the final revisions to table 1 of subpart R to increase burden to any facility and can be implemented without delay. For the removal of the SSM exemptions, we are finalizing that facilities must comply by the effective date of the final rule. The compliance times we are finalizing will ensure that the regulations are consistent with the decision in *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008) in which the court vacated portions of two provisions in the EPA’s CAA section 112 regulations governing the emissions of hazardous air pollutants during periods of SSM. Specifically, the court vacated the SSM exemption contained in 40 CFR 63.6(f)(1) and (h)(1). The EPA removed these SSM exemptions from the CFR in March 2021 to reflect the court’s decision (86 FR 13819). The EPA does not expect any of the final revisions

pertaining to SSM in table 1 of subpart R to increase burden to any facility and can be implemented without delay. In addition, we do not expect additional time is necessary generally for facilities to comply with changes to SSM provisions because we have concluded that the sources can meet the standards at all times, as described in section III.B.1.a. We are therefore finalizing that facilities must comply no later than the effective date of this final rule.

As explained in the preamble of the proposed action (87 FR 35635; June 10, 2022), the EPA is finalizing the requirements to install fitting controls for external floating roof storage vessels the next time the storage vessel is completely emptied and degassed or 10 years after the promulgation date of the final rule, whichever occurs first, to align the installation of controls with a planned degassing event, to the extent practicable to minimize the offsetting emissions that occur due to a degassing event. The reporting requirements for performance tests and performance evaluations are required to be submitted following the procedures in 40 CFR 63.9(k) 180 days after the promulgation date. New sources must comply with all of the standards immediately upon the effective date of the standard, July 8, 2024, or upon startup, whichever is later.

2. NESHAP Subpart BBBBBB

The revisions to the GACT standards being promulgated in this action are effective on July 8, 2024.

The compliance date for existing gasoline distribution facilities subject to NESHAP subpart BBBBBB is May 10, 2027, with the exception of the changes to table 4 of subpart BBBBBB, revisions to SSM provisions, the finalized external floating roof storage vessel fitting controls, and performance test and performance evaluation reporting requirements. As explained in the preamble of the proposed action (87 FR 35635; June 10, 2022) and in section III.A.2.b.iv of this preamble, the EPA considers 3 years after the promulgation date of the final rule to be as expedient as practicable to implement the final requirements.

The EPA does not expect any of the final revisions to table 4 of subpart BBBBBB to increase burden to any facility and can be implemented without delay. For the revisions to table 4 of subpart BBBBBB that remove references to vacated provisions and the removal of references to malfunction, we are finalizing that facilities must comply by the effective date of the final rule. We do not expect additional time is necessary generally for facilities to

comply with changes to SSM provisions because we have concluded that the sources can meet the standards at all times, as described in section III.B.1.c.

As explained in the preamble of the proposed action (87 FR 35635; June 10, 2022), the EPA is finalizing the requirements to install fitting controls for external floating roof storage vessels the next time the storage vessel is completely emptied and degassed or 10 years after the promulgation date of the final rule, whichever occurs first, to align the installation of controls with a planned degassing event, to the extent practicable to minimize the offsetting emissions that occur due to a degassing event. The reporting requirements for performance tests and performance evaluations are required to be submitted following the procedures in 40 CFR 63.9(k) 180 days after the promulgation date. New sources must comply with all of the standards immediately upon the effective date of the standard, July 8, 2024, or upon startup, whichever is later.

3. NSPS Subpart XXa

The effective date of the final rule requirements in 40 CFR part 60, subpart XXa, will be July 8, 2024. Affected sources that commence construction, reconstruction, or modification after June 10, 2022, must comply with all requirements of 40 CFR part 60, subpart XXa, no later than the effective date of the final rule or upon startup, whichever is later. This proposed compliance schedule is consistent with CAA section 111(e).

IV. Summary of Cost, Environmental, and Economic Impacts and Additional Analyses Conducted

A. What are the affected facilities?

There are approximately 9,500 facilities subject to the Gasoline Distribution NESHAPs and the Bulk Gasoline Terminals NSPS. An estimated 210 facilities are classified as major sources, and 9,260 are area sources. The EPA estimated that there will be 5 new facilities and 15 modified/reconstructed facilities subject to NSPS subpart XXa in the next 5 years.

B. What are the air quality impacts?

This final action will reduce HAP and VOC emissions from Gasoline Distribution NESHAP and Bulk Gasoline Terminals NSPS sources. In comparison to baseline emissions of 6,110 tpy HAP and 121,000 tpy VOC, the EPA estimates HAP and VOC emission reductions of approximately 2,220 and 45,400 tpy, respectively, based on our analysis of the final rules

in this action as described in sections III.A and B in this preamble. Emission reductions and secondary impacts (e.g., emission increases associated with supplemental fuel or additional electricity) by rule are listed below.

1. NESHAP Subpart R

For the major source rule, the EPA estimates HAP and VOC emission reductions of approximately 134 and 2,160 tpy, respectively, compared to baseline HAP and VOC emissions of 845 and 18,200 tpy. The EPA estimates that the final rule will not have any secondary pollutant impacts. More information about the estimated emission reductions and secondary impacts of this final action for the major source rule can be found in the document, *Updated Major Source Technology Review for Gasoline Distribution Facilities (Bulk Gasoline Terminals and Pipeline Breakout Stations)* NESHAP.

2. NESHAP Subpart BBBB

For the area source rule, the EPA estimates HAP and VOC emission reductions of approximately 2,090 and 40,300 tpy, respectively, compared to baseline HAP and VOC emissions of 5,260 and 99,400 tpy. The EPA estimates that the final rule will result in additional emissions of 32,400 tpy of carbon dioxide, 19 tpy of nitrogen oxides, and 86 tpy of carbon monoxide. More information about the estimated emission reductions and secondary impacts of this final action for the area source rule can be found in the document, *Updated Area Source Technology Review for Gasoline Distribution Bulk Terminals, Bulk Plants, and Pipeline Facilities* NESHAP.

3. NSPS Subpart XXa

For the NSPS, the EPA estimates VOC emission reductions of approximately 2,950 tpy compared to baseline emissions of 3,890 tpy. The EPA estimates that the final rule will result in additional emissions of 2,140 tpy of carbon dioxide, 1.3 tpy of nitrogen oxides, and 1.3 tpy of sulfur dioxide. More information about the estimated emission reductions and secondary impacts of this final action for the NSPS can be found in the document, *Updated New Source Performance Standards Review for Bulk Gasoline Terminals*.

C. What are the cost impacts?

This final action will cost (in 2021 dollars) approximately \$75.8 million in total capital costs and result in total annualized cost savings of \$3.77 million per year (including product recovery) based on our analysis of the final action

described in sections III.A and B of this preamble. Costs by rule are listed below.

1. NESHAP Subpart R

For the major source rule, the EPA estimates this final rule will cost approximately \$2.38 million in total capital costs and \$1.91 million per year in total annualized costs (including product recovery). More information about the estimated cost of this final action for the major source rule can be found in the document, *Updated Major Source Technology Review for Gasoline Distribution Facilities (Bulk Gasoline Terminals and Pipeline Breakout Stations)* NESHAP.

2. NESHAP Subpart BBBB

For the area source rule, the EPA estimates this final rule will cost approximately \$66.2 million in total capital costs and have cost savings of \$5.74 million per year in total annualized costs (including product recovery). More information about the estimated cost of this final action for the area source rule can be found in the document, *Updated Area Source Technology Review for Gasoline Distribution Bulk Terminals, Bulk Plants, and Pipeline Facilities* NESHAP.

3. NSPS Subpart XXa

For the NSPS, the EPA estimates this final rule will cost approximately \$7.20 million in total capital costs and \$66,000 per year in total annualized costs (including product recovery). More information about the estimated cost of this final action for the NSPS can be found in the document, *Updated New Source Performance Standards Review for Bulk Gasoline Terminals*.

D. What are the economic impacts?

The EPA conducted economic impact analyses, contained in the RIA, for this final action. The RIA is available in the docket for this action. The economic impact analyses contain two parts. The economic impacts of the final action on small entities are calculated as the percentage of total annualized costs incurred by affected ultimate parent owners to their revenues. This ratio provides a measure of the direct economic impact to ultimate parent owners of gasoline distribution facilities while presuming no impact on consumers. We estimate that the average small entity impacted by the final action will incur total annualized costs of 0.40 percent of their revenue, with none exceeding 6.56 percent. We estimate that fewer than 9 percent of impacted small entities will incur total annualized costs greater than 1 percent of their revenue and that fewer than 3

percent will incur total annualized costs greater than 3 percent of their revenue. This is based on a conservative estimate of costs imposed on ultimate parent companies, where total annualized costs imposed on a facility are at the upper bound of what is possible under the rule and do not include product recovery as a credit. More explanation of these economic impacts can be found in section V.C, the Regulatory Flexibility Act (RFA), and in the RIA for this final action. The RIA also contains a supplementary analysis of small business impacts using data from the U.S. Census Bureau.

The EPA also prepared a partial equilibrium model of the U.S. gasoline market in order to project changes caused by this final action to the price and quantity of gasoline sold from 2027 to 2041. Using this model, the price of gasoline is projected to rise by less than 0.006 percent (less than two hundredths of a cent) in all years from 2027 to 2041, whereas the quantity of gasoline consumed is projected to fall by less than 0.002 percent in all years from 2027 to 2041. These projections consider the costs imposed by amendments to NESHAP subpart BBBBBB, NESHAP subpart R, and amendments to the NSPS promulgated in subpart XXa.

Thus, economic impacts are expected to be low for affected companies and industries impacted by this final action, and there are not likely to be substantial impacts on the markets for affected products. The costs of the final action are not expected to result in a significant market impact, regardless of whether they are passed on to the purchaser or absorbed by the firms. We note that these economic impacts do not include the expected product recovery of gasoline under each of these final rules. The RIA for this final action includes more details and discussion of these projected impacts.

E. What are the benefits?

The emission controls installed to comply with the final action are expected to reduce VOC emissions which, in conjunction with nitrogen oxides and in the presence of sunlight, form ground-level ozone (O₃). This section reports the estimated ozone-related benefits of reducing VOC emissions in terms of the number and value of avoided ozone-attributable deaths and illnesses.

As a first step in quantifying O₃-related human health impacts, the EPA consults the *Integrated Science*

Assessment for Ozone (Ozone ISA)¹⁰ as summarized in the *Technical Support Document for the Final Revised Cross State Air Pollution Rule Update*.¹¹ This document synthesizes the toxicological, clinical, and epidemiological evidence to determine whether each pollutant is causally related to an array of adverse human health outcomes associated with either acute (*i.e.*, hours or days-long) or chronic (*i.e.*, years-long) exposure. For each outcome, the Ozone ISA reports this relationship to be causal, likely to be causal, suggestive of a causal relationship, inadequate to infer a causal relationship, or not likely to be a causal relationship.

In brief, the Ozone ISA found short-term (less than one month) exposures to ozone to be causally related to respiratory effects, a “likely to be causal” relationship with metabolic effects and a “suggestive of, but not sufficient to infer, a causal relationship” for central nervous system effects, cardiovascular effects, and total mortality. The Ozone ISA reported that long-term exposures (one month or longer) to ozone are “likely to be causal” for respiratory effects including respiratory mortality, and a “suggestive of, but not sufficient to infer, a causal relationship” for cardiovascular effects, reproductive effects, central nervous system effects, metabolic effects, and total mortality.

For all estimates, we summarized the monetized ozone-related health benefits using discount rates of 3 percent and 7 percent for both short-term and long-term effects for the 15-year analysis period of these rules discounted back to 2024 rounded to 2 significant figures. All estimates are presented in 2021 dollars. For the full set of underlying calculations see the Gasoline Distribution Benefits workbook, available in the docket for this action as an attachment to the RIA. In addition, we include the monetized disbenefits from additional CO₂ emissions using a 3 percent rate, which occur with NESHAP subpart BBBBBB and NSPS subpart XXa but not NESHAP subpart R since there are no additional CO₂

emissions as a result of the NESHAP subpart R final rule. The EPA has prepared a benefits analysis, contained in the RIA and summarized here, to provide the public the same extent of analysis, including monetized benefits and disbenefits, for the rules in this final action as was provided for the proposal RIA.

Due to methodology and data limitations, we did not attempt to monetize the health benefits of reductions in HAP in this analysis. Monetization of the benefits of reductions in cancer incidences requires several important inputs, including central estimates of cancer risks, estimates of exposure to carcinogenic HAP, and estimates of the value of an avoided case of cancer (fatal and non-fatal). A qualitative discussion of the health effects associated with HAP emitted from sources subject to control under the final action is included in the RIA.

1. NESHAP Subpart R

The PV of the benefits for the final amendments to NESHAP subpart R range from \$11 million at a 3 percent discount rate to \$6.3 million at a 7 percent discount rate for short-term effects and \$87 million at a 3 percent discount rate to \$52 million at a 7 percent discount rate for long-term effects. The EAV of the benefits for the final amendments to NESHAP subpart R range from \$0.89 million at a 3 percent discount rate to \$0.70 million at a 7 percent discount rate for short-term effects and \$7.3 million at the 3 percent discount rate to \$5.8 million at a 7 percent discount rate for long-term effects.

2. NESHAP Subpart BBBBBB

The PV of the net benefits (monetized health benefits minus monetized climate disbenefits) for the final amendments to NESHAP subpart BBBBBB range from \$170 million at a 3 percent discount rate to \$90 million at a 7 percent discount rate for short-term effects and \$1,600 million at a 3 percent discount rate to \$950 million at a 7 percent discount rate for long-term effects. The EAV of the net benefits for the final amendments to NESHAP subpart BBBBBB range from \$15 million at a 3 percent discount rate to \$11 million at a 7 percent discount rate for short-term effects and \$140 million at the 3 percent discount rate to \$110 million at a 7 percent discount rate for long-term effects.

3. NSPS Subpart XXa

The PV of the net benefits (monetized health benefits minus monetized

¹⁰ U.S. EPA (2020). *Integrated Science Assessment for Ozone and Related Photochemical Oxidants*. U.S. Environmental Protection Agency. Washington, DC. Office of Research and Development. EPA/600/R-20/012. Available at: <https://www.epa.gov/isa/integrated-science-assessment-isa-ozone-and-related-photochemical-oxidants>.

¹¹ U.S. EPA. 2021. *Technical Support Document (TSD) for the Final Revised Cross-State Air Pollution Rule Update for the 2008 Ozone Season NAAQS Estimating PM_{2.5}- and Ozone-Attributable Health Benefits*. https://www.epa.gov/sites/default/files/2021-03/documents/estimating_pm2.5_and_ozone-attributable_health_benefits_tsd.pdf.

climate disbenefits) for the final NSPS subpart XXa range from \$29 million at a 3 percent discount rate to \$14 million at a 7 percent discount rate for short-term effects and \$280 million at a 3 percent discount rate to \$160 million at a 7 percent discount rate for long-term effects. The EAV of the net benefits for the final NSPS subpart XXa range from \$2.4 million at a 3 percent discount rate to \$1.7 million at a 7 percent discount rate for short-term effects and \$24 million at the 3 percent discount rate to \$17 million at a 7 percent discount rate for long-term effects.

4. Cumulative Benefits Across Rules

The PV of the net benefits (monetized health benefits minus monetized climate disbenefits) for all three rules cumulatively range from \$210 million at a 3 percent discount rate to \$110 million at a 7 percent discount rate for short-term effects and \$2,000 million at a 3 percent discount rate to \$1,200 million at a 7 percent discount rate for long-term effects. The EAV of the net benefits for all three rules cumulatively range from \$17 million at a 3 percent discount rate to \$13 million at a 7 percent discount rate for short-term effects and \$170 million at the 3 percent discount rate to \$130 million at a 7 percent discount rate for long-term effects.

F. What analysis of environmental justice did the EPA conduct?

The EPA defines EJ as “the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision-making and other Federal activities that affect human health and the environment so that people: (i) Are fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers; and (ii) have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.”¹² In recognizing that communities with EJ concerns often bear an unequal burden of environmental harms and risks, the EPA continues to consider ways of protecting them from adverse public health and environmental effects of air pollution. For purposes of analyzing

regulatory impacts, the EPA relies upon its June 2016 *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis*,¹³ which provides recommendations that encourage analysts to conduct the highest quality analysis feasible, recognizing that data limitations, time, resource constraints, and analytical challenges will vary by media and circumstance.

1. NESHAP Subpart R

To examine the potential for any EJ issues that might be associated with gasoline distribution major source facilities subject to NESHAP subpart R, we performed a proximity demographic analysis at proposal, which is an assessment of individual demographic groups of the populations living within 5 kilometers (km, ~3.1 miles) and 50 km (~31 miles) of the facilities. The EPA then compared the data from this analysis to the national average for each of the demographic groups. We have determined that the affected facilities did not change as a result of public comments. Therefore, the analysis from the proposed rule is still applicable for this final action.

In summary, the results of the demographic proximity analysis indicate that, for populations within 5 km (~3.1 miles) of the 117 major source gasoline distribution facilities,¹⁴ the percent of the population that is Hispanic or Latino is significantly higher than the national average (33 percent versus 19 percent). Specifically, populations around 12 facilities are more than three times the national average for the percent that is Hispanic/Latino (greater than 56 percent). The percent of the population that is African American (15 percent) and Other and Multiracial (10 percent) are slightly above the national averages (12 percent and 8 percent, respectively). The percent of people living below the poverty level (17 percent) and those over 25 without a high school diploma (18 percent) are higher than the national averages (13 percent and 12 percent, respectively). The percent of people living in linguistic isolation is higher than the national average (9 percent versus 5 percent).

More detailed results of the demographic proximity analysis can be found in section IV.F. of the proposed rule's preamble (see 87 FR 35638; June 10, 2022) and in the technical report,

¹³ See <https://www.epa.gov/environmentaljustice/technical-guidance-assessing-environmental-justice-regulatory-analysis>.

¹⁴ The EPA estimates there are approximately 210 major source gasoline distribution facilities; however, we had location information for only 117 of the facilities.

Analysis of Demographic Factors for Populations Living Near Gasoline Distribution Facilities, available in Docket ID No. EPA-HQ-OAR-2020-0371.

As noted earlier in this preamble, the EPA determined that the standards should be revised to reflect cost-effective developments in practices, process, or controls. Because we based the analysis of the impacts and emission reductions on model plants, we are not able to ascertain specifically how the potential benefits will be distributed across the population. Thus, we are limited in our ability to estimate the potential EJ impacts of this rule. However, we anticipate that the changes to NESHAP subpart R will generally improve human health exposures for populations in surrounding communities. The EPA estimates that NESHAP subpart R will reduce HAP emissions from gasoline distribution facilities by 130 tpy and VOC emissions by 2,200 tpy. The changes will have beneficial effects on air quality and public health for populations exposed to emissions from gasoline distribution facilities that are major sources and will provide additional health protection for most populations, including communities already overburdened by pollution, which are often people of color, low-income, and indigenous communities.

2. NESHAP Subpart BBBBBB

To examine the potential for any EJ issues that might be associated with gasoline distribution area source facilities subject to NESHAP subpart BBBBBB, we performed a proximity demographic analysis at proposal, which is an assessment of individual demographic groups of the populations living within 5 km and 50 km of the facilities. The EPA then compared the data from this analysis to the national average for each of the demographic groups. We have determined that the affected facilities did not change as a result of public comments. Therefore, the analysis from the proposed rule is still applicable for this final action.

In summary, the results of the demographic analysis indicate that, for populations within 5 km of 1,229 area source gasoline distribution facilities,¹⁵ the Hispanic or Latino (26 percent) and African American (18 percent) populations are significantly larger than the national averages (19 percent and 12 percent, respectively). Specifically,

¹⁵ The EPA estimates there are approximately 9,260 area source gasoline distribution facilities; however, we had location information for only 1,229 of the facilities.

¹² 88 FR 25251 (April 26, 2023); <https://www.federalregister.gov/documents/2023/04/26/2023-08955/revitalizing-our-nations-commitment-to-environmental-justice-for-all>.

populations around 102 facilities are more than three times the national average for the percent that is Hispanic/Latino (greater than 56 percent) and the populations around 218 facilities are more than three times the national average for the percent that is African American (greater than 36 percent).

The percent of the population that is Other and Multiracial (10 percent) is slightly above the national average (8 percent). The percent of people living below the poverty level (18 percent) and those over 25 without a high school diploma (16 percent) are higher than the national averages (13 percent and 12 percent, respectively). The percent of people living in linguistic isolation was higher than the national average (9 percent versus 5 percent).

More detailed results of the demographic proximity analysis can be found in section IV.F. of the proposed rule's preamble (see 87 FR 35639; June 10, 2022) and in the technical report, *Analysis of Demographic Factors for Populations Living Near Gasoline Distribution Facilities*, available in Docket ID No. EPA-HQ-OAR-2020-0371.

As noted earlier, the EPA determined that the standards should be revised to reflect cost-effective developments in practices, process, or controls. Because we based the analysis of the impacts and emission reductions on model plants, we are not able to ascertain specifically how the potential benefits will be distributed across the population. Thus, we are limited in our ability to estimate the potential EJ impacts of this rule. However, we anticipate that the changes to NESHAP subpart BBBBBB will generally improve human health exposures for populations in surrounding communities. The EPA estimates that NESHAP subpart BBBBBB will reduce HAP emissions from gasoline distribution facilities by 2,100 tpy and VOC emissions by 40,300 tpy. The changes will have beneficial effects on air quality and public health for populations exposed to emissions from gasoline distribution facilities that are area sources and will provide additional health protection for most populations, including communities already overburdened by pollution, which are often people of color, low-income, and indigenous communities.

3. NSPS Subpart XXa

As indicated in the proposal, the locations of any new Bulk Gasoline Terminals that will be subject to NSPS subpart XXa are not known. In addition, it is not known which existing Bulk Gasoline Terminals may be modified or reconstructed and subject to NSPS

subpart XXa. Thus, we are limited in our ability to estimate the potential EJ impacts of this rule. However, we anticipate that the changes to NSPS subpart XXa will generally minimize future emissions to levels of BSER and human health exposures for populations in surrounding communities of new, modified, or reconstructed facilities, including those communities with higher percentages of people of color, low income, and indigenous communities. Specifically, the EPA determined that the standards should be revised to reflect BSER. The EPA estimates that NSPS subpart XXa will reduce VOC emissions by 3,000 tpy. The changes will have beneficial effects on air quality and public health for populations exposed to emissions from gasoline distribution facilities with new, modified or reconstructed sources and will provide additional health protection for most populations, including communities already overburdened by pollution, which are often people of color, low-income, and indigenous communities.

V. Statutory and Executive Order Reviews

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

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review

This action is a “significant regulatory action” as defined under section 3(f)(1) of Executive Order 12866, as amended by Executive Order 14094. Accordingly, the EPA submitted this action to the Office of Management and Budget (OMB) for Executive Order 12866 review. Documentation of any changes made in response to the Executive Order 12866 review is available in the docket. The EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis, *Regulatory Impact Analysis for the Final National Emission Standards for Hazardous Air Pollutants: Gasoline Distribution Technology Review and Standards of Performance for Bulk Gasoline Terminals Review* (Ref. EPA-452/R-24-022), is also available in the docket.¹⁶

¹⁶ A discussion of the market failure that this rulemaking action addresses can be found in Chapter 1 of the Regulatory Impact Analysis.

B. Paperwork Reduction Act (PRA)

1. NESHAP Subpart R

The information collection activities in this rule have been submitted for approval to OMB under the PRA. The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 1659.12. You can find a copy of the ICR in the docket, and it is briefly summarized here. The information collections requirements are not enforceable until OMB approves them.

The EPA is finalizing amendments that revise provisions pertaining to emissions during periods of SSM, add requirements for electronic reporting of periodic reports and performance test results, and make other minor clarifications and corrections. This information will be collected to assure compliance with NESHAP subpart R.

Respondents/affected entities:

Owners or operators of gasoline distribution facilities.

Respondent's obligation to respond:

Mandatory (40 CFR part 63, subpart R).
Estimated number of respondents: 210 (assumes no new respondents over next 3 years).

Frequency of response: Initially, semiannually, and annually.

Total estimated burden: 16,300 hours (per year) to comply with the promulgated amendments in the NESHAP. Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: \$ 972,013 (per year), including no annualized capital or operation and maintenance costs, to comply with the promulgated amendments in the NESHAP.

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 OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

2. NESHAP Subpart BBBBBB

The information collection activities in this rule have been submitted for approval to OMB under the PRA. The ICR document that the EPA prepared has been assigned EPA ICR number 2237.07. You can find a copy of the ICR in the docket, and it is briefly summarized here. The information collections requirements are not enforceable until OMB approves them.

The EPA is finalizing amendments that revise provisions to add requirements for electronic reporting of periodic reports and performance test results, and make other minor clarifications and corrections. This information will be collected to assure compliance with NESHAP subpart BBBBBB.

Respondents/affected entities: Owners or operators of gasoline distribution facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart BBBBBB).

Estimated number of respondents: 9,263 (assumes no new respondents over the next 3 years).

Frequency of response: Initially, semiannually, and annually.

Total estimated burden: 83,882 hours (per year) to comply with the promulgated amendments in the NESHAP. Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: \$ 5,001,981 (per year), including no annualized capital or operation and maintenance costs, to comply with the promulgated amendments in the NESHAP.

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 OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

3. NSPS Subpart XXa

The information collection activities in this rule have been submitted for approval to OMB under the PRA. The ICR document that the EPA prepared has been assigned EPA ICR number 2720.01. You can find a copy of the ICR in the docket, and it is briefly summarized here. The information collections requirements are not enforceable until OMB approves them.

The EPA is finalizing provisions to require electronic reporting of periodic reports and performance test results. This information will be collected to assure compliance with NSPS subpart XXa.

Respondents/affected entities: Owners or operators of bulk gasoline terminals.

Respondent's obligation to respond: Mandatory (40 CFR part 60, subpart XXa).

Estimated number of respondents: 12 (assumes four new respondents each year over the next 3 years).

Frequency of response: Initially, semiannually, and annually.

Total estimated burden: 1,132 hours (per year) to comply with all of the requirements in the NSPS. Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: \$ 66,930 (per year), including no annualized capital or operation and maintenance costs, to comply with all of the requirements in the NSPS.

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 OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have significant economic impacts on a substantial number of small entities under the RFA. The small entities subject to the requirements of these rules are small businesses that own gasoline distribution facilities. For NESHAP subpart R, the EPA determined that two small entities are affected by the amendments, which is 5 percent of all affected ultimate parent companies. Neither of these small entities is projected to incur costs from this rule greater than 1 percent of their sales. For NESHAP subpart BBBBBB, the EPA determined that 116 small entities are affected by these amendments, which is 42 percent of all affected ultimate parent companies. Less than 9 percent of these small entities (10 total) are projected to incur costs from this rule greater than 1 percent of their annual sales, and less than 3 percent (3 total) are project to incur costs greater than 3 percent of their annual sales (with a maximum economic impact of 6.56 percent) without including expected gasoline product recovery. Finally, for NSPS subpart XXa, the EPA did not identify any small entities that are affected by NSPS subpart XXa and does not project that any entities affected by the NSPS will incur costs greater than 1 percent of their annual sales. Inclusion of expected gasoline product recovery will reduce these small entity impact estimates. Details of the analyses for each rule are presented in the RIA available in the docket.

D. Unfunded Mandates Reform Act of 1995 (UMRA)

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. While this action creates an enforceable duty on the private sector, the cost does not exceed \$100 million or more.

E. Executive Order 13132: Federalism

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

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

This action does not have Tribal implications, as specified in Executive Order 13175. The EPA estimates there are approximately 210 major source and 9,260 area source gasoline distribution facilities; however, we had location information for only 117 of the major source facilities and 1,229 of the area source facilities. None of the facilities that have been identified as being affected by this action are owned or operated by Tribal governments or located within Tribal lands. Thus, Executive Order 13175 does not apply to this action. However, consistent with the *EPA Policy on Consultation with Indian Tribes*, the EPA offered government-to-government consultation with Tribes by sending a letter dated June 24, 2022, inviting all federally recognized Tribes to request a consultation. No Tribes requested a consultation.

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

Executive Order 13045 directs Federal agencies to include an evaluation of the health and safety effects of the planned regulation on children in Federal health and safety standards and explain why the regulation is preferable to potentially effective and reasonably feasible alternatives. This action is not subject to Executive Order 13045 because the EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. The final rules lower gasoline vapors and are projected to improve overall health including children.

H. Executive Order 13211: Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use

This action is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The EPA expects these rules will not reduce crude oil supply, fuel production, coal production, natural gas production, or electricity production. The EPA estimates these rules will have minimal impact on the amount of imports or exports of crude oils, condensates, or other organic liquids used in the energy supply industries. Given the minimal impacts on energy supply, distribution, and use as a whole nationally, no significant adverse energy effects are expected to occur. For more information on these estimates of energy effects, please refer to Chapter 5 of the RIA available in the docket.

I. National Technology Transfer and Advancement Act (NTTAA)

This action involves technical standards. The EPA has decided to use EPA Method 18. While the EPA identified ASTM 6420–18 as being potentially applicable, the Agency decided not to use it. The use of this voluntary consensus standard would be impractical because it has a limited list of analytes and is not suitable for analyzing many compounds that are expected to occur in gasoline vapor.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation’s Commitment to Environmental Justice for All

For NESHAP subparts R and BBBBBB, the EPA believes that the human health or environmental conditions that exist prior to this action result in or have the potential to result in disproportionate and adverse human health or environmental effects on communities with environmental justice concerns. The percent Hispanic or Latino population, African American, and Other and Multiracial are above the national averages for these demographic groups. The percent of people living below the poverty level and those over 25 without a high school diploma, and people living in linguistic isolation are also higher than the national averages. The EPA believes that this action is likely to reduce existing disproportionate and adverse effects on communities with environmental justice concerns. The EPA estimates that these

NESHAP final rules will reduce HAP emissions from gasoline distribution facilities by over 2,200 tpy and VOC emissions by 42,500 tpy.

For NSPS subpart XXa, the EPA believes that it is not practicable to assess whether this action is likely to result in new disproportionate and adverse effects on communities with environmental justice concerns, because the location and number of new, modified, or reconstructed sources is unknown. Because NSPS subpart XXa applies to future new facilities, the locations of such Bulk Gasoline Terminals that will be subject to NSPS subpart XXa are not known. In addition, it is not known which existing Bulk Gasoline Terminals may be modified or reconstructed and subject to NSPS subpart XXa. Thus, we are limited in our ability to estimate the potential EJ impacts of this subpart, but we note that future emission increases associated with construction of any new, modified, or reconstructed sources will be minimized to levels of BSER.

The information supporting this Executive order review is contained in section IV.F. of this action, with additional details in section IV.F. of the proposed rules’ preamble (87 FR 35637; June 10, 2022), and in the technical report, *Analysis of Demographic Factors for Populations Living Near Gasoline Distribution Facilities*, available in Docket ID No. EPA–HQ–OAR–2020–0371.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Parts 60 and 63

Environmental protection, Administrative practice and procedures, Air pollution control, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Michael S. Regan,
Administrator.

For the reasons stated in the preamble, title 40, chapter I, parts 60 and 63 of the Code of Federal Regulations are amended as follows:

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

■ 1. The authority citation for part 60 continues to read as follows:

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

Subpart XX—Standards of Performance for Bulk Gasoline Terminals That Commenced Construction, Modification, or Reconstruction After December 17, 1980, and On or Before June 10, 2022

- 2. The heading for subpart XX is revised to read as set forth above.
- 3. Section 60.500 is amended by revising paragraph (b) to read as follows:

§ 60.500 Applicability and designation of affected facility.

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(b) Each facility under paragraph (a) of this section, the construction or modification of which is commenced after December 17, 1980, and on or before June 10, 2022, is subject to the provisions of this subpart.

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- 4. Subpart XXa is added to read as follows:

Subpart XXa—Standards of Performance for Bulk Gasoline Terminals that Commenced Construction, Modification, or Reconstruction After June 10, 2022

Sec.

- 60.500a Applicability and designation of affected facility.
- 60.501a Definitions.
- 60.502a Standard for volatile organic compound (VOC) emissions from bulk gasoline terminals.
- 60.503a Test methods and procedures.
- 60.504a Monitoring requirements.
- 60.505a Reporting and recordkeeping.

Subpart XXa—Standards of Performance for Bulk Gasoline Terminals that Commenced Construction, Modification, or Reconstruction After June 10, 2022

§ 60.500a Applicability and designation of affected facility.

(a) You are subject to the applicable provisions of this subpart if you are the owner or operator of one or more of the affected facilities listed in paragraphs (a)(1) and (2) of this section.

(1) Each gasoline loading rack affected facility, which is the total of all the loading racks at a bulk gasoline terminal that deliver liquid product into gasoline cargo tanks including the gasoline loading racks, the vapor collection systems, and the vapor processing system.

(2) Each collection of equipment at a bulk gasoline terminal affected facility, which is the total of all equipment associated with the loading of gasoline at a bulk gasoline terminal including the lines and pumps transferring gasoline from storage vessels, the gasoline loading racks, the vapor collection

systems, and the vapor processing system.

(b) Each affected facility under paragraph (a) of this section for which construction, modification (as defined in § 60.2 and detailed in § 60.14), or reconstruction (as detailed in § 60.15 and paragraph (e) of this section) is commenced after June 10, 2022, is subject to the provisions of this subpart.

(c) All standards including emission limitations shall apply at all times, including periods of startup, shutdown, and malfunction. As provided in § 60.11(f), this paragraph (c) supersedes the exemptions for periods of startup, shutdown, and malfunction in subpart A of this part.

(d) A newly constructed gasoline loading rack affected facility that was subject to the standards in § 60.502a(b) will continue to be subject to the standards in § 60.502a(b) for newly constructed gasoline loading rack affected facilities if they are subsequently modified or reconstructed.

(e) For purposes of this subpart:

(1) The cost of the following frequently replaced components of the gasoline loading rack affected facility shall not be considered in calculating either the “fixed capital cost of the new components” or the “fixed capital cost that would be required to construct a comparable entirely new facility” under § 60.15: pump seals, loading arm gaskets and swivels, coupler gaskets, overfill sensor couplers and cables, flexible vapor hoses, and grounding cables and connectors.

(2) Under § 60.15, the “fixed capital cost of the new components” includes the fixed capital cost of all depreciable components, except components specified in paragraph (e)(1) of this section which are or will be replaced pursuant to all continuous programs of component replacement which are commenced within any 2-year period following June 10, 2022. For purposes of this paragraph (e)(2), “commenced” means that an owner or operator has undertaken a continuous program of component replacement or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of component replacement.

§ 60.501a Definitions.

The terms used in this subpart are defined in the Clean Air Act, in § 60.2, or in this section as follows:

3-hour rolling average means the arithmetic mean of the previous thirty-six 5-minute periods of valid operating data collected, as specified, for the monitored parameter. Valid data

excludes data collected during periods when the monitoring system is out of control, while conducting repairs associated with periods when the monitoring system is out of control, or while conducting required monitoring system quality assurance or quality control activities. The thirty-six 5-minute periods should be consecutive, but not necessarily continuous if operations or the collection of valid data were intermittent.

Bulk gasoline terminal means any gasoline facility which receives gasoline by pipeline, ship, barge, or cargo tank and subsequently loads all or a portion of the gasoline into gasoline cargo tanks for transport to bulk gasoline plants or gasoline dispensing facilities and has a gasoline throughput greater than 20,000 gallons per day (75,700 liters per day). Gasoline throughput shall be the maximum calculated design throughput for the facility as may be limited by compliance with an enforceable condition under Federal, State, or local law and discoverable by the Administrator and any other person.

Continuous monitoring system is a comprehensive term that may include, but is not limited to, continuous emission monitoring systems, continuous parameter monitoring systems, or other manual or automatic monitoring that is used for demonstrating compliance on a continuous basis.

Equipment means each valve, pump, pressure relief device, open-ended valve or line, sampling connection system, and flange or other connector in the gasoline liquid transfer and vapor collection systems. This definition also includes the entire vapor processing system except the exhaust port(s) or stack(s).

Flare means a thermal combustion device using an open or shrouded flame (without full enclosure) such that the pollutants are not emitted through a conveyance suitable to conduct a performance test.

Gasoline means any petroleum distillate or petroleum distillate/alcohol blend having a Reid vapor pressure of 4.0 pounds per square inch (27.6 kilopascals) or greater which is used as a fuel for internal combustion engines.

Gasoline cargo tank means a delivery tank truck or railcar which is loading gasoline or which has loaded gasoline on the immediately previous load.

In gasoline service means that a piece of equipment is used in a system that transfers gasoline or gasoline vapors.

Loading rack means the loading arms, pumps, meters, shutoff valves, relief valves, and other piping and valves necessary to fill gasoline cargo tanks.

Submerged filling means the filling of a gasoline cargo tank through a submerged fill pipe whose discharge is no more than the 6 inches from the bottom of the tank. Bottom filling of gasoline cargo tanks is included in this definition.

Thermal oxidation system means an enclosed combustion device used to mix and ignite fuel, air pollutants, and air to provide a flame to heat and oxidize air pollutants. Auxiliary fuel may be used to heat air pollutants to combustion temperatures. *Thermal oxidation systems* emit pollutants through a conveyance suitable to conduct a performance test.

Total organic compounds (TOC) means those compounds measured according to the procedures in Method 25, 25A, or 25B of appendix A-7 to this part. The methane content may be excluded from the TOC concentration as described in § 60.503a.

Vapor collection system means any equipment used for containing total organic compounds vapors displaced during the loading of gasoline cargo tanks.

Vapor processing system means all equipment used for recovering or oxidizing total organic compounds vapors displaced from the affected facility.

Vapor recovery system means processing equipment used to absorb and/or condense collected vapors and return the total organic compounds for blending with gasoline or other petroleum products or return to a petroleum refinery or transmix facility for further processing. Vapor recovery systems include but are not limited to carbon adsorption systems or refrigerated condensers.

Vapor-tight gasoline cargo tank means a gasoline cargo tank which has demonstrated within the 12 preceding months that it meets the annual certification test requirements in § 60.503a(f).

§ 60.502a Standard for volatile organic compound (VOC) emissions from bulk gasoline terminals.

(a) Each gasoline loading rack affected facility shall be equipped with a vapor collection system designed and operated to collect the total organic compounds vapors displaced from gasoline cargo tanks during product loading.

(b) For each newly constructed gasoline loading rack affected facility, the facility owner or operator must meet the applicable emission limitations in paragraph (b)(1) or (2) of this section no later than the date on which § 60.8(a) requires a performance test to be completed. A flare cannot be used to

comply with the emission limitations in this paragraph (b).

(1) If a thermal oxidation system is used, maintain the emissions to the atmosphere from the vapor collection system due to the loading of liquid product into gasoline cargo tanks at or below 1.0 milligram of total organic compounds per liter of gasoline loaded (mg/L). Continual compliance with this requirement must be demonstrated as specified in paragraphs (b)(1)(i) and (ii) of this section.

(i) Conduct initial and periodic performance tests as specified in § 60.503a(a) through (c) and meet the emission limitation in this paragraph (b)(1).

(ii) Maintain combustion zone temperature of the thermal oxidation system at or above the 3-hour rolling average operating limit established during the performance test when loading liquid product into gasoline cargo tanks. Valid operating data must exclude periods when there is no liquid product being loaded. If previous contents of the cargo tanks are known, you may also exclude periods when liquid product is loaded but no gasoline cargo tanks are being loaded provided that you excluded these periods in the determination of the combustion zone temperature operating limit according to the provisions in § 60.503a(c)(8)(ii).

(2) If a vapor recovery system is used:

(i) Maintain the emissions to the atmosphere from the vapor collection system at or below 550 parts per million by volume (ppmv) of TOC as propane determined on a 3-hour rolling average when the vapor recovery system is operating;

(ii) Operate the vapor recovery system during all periods when the vapor recovery system is capable of processing gasoline vapors, including periods when liquid product is being loaded, during carbon bed regeneration, and when preparing the beds for reuse; and

(iii) Operate the vapor recovery system to minimize air or nitrogen intrusion except as needed for the system to operate as designed for the purpose of removing VOC from the adsorption media or to break vacuum in the system and bring the system back to atmospheric pressure. Consistent with § 60.12, the use of gaseous diluents to achieve compliance with a standard which is based on the concentration of a pollutant in the gases discharged to the atmosphere is prohibited.

(c) For each modified or reconstructed gasoline loading rack affected facility, the facility owner or operator must meet the applicable emission limitations in paragraphs (c)(1) through (3) of this section no later than the date on which

§ 60.8(a) requires a performance test to be completed.

(1) If a thermal oxidation system is used, maintain the emissions to the atmosphere from the vapor collection system due to the loading of liquid product into gasoline cargo tanks at or below 10 mg/L. Continual compliance with this requirement must be demonstrated as specified in paragraphs (c)(1)(i) through (iii) of this section.

(i) Conduct initial and periodic performance tests as specified in § 60.503a(a) through (c) and meet the emission limitation in this paragraph (c)(1).

(ii) Maintain combustion zone temperature of the thermal oxidation system at or above the 3-hour rolling average operating limit established during the performance test when loading liquid product into gasoline cargo tanks. Valid operating data must exclude periods when there is no liquid product being loaded. If previous contents of the cargo tanks are known, you may also exclude periods when liquid product is loaded but no gasoline cargo tanks are being loaded provided that you excluded these periods in the determination of the combustion zone temperature operating limit according to the provisions in § 60.503a(c)(8)(ii).

(iii) As an alternative to the combustion zone temperature operating limit, you may elect to use the monitoring provisions as specified in paragraph (c)(3) of this section.

(2) If a vapor recovery system is used:

(i) Maintain the emissions to the atmosphere from the vapor collection system at or below 5,500 ppmv of TOC as propane determined on a 3-hour rolling average when the vapor recovery system is operating;

(ii) Operate the vapor recovery system during all periods when the vapor recovery system is capable of processing gasoline vapors, including periods when liquid product is being loaded, during carbon bed regeneration, and when preparing the beds for reuse; and

(iii) Operate the vapor recovery system to minimize air or nitrogen intrusion except as needed for the system to operate as designed for the purpose of removing VOC from the adsorption media or to break vacuum in the system and bring the system back to atmospheric pressure. Consistent with § 60.12, the use of gaseous diluents to achieve compliance with a standard which is based on the concentration of a pollutant in the gases discharged to the atmosphere is prohibited.

(3) If a flare is used or if a thermal oxidation system for which these provisions are specified as a monitoring alternative is used, meet all applicable

requirements specified in § 63.670(b) through (g) and (i) through (n) of this chapter except as provided in paragraphs (c)(3)(i) through (ix) of this section.

(i) For the purpose of this subpart, “regulated materials” refers to “vapors displaced from gasoline cargo tanks during product loading”. If you do not know the previous contents of the cargo tank, you must assume that cargo tank is a gasoline cargo tank.

(ii) In § 63.670(c) of this chapter for visible emissions:

(A) The phrase “specify the smokeless design capacity of each flare and” does not apply.

(B) The phrase “and the flare vent gas flow rate is less than the smokeless design capacity of the flare” does not apply.

(C) Substitute “The owner or operator shall monitor for visible emissions from the flare as specified in § 60.504a(c)(4).” for the sentence “The owner or operator shall monitor for visible emissions from the flare as specified in paragraph (h) of this section.”

(iii) The phrase “and the flare vent gas flow rate is less than the smokeless design capacity of the flare” in § 63.670(d) of this chapter for flare tip velocity requirements does not apply.

(iv) Substitute “pilot flame or flare flame” for each occurrence of “pilot flame.”

(v) Substitute “gasoline distribution facility” for each occurrence of “petroleum refinery” or “refinery.”

(vi) As an alternative to the flow rate monitoring alternatives provided in § 63.670(i) of this chapter, you may elect to determine flare waste gas flow rate by monitoring the cumulative loading rates of all liquid products loaded into cargo tanks for which the displaced vapors are managed by the affected facility’s vapor collection system and vapor processing system.

(vii) If using provision in § 63.670(j)(6) of this chapter for flare vent gas composition monitoring, you must comply with those provisions as specified in paragraphs (c)(3)(vii)(A) through (G) of this section.

(A) You must submit a separate written application to the Administrator for an exemption from monitoring, as described in § 63.670(j)(6)(i) of this chapter.

(B) You must determine the minimum ratio of gasoline loaded to total liquid product loaded for which the affected source must operate at or above at all times when liquid product is loaded into cargo tanks for which vapors collected are sent to the flare or, if applicable, thermal oxidation system and include that in the explanation of

conditions expected to produce the flare gas with lowest net heating value as required in § 63.670(j)(6)(i)(C) of this chapter. For air assisted flares or thermal oxidation systems, you must also establish a minimum gasoline loading rate (*i.e.*, volume of gasoline loaded in a 15-minute period) for which the affected source must operate at or above at all times and include that in the explanation of conditions that ensure the flare gas net heating value is consistent and representative of the lowest net heating value as required in § 63.670(j)(6)(i)(C).

(C) As required in § 63.670(j)(6)(i)(D) of this chapter, samples must be collected at the conditions identified in § 63.670(j)(6)(i)(C) of this chapter, which includes the applicable conditions specified in paragraph (c)(3)(vii)(B) of this section.

(D) The first change from winter gasoline to summer gasoline or from summer gasoline to winter gasoline, whichever comes first, is considered a change in operating conditions under § 63.670(j)(6)(iii) of this chapter and must be evaluated according to the provisions in § 63.670(j)(6)(iii). If separate net heating values are determined for summer gasoline loading versus winter gasoline loading, you may use the summer net heating value for all subsequent summer gasoline loading operations and the winter net heating value for all subsequent winter gasoline loading operations provided there are no other changes in operations.

(E) You must monitor the volume of gasoline loaded and the total volume of liquid product loaded on a 5-minute block basis and maintain the ratio of gasoline loaded to total liquid product loaded at or above the value determined in paragraph (c)(3)(vii)(B) of this section and, for air assisted flares or thermal oxidation systems, maintain the gasoline loading rate at or above the value determined in paragraph (c)(3)(vii)(B) on a rolling 15-minute period basis, calculated based on liquid product loaded during 3 contiguous 5-minute blocks, considering only those periods when liquid product is loaded into gasoline cargo tanks for any portion of three contiguous 5-minute block periods.

(F) For unassisted or perimeter air assisted flares or thermal oxidation systems, if the net heating value determined in § 63.670(j)(6)(i)(F) of this chapter meets or exceeds 270 British thermal units per standard cubic feet (Btu/scf), compliance with the ratio of gasoline loaded to total liquid product loaded as specified in paragraph (c)(3)(vii)(E) of this section demonstrates compliance with the flare combustion

zone net heating value (NHV_{cz}) operating limit in § 63.670(e) of this chapter.

(G) For perimeter air assisted flares or thermal oxidation systems, if the net heating value determined in § 63.670(j)(6)(i)(F) of this chapter meets or exceeds the net heating value dilution parameter (NHV_{dil}) operating limit of 22 British thermal units per square foot (Btu/ft²) at the flow rate associated with the minimum gasoline loading rate determined in paragraph (c)(3)(vii)(B) of this section at any air assist rate used, compliance with the minimum gasoline loading rate as specified in paragraph (c)(3)(vii)(E) of this section demonstrates compliance with the NHV_{dil} operating limit in § 63.670(f) of this chapter.

(viii) You may elect to establish a minimum supplemental gas addition rate and monitor the supplemental gas addition rate, in addition to the operating limits in paragraph (c)(3)(vii)(E) of this section, to demonstrate compliance with the flare combustion zone operating limit in § 63.670(e) of this chapter and, if applicable, flare dilution operating limit in § 63.670(f) of this chapter, as follows.

(A) Use the minimum flare vent gas net heating value prior to addition of supplemental gas as established in paragraph (c)(3)(vii) of this section.

(B) Determine the maximum flow rate based on the maximum cumulative loading rate for a 15-minute block period considering all loading racks at the affected facility and considering restrictions on maximum loading rates necessary for compliance with the maximum pressure limits for the vapor collection and liquid loading equipment specified in paragraph (h) of this section.

(C) Determine the supplemental gas addition rate needed to yield NHV_{cz} of 270 Btu/scf using equation in § 63.670(m)(1) of this chapter.

(D) For flares (or thermal oxidation systems) with perimeter assist air, determine the supplemental gas addition rate needed to yield NHV_{dil} of 22 Btu/ft² using equation in § 63.670(n)(1) of this chapter at the flare vent gas net heating value determined in paragraph (c)(3)(vii) of this section, the flare gas flow rate associated with the minimum gasoline loading rate as determined in paragraph (c)(3)(vii)(B) of this section, and the fixed air assist rate. If the air assist rate is varied based on total liquid product loading rates, you must use the air assist rate used at low flow rates and repeat the calculation using the minimum flow rate associated with each air assist rate setting and select the maximum supplemental gas

addition rate across any of the air assist rate settings.

(E) Maintain the supplemental gas addition rate above the greater of the values determined in paragraphs (c)(3)(viii)(C) and, if applicable, (c)(3)(viii)(D) of this section on a 15-minute block period basis when liquid product is loaded into gasoline cargo tanks for at least 15-minutes.

(ix) As an alternative to determining the flare tip velocity rate for each 15-minute block to determine compliance with the flare tip velocity operating limit as specified in § 63.670(k)(2) of this chapter, you may elect to conduct a one-time flare tip velocity operating limit compliance assessment as provided in paragraphs (c)(3)(ix)(A) through (D) of this section. If the flare or loading rack configurations change (*e.g.*, flare tip modified or additional loading racks are added for which vapors are directed to the flare), you must repeat this one-time assessment based on the new configuration.

(A) Determine the unobstructed cross-sectional area of the flare tip, in units of square feet, as specified in § 63.670(k)(1) of this chapter.

(B) Determine the maximum flow rate, in units of cubic feet per second, based on the maximum cumulative loading rate for a 15-minute block period considering all loading racks at the gasoline loading racks affected facility and considering restrictions on maximum loading rates necessary for compliance with the maximum pressure limits for the vapor collection and liquid loading equipment specified in paragraph (h) of this section.

(C) Calculate the maximum flare tip velocity as the maximum flow rate from paragraph (c)(3)(ix)(B) of this section divided by the unobstructed cross-sectional area of the flare tip from paragraph (c)(3)(ix)(A) of this section.

(D) Demonstrate that the maximum flare tip velocity as calculated in paragraph (c)(3)(ix)(C) of this section is less than 60 feet per second.

(d) Each vapor collection system for the gasoline loading rack affected facility shall be designed to prevent any total organic compounds vapors collected at one loading rack from passing to another loading rack.

(e) Loadings of liquid product into gasoline cargo tanks at a gasoline loading rack affected facility shall be limited to vapor-tight gasoline cargo tanks according to the methods in § 60.503a(f) using the following procedures:

(1) The owner or operator shall obtain the vapor tightness annual certification test documentation described in § 60.505a(a)(3) for each gasoline cargo

tank which is to be loaded at the affected facility. If you do not know the previous contents of a cargo tank, you must assume that cargo tank is a gasoline cargo tank.

(2) The owner or operator shall obtain and record the cargo tank identification number of each gasoline cargo tank which is to be loaded at the affected facility.

(3) The owner or operator shall cross-check each cargo tank identification number obtained in paragraph (e)(2) of this section with the file of gasoline cargo tank vapor tightness documentation specified in paragraph (e)(1) of this section prior to loading any liquid product into the gasoline cargo tank.

(f) Loading of liquid product into gasoline cargo tanks at a gasoline loading rack affected facility shall be conducted using submerged filling, as defined in § 60.501a, and only into gasoline cargo tanks equipped with vapor collection equipment that is compatible with the terminal's vapor collection system. If you do not know the previous contents of a cargo tank, you must assume that cargo tank is a gasoline cargo tank.

(g) Loading of liquid product into gasoline cargo tanks at a gasoline loading rack affected facility shall only be conducted when the terminal's and the cargo tank's vapor collection systems are connected. If you do not know the previous contents of a cargo tank, you must assume that cargo tank is a gasoline cargo tank.

(h) The vapor collection and liquid loading equipment for a gasoline loading rack affected facility shall be designed and operated to prevent gauge pressure in the gasoline cargo tank from exceeding 18 inches of water (460 millimeters (mm) of water) during product loading. This level is not to be exceeded and must be continuously monitored according to the procedures specified in § 60.504a(d).

(i) No pressure-vacuum vent in the gasoline loading rack affected facility's vapor collection system shall begin to open at a system pressure less than 18 inches of water (460 mm of water) or at a vacuum of less than 6.0 inches of water (150 mm of water).

(j) Each owner or operator of a collection of equipment at a bulk gasoline terminal affected facility shall perform leak inspection and repair of all equipment in gasoline service, which includes all equipment in the vapor collection system, the vapor processing system, and each loading rack and loading arm handling gasoline, according to the requirements in paragraphs (j)(1) through (8) of this

section. The owner or operator must keep a list, summary description, or diagram(s) showing the location of all equipment in gasoline service at the facility.

(1) Conduct leak detection monitoring of all pumps, valves, and connectors in gasoline service using either of the methods specified in paragraph (j)(1)(i) or (ii) of this section.

(i) Use optical gas imaging (OGI) to quarterly monitor all pumps, valves, and connectors in gasoline service as specified in § 60.503a(e)(2).

(ii) Use Method 21 of appendix A-7 to this part as specified in § 60.503a(e)(1) and paragraphs (j)(1)(ii)(A) through (C) of this section.

(A) All pumps must be monitored quarterly, unless the pump meets one of the requirements in § 60.482-1a(d) or § 60.482-2a(d) through (g). An instrument reading of 10,000 ppm or greater is a leak.

(B) All valves must be monitored quarterly, unless the valve meets one of the requirements in § 60.482-1a(d) or § 60.482-7a(f) through (h). An instrument reading of 10,000 ppm or greater is a leak.

(C) All connectors must be monitored annually, unless the connector meets one of the requirements in § 60.482-1a(d) or § 60.482-11a(e) or (f). An instrument reading of 10,000 ppm or greater is a leak.

(2) During normal duties, record leaks identified by audio, visual, or olfactory methods.

(3) If evidence of a potential leak is found at any time by audio, visual, olfactory, or any other detection method for any equipment (as defined in § 60.501a), a leak is detected.

(4) For pressure relief devices, comply with the requirements in paragraphs (j)(4)(i) through (ii) of this section.

(i) Conduct instrument monitoring of each pressure relief device quarterly and within 5 calendar days after each pressure release to detect leaks by the methods specified in paragraph (j)(1) of this section, except as provided in § 60.482-4a(c).

(ii) If emissions are observed when using OGI, a leak is detected. If Method 21 is used, an instrument reading of 10,000 ppm or greater indicates a leak is detected.

(5) For sampling connection systems, comply with the requirements in § 60.482-5a.

(6) For open-ended valves or lines, comply with the requirements in § 60.482-6a.

(7) When a leak is detected for any equipment, comply with the requirements of paragraphs (j)(7)(i) through (iii) of this section.

(i) A weatherproof and readily visible identification, marked with the equipment identification number, must be attached to the leaking equipment. The identification on equipment may be removed after it has been repaired.

(ii) An initial attempt at repair shall be made as soon as practicable, but no later than 5 calendar days after the leak is detected. An initial attempt at repair is not required if the leak is detected using OGI and the equipment identified as leaking would require elevating the repair personnel more than 2 meters above a support surface.

(iii) Repair or replacement of leaking equipment shall be completed within 15 calendar days after detection of each leak, except as provided in paragraph (j)(8) of this section.

(A) For leaks identified pursuant to instrument monitoring required under paragraph (j)(1) of this section, the leak is repaired when instrument re-monitoring of the equipment does not detect a leak.

(B) For leaks identified pursuant to paragraph (j)(2) of this section, the leak is repaired when the leak can no longer be identified using audio, visual, or olfactory methods.

(8) Delay of repair of leaking equipment will be allowed according to the provisions in paragraphs (j)(8)(i) through (iv) of this section. The owner or operator shall provide in the semiannual report specified in § 60.505a(c), the reason(s) why the repair was delayed and the date each repair was completed.

(i) Delay of repair of equipment will be allowed for equipment that is isolated from the affected facility and that does not remain in gasoline service.

(ii) Delay of repair for valves and connectors will be allowed if:

(A) The owner or operator demonstrates that emissions of purged material resulting from immediate repair are greater than the fugitive emissions likely to result from delay of repair, and

(B) When repair procedures are effected, the purged material is collected and destroyed or recovered in a control device complying with § 60.482-10a or the requirements in paragraph (b) or (c) of this section, as applicable.

(iii) Delay of repair will be allowed for a valve, but not later than 3 months after the leak was detected, if valve assembly replacement is necessary, valve assembly supplies have been depleted, and valve assembly supplies had been sufficiently stocked before the supplies were depleted.

(iv) Delay of repair for pumps will be allowed if:

(A) Repair requires the use of a dual mechanical seal system that includes a barrier fluid system; and

(B) Repair is completed as soon as practicable, but not later than 6 months after the leak was detected.

(k) You must not allow gasoline to be handled at a bulk gasoline terminal that contains an affected facility listed under § 60.500a(a) in a manner that would result in vapor releases to the atmosphere for extended periods of time. Measures to be taken include, but are not limited to, the following:

(1) Minimize gasoline spills;

(2) Clean up spills as expeditiously as practicable;

(3) Cover all open gasoline containers and all gasoline storage tank fill-pipes with a gasketed seal when not in use; and

(4) Minimize gasoline sent to open waste collection systems that collect and transport gasoline to reclamation and recycling devices, such as oil/water separators.

§ 60.503a Test methods and procedures.

(a) *General performance test and performance evaluation requirements.*

(1) In conducting the performance tests or evaluations required by this subpart (or as requested by the Administrator), the owner or operator shall use the test methods and procedures as specified in this section, except as provided in § 60.8(b). The three-run requirement of § 60.8(f) does not apply to this subpart.

(2) Immediately before the performance test, conduct leak detection monitoring following the methods in paragraph (e)(1) of this section to identify leakage of vapor from all equipment, including loading arms, in the gasoline loading rack affected

facility while gasoline is being loaded into a gasoline cargo tank to ensure the terminal's vapor collection system equipment is operated with no detectable emissions. The owner or operator shall repair all leaks identified with readings of 500 ppmv (as methane) or greater above background before conducting the performance test and within the timeframe specified in § 60.502a(j)(7).

(b) *Performance test or performance evaluation timing.* (1) For each gasoline loading rack affected facility subject to the mass emission limits in § 60.502a(b)(1) or (c)(1), conduct the initial performance test of the vapor collection and processing systems according to the timing specified in § 60.8(a). For each gasoline loading rack affected facility subject to the emission limits in § 60.502a(b)(2) or (c)(2), conduct the initial performance evaluation of the continuous emissions monitoring system (CEMS) according to the timing specified for performance tests in § 60.8(a).

(2) For each gasoline loading rack affected facility complying with the mass emission limits in § 60.502a(b)(1) or (c)(1), conduct subsequent performance test of the vapor collection and processing system no later than 60 calendar months after the previous performance test.

(3) For each gasoline loading rack affected facility complying with the concentration emission limits in § 60.502a(b)(2) or (c)(2), conduct subsequent performance evaluations of CEMS for the vapor collection and processing system no later than 12 calendar months after the previous performance evaluation.

(c) *Performance test requirements for mass loading emission limit.* The owner or operator of a gasoline loading rack affected facility shall conduct performance tests of the vapor collection and processing system subject to the emission limits in § 60.502a(b)(1) or (c)(1), as specified in paragraphs (c)(1) through (8) of this section.

(1) The performance test shall be 6 hours long during which at least 80,000 gallons (300,000 liters) of gasoline is loaded. If this is not possible, the test may be continued the same day until 80,000 gallons (300,000 liters) of gasoline is loaded. If 80,000 gallons (300,000 liters) cannot be loaded during the first day of testing, the test may be resumed the next day with another 6-hour period. During the second day of testing, the 80,000-gallon (300,000-liter) criterion need not be met. However, as much as possible, testing should be conducted during the 6-hour period in which the highest throughput of gasoline normally occurs.

(2) If the vapor processing system is intermittent in operation and employs an intermediate vapor holder to accumulate total organic compounds vapors collected from gasoline cargo tanks, the performance test shall begin at a reference vapor holder level and shall end at the same reference point. The test shall include at least two startups and shutdowns of the vapor processor. If this does not occur under automatically controlled operations, the system shall be manually controlled.

(3) The emission rate (E) of total organic compounds shall be computed using the following equation:

$$E = K \sum_{i=1}^n (V_{esi} C_{ei}) / (L 10^6)$$

Equation 1 to paragraph (c)(3)

Where:

E = emission rate of total organic compounds, mg/liter of gasoline loaded.

V_{esi} = volume of air-vapor mixture exhausted at each interval "i", scm.

C_{ei} = concentration of total organic compounds at each interval "i", ppm.

L = total volume of gasoline loaded, liters.

n = number of testing intervals.

i = emission testing interval of 5 minutes.

K = density of calibration gas, 1.83×10^6 for propane, mg/scm.

(4) The performance test shall be conducted in intervals of 5 minutes. For each interval "i", readings from each measurement shall be recorded, and the volume exhausted (V_{esi}) and the

corresponding average total organic compounds concentration (C_{ei}) shall be determined. The sampling system response time shall be accounted for when determining the average total organic compounds concentration corresponding to the volume exhausted.

(5) Method 2B of appendix A-1 to this part shall be used to determine the volume (V_{esi}) of air-vapor mixture exhausted at each interval.

(6) Method 25, 25A, or 25B of appendix A-7 to this part shall be used for determining the total organic compounds concentration (C_{ei}) at each interval. Method 25 must not be used if the outlet TOC concentration is less than 50 ppmv. The calibration gas shall

be propane. If the owner or operator conducts the performance test using either Method 25A or Method 25B, the methane content in the exhaust vent may be excluded following the procedures in paragraphs (c)(6)(i) through (v) of this section.

Alternatively, an instrument that uses gas chromatography with a flame ionization detector may be used according to the procedures in paragraph (c)(6)(vi) of this section.

(i) Measure the methane concentration by Method 18 of appendix A-6 to this part or Method 320 of appendix A to part 63 of this chapter.

(ii) Calibrate the Method 25A or Method 25B analyzer using both propane and methane to develop response factors to both compounds.

(iii) Determine the TOC concentration with the Method 25A or Method 25B analyzer on an as methane basis.

(iv) Subtract the methane measured according to paragraph (c)(6)(i) of this section from the concentration determined in paragraph (c)(6)(iii) of this section.

(v) Convert the concentration difference determined in paragraph (c)(6)(iv) of this section to TOC (minus methane), as propane, by using the response factors determined in paragraph (c)(6)(ii) of this section. Multiply the concentration difference in paragraph (c)(6)(iv) of this section by the ratio of the response factor for propane to the response factor for methane.

(vi) Methane must be separated by the gas chromatograph and measured by the flame ionization detector, followed by a back-flush of the chromatographic column to directly measure TOC concentration minus methane. Use a direct interface and heated sampling line from the sampling point to the gas chromatographic injection valve. All sampling components leading to the analyzer must be heated to greater than 110 °C. Calibrate the instrument with propane. Calibration error and calibration drift must be demonstrated according to Method 25A, and the appropriate procedures in Method 25A must be followed to ensure the calibration error and calibration drift are within Method 25A limits. The TOC concentration minus methane must be recorded at least once every 15 minutes. The performance test report must include the calibration results and the results demonstrating proper separation of methane from the TOC concentration.

(7) To determine the volume (L) of gasoline dispensed during the performance test period at all loading racks whose vapor emissions are controlled by the processing system being tested, terminal records or readings from gasoline dispensing meters at each loading rack shall be used.

(8) Monitor the temperature in the combustion zone using the continuous parameter monitoring system (CPMS) required in § 60.504a(a) and determine the operating limit for the combustion device using the following procedures:

(i) Record the temperature or average temperature for each 5-minute period during the performance test.

(ii) Using only the 5-minute periods in which liquid product is loaded into gasoline cargo tanks, determine the 1-hour average temperature for each hour

of the performance test. If you do not know the previous contents of the cargo tank, you must assume liquid product loading is performed in gasoline cargo tanks such that you use all 5-minute periods in which liquid product is loaded into gasoline cargo tanks when determining the 1-hour average temperature for each hour of the performance test.

(iii) Starting at the end of the third hour of the performance test and at the end of each successive hour, calculate the 3-hour rolling average temperature using the 1-hour average values in paragraph (c)(8)(ii) of this section. For a 6-hour test, this would result in four 3-hour averages (averages for hours 1 through 3, 2 through 4, 3 through 5, and 4 through 6).

(iv) Set the operating limit at the lowest 3-hour average temperature determined in paragraph (c)(8)(iii) of this section. New operating limits become effective on the date that the performance test report is submitted to the U.S. Environmental Protection Agency (EPA) Compliance and Emissions Data Reporting Interface (CEDRI), per the requirements of § 60.505a(b).

(d) *Performance evaluation requirements for concentration emission limit.* The owner or operator shall conduct performance evaluations of the CEMS for vapor collection and processing systems subject to the emission limits in § 60.502a(b)(2) or (c)(2) as specified in paragraph (d)(1) or (2) of this section, as applicable.

(1) If the CEMS uses a nondispersive infrared analyzer, the CEMS must be installed, evaluated, and operated according to the requirements of Performance Specification 8 of appendix B to this part. Method 25B in appendix A–7 to this part must be used as the reference method, and the calibration gas must be propane. The owner or operator may request an alternative test method under § 60.8(b) to use a CEMS that excludes the methane content in the exhaust vent.

(2) If the CEMS uses a flame ionization detector, the CEMS must be installed, evaluated, and operated according to the requirements of Performance Specification 8A of appendix B to this part. As part of the performance evaluation, conduct a relative accuracy test audit (RATA) following the procedures in Performance Specification 2, section 8.4, of appendix B to this part; the relative accuracy must meet the criteria of Performance Specification 8, section 13.2, of appendix B to this part. Method 25A in appendix A–7 to this part must be used as the reference method, and

the calibration gas must be propane. The owner or operator may exclude the methane content in the exhaust following the procedures in paragraphs (d)(2)(i) through (iv) of this section.

(i) Methane must be separated using a chromatographic column and measured by the flame ionization detector, followed by a back-flush of the chromatographic column to directly measure TOC concentration minus methane.

(ii) The CEMS must be installed, evaluated, and operated according to the requirements of Performance Specification 8A of appendix B to this part, except the target compound is TOC minus methane. As part of the performance evaluation, conduct a RATA following the procedures in Performance Specification 2, section 8.4, of appendix B to this part; the relative accuracy must meet the criteria of Performance Specification 8, section 13.2, of appendix B to this part.

(iii) If the concentration of TOC minus methane in the exhaust stream is greater than 50 ppmv, Method 25 in appendix A–7 to this part must be used as the reference method, and the calibration gas must be propane. If the concentration of TOC minus methane in the exhaust stream is 50 ppmv or less, Method 25A in appendix A–7 to this part must be used as the reference method, and the calibration gas must be propane. If Method 25A is the reference method, the procedures in paragraph (c)(6) of this section may be used to subtract methane from the TOC concentration.

(iv) The TOC concentration minus methane must be recorded at least once every 15 minutes.

(e) *Leak detection monitoring.* Conduct the leak detection monitoring specified in § 60.502a(j)(1) for the collection of equipment at a bulk gasoline terminal affected facility using one of the procedures specified in paragraph (e)(1) or (2) of this section. Conduct the leak detection monitoring specified in paragraph (a)(2) of this section using the procedures specified in paragraph (e)(1) of this section, except that the instrument reading that defines a leak is specified in paragraph (a)(2) for all equipment, including loading arms, in the gasoline loading rack affected facility and the calibration gas in paragraph (e)(1)(ii) must be at a concentration of 500 ppm methane.

(1) Method 21 in appendix A–7 to this part. The instrument reading that defines a leak is 10,000 ppmv (as methane). The instrument shall be calibrated before use each day of its use by the procedures specified in Method 21 of appendix A–7. The calibration

gases in paragraphs (e)(1)(i) and (ii) of this section must be used. The drift assessment specified in paragraph (e)(1)(iii) of this section must be performed at the end of each monitoring day.

(i) Zero air (less than 10 ppm of hydrocarbon in air); and

(ii) Methane and air at a concentration of 10,000 ppm methane.

(iii) At the end of each monitoring day, check the instrument using the same calibration gas that was used to calibrate the instrument before use. Follow the procedures specified in Method 21 of appendix A–7 to this part, section 10.1, except do not adjust the meter readout to correspond to the calibration gas value. If multiple scales are used, record the instrument reading for each scale used. Divide the arithmetic difference of the initial and post-test calibration response by the corresponding calibration gas value for each scale and multiply by 100 to express the calibration drift as a percentage. If a calibration drift assessment shows a negative drift of more than 10 percent, then re-monitor all equipment monitored since the last calibration with instrument readings between the leak definition and the leak definition multiplied by (100 minus the percent of negative drift) divided by 100. If any calibration drift assessment shows a positive drift of more than 10 percent from the initial calibration value, then, at the owner/operator's discretion, all equipment with instrument readings above the leak definition and below the leak definition multiplied by (100 plus the percent of positive drift) divided by 100 monitored since the last calibration may be re-monitored.

(2) OGI according to all the requirements in appendix K to this part. A leak is defined as any emissions plume imaged by the camera from equipment regulated by this subpart.

(f) *Annual certification test.* The annual certification test for gasoline cargo tanks shall consist of the following test methods and procedures:

(1) Method 27 of appendix A–8 to this part. Conduct the test using a time period (t) for the pressure and vacuum tests of 5 minutes. The initial pressure (P_i) for the pressure test shall be 460 mm water (H_2O) (18 in. H_2O), gauge. The initial vacuum (V_i) for the vacuum test shall be 150 mm H_2O (6 in. H_2O), gauge. The maximum allowable pressure and vacuum changes (Δp , Δv) are as shown in table 1 to this paragraph (f)(1).

TABLE 1 TO PARAGRAPH (f)(1)—ALLOWABLE GASOLINE CARGO TANK TEST PRESSURE OR VACUUM CHANGE

Gasoline cargo tank or compartment capacity, gallons (liters)	Annual certification-allowable pressure or vacuum change (Δp , Δv) in 5 minutes, mm H_2O (in. H_2O)
2,500 or more (9,464 or more)	12.7 (0.50)
1,500 to 2,499 (5,678 to 9,463)	19.1 (0.75)
1,000 to 1,499 (3,785 to 5,677)	25.4 (1.00)
999 or less (3,784 or less) ..	31.8 (1.25)

(2) Pressure test of the gasoline cargo tank's internal vapor valve as follows:

(i) After completing the tests under paragraph (f)(1) of this section, use the procedures in Method 27 to repressurize the gasoline cargo tank to 460 mm H_2O (18 in. H_2O), gauge. Close the gasoline cargo tank's internal vapor valve(s), thereby isolating the vapor return line and manifold from the gasoline cargo tank.

(ii) Relieve the pressure in the vapor return line to atmospheric pressure, then reseal the line. After 5 minutes, record the gauge pressure in the vapor return line and manifold. The maximum allowable 5-minute pressure increase is 65 mm H_2O (2.5 in. H_2O).

(3) As an alternative to paragraph (f)(1) of this section, you may use the procedure in § 63.425(i) of this chapter.

§ 60.504a Monitoring requirements.

(a) *Monitoring requirements for thermal oxidation systems complying with the combustion zone temperature operating limit.* Install, operate, and maintain a CPMS for measuring the combustion zone temperature as specified in paragraphs (a)(1) through (5) of this section.

(1) Install the temperature CPMS in the combustion (flame) zone or in the exhaust gas stream as close as practical to the combustion burners in a position that provides a representative temperature of the combustion zone of the thermal oxidation system.

(2) The temperature CPMS must be capable of measuring temperature with an accuracy of ± 1 percent over the normal range of temperatures measured.

(3) The temperature CPMS must be capable of recording the temperature at least once every 5 minutes and calculating hourly block averages that include only those 5-minute periods in which liquid product was loaded into gasoline cargo tanks.

(4) At least quarterly, inspect all components for integrity and all electrical connections for continuity,

oxidation, and galvanic corrosion, unless the CPMS has a redundant temperature sensor.

(5) Conduct calibration checks at least annually and conduct calibration checks following any period of more than 24 hours throughout which the temperature exceeded the manufacturer's specified maximum rated temperature or install a new temperature sensor.

(b) *Monitoring requirements for vapor recovery systems.* Install, calibrate, operate, and maintain a CEMS for measuring the concentration of TOC in the atmospheric vent from the vapor recovery system as specified in paragraphs (b)(1) and (2) of this section. Locate the sampling probe or other interface at a measurement location such that you obtain representative measurements of emissions from the vapor recovery system.

(1) The requirements of Performance Specification 8 of appendix B to this part, or, if the CEMS uses a flame ionization detector, Performance Specification 8A of appendix B to this part, the quality assurance requirements in Procedure 1 of appendix F to this part, and the procedures under § 60.13 must be followed for installation, evaluation, and operation of the CEMS. For CEMS certified using Performance Specification 8A of appendix B, conduct the RATA required under Procedure 1 according to the requirements in § 60.503a(d). As required by § 60.503a(b)(3), conduct annual performance evaluations of each TOC CEMS according to the requirements in § 60.503a(d). Conduct accuracy determinations quarterly and calibration drift tests daily in accordance with Procedure 1 in appendix F.

(2) The span value of the TOC CEMS must be approximately 2 times the applicable emission limit.

(c) *Monitoring requirements for flares and thermal oxidation systems for which flare monitoring alternative is provided.* Install, operate, and maintain CPMS for flares used to comply with the emission limitations in § 60.502a(c)(3), including monitors used for gasoline and total liquid product loading rates, following the requirements specified in § 63.671 of this chapter as specified in paragraphs (c)(1) through (3) of this section and conduct visible emission observations as specified in paragraph (c)(4) of this section.

(1) Substitute “pilot flame or flare flame” for each occurrence of “pilot flame.”

(2) You may elect to determine compositional analysis for net heating value with a continuous process mass spectrometer without the use of a gas

chromatograph. If you choose to determine compositional analysis for net heating value with a continuous process mass spectrometer, then you must comply with the requirements specified in paragraphs (c)(2)(i) through (vii) of this section.

(i) You must meet the requirements in § 63.671(e)(2) of this chapter. You may augment the minimum list of calibration gas components found in § 63.671(e)(2) with compounds found during a pre-survey or known to be in the gas through process knowledge.

(ii) Calibration gas cylinders must be certified to an accuracy of 2 percent and traceable to National Institute of Standards and Technology (NIST) standards.

(iii) For unknown gas components that have similar analytical mass fragments to calibration compounds, you may report the unknowns as an

increase in the overlapped calibration gas compound. For unknown compounds that produce mass fragments that do not overlap calibration compounds, you may use the response factor for the nearest molecular weight hydrocarbon in the calibration mix to quantify the unknown component's net heating value of flare vent gas (NHV_{vg}).

(iv) You may use the response factor for n-pentane to quantify any unknown components detected with a higher molecular weight than n-pentane.

(v) You must perform an initial calibration to identify mass fragment overlap and response factors for the target compounds.

(vi) You must meet applicable requirements in Performance Specification 9 of appendix B to this part for continuous monitoring system acceptance including, but not limited to,

performing an initial multi-point calibration check at three concentrations following the procedure in section 10.1 of Performance Specification 9 and performing the periodic calibration requirements listed for gas chromatographs in table 13 to part 63, subpart CC, of this chapter, for the process mass spectrometer. You may use the alternative sampling line temperature allowed under Net Heating Value by Gas Chromatograph in table 13 to part 63, subpart CC.

(vii) The average instrument calibration error (CE) for each calibration compound at any calibration concentration must not differ by more than 10 percent from the certified cylinder gas value. The CE for each component in the calibration blend must be calculated using the following equation:

$$CE = \frac{C_m - C_a}{C_a} \times 100$$

Equation 1 to paragraph (c)(2)(vii)

Where:

C_m = Average instrument response (ppm).

C_a = Certified cylinder gas value (ppm).

(3) If you use a gas chromatograph or mass spectrometer for compositional

analysis for net heating value, then you may choose to use the CE of net heating value (NHV) measured versus the cylinder tag value NHV as the measure of agreement for daily calibration and quarterly audits in lieu of determining

the compound-specific CE. The CE for NHV at any calibration level must not differ by more than 10 percent from the certified cylinder gas value. The CE for NHV must be calculated using the following equation:

$$CE = \frac{NHV_{measured} - NHV_a}{NHV_a} \times 100$$

Equation 2 to paragraph (c)(3)

Where:

NHV_{measured} = Average instrument response (Btu/scf)

NHV_a = Certified cylinder gas value (Btu/scf).

(4) If visible emissions are observed for more than one continuous minute during normal duties, visible emissions observation using Method 22 of appendix A-7 to this part must be conducted for 2 hours or until 5-minutes of visible emissions are observed.

(d) *Pressure CPMS requirements.* The owner or operator shall install, operate, and maintain a CPMS to measure the pressure of the vapor collection system to determine compliance with the standard in § 60.502a(h) as specified in paragraphs (d)(1) through (4) of this section.

(1) Install a pressure CPMS (liquid manometer, magnehelic gauge, or equivalent instrument), capable of measuring up to 500 mm of water gauge

pressure with ±2.5 mm of water precision on the terminal's vapor collection system at a pressure tap located as close as possible to the connection with the gasoline cargo tank. If necessary to obtain representative loading pressures, install pressure CPMS for each loading rack.

(2) Check the calibration of the pressure CPMS at least annually. Check the calibration of the pressure CPMS following any period of more than 24 hours throughout which the pressure exceeded the manufacturer's specified maximum rated pressure or install a new pressure sensor.

(3) At least quarterly, visually inspect components of the pressure CPMS for integrity, oxidation and galvanic corrosion, unless the system has a redundant pressure sensor.

(4) The output of the pressure CPMS must be reviewed each operating day to ensure that the pressure readings fluctuate as expected during loading of gasoline cargo tanks to verify the

pressure taps are not plugged. Plugged pressure taps must be unplugged or otherwise repaired within 24 hours or prior to the next gasoline cargo tank loading, whichever time period is longer.

(e) *Limited alternative requirements for vapor recovery systems.* If the CEMS used for measuring the concentration of TOC in the atmospheric vent from the vapor recovery system as specified in paragraph (b) of this section requires maintenance such that it is off-line for more than 15 minutes, you may follow the requirements in paragraphs (e)(1) and (2) of this section and monitor product loading quantities and regeneration cycle parameters as an alternative to the monitoring requirement in paragraph (b) for no more than 240 hours in a calendar year.

(1) Determine the quantity of liquid product loaded in gasoline cargo tanks for the past 10 adsorption cycles prior to the CEMS going off-line and select the smallest of these values as your

product loading quantity operating limit.

(2) Determine the vacuum pressure, purge gas quantities, and duration of the vacuum/purge cycles used for the past 10 desorption cycles prior to the CEMS going off-line. You must operate vapor recovery system desorption cycles as specified in paragraphs (e)(2)(i) through (iii) of this section.

(i) The vacuum pressure for each desorption cycle must be at or above the average vacuum pressure from the past 10 desorption cycles. Note: a higher vacuum means a lower absolute pressure.

(ii) Purge gas quantity used for each desorption cycle must be at or above the average quantity of purge gas used from the past 10 desorption cycles.

(iii) Duration of the vacuum/purge cycle for each desorption cycle must be at or above the average duration of the vacuum/purge cycle used from the past 10 desorption cycles.

§ 60.505a Recordkeeping and reporting.

(a) *Recordkeeping requirements.* For each affected facility listed under § 60.500a(a), keep records as specified in paragraphs (a)(1) through (9) of this section, as applicable, for a minimum of five years unless otherwise specified in this section. These recordkeeping requirements supersede the requirements in § 60.7(b).

(1) For each thermal oxidation system used to comply with the emission limitations in § 60.502a(b)(1) or (c)(1) by monitoring the combustion zone temperature as specified in § 60.502a(b)(1)(ii) or (c)(1)(ii), for each pressure CPMS used to comply with the requirements in § 60.502a(h), and for each vapor recovery system used to comply with the emission limitations in § 60.502a(b)(2) or (c)(2), maintain records, as applicable, of:

(i) The applicable operating or emission limit for the continuous monitoring system (CMS). For combustion zone temperature operating limits, include the applicable date range the limit applies based on when the performance test was conducted.

(ii) Each 3-hour rolling average combustion zone temperature measured by the temperature CPMS, each 5-minute average reading from the pressure CPMS, and each 3-hour rolling average TOC concentration (as propane) measured by the TOC CEMS.

(iii) For each deviation of the 3-hour rolling average combustion zone temperature operating limit, maximum loading pressure specified in § 60.502a(h), or 3-hour rolling average TOC concentration (as propane), the

start date and time, duration, cause, and the corrective action taken.

(iv) For each period when there was a CMS outage or the CMS was out of control, the start date and time, duration, cause, and the corrective action taken. For TOC CEMS outages where the limited alternative for vapor recovery systems in § 60.504a(e) is used, the corrective action taken shall include an indication of the use of the limited alternative for vapor recovery systems in § 60.504a(e).

(v) Each inspection or calibration of the CMS including a unique identifier, make, and model number of the CMS, and date of calibration check. For TOC CEMS, include the type of CEMS used (*i.e.*, flame ionization detector, nondispersive infrared analyzer) and an indication of whether methane is excluded from the TOC concentration reported in paragraph (a)(1)(ii) of this section.

(vi) For TOC CEMS outages where the limited alternative for vapor recovery systems in § 60.504a(e) is used, also keep records of:

(A) The quantity of liquid product loaded in gasoline cargo tanks for the past 10 adsorption cycles prior to the CEMS outage.

(B) The vacuum pressure, purge gas quantities, and duration of the vacuum/purge cycles used for the past 10 desorption cycles prior to the CEMS outage.

(C) The quantity of liquid product loaded in gasoline cargo tanks for each adsorption cycle while using the alternative.

(D) The vacuum pressure, purge gas quantities, and duration of the vacuum/purge cycles for each desorption cycle while using the alternative.

(2) For each flare used to comply with the emission limitations in § 60.502a(c)(3) and for each thermal oxidation system using the flare monitoring alternative as provided in § 60.502a(c)(1)(iii), maintain records of:

(i) The output of the monitoring device used to detect the presence of a pilot flame as required in § 63.670(b) of this chapter for a minimum of 2 years. Retain records of each 15-minute block during which there was at least one minute that no pilot flame was present when gasoline vapors were routed to the flare for a minimum of 5 years. The record must identify the start and end time and date of each 15-minute block.

(ii) Visible emissions observations as specified in paragraphs (a)(2)(ii)(A) and (B) of this section, as applicable, for a minimum of 3 years.

(A) If visible emissions observations are performed using Method 22 of appendix A-7 to this part, the record

must identify the date, the start and end time of the visible emissions observation, and the number of minutes for which visible emissions were observed during the observation. If the owner or operator performs visible emissions observations more than one time during a day, include separate records for each visible emissions observation performed.

(B) For each 2-hour period for which visible emissions are observed for more than 5 minutes in 2 consecutive hours but visible emissions observations according to Method 22 of appendix A-7 to this part were not conducted for the full 2-hour period, the record must include the date, the start and end time of the visible emissions observation, and an estimate of the cumulative number of minutes in the 2-hour period for which emissions were visible based on best information available to the owner or operator.

(iii) Each 15-minute block period during which operating values are outside of the applicable operating limits specified in § 63.670(d) through (f) of this chapter when liquid product is being loaded into gasoline cargo tanks for at least 15-minutes identifying the specific operating limit that was not met.

(iv) The 15-minute block average cumulative flows for flare vent gas or the thermal oxidation system vent gas and, if applicable, total steam, perimeter assist air, and pre-mix assist air specified to be monitored under § 63.670(i) of this chapter, along with the date and start and end time for the 15-minute block. If multiple monitoring locations are used to determine cumulative vent gas flow, total steam, perimeter assist air, and pre-mix assist air, retain records of the 15-minute block average flows for each monitoring location for a minimum of 2 years, and retain the 15-minute block average cumulative flows that are used in subsequent calculations for a minimum of 5 years. If pressure and temperature monitoring is used, retain records of the 15-minute block average temperature, pressure and molecular weight of the flare vent gas, thermal oxidation system vent gas, or assist gas stream for each measurement location used to determine the 15-minute block average cumulative flows for a minimum of 2 years, and retain the 15-minute block average cumulative flows that are used in subsequent calculations for a minimum of 5 years. If you use the supplemental gas flow rate monitoring alternative in § 60.502a(c)(3)(viii), the required minimum supplemental gas flow rate (winter and summer, if applicable) and the actual monitored supplemental gas flow rate for the 15-

minute block. Retain the supplemental gas flow rate records for a minimum of 5 years.

(v) The flare vent gas compositions or thermal oxidation system vent gas specified to be monitored under § 63.670(j) of this chapter. Retain records of individual component concentrations from each compositional analyses for a minimum of 2 years. If an NH_3 analyzer is used, retain records of the 15-minute block average values for a minimum of 5 years. If you demonstrate your gas streams have consistent composition using the provisions in § 63.670(j)(6) of this chapter as specified in § 60.502a(c)(3)(vii), retain records of the required minimum ratio of gasoline loaded to total liquid product loaded and the actual ratio on a 5-minute block basis. If applicable, you must retain records of the required minimum gasoline loading rate as specified in § 60.502a(c)(3)(vii) and the actual gasoline loading rate on a 5-minute block basis for a minimum of 5 years.

(vi) Each 15-minute block average operating parameter calculated following the methods specified in § 63.670(k) through (n) of this chapter, as applicable.

(vii) All periods during which the owner or operator does not perform monitoring according to the procedures in § 63.670(g), (i), and (j) of this chapter or in § 60.502a(c)(3)(vii) and (viii) as applicable. Note the start date, start time, and duration in minutes for each period.

(viii) An indication of whether “vapors displaced from gasoline cargo tanks during product loading” excludes periods when liquid product is loaded but no gasoline cargo tanks are being loaded or if liquid product loading is assumed to be loaded into gasoline cargo tanks according to the provisions in § 60.502a(c)(3)(i), records of all time periods when “vapors displaced from gasoline cargo tanks during product loading”, and records of time periods when there were no “vapors displaced from gasoline cargo tanks during product loading”.

(ix) If you comply with the flare tip velocity operating limit using the one-time flare tip velocity operating limit compliance assessment as provided in § 60.502a(c)(3)(ix), maintain records of the applicable one-time flare tip velocity operating limit compliance assessment for as long as you use this compliance method.

(x) For each parameter monitored using a CMS, retain the records specified in paragraphs (a)(2)(x)(A) through (C) of this section, as applicable:

(A) For each deviation, record the start date and time, duration, cause, and corrective action taken.

(B) For each period when there is a CMS outage or the CMS is out of control, record the start date and time, duration, cause, and corrective action taken.

(C) Each inspection or calibration of the CMS including a unique identifier, make, and model number of the CMS, and date of calibration check.

(3) The gasoline cargo tank vapor tightness documentation required under § 60.502a(e)(1) for each gasoline cargo tank loading at the affected facility shall be kept on file at the terminal in either a hardcopy or electronic form available for inspection. The documentation shall include, at a minimum, the following information:

(i) Test title: Annual Certification Test—EPA Method 27 or Railcar Bubble Leak Test Procedure.

(ii) Cargo tank owner's name and address.

(iii) Cargo tank identification number.

(iv) Test location and date.

(v) Tester name and signature.

(vi) Witnessing inspector, if any: Name, signature, and affiliation.

(vii) Vapor tightness repair: Nature of repair work and when performed in relation to vapor tightness testing.

(viii) Test results: Tank or compartment capacity, test pressure; pressure or vacuum change, mm of water; time period of test; number of leaks found with instrument; and leak definition.

(4) Records of each instance in which liquid product was loaded into a gasoline cargo tank for which vapor tightness documentation required under § 60.502a(e)(1) was not provided or available in the terminal's records. These records shall include, at a minimum:

(i) Cargo tank owner and address.

(ii) Cargo tank identification number.

(iii) Date and time liquid product was loaded into a gasoline cargo tank without proper documentation.

(iv) Date proper documentation was received or statement that proper documentation was never received.

(5) Records of each instance when liquid product was loaded into gasoline cargo tanks not using submerged filling, as defined in § 60.501a, not equipped with vapor collection equipment that is compatible with the terminal's vapor collection system, or not properly connected to the terminal's vapor collection system. These records shall include, at a minimum:

(i) Date and time of liquid product loading into gasoline cargo tank not using submerged filling, improperly equipped, or improperly connected.

(ii) Type of deviation (e.g., not submerged filling, incompatible equipment, not properly connected).

(iii) Cargo tank identification number.

(6) A record [list, summary description, or diagram(s) showing the location] of all equipment in gasoline service at the collection of equipment at a bulk gasoline terminal affected facility and at the loading rack affected facility. A record of each leak inspection and leak identified under §§ 60.503a(a)(2) and 60.502a(j) as specified in paragraphs (a)(6)(i) through (iv) of this section:

(i) For each leak inspection, keep the following records:

(A) An indication if the leak inspection was conducted under § 60.502a(j) or § 60.503a(a)(2).

(B) Leak determination method used for the leak inspection.

(ii) For leak inspections conducted with Method 21 of appendix A-7 to this part, keep the following additional records:

(A) Date of inspection.

(B) Inspector name.

(C) Monitoring instrument identification.

(D) Identification of all equipment surveyed and the instrument reading for each piece of equipment.

(E) Date and time of instrument calibration and initials of operator performing the calibration.

(F) Calibration gas cylinder identification, certification date, and certified concentration.

(G) Instrument scale used.

(H) Results of the daily calibration drift assessment.

(iii) For leak inspections conducted with OGI, keep the records specified in section 12 of appendix K to this part.

(iv) For each leak detected during a leak inspection or by audio/visual/olfactory methods during normal duties, record the following information:

(A) The equipment type and identification number.

(B) The date the leak was detected, the name of the person who found the leak, the nature of the leak (i.e., vapor or liquid), and the method of detection (i.e., audio/visual/olfactory, Method 21 of appendix A-7 to this part, or OGI).

(C) The dates of each attempt to repair the leak and the repair methods applied in each attempt to repair the leak.

(D) The date of successful repair of the leak, the method of monitoring used to confirm the repair, and if Method 21 of appendix A-7 to this part is used to confirm the repair, the maximum instrument reading measured by Method 21 of appendix A-7. If OGI is used to confirm the repair, keep video footage of the repair confirmation.

(E) For each repair delayed beyond 15 calendar days after discovery of the leak, record "Repair delayed", the reason for the delay, and the expected date of successful repair. The owner or operator (or designate) whose decision it was that repair could not be carried out in the 15-calendar-day timeframe must sign the record.

(F) For each leak that is not repairable, the maximum instrument reading measured by Method 21 of appendix A-7 to this part at the time the leak is determined to be not repairable, a video captured by the OGI camera showing that emissions are still visible, or a signed record that the leak is still detectable via audio/visual/olfactory methods.

(7) Records of each performance test or performance evaluation conducted on the affected facility and each notification and report submitted to the Administrator. For each performance test, include an indication of whether liquid product loading is assumed to be loaded into gasoline cargo tanks or periods when liquid product is loaded but no gasoline cargo tanks are being loaded are excluded in the determination of the combustion zone temperature operating limit according to the provision in § 60.503a(c)(8)(ii).

(8) Records of all 5-minute time periods during which liquid product is loaded into gasoline cargo tanks or assumed to be loaded into gasoline cargo tanks and records of all 5-minute time periods when there was no liquid product loaded into gasoline cargo tanks.

(9) Any records required to be maintained by this subpart that are submitted electronically via the EPA's Compliance and Emissions Reporting Interface (CEDRI) may be maintained in electronic format. This ability to maintain electronic copies does not affect the requirement for facilities to make records, data, and reports available upon request to a delegated authority or the EPA as part of an on-site compliance evaluation.

(b) *Reporting requirements for performance tests and evaluations.* Within 60 days after the date of completing each performance test and each CEMS performance evaluation required by this subpart, you must submit the results following the procedures specified in paragraph (e) of this section. As required by § 60.8(f)(2)(iv), you must include the value for the combustion zone temperature operating parameter limit set based on your performance test in the performance test report. Data collected using test methods supported by the EPA's Electronic Reporting Tool

(ERT) and performance evaluations of CEMS measuring RATA pollutants that are supported by the EPA's ERT as listed on the EPA's ERT website (<https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert>) at the time of the test or performance evaluation must be submitted in a file format generated using the EPA's ERT. Alternatively, you may submit an electronic file consistent with the extensible markup language (XML) schema listed on the EPA's ERT website. Data collected using test methods that are not supported by the EPA's ERT and performance evaluations of CEMS measuring RATA pollutants that are not supported by the EPA's ERT as listed on the EPA's ERT website at the time of the test or performance evaluation must be included as an attachment in the ERT or an alternate electronic file.

(c) *Reporting requirements for semiannual report.* You must submit to the Administrator semiannual reports with the applicable information in paragraphs (c)(1) through (7) of this section by the dates specified in paragraph (d) of this section following the procedure specified in paragraph (e) of this section. For this subpart, the semiannual reports supersede the excess emissions and monitoring systems performance report and/or summary report form required under § 60.7. Beginning on July 8, 2024, or once the report template for this subpart has been available on the CEDRI website (<https://www.epa.gov/electronic-reporting-air-emissions/cedri>) for one year, whichever date is later, submit all subsequent reports using the appropriate electronic report template on the CEDRI website for this subpart and following the procedure specified in paragraph (e). The date report templates become available will be listed on the CEDRI website. Unless the Administrator or delegated State agency or other authority has approved a different schedule for submission of reports, the report must be submitted by the deadline specified in this subpart, regardless of the method in which the report is submitted.

(1) Report the following general facility information:

- (i) Facility name.
- (ii) Facility physical address, including city, county, and State.
- (iii) Latitude and longitude of facility's physical location. Coordinates must be in decimal degrees with at least five decimal places.

(iv) The following information for the contact person:

- (A) Name.
- (B) Mailing address.

(C) Telephone number.

(D) Email address.

(v) Date of report and beginning and ending dates of the reporting period. You are no longer required to provide the date of report when the report is submitted via CEDRI.

(vi) Statement by a responsible official, with that official's name, title, and signature, certifying the truth, accuracy, and completeness of the content of the report. If your report is submitted via CEDRI, the certifier's electronic signature during the submission process replaces the requirement in this paragraph (c)(1)(vi).

(2) For each thermal oxidation system used to comply with the emission limitations in § 60.502a(b)(1) or (c)(1) by monitoring the combustion zone temperature as specified in § 60.502a(b)(1)(ii) or (c)(1)(ii), for each pressure CPMS used to comply with the requirements in § 60.502a(h), and for each vapor recovery system used to comply with the emission limitations in § 60.502a(b)(2) or (c)(2) report the following information for the CMS:

(i) For all instances when the temperature CPMS measured 3-hour rolling averages below the established operating limit or when the vapor collection system pressure exceeded the maximum loading pressure specified in § 60.502a(h) when liquid product was being loaded into gasoline cargo tanks or when the TOC CEMS measured 3-hour rolling average concentrations higher than the applicable emission limitation when the vapor recovery system was operating:

(A) The date and start time of the deviation.

(B) The duration of the deviation in hours.

(C) Each 3-hour rolling average combustion zone temperature, average pressure, or 3-hour rolling average TOC concentration during the deviation. For TOC concentration, indicate whether methane is excluded from the TOC concentration.

(D) A unique identifier for the CMS.

(E) The make, model number, and date of last calibration check of the CMS.

(F) The cause of the deviation and the corrective action taken.

(ii) For all instances that the temperature CPMS for measuring the combustion zone temperature or pressure CPMS was not operating or was out of control when liquid product was loaded into gasoline cargo tanks, or the TOC CEMS was not operating or was out of control when the vapor recovery system was operating:

(A) The date and start time of the deviation.

(B) The duration of the deviation in hours.

(C) A unique identifier for the CMS.

(D) The make, model number, and date of last calibration check of the CMS.

(E) The cause of the deviation and the corrective action taken. For TOC CEMS outages where the limited alternative for vapor recovery systems in § 60.504a(e) is used, the corrective action taken shall include an indication of the use of the limited alternative for vapor recovery systems in § 60.504a(e).

(F) For TOC CEMS outages where the limited alternative for vapor recovery systems in § 60.504a(e) is used, report either an indication that there were no deviations from the operating limits when using the limited alternative or report the number of each of the following types of deviations that occurred during the use of the limited alternative for vapor recovery systems in § 60.504a(e).

(1) The number of adsorption cycles when the quantity of liquid product loaded in gasoline cargo tanks exceeded the operating limit established in § 60.504a(e)(1). Enter 0 if no deviations of this type.

(2) The number of desorption cycles when the vacuum pressure was below the average vacuum pressure as specified in § 60.504a(e)(2)(i). Enter 0 if no deviations of this type.

(3) The number of desorption cycles when the quantity of purge gas used was below the average quantity of purge gas as specified in § 60.504a(e)(2)(ii). Enter 0 if no deviations of this type.

(4) The number of desorption cycles when the duration of the vacuum/purge cycle was less than the average duration as specified in § 60.504a(e)(2)(iii). Enter 0 if no deviations of this type.

(3) For each flare used to comply with the emission limitations in § 60.502a(c)(3) and for each thermal oxidation system using the flare monitoring alternative as provided in § 60.502a(c)(1)(iii), report:

(i) The date and start and end times for each of the following instances:

(A) Each 15-minute block during which there was at least one minute when gasoline vapors were routed to the flare and no pilot flame was present.

(B) Each period of 2 consecutive hours during which visible emissions exceeded a total of 5 minutes.

Additionally, report the number of minutes for which visible emissions were observed during the observation or an estimate of the cumulative number of minutes in the 2-hour period for which emissions were visible based on best information available to the owner or operator.

(C) Each 15-minute period for which the applicable operating limits specified in § 63.670(d) through (f) of this chapter were not met. You must identify the specific operating limit that was not met. Additionally, report the information in paragraphs (c)(3)(i)(C)(1) through (3) of this section, as applicable.

(1) If you use the loading rate operating limits as determined in § 60.502a(c)(3)(vii) alone or in combination with the supplemental gas flow rate monitoring alternative in § 60.502a(c)(3)(viii), the required minimum ratio and the actual ratio of gasoline loaded to total product loaded for the rolling 15-minute period and, if applicable, the required minimum quantity and the actual quantity of gasoline loaded, in gallons, for the rolling 15-minute period.

(2) If you use the supplemental gas flow rate monitoring alternative in § 60.502a(c)(3)(viii), the required minimum supplemental gas flow rate and the actual supplemental gas flow rate including units of flow rates for the 15-minute block.

(3) If you use parameter monitoring systems other than those specified in paragraphs (c)(3)(i)(C)(1) and (2) of this section, the value of the net heating value operating parameter(s) during the deviation determined following the methods in § 63.670(k) through (n) of this chapter as applicable.

(ii) The start date, start time, and duration in minutes for each period when “vapors displaced from gasoline cargo tanks during product loading” were routed to the flare or thermal oxidation system and the applicable monitoring was not performed.

(iii) For each instance reported under paragraphs (c)(3)(i) and (ii) of this section that involves CMS, report the following information:

(A) A unique identifier for the CMS.

(B) The make, model number, and date of last calibration check of the CMS.

(C) The cause of the deviation or downtime and the corrective action taken.

(4) For any instance in which liquid product was loaded into a gasoline cargo tank for which vapor tightness documentation required under § 60.502a(e)(1) was not provided or available in the terminal's records, report:

(i) Cargo tank owner and address.

(ii) Cargo tank identification number.

(iii) Date and time liquid product was loaded into a gasoline cargo tank without proper documentation.

(iv) Date proper documentation was received or statement that proper documentation was never received.

(5) For each instance when liquid product was loaded into gasoline cargo tanks not using submerged filling, as defined in § 60.501a, not equipped with vapor collection equipment that is compatible with the terminal's vapor collection system, or not properly connected to the terminal's vapor collection system, report:

(i) Date and time of liquid product loading into gasoline cargo tank not using submerged filling, improperly equipped, or improperly connected.

(ii) Type of deviation (*e.g.*, not submerged filling, incompatible equipment, or not properly connected).

(iii) Cargo tank identification number.

(6) Report the following information for each leak inspection required under §§ 60.502a(j)(1) and 60.503a(a)(2) and each leak identified under § 60.502a(j)(2).

(i) For each leak detected during a leak inspection required under §§ 60.502a(j)(1) and 60.503a(a)(2), report:

(A) The date of inspection.

(B) The leak determination method (OGI or Method 21 of appendix A-7 to this part).

(C) The total number and type of equipment for which leaks were detected.

(D) The total number and type of equipment for which leaks were repaired within 15 calendar days.

(E) The total number and type of equipment for which no repair attempt was made within 5 calendar days of the leaks being identified.

(F) The total number and type of equipment placed on the delay of repair, as specified in § 60.502a(j)(8).

(ii) For leaks identified under § 60.502a(j)(2), report:

(A) The total number and type of equipment for which leaks were identified.

(B) The total number and type of equipment for which leaks were repaired within 15 calendar days.

(C) The total number and type of equipment for which no repair attempt was made within 5 calendar days of the leaks being identified.

(D) The total number and type of equipment placed on the delay of repair, as specified in § 60.502a(j)(8).

(iii) The total number of leaks on the delay of repair list at the start of the reporting period.

(iv) The total number of leaks on the delay of repair list at the end of the reporting period.

(v) For each leak that was on the delay of repair list at any time during the reporting period, report:

(A) Unique equipment identification number.

(B) Type of equipment.

(C) Leak determination method (OGI, Method 21 of appendix A-7 to this part, or audio, visual, or olfactory).

(D) The reason(s) why the repair was not feasible within 15 calendar days.

(E) If applicable, the date repair was completed.

(7) If there were no deviations from the emission limitations, operating parameters, or work practice standards, then provide a statement that there were no deviations from the emission limitations, operating limits, or work practice standards during the reporting period. If there were no periods during which a CMS (including a CEMS or CPMS) was inoperable or out-of-control, then provide a statement that there were no periods during which a CMS was inoperable or out-of-control during the reporting period.

(d) *Timeframe for semiannual report submissions.* (1) The first semiannual report will cover the date starting with the date the source first becomes an affected facility subject to this subpart and ending with the last day of the month five months later. For example, if the source becomes an affected facility on April 15, the first semiannual report would cover the period from April 15 to September 30. The first semiannual report must be submitted on or before the last day of the month two months after the last date covered by the semiannual report. In this example, the first semiannual report would be due November 30.

(2) Subsequent semiannual reports will cover subsequent 6 calendar month periods with each report due on or before the last day of the month two months after the last date covered by the semiannual report.

(e) *Requirements for electronically submitting reports.* For reports required to be submitted following the procedures specified in this paragraph (e), you must submit reports to the EPA via CEDRI, which can be accessed through the EPA's Central Data Exchange (CDX) (<https://cdx.epa.gov/>). The EPA will make all the information submitted through CEDRI available to the public without further notice to you. Do not use CEDRI to submit information you claim as confidential business information (CBI). Although we do not expect persons to assert a claim of CBI, if you wish to assert a CBI claim for some of the information in the report, you must submit a complete file in the format specified in this subpart, including information claimed to be CBI, to the EPA following the procedures in paragraphs (e)(1) and (2) of this section. Clearly mark the part or all of the information that you claim to

be CBI. Information not marked as CBI may be authorized for public release without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. All CBI claims must be asserted at the time of submission. Anything submitted using CEDRI cannot later be claimed CBI. Furthermore, under CAA section 114(c), emissions data are not entitled to confidential treatment, and the EPA is required to make emissions data available to the public. Thus, emissions data will not be protected as CBI and will be made publicly available. You must submit the same file submitted to the CBI office with the CBI omitted to the EPA via the EPA's CDX as described earlier in this paragraph (e).

(1) The preferred method to receive CBI is for it to be transmitted electronically using email attachments, File Transfer Protocol, or other online file sharing services. Electronic submissions must be transmitted directly to the OAQPS CBI Office at the email address oaqpscbi@epa.gov, and as described above, should include clear CBI markings. ERT files should be flagged to the attention of the Group Leader, Measurement Policy Group; all other files should be flagged to the attention of the Gasoline Distribution Sector Lead. If assistance is needed with submitting large electronic files that exceed the file size limit for email attachments, and if you do not have your own file sharing service, please email oaqpscbi@epa.gov to request a file transfer link.

(2) If you cannot transmit the file electronically, you may send CBI information through the postal service to the following address: U.S. EPA, Attn: OAQPS Document Control Officer, Mail Drop: C404-02, 109 T.W. Alexander Drive, P.O. Box 12055, RTP, NC 27711. ERT files should be flagged to the attention of the Group Leader, Measurement Policy Group, and all other files should also be flagged to the attention of the Gasoline Distribution Sector Lead. The mailed CBI material should be double wrapped and clearly marked. Any CBI markings should not show through the outer envelope.

(f) *Claims of EPA system outage.* If you are required to electronically submit a report through CEDRI in the EPA's CDX, you may assert a claim of EPA system outage for failure to timely comply with that reporting requirement. To assert a claim of EPA system outage, you must meet the requirements outlined in paragraphs (f)(1) through (7) of this section.

(1) You must have been or will be precluded from accessing CEDRI and

submitting a required report within the time prescribed due to an outage of either the EPA's CEDRI or CDX systems.

(2) The outage must have occurred within the period of time beginning five business days prior to the date that the submission is due.

(3) The outage may be planned or unplanned.

(4) You must submit notification to the Administrator in writing as soon as possible following the date you first knew, or through due diligence should have known, that the event may cause or has caused a delay in reporting.

(5) You must provide to the Administrator a written description identifying:

(i) The date(s) and time(s) when CDX or CEDRI was accessed and the system was unavailable;

(ii) A rationale for attributing the delay in reporting beyond the regulatory deadline to EPA system outage;

(iii) A description of measures taken or to be taken to minimize the delay in reporting; and

(iv) The date by which you propose to report, or if you have already met the reporting requirement at the time of the notification, the date you reported.

(6) The decision to accept the claim of EPA system outage and allow an extension to the reporting deadline is solely within the discretion of the Administrator.

(7) In any circumstance, the report must be submitted electronically as soon as possible after the outage is resolved.

(g) *Claims of force majeure.* If you are required to electronically submit a report through CEDRI in the EPA's CDX, you may assert a claim of *force majeure* for failure to timely comply with that reporting requirement. To assert a claim of *force majeure*, you must meet the requirements outlined in paragraphs (g)(1) through (5) of this section.

(1) You may submit a claim if a *force majeure* event is about to occur, occurs, or has occurred or there are lingering effects from such an event within the period of time beginning five business days prior to the date the submission is due. For the purposes of this section, a *force majeure* event is defined as an event that will be or has been caused by circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevents you from complying with the requirement to submit a report electronically within the time period prescribed. Examples of such events are acts of nature (e.g., hurricanes, earthquakes, or floods), acts of war or terrorism, or equipment failure or safety hazard beyond the control of the

affected facility (e.g., large scale power outage).

(2) You must submit notification to the Administrator in writing as soon as possible following the date you first knew, or through due diligence should have known, that the event may cause or has caused a delay in reporting.

(3) You must provide to the Administrator:

(i) A written description of the *force majeure* event;

(ii) A rationale for attributing the delay in reporting beyond the regulatory deadline to the *force majeure* event;

(iii) A description of measures taken or to be taken to minimize the delay in reporting; and

(iv) The date by which you propose to report, or if you have already met the reporting requirement at the time of the notification, the date you reported.

(4) The decision to accept the claim of *force majeure* and allow an extension to the reporting deadline is solely within the discretion of the Administrator.

(5) In any circumstance, the reporting must occur as soon as possible after the *force majeure* event occurs.

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

■ 5. The authority citation for part 63 continues to read as follows:

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

Subpart R—National Emission Standards for Gasoline Distribution Facilities (Bulk Gasoline Terminals and Pipeline Breakout Stations)

■ 6. Section 63.420 is amended by

■ a. Revising paragraphs (a) introductory text, (a)(1) introductory text, (a)(2), (b) introductory text, (b)(1) introductory text, (b)(2), (c) introductory text, (c)(2), (d) introductory text, (d)(2), (g), (i), and (j); and

■ b. Adding paragraph (k).

The revisions and addition read as follows:

§ 63.420 Applicability.

(a) Prior to May 8, 2027, the affected source to which the provisions of this subpart apply is each bulk gasoline terminal, except those bulk gasoline terminals meeting either of the criteria listed in paragraph (a)(1) or (2) of this section. No later than May 8, 2027, the affected source to which the provisions of this subpart apply is each bulk gasoline terminal located at a major source as defined in § 63.2.

(1) Bulk gasoline terminals for which the owner or operator has documented

and recorded to the Administrator's satisfaction that the result, E_T , of the following equation is less than 1, and complies with requirements in paragraphs (c), (d), (e), and (f) of this section:

* * * * *

(2) Bulk gasoline terminals for which the owner or operator has documented and recorded to the Administrator's satisfaction that the facility is not a major source, or is not located within a contiguous area and under common control of a facility that is a major source, as defined in § 63.2.

(b) Prior to May 8, 2027, the affected source to which the provisions of this subpart apply is each pipeline breakout station, except those pipeline breakout stations meeting either of the criteria listed in paragraph (b)(1) or (2) of this section. No later than May 8, 2027, the affected source to which the provisions of this subpart apply is each pipeline breakout station located at a major source as defined in § 63.2.

(1) Pipeline breakout stations for which the owner or operator has documented and recorded to the Administrator's satisfaction that the result, E_P , of the following equation is less than 1, and complies with requirements in paragraphs (c), (d), (e), and (f) of this section:

* * * * *

(2) Pipeline breakout stations for which the owner or operator has documented and recorded to the Administrator's satisfaction that the facility is not a major source, or is not located within a contiguous area and under common control of a facility that is a major source, as defined in § 63.2.

(c) Prior to May 8, 2027, a facility for which the results, E_T or E_P , of the calculation in paragraph (a)(1) or (b)(1) of this section has been documented and is less than 1.0 but greater than or equal to 0.50, is exempt from the requirements of this subpart, except that the owner or operator shall:

* * * * *

(2) Maintain records and provide reports in accordance with the provisions of § 63.428(l)(4).

(d) Prior to May 8, 2027, a facility for which the results, E_T or E_P , of the calculation in paragraph (a)(1) or (b)(1) of this section has been documented and is less than 0.50, is exempt from the requirements of this subpart, except that the owner or operator shall:

* * * * *

(2) Maintain records and provide reports in accordance with the provisions of § 63.428(l)(5).

* * * * *

(g) Each owner or operator of a bulk gasoline terminal or pipeline breakout station subject to the provisions of this subpart that is also subject to applicable provisions of part 60, subpart Kb, XX, or XXa, of this chapter shall comply only with the provisions in each subpart that contain the most stringent control requirements for that facility.

* * * * *

(i) A bulk gasoline terminal or pipeline breakout station with a Standard Industrial Classification code 2911 located within a contiguous area and under common control with a refinery complying with §§ 63.646, 63.648, 63.649, 63.650, and 63.660 is not subject to the standards in this subpart, except as specified in § 63.650.

(j) Notwithstanding any other provision of this subpart, the December 14, 1995, compliance date for existing facilities in §§ 63.424(e) and 63.428(a), (l)(4)(i), and (l)(5)(i) is stayed from December 8, 1995, to March 7, 1996.

(k) Each owner or operator of an affected source bulk gasoline terminal or pipeline breakout station must comply with the standards in this part at all times. At all times, the owner or operator must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions. The general duty to minimize emissions does not require the owner or operator to make any further efforts to reduce emissions if levels required by the applicable standard have been achieved. Determination of whether a source is operating in compliance with operation and maintenance requirements will be based on information available to the Administrator which may include, but is not limited to, monitoring results, review of operation and maintenance procedures, review of operation and maintenance records, and inspection of the source.

■ 7. Section 63.421 is amended by:

■ a. Revising the introductory text and the definitions of "Bulk gasoline terminal" and "Flare";

■ b. Adding in alphabetical order a definition for "Gasoline";

■ c. Revising the definition of "Pipeline breakout station";

■ d. Adding in alphabetical order a definition for "Submerged filling"; and

■ e. Revising the definition for "Thermal oxidation system".

The revisions and additions read as follows:

§ 63.421 Definitions.

As used in this subpart, all terms not defined herein shall have the meaning given them in the Act; in subparts A, K, Ka, Kb, and Xxa of part 60 of this chapter; or in subpart A of this part. All terms defined in both subpart A of part 60 of this chapter and subpart A of this part shall have the meaning given in subpart A of this part. For purposes of this subpart, definitions in this section supersede definitions in other parts or subparts.

Bulk gasoline terminal means:

(1) Prior to May 8, 2027, any gasoline facility which receives gasoline by pipeline, ship or barge, and has a gasoline throughput greater than 75,700 liters per day. Gasoline throughput shall be the maximum calculated design throughput as may be limited by compliance with an enforceable condition under Federal, State, or local law and discoverable by the Administrator and any other person.

(2) On or after May 8, 2027, any gasoline facility which receives gasoline by pipeline, ship, barge, or cargo tank and subsequently loads all or a portion of the gasoline into gasoline cargo tanks for transport to bulk gasoline plants or gasoline dispensing facilities and has a gasoline throughput greater than 20,000 gallons per day (75,700 liters per day). Gasoline throughput shall be the maximum calculated design throughput for the facility as may be limited by compliance with an enforceable condition under Federal, State, or local law and discoverable by the Administrator and any other person.

* * * * *

Flare means a thermal combustion device using an open or shrouded flame (without full enclosure) such that the pollutants are not emitted through a conveyance suitable to conduct a performance test.

Gasoline means any petroleum distillate or petroleum distillate/alcohol blend having a Reid vapor pressure of 4.0 pounds per square inch (27.6 kilopascals) or greater, which is used as a fuel for internal combustion engines.

* * * * *

Pipeline breakout station means:

(1) Prior to May 8, 2027, a facility along a pipeline containing storage vessels used to relieve surges or receive and store gasoline from the pipeline for reinjection and continued transportation by pipeline or to other facilities.

(2) On or after May 8, 2027, a facility along a pipeline containing storage vessels used to relieve surges or receive and store gasoline from the pipeline for reinjection and continued transportation by pipeline to other facilities. *Pipeline*

breakout stations do not have loading racks where gasoline is loaded into cargo tanks. If any gasoline is loaded into cargo tanks, the facility is a bulk gasoline terminal for the purposes of this subpart provided the facility-wide gasoline throughput (including pipeline throughput) exceeds the limits specified for bulk gasoline terminals.

* * * * *

Submerged filling means the filling of a gasoline cargo tank through a submerged fill pipe whose discharge is no more than the 6 inches from the bottom of the tank. Bottom filling of gasoline cargo tanks is included in this definition.

Thermal oxidation system means an enclosed combustion device used to mix and ignite fuel, air pollutants, and air to provide a flame to heat and oxidize hazardous air pollutants. Auxiliary fuel may be used to heat air pollutants to combustion temperatures. *Thermal oxidation systems* emit pollutants through a conveyance suitable to conduct a performance test.

* * * * *

■ 8. Revise § 63.422 to read as follows:

§ 63.422 Standards: Loading racks.

(a) You must meet either the requirements in paragraph (a)(1) or (2) of this section, as applicable in paragraph (d) of this section.

(1) Each owner or operator of loading racks at a bulk gasoline terminal subject to the provisions of this subpart shall comply with the requirements in § 60.502 of this chapter except for paragraphs (b), (c), and (j) of that section. For purposes of this section, the term “affected facility” used in § 60.502 means the loading racks that load gasoline cargo tanks at the bulk gasoline terminals subject to the provisions of this subpart.

(2) Each owner or operator of loading racks at a bulk gasoline terminal subject to the provisions of this subpart shall comply with the requirements in § 60.502a of this chapter except for paragraphs (b) and (j) of that section and shall comply with the provisions in paragraphs (b) through (c) of this section. For purposes of this section, the term “gasoline loading rack affected facility” used in § 60.502a means “the loading racks that load gasoline cargo tanks at the bulk gasoline terminals subject to the provisions of this subpart.” For purposes of this subpart, the term “vapor-tight gasoline cargo tanks” used in § 60.502a(e) of this chapter shall have the meaning given in § 63.421. As an alternative to the pressure monitoring requirements in § 60.504a(d) of this chapter, you may

comply with the requirements specified in § 63.427(f).

(b) You must meet either the emission limits in paragraph (b)(1) or (2) of this section, as applicable in paragraph (d) of this section.

(1) Emissions to the atmosphere from the vapor collection and processing systems due to the loading of gasoline cargo tanks shall not exceed 10 milligrams of total organic compounds per liter of gasoline loaded.

(2) You must comply with the provisions in § 60.502a(c) of this chapter for all loading racks that load gasoline cargo tanks at the bulk gasoline terminals subject to the provisions of this subpart, not just those that are modified or reconstructed.

(c) Each owner or operator of a bulk gasoline terminal subject to the provisions of this subpart shall discontinue loading any cargo tank that fails vapor tightness according to the test requirements in § 63.425(f), (g), and (h) until vapor tightness documentation for that gasoline cargo tank is obtained which documents that:

(1) The tank truck or railcar gasoline cargo tank has been repaired, retested, and subsequently passed either the annual certification test described in § 63.425(e) or the railcar bubble test described in § 63.425(i); or

(2) For each gasoline cargo tank failing the test in § 63.425(f) at the facility, the cargo tank meets the test requirements in either § 63.425(g) or (h); or

(3) For each gasoline cargo tank failing the test in § 63.425(g) at the facility, the cargo tank meets the test requirements in § 63.425(h).

(d) Each owner or operator shall meet the requirements in this section as expeditiously as practicable, but no later than the dates provided in paragraphs (d)(1) through (3) of this section.

(1) For facilities that commenced construction on or before February 8, 1994, each owner or operator shall meet the requirements in paragraphs (a)(1), (b)(1), and (c) of this section no later than December 15, 1997. Beginning no later than May 8, 2027, paragraphs (a)(1) and (b)(1) of this section no longer apply and each owner or operator shall meet the requirements in paragraphs (a)(2), (b)(2), and (c) of this section.

(2) For facilities that commenced construction after February 8, 1994, and on or before June 10, 2022, each owner or operator shall meet the requirements in paragraphs (a)(1), (b)(1), and (c) of this section upon startup. Beginning no later than May 8, 2027, paragraphs (a)(1) and (b)(1) of this section no longer apply and each owner or operator shall meet

the requirements in paragraphs (a)(2), (b)(2), and (c) of this section.

(3) For facilities that commenced construction after June 10, 2022, each owner or operator shall meet the requirements in paragraphs (a)(2), (b)(2), and (c) of this section upon startup or July 8, 2024, whichever is later.

(e) As an alternative to § 60.502(h) and (i) or § 60.502a(h) and (i) of this chapter as specified in paragraph (a) of this section, the owner or operator may comply with paragraphs (e)(1) and (2) of this section.

(1) The owner or operator shall design and operate the vapor processing system, vapor collection system, and liquid loading equipment to prevent gauge pressure in the railcar gasoline cargo tank from exceeding the applicable test limits in § 63.425(e) and (i) during product loading. This level is not to be exceeded when measured by the procedures specified in § 60.503(d) of this chapter during any performance test or performance evaluation conducted under § 63.425(b) or (c).

(2) No pressure-vacuum vent in the bulk gasoline terminal's vapor processing system or vapor collection system may begin to open at a system pressure less than the applicable test limits in § 63.425(e) or (i).

■ 9. Revise § 63.423 to read as follows:

§ 63.423 Standards: Storage vessels.

(a) Each owner or operator of a bulk gasoline terminal or pipeline breakout station subject to the provisions of this subpart shall equip each gasoline storage vessel according to the requirements in paragraph (a)(1) or (2) of this section, as applicable in paragraph (c) of this section.

(1) Equip each gasoline storage vessel with a design capacity greater than or equal to 75 m³ according to the requirements in § 60.112b(a)(1) through (4) of this chapter, except for the requirements in § 60.112b(a)(1)(iv) through (ix) and (a)(2)(ii) of this chapter.

(2) Equip each gasoline external floating roof storage vessel with a design capacity greater than or equal to 75 m³ according to the requirements in § 60.112b(a)(2)(ii) of this chapter if such storage vessel does not currently meet the requirements in paragraph (a)(1) of this section.

(b) Each owner or operator of a bulk gasoline terminal or pipeline breakout station subject to the provisions of this subpart shall equip each gasoline storage vessel according to the requirements in paragraphs (b)(1) of this section and, if a floating roof is used, either paragraph (b)(2) or (3) of this section, as applicable in paragraph (c) of this section.

(1) Equip, maintain, and operate each gasoline storage vessel with a design capacity greater than or equal to 75 m³ according to the requirements in § 60.112b(a)(1) through (4) of this chapter, except for the requirements in § 60.112b(a)(1)(iv) through (ix) of this chapter. Alternatively, you may elect to equip, maintain, and operate each affected gasoline storage vessel with a design capacity greater than or equal to 75 m³ according to the requirements in subpart WW of this part as specified in § 60.110b(e)(5) of this chapter.

(2) Equip, maintain, and operate each internal floating control system to maintain the vapor concentration within the storage vessel above the floating roof at or below 25 percent of the lower explosive limit (LEL) on a 5-minute rolling average basis without the use of purge gas. This standard may require additional controls beyond those specified in paragraph (b)(1) of this section. Compliance with this paragraph (b)(2) shall be determined using the methods in § 63.425(j). A deviation of the LEL level is considered an inspection failure under § 60.113b(a)(2) of this chapter or § 63.1063(d)(2) and must be remedied as such. Any repairs made must be confirmed effective through re-monitoring of the LEL and meeting the level in this paragraph (b)(2) within the timeframes specified in § 60.113b(a)(2) or § 63.1063(e), as applicable.

(3) Equip, maintain, and operate each gasoline external floating roof storage vessel with a design capacity greater than or equal to 75 m³ with fitting controls as specified in § 60.112b(a)(2)(ii) of this chapter.

(c) Each gasoline storage vessel at bulk gasoline terminals and pipeline breakout stations shall be in compliance with the requirements of this section as expeditiously as practicable, but no later than the dates provided in paragraphs (c)(1) through (3) of this section.

(1) For facilities that commenced construction on or before February 8, 1994, each gasoline storage vessel shall meet the requirements in paragraph (a) of this section no later than December 15, 1997. Beginning no later than May 8, 2027, paragraph (a) of this section no longer applies and each gasoline storage vessel shall meet the requirements in paragraphs (b)(1) and (2) of this section no later than May 8, 2027. If applicable, the fitting controls required in paragraph (b)(3) of this section must be installed the next time the storage vessel is completely emptied and degassed, or by May 8, 2034, whichever occurs first.

(2) For facilities that commenced construction after February 8, 1994, and on or before June 10, 2022, each

gasoline storage vessel shall meet the requirements in paragraph (a) of this section upon startup. Beginning no later than May 8, 2027, paragraph (a) of this section no longer applies and each gasoline storage vessel shall meet the requirements in paragraphs (b)(1) and (2) of this section no later than May 8, 2027. If applicable, the fitting controls required in paragraph (b)(3) of this section must be installed the next time the storage vessel is completely emptied and degassed, or by May 8, 2034, whichever occurs first.

(3) For facilities that commenced construction after June 10, 2022, each owner or operator shall meet the requirements in paragraph (b) of this section upon startup or July 8, 2024, whichever is later.

■ 10. Revise § 63.424 to read as follows:

§ 63.424 Standards: Equipment leaks.

(a) Each owner or operator of a bulk gasoline terminal or pipeline breakout station subject to the provisions of this subpart shall implement a leak detection and repair program for all equipment in gasoline service according to the requirements in paragraph (b) or (c) of this section, as applicable in paragraph (e) of this section and minimize gasoline vapor losses according to paragraph (d) of this section.

(b) Each owner or operator of a bulk gasoline terminal or pipeline breakout station subject to the provisions of this subpart shall perform a monthly leak inspection of all equipment in gasoline service. For this inspection, detection methods incorporating sight, sound, and smell are acceptable. Each piece of equipment shall be inspected during the loading of a gasoline cargo tank.

(1) A logbook shall be used and shall be signed by the owner or operator at the completion of each inspection. A section of the log shall contain a list, summary description, or diagram(s) showing the location of all equipment in gasoline service at the facility.

(2) Each detection of a liquid or vapor leak shall be recorded in the logbook. When a leak is detected, an initial attempt at repair shall be made as soon as practicable, but no later than 5 calendar days after the leak is detected. Repair or replacement of leaking equipment shall be completed within 15 calendar days after detection of each leak, except as provided in paragraph (b)(3) of this section.

(3) Delay of repair of leaking equipment will be allowed upon a demonstration to the Administrator that repair within 15 days is not feasible. The owner or operator shall provide the reason(s) a delay is needed and the date

by which each repair is expected to be completed.

(4) As an alternative to compliance with the provisions in paragraphs (b)(1) through (3) of this section, owners or operators may implement an instrument leak monitoring program that has been demonstrated to the Administrator as at least equivalent.

(c) Comply with the requirements in § 60.502a(j) of this chapter except as provided in paragraphs (c)(1) through (3) of this section.

(1) The frequency for optical gas imaging (OGI) monitoring shall be semiannually rather than quarterly as specified in § 60.502a(j)(1)(i).

(2) The frequency for Method 21 monitoring of pumps and valves shall be semiannually rather than quarterly as specified in § 60.502a(j)(1)(ii)(A) and (B).

(3) The frequency of monitoring of pressure relief devices shall be semiannually and within 5 calendar days after each pressure release rather than quarterly and within 5 calendar days after each pressure release as specified in § 60.502a(j)(4)(i).

(d) Owners and operators shall not allow gasoline to be handled in a manner that would result in vapor releases to the atmosphere for extended periods of time. Measures to be taken include, but are not limited to, the following:

(1) Minimize gasoline spills;

(2) Clean up spills as expeditiously as practicable;

(3) Cover all open gasoline containers with a gasketed seal when not in use; and

(4) Minimize gasoline sent to open waste collection systems that collect and transport gasoline to reclamation and recycling devices, such as oil/water separators.

(e) Compliance with the provisions of this section shall be achieved as expeditiously as practicable, but no later than the dates provided in paragraphs (e)(1) through (3) of this section.

(1) For facilities that commenced construction on or before February 8, 1994, meet the requirements in paragraphs (b) and (d) of this section no later than December 15, 1997. Beginning no later than May 8, 2027, paragraph (b) of this section no longer applies and facilities shall meet the requirements in paragraphs (c) and (d) of this section no later than May 8, 2027.

(2) For facilities that commenced construction after February 8, 1994, and on or before June 10, 2022, meet the requirements in paragraphs (b) and (d) of this section upon startup. Beginning no later than May 8, 2027, paragraph (b) of this section no longer applies and

facilities shall meet the requirements in paragraphs (c) and (d) of this section no later than May 8, 2027.

(3) For facilities that commenced construction after June 10, 2022, meet the requirements in paragraph (c) and (d) of this section upon startup or July 8, 2024, whichever is later.

■ 11. Section 63.425 is amended by:

■ a. Revising paragraphs (a) through (d), (e)(1), (f) introductory text, and (f)(1);

■ b. Revising equation term “N” in the equation in paragraph (g)(3);

■ c. Revising paragraph (h); and

■ d. Adding paragraph (j).

The revisions and addition read as follows:

§ 63.425 Test methods and procedures.

(a) *Performance test and evaluation requirements.* Each owner or operator subject to the emission standard in § 63.422(b)(1) or § 60.112b(a)(3)(ii) of this chapter shall comply with the requirements in paragraph (b) of this section. Each owner or operator subject to the emission standard in § 63.422(b)(2) shall comply with the requirements in paragraph (c) of this section. Performance tests shall be conducted under representative conditions when liquid product is being loaded into gasoline cargo tanks and shall include periods between gasoline cargo tank loading (when one cargo tank is disconnected and another cargo tank is moved into position for loading) provided that liquid product loading into gasoline cargo tanks is conducted for at least a portion of each 5 minute block of the performance test. You may not conduct performance tests during periods of malfunction. You must record the process information that is necessary to document operating conditions during the test and include in such record an explanation to support that such conditions represent normal operation. Upon request, you shall make available to the Administrator such records as may be necessary to determine the conditions of performance tests.

(b) *Gasoline loading rack and gasoline storage vessel performance test requirements.* For gasoline loading racks subject to the requirements in § 63.422(b)(1) or gasoline storage vessels subject to the requirements in § 60.112b(a)(3)(ii) of this chapter:

(1) Conduct a performance test on the vapor processing and collection systems according to either paragraph (b)(1)(i) or (ii) of this section.

(i) Use the test methods and procedures in § 60.503 of this chapter, except a reading of 500 ppm shall be used to determine the level of leaks to

be repaired under § 60.503(b) of this chapter, or

(ii) Use alternative test methods and procedures in accordance with the alternative test method requirements in § 63.7(f).

(2) The performance test requirements of § 60.503(c) of this chapter do not apply to flares defined in § 63.421 and meeting the flare requirements in § 63.11(b). The owner or operator shall demonstrate that the flare and associated vapor collection system is in compliance with the requirements in § 63.11(b) and § 60.503(a), (b), and (d) of this chapter, respectively.

(3) For each performance test conducted under paragraph (b)(1) of this section, the owner or operator shall determine a monitored operating parameter value for the vapor processing system using the following procedure:

(i) During the performance test, continuously record the operating parameter under § 63.427(a);

(ii) Determine an operating parameter value based on the parameter data monitored during the performance test, supplemented by engineering assessments and the manufacturer's recommendations; and

(iii) Provide for the Administrator's approval the rationale for the selected operating parameter value, and monitoring frequency and averaging time, including data and calculations used to develop the value and a description of why the value, monitoring frequency, and averaging time demonstrate continuous compliance with the emission standard in § 63.422(b)(1) or § 60.112b(a)(3)(ii) of this chapter.

(4) For performance tests performed after the initial test, the owner or operator shall document the reasons for any change in the operating parameter value since the previous performance test.

(c) *Gasoline loading rack performance test and evaluation requirements.* For gasoline loading rack sources subject to the requirements in § 63.422(b)(2):

(1) Conduct performance tests or evaluations on the vapor processing and collection systems according to the requirements in § 60.503a(a), (c) and (d) of this chapter.

(2) The first performance test or performance evaluation of the continuous emissions monitoring system (CEMS) shall be conducted within 180 days of the date affected source begins compliance with the requirements in § 63.422(b)(2). A previously conducted performance test may be used to satisfy this requirement if the conditions in paragraphs (c)(2)(i)

through (v) of this section are met. Prior to conducting this performance test or evaluation, you must continue to meet the monitoring and operating limits that apply based on the previously conducted performance test.

- (i) The performance test was conducted on or after May 8, 2022.
 - (ii) No changes have been made to the process or control device since the time of the performance test.
 - (iii) The operating conditions, test methods, and test requirements (e.g., length of test) used for the previous performance test conform to the requirements in paragraph (c)(1) of this section.
 - (iv) The temperature in the combustion zone was recorded during the performance test as specified in § 60.503a(c)(8)(i) of this chapter and can be used to establish the operating limit as specified in § 60.503a(c)(8)(ii) through (iv) of this chapter.
 - (v) The performance test demonstrates compliance with the emission limit specified in § 63.422(b)(2).
- (3) For loading racks complying with the mass loading emission limit in § 60.502a(c)(1) of this chapter, subsequent performance tests shall be conducted no later than 60 calendar months after the previous performance test.
- (4) For loading racks complying with the concentration emission limit in § 60.502a(c)(2) of this chapter, subsequent performance evaluations of CEMS for the vapor collection and processing system shall be conducted

- no later than 12 calendar months after the previous performance evaluation.
- (d) *Gasoline storage vessel requirements.* The owner or operator of each gasoline storage vessel subject to the provisions of § 63.423 shall comply with § 60.113b of this chapter and, if applicable, the provisions in paragraph (j) of this section. If a closed vent system and control device are used, as specified in § 60.112b(a)(3) of this chapter, to comply with the requirements in § 63.423, the owner or operator shall also comply with the requirements in paragraph (d)(1) or (2) of this section, as applicable.
- (1) If the gasoline storage vessel is subject to the provision in § 63.423(a) or the provision in § 63.423(b) and a control device other than a flare is used for the gasoline storage vessel, the owner or operator shall also comply with the requirements in paragraph (b) of this section.
- (2) If the gasoline storage vessel is subject to the provision in § 63.423(b) and a flare is used as the control device for the gasoline storage vessel, you must comply with the requirements in § 60.502a(c)(3) of this chapter as indicated in paragraphs (d)(2)(i) and (ii) of this section rather than the requirements in § 60.18(e) and (f) of this chapter as specified in § 60.113b(d) of this chapter.
- (i) At § 60.502a(c)(3)(i) of this chapter, replace “vapors displaced from gasoline cargo tanks during product loading” with “vapors from the gasoline storage vessel.”

- (ii) Section 60.502a(c)(3)(vi) through (ix) of this chapter does not apply.
- (e) * * *
- (1) *Method 27 of appendix A–8 to part 60 of this chapter.* Conduct the test using a time period (t) for the pressure and vacuum tests of 5 minutes. The initial pressure (P_i) for the pressure test shall be 460 millimeters (mm) of water (H₂O) (18 inches (in.) H₂O), gauge. The initial vacuum (V_i) for the vacuum test shall be 150 mm H₂O (6 in. H₂O), gauge. Each owner or operator shall implement the requirements in paragraph (e)(1)(i) or (ii) of this section, as applicable in paragraph (e)(1)(iii) of this section.
- (i) The maximum allowable pressure and vacuum changes (Δ p, Δ v) are as shown in the second column of table 1 to this paragraph (e)(1).
- (ii) The maximum allowable pressure and vacuum changes (Δ p, Δ v) are as shown in the third column of table 1 to this paragraph (e)(1).
- (iii) Compliance with the provisions of this section shall be achieved as expeditiously as practicable, but no later than the dates provided in paragraphs (e)(1)(iii)(A) and (B) of this section.
- (A) For facilities that commenced construction on or before June 10, 2022, meet the requirements in paragraph (e)(1)(i) of this section prior to May 8, 2027, and meet the requirements in paragraph (e)(1)(ii) of this section no later than May 8, 2027.
- (B) For facilities that commenced construction after June 10, 2022, meet the requirements in paragraph (e)(1)(ii) of this section upon startup or July 8, 2024, whichever is later.

TABLE 1 TO PARAGRAPH (e)(1)—ALLOWABLE CARGO TANK TEST PRESSURE OR VACUUM CHANGE

Cargo tank or compartment capacity, liters (gal)	Annual certification-allowable pressure or vacuum change (Δ p, Δ v) in 5 minutes, mm H ₂ O (in. H ₂ O)	Annual certification-allowable pressure or vacuum change (Δ p, Δ v) in 5 minutes, mm H ₂ O (in. H ₂ O)]	Allowable pressure change (Δ p) in 5 minutes at any time, mm H ₂ O (in. H ₂ O)
9,464 or more (2,500 or more)	25 (1.0)	12.7 (0.50)	64 (2.5)
9,463 to 5,678 (2,499 to 1,500)	38 (1.5)	19.1 (0.75)	76 (3.0)
5,677 to 3,785 (1,499 to 1,000)	51 (2.0)	25.4 (1.00)	89 (3.5)
3,784 or less (999 or less)	64 (2.5)	31.8 (1.25)	102 (4.0)

- * * * * *
- (f) *Leak detection test.* The leak detection test shall be performed using Method 21 of appendix A–7 to part 60 of this chapter. A vapor-tight gasoline cargo tank shall have no leaks at any time when tested according to the procedures in this paragraph (f).
- (1) The instrument reading that defines a leak is 10,000 ppm (as propane). Use propane to calibrate the instrument, setting the span at the leak definition. The response time to 90

- percent of the final stable reading shall be less than 8 seconds for the detector with the sampling line and probe attached.
- * * * * *
- (g) * * *
- (3) * * *
- N = 5-minute continuous performance standard at any time from the fourth column of table 1 to paragraph (e)(1) of this section, inches H₂O.
- * * * * *

- (h) *Continuous performance pressure decay test.* The continuous performance pressure decay test shall be performed using Method 27 in appendix A to part 60 of this chapter. Conduct only the positive pressure test using a time period (t) of 5 minutes. The initial pressure (P_i) shall be 460 mm H₂O (18 in. H₂O), gauge. The maximum allowable 5-minute pressure change (Δ p) which shall be met at any time is

shown in the fourth column of table 1 to paragraph (e)(1) of this section.

* * * * *

(j) *LEL monitoring procedures.*

Compliance with the vapor concentration below the LEL level for internal floating roof storage vessels at § 63.423(b)(2) shall be determined based on the procedures specified in paragraphs (j)(1) through (5) of this section. If tubing is necessary to obtain the measurements, the tubing must be non-crimping and made of Teflon or other inert material.

(1) LEL monitoring must be conducted at least once every 12 months and at other times upon request by the Administrator. If the measurement cannot be performed due to wind speeds exceeding those specified in paragraph (j)(3)(iii) of this section, the measurement must be performed within 30 days of the previous attempt.

(2) The calibration of the LEL meter must be checked per manufacturer specifications immediately before and after the measurements as specified in paragraphs (j)(2)(i) and (ii) of this section. If tubing will be used for the measurements, the tubing must be attached during calibration so that the calibration gas travels through the entire measurement system.

(i) Conduct the span check using a calibration gas recommended by the LEL meter manufacturer. The calibration gas must contain a single hydrocarbon at a concentration corresponding to 50 percent of the LEL (e.g., 2.50 percent by volume when using methane as the calibration gas). The vendor must provide a Certificate of Analysis for the gas, and the certified concentration must be within ± 2 percent (e.g., 2.45 percent—2.55 percent by volume when using methane as the calibration gas). The LEL span response must be between 49 percent and 51 percent. If the span check prior to the measurements does not meet this requirement, the LEL meter must be recalibrated or replaced. If the span check after the measurements does not meet this requirement, the LEL meter must be recalibrated or replaced, and the measurements must be repeated.

(ii) Check the instrumental offset response using a certified compressed gas cylinder of zero air or an ambient environment that is free of organic compounds. The pre-measurement instrumental offset response must be 0 percent LEL. If the LEL meter does not meet this requirement, the LEL meter must be recalibrated or replaced.

(3) Conduct the measurements as specified in paragraphs (j)(3)(i) through (iv) of this section.

(i) Measurements of the vapors within the internal floating roof storage vessel must be collected no more than 3 feet above the internal floating roof.

(ii) Measurements shall be taken for a minimum of 20 minutes, logging the measurements at least once every 15 seconds, or until one 5-minute average as determined according to paragraph (j)(5)(ii) of this section exceeds the level specified in § 63.423(b)(2).

(iii) Measurements shall be taken when the wind speed at the top of the tank is 5 mph or less to the extent practicable, but in no case shall measurements be taken when the sustained wind speed at top of tank is greater than the annual average wind speed at the site or 15 mph, whichever is less.

(iv) Measurements should be conducted when the internal floating roof is floating with limited product movement (limited filling or emptying of the tank).

(4) To determine the actual vapor concentration within the storage vessel, the percent of the LEL “as the calibration gas” must be corrected according to one of the following procedures. Alternatively, if the LEL meter used has correction factors that can be selected from the meter’s program, you may enable this feature to automatically apply one of the correction factors specified in paragraphs (j)(4)(i) and (ii) of this section.

(i) Multiply the measurement by the published gasoline vapor correction factor for the specific LEL meter and calibration gas used.

(ii) If there is no published correction factor for gasoline vapors for the specific LEL meter used, multiply the measurement by the published correction factor for butane as a surrogate for determining the LEL of gasoline vapors. The correction factor must correspond to the calibration gas used.

(5) Use the calculation procedures in paragraphs (j)(5)(i) through (iii) of this section to determine compliance with the LEL level.

(i) For each minute while measurements are being taken, determine the one-minute average reading as the arithmetic average of the corrected individual measurements (taken at least once every 15 seconds) during the minute.

(ii) Starting with the end of the fifth minute of data, calculate a five-minute rolling average as the arithmetic average of the previous five one-minute readings determined under paragraph (j)(5)(i) of this section. Determine a new five-

minute average reading for every subsequent one-minute reading.

(iii) Each five-minute rolling average must meet the LEL level specified in § 63.423(b)(2).

■ 12. Section 63.427 is amended by revising paragraphs (a) introductory text, (a)(3), (b), and (c) and adding paragraphs (d), (e), and (f) to read as follows:

§ 63.427 Continuous monitoring.

(a) Each owner or operator of a bulk gasoline terminal subject to the provisions in § 63.422(b)(1) shall install, calibrate, certify, operate, and maintain, according to the manufacturer’s specifications, a continuous monitoring system (CMS) as specified in paragraph (a)(1), (2), (3), or (4) of this section, except as allowed in paragraph (a)(5) of this section.

* * * * *

(3) Where a thermal oxidation system is used, a CPMS capable of measuring temperature must be installed in the firebox or in the ductwork immediately downstream from the firebox in a position before any substantial heat exchange occurs.

* * * * *

(b) Each owner or operator of a bulk gasoline terminal subject to the provisions in § 63.422(b)(1) shall operate the vapor processing system in a manner not to exceed the operating parameter value for the parameter described in paragraphs (a)(1) and (2) of this section, or to go below the operating parameter value for the parameter described in paragraph (a)(3) of this section, and established using the procedures in § 63.425(b). In cases where an alternative parameter pursuant to paragraph (a)(5) of this section is approved, each owner or operator shall operate the vapor processing system in a manner not to exceed or not to go below, as appropriate, the alternative operating parameter value. Operation of the vapor processing system in a manner exceeding or going below the operating parameter value, as specified above, shall constitute a violation of the emission standard in § 63.422(b)(1).

(c) Except as provided in paragraph (f) of this section, each owner or operator of a bulk gasoline terminal subject to the provisions in § 63.422(b)(2) shall install, calibrate, certify, operate, and maintain a CMS as specified in § 60.504a(a) through (d) of this chapter, as applicable. You may use the limited alternative monitoring methods as specified in § 60.504a(e) of this chapter, if applicable.

(d) Each owner or operator of a bulk gasoline terminal subject to the

provisions in § 63.422(b)(2) shall operate the vapor processing system in a manner consistent with the minimum and/or maximum operating parameter value or procedures described in §§ 60.502a(a) and (c) and 60.504a(a) and (c) of this chapter. Operation of the vapor processing system in a manner that constitutes a period of excess emissions or failure to perform procedures required shall constitute a deviation of the emission standard in § 63.422(b)(2).

(e) Each owner or operator of gasoline storage vessels subject to the provisions of § 63.423 shall comply with the monitoring requirements in § 60.116b of this chapter, except records shall be kept for at least 5 years. If a closed vent system and control device are used, as specified in § 60.112b(a)(3) of this chapter, to comply with the requirements in § 63.423, the owner or operator shall also comply with the requirements in paragraph (e)(1) or (2) of this section, as applicable.

(1) If the gasoline storage vessel is subject to the provision in § 63.423(a) or if the gasoline storage vessel is subject to the provision in § 63.423(b) and a control device other than a flare is used for the gasoline storage vessel, the owner or operator shall also comply with the requirements in paragraph (a) of this section.

(2) If the gasoline storage vessel is subject to the provision in § 63.423(b) and a flare is used as the control device for the affected gasoline storage vessel, you must comply with the monitoring requirements in § 60.504a(c) of this chapter.

(f) As an alternative to the pressure monitoring requirements in § 60.504a(d) of this chapter, you may comply with the pressure monitoring requirements in § 60.503(d) of this chapter during any performance test or performance evaluation conducted under § 63.425(c) to demonstrate compliance with the provisions in § 60.502a(h) of this chapter.

■ 13. Revising § 63.428 to read as follows:

§ 63.428 Recordkeeping and reporting.

(a) The initial notifications required for existing affected sources under § 63.9(b)(2) shall be submitted by 1 year after an affected source becomes subject to the provisions of this subpart or by December 16, 1996, whichever is later. Affected sources that are major sources on December 16, 1996, and plan to be area sources by December 15, 1997, shall include in this notification a brief, non-binding description of and schedule for the action(s) that are planned to achieve area source status.

(b) Each owner or operator of a bulk gasoline terminal subject to the provisions of this subpart shall keep records in either hardcopy or electronic form of the test results for each gasoline cargo tank loading at the facility for at least 5 years as specified in paragraphs (b)(1) through (3) of this section. Each owner or operator of a bulk gasoline terminal subject to the provisions of this subpart shall keep records for at least 5 years as specified in paragraphs (b)(4) and (5) of this section.

(1) Annual certification testing performed under § 63.425(e) and railcar bubble leak testing performed under § 63.425(i); and

(2) Continuous performance testing performed at any time at that facility under § 63.425(f), (g), and (h).

(3) The documentation file shall be kept up-to-date for each gasoline cargo tank loading at the facility. The documentation for each test shall include, as a minimum, the following information:

(i) Name of test: Annual Certification Test—Method 27 (§ 63.425(e)(1)); Annual Certification Test—Internal Vapor Valve (§ 63.425(e)(2)); Leak Detection Test (§ 63.425(f)); Nitrogen Pressure Decay Field Test (§ 63.425(g)); Continuous Performance Pressure Decay Test (§ 63.425(h)); or Railcar Bubble Leak Test Procedure (§ 63.425(i)).

(ii) Cargo tank owner's name and address.

(iii) Cargo tank identification number.

(iv) Test location and date.

(v) Tester name and signature.

(vi) Witnessing inspector, if any: Name, signature, and affiliation.

(vii) Vapor tightness repair: Nature of repair work and when performed in relation to vapor tightness testing.

(viii) Test results: tank or compartment capacity; test pressure; pressure or vacuum change, mm of water; time period of test; number of leaks found with instrument; and leak definition.

(4) Records of each instance in which liquid product was loaded into a gasoline cargo tank for which vapor tightness documentation required under § 60.502(e)(1) or § 60.502a(e)(1) of this chapter, as applicable, was not provided or available in the terminal's records. These records shall include, at a minimum:

(i) Cargo tank owner and address.

(ii) Cargo tank identification number.

(iii) Date and time liquid product was loaded into a gasoline cargo tank without proper documentation.

(iv) Date proper documentation was received or statement that proper documentation was never received.

(5) Records of each instance when liquid product was loaded into gasoline

cargo tanks not using submerged filling, as defined in § 63.421, not equipped with vapor collection equipment that is compatible with the terminal's vapor collection system, or not properly connected to the terminal's vapor collection system. These records shall include, at a minimum:

(i) Date and time of liquid product loading into gasoline cargo tank not using submerged filling, improperly equipped or improperly connected.

(ii) Type of deviation (*e.g.*, not submerged filling, incompatible equipment, not properly connected).

(iii) Cargo tank identification number.

(c) Each owner or operator of a bulk gasoline terminal subject to the provisions in § 63.422(b)(1) shall:

(1) Keep an up-to-date, readily accessible record of the continuous monitoring data required under § 63.427(a). This record shall indicate the time intervals during which loadings of gasoline cargo tanks have occurred or, alternatively, shall record the operating parameter data only during such loadings. The date and time of day shall also be indicated at reasonable intervals on this record.

(2) Record and report simultaneously with the notification of compliance status required under § 63.9(h):

(i) All data and calculations, engineering assessments, and manufacturer's recommendations used in determining the operating parameter value under § 63.425(b); and

(ii) The following information when using a flare under provisions of § 63.11(b) to comply with § 63.422(b):

(A) Flare design (*i.e.*, steam-assisted, air-assisted, or non-assisted); and

(B) All visible emissions readings, heat content determinations, flow rate measurements, and exit velocity determinations made during the compliance determination required under § 63.425(b).

(3) If an owner or operator requests approval to use a vapor processing system or monitor an operating parameter other than those specified in § 63.427(a), the owner or operator shall submit a description of planned reporting and recordkeeping procedures. The Administrator will specify appropriate reporting and recordkeeping requirements as part of the review of the permit application.

(4) Keep written procedures required under § 63.8(d)(2) on record for the life of the affected source or until the affected source is no longer subject to the provisions of this part, to be made available for inspection, upon request, by the Administrator. If the performance evaluation plan is revised, you shall keep previous (*i.e.*, superseded) versions

of the performance evaluation plan on record to be made available for inspection, upon request, by the Administrator, for a period of 5 years after each revision to the plan. The program of corrective action shall be included in the plan as required under § 63.8(d)(2).

(d) Each owner or operator of a bulk gasoline terminal subject to the provisions in § 63.422(b)(2) shall keep records as specified in paragraphs (d)(1) through (4) of this section, as applicable, for a minimum of five years unless otherwise specified in this section:

(1) For each thermal oxidation system used to comply with the emission limitations in § 63.422(b)(2) by monitoring the combustion zone temperature as specified in § 60.502a(c)(1)(ii) of this chapter, for each pressure CPMS used to comply with the requirements in § 60.502a(h) of this chapter, and for each vapor recovery system used to comply with the emission limitations in § 63.422(b)(2), maintain records, as applicable, of:

(i) The applicable operating or emission limit for the CMS. For combustion zone temperature operating limits, include the applicable date range the limit applies based on when the performance test was conducted.

(ii) Each 3-hour rolling average combustion zone temperature measured by the temperature CPMS, each 5-minute average reading from the pressure CPMS, and each 3-hour rolling average total organic compounds (TOC) concentration (as propane) measured by the TOC CEMS.

(iii) For each deviation of the 3-hour rolling average combustion zone temperature operating limit, maximum loading pressure specified in § 60.502a(h) of this chapter, or 3-hour rolling average TOC concentration (as propane), the start date and time, duration, cause, and the corrective action taken.

(iv) For each period when there was a CMS outage or the CMS was out of control, the start date and time, duration, cause, and the corrective action taken. For TOC CEMS outages where the limited alternative for vapor recovery systems in § 60.504a(e) of this chapter is used, the corrective action taken shall include an indication of the use of the limited alternative for vapor recovery systems in § 60.504a(e).

(v) Each inspection or calibration of the CMS including a unique identifier, make, and model number of the CMS, and date of calibration check. For TOC CEMS, include the type of CEMS used (*i.e.*, flame ionization detector, nondispersive infrared analyzer) and an

indication of whether methane is excluded from the TOC concentration reported in paragraph (d)(1)(ii) of this section.

(vi) TOC CEMS outages where the limited alternative for vapor recovery systems in § 60.504a(e) of this chapter is used, also keep records of:

(A) The quantity of liquid product loaded in gasoline cargo tanks for the past 10 adsorption cycles prior to the CEMS outage.

(B) The vacuum pressure, purge gas quantities, and duration of the vacuum/purge cycles used for the past 10 desorption cycles prior to the CEMS outage.

(C) The quantity of liquid product loaded in gasoline cargo tanks for each adsorption cycle while using the alternative.

(D) The vacuum pressure, purge gas quantities, and duration of the vacuum/purge cycles for each desorption cycle while using the alternative.

(2) For each flare used to comply with the emission limitations in § 63.422(b)(2) and for each thermal oxidation system using the flare monitoring alternative as provided in § 60.502a(c)(1)(iii) of this chapter, maintain records of:

(i) The output of the monitoring device used to detect the presence of a pilot flame as required in § 63.670(b) for a minimum of 2 years. Retain records of each 15-minute block during which there was at least one minute that no pilot flame is present when gasoline vapors were routed to the flare for a minimum of 5 years. The record must identify the start and end time and date of each 15-minute block.

(ii) Visible emissions observations as specified in paragraphs (d)(2)(ii)(A) and (B) of this section, as applicable, for a minimum of 3 years.

(A) If visible emissions observations are performed using Method 22 of appendix A–7 to part 60 of this chapter, the record must identify the date, the start and end time of the visible emissions observation, and the number of minutes for which visible emissions were observed during the observation. If the owner or operator performs visible emissions observations more than one time during a day, include separate records for each visible emissions observation performed.

(B) For each 2-hour period for which visible emissions are observed for more than 5 minutes in 2 consecutive hours but visible emissions observations according to Method 22 of appendix A–7 to part 60 of this chapter were not conducted for the full 2-hour period, the record must include the date, the start and end time of the visible emissions

observation, and an estimate of the cumulative number of minutes in the 2-hour period for which emissions were visible based on best information available to the owner or operator.

(iii) Each 15-minute block period during which operating values are outside of the applicable operating limits specified in § 63.670(d) through (f) when liquid product is being loaded into gasoline cargo tanks for at least 15-minutes identifying the specific operating limit that was not met.

(iv) The 15-minute block average cumulative flows for the thermal oxidation system vent gas or flare vent gas and, if applicable, total steam, perimeter assist air, and premix assist air specified to be monitored under § 63.670(i), along with the date and start and end time for the 15-minute block. If multiple monitoring locations are used to determine cumulative vent gas flow, total steam, perimeter assist air, and premix assist air, retain records of the 15-minute block average flows for each monitoring location for a minimum of 2 years, and retain the 15-minute block average cumulative flows that are used in subsequent calculations for a minimum of 5 years. If pressure and temperature monitoring is used, retain records of the 15-minute block average temperature, pressure and molecular weight of the thermal oxidation system vent gas, flare vent gas, or assist gas stream for each measurement location used to determine the 15-minute block average cumulative flows for a minimum of 2 years, and retain the 15-minute block average cumulative flows that are used in subsequent calculations for a minimum of 5 years. If you use the supplemental gas flow rate monitoring alternative in § 60.502a(c)(3)(viii) of this chapter, the required supplemental gas flow rate (winter and summer, if applicable) and the actual monitored supplemental gas flow rate for the 15-minute block. Retain the supplemental gas flow rate records for a minimum of 5 years.

(v) The thermal oxidation system vent gas or flare vent gas compositions specified to be monitored under § 63.670(j). Retain records of individual component concentrations from each compositional analyses for a minimum of 2 years. If NHV_{vg} analyzer is used, retain records of the 15-minute block average values for a minimum of 5 years. If you demonstrate your gas streams have consistent composition using the provisions in § 63.670(j)(6) as specified in § 60.502a(c)(3)(vii) of this chapter, retain records of the required minimum ratio of gasoline loaded to total liquid product loaded and the actual ratio on a 15-minute block basis.

If applicable, you must retain records of the required minimum gasoline loading rate as specified in § 60.502a(c)(3)(vii) and the actual gasoline loading rate on a 15-minute block basis for a minimum of 5 years.

(vi) Each 15-minute block average operating parameter calculated following the methods specified in § 63.670(k) through (n), as applicable.

(vii) All periods during which the owner or operator does not perform monitoring according to the procedures in § 63.670(g), (i), and (j) or in § 60.502a(c)(3)(vii) and (viii) of this chapter as applicable. Note the start date, start time, and duration in minutes for each period.

(viii) An indication of whether “vapors displaced from gasoline cargo tanks during product loading” excludes periods when liquid product is loaded but no gasoline cargo tanks are being loaded or if liquid product loading is assumed to be loaded into gasoline cargo tanks according to the provisions in § 60.502a(c)(3)(i) of this chapter, records of all time periods when “vapors displaced from gasoline cargo tanks during product loading”, and records of time periods when there were no “vapors displaced from gasoline cargo tanks during product loading”.

(ix) If you comply with the flare tip velocity operating limit using the one-time flare tip velocity operating limit compliance assessment as provided in § 60.502a(c)(3)(ix) of this chapter, maintain records of the applicable one-time flare tip velocity operating limit compliance assessment for as long as you use this compliance method.

(x) For each parameter monitored using a CMS, retain the records specified in paragraphs (d)(2)(x)(A) through (C) of this section, as applicable:

(A) For each deviation, record the start date and time, duration, cause, and corrective action taken.

(B) For each period when there is a CMS outage or the CMS is out of control, record the start date and time, duration, cause, and corrective action taken.

(C) Each inspection or calibration of the CMS including a unique identifier, make, and model number of the CMS, and date of calibration check.

(3) Records of all 5-minute time periods during which liquid product is loaded into gasoline cargo tanks or assumed to be loaded into gasoline cargo tanks and records of all 5-minute time periods when there was no liquid product loaded into gasoline cargo tanks.

(4) Keep written procedures required under § 63.8(d)(2) on record for the life

of the affected source or until the affected source is no longer subject to the provisions of this part, to be made available for inspection, upon request, by the Administrator. If the performance evaluation plan is revised, you shall keep previous (*i.e.*, superseded) versions of the performance evaluation plan on record to be made available for inspection, upon request, by the Administrator, for a period of 5 years after each revision to the plan. The program of corrective action shall be included in the plan as required under § 63.8(d)(2).

(e) Each owner or operator of storage vessels subject to the provisions of this subpart shall keep records as specified in § 60.115b of this chapter, except records shall be kept for at least 5 years. Additionally, for each storage vessel complying with the provisions in § 63.423(b)(2), keep records of each LEL monitoring event as specified in paragraphs (e)(1) through (9) of this section.

(1) Date and time of the LEL monitoring, and the storage vessel being monitored.

(2) A description of the monitoring event (*e.g.*, monitoring conducted concurrent with visual inspection required under § 60.113b(a)(2) of this chapter or § 63.1063(d)(2); monitoring that occurred on a date other than the visual inspection required under § 60.113b(a)(2) or § 63.1063(d)(2); re-monitoring due to high winds; re-monitoring after repair attempt).

(3) Wind speed at the top of the storage vessel on the date of LEL monitoring.

(4) The LEL meter manufacturer and model number used, as well as an indication of whether tubing was used during the LEL monitoring, and if so, the type and length of tubing used.

(5) Calibration checks conducted before and after making the measurements, including both the span check and instrumental offset. This includes the hydrocarbon used as the calibration gas, the Certificate of Analysis for the calibration gas(es), the results of the calibration check, and any corrective action for calibration checks that do not meet the required response.

(6) Location of the measurements and the location of the floating roof.

(7) Each measurement (taken at least once every 15 seconds). The records should indicate whether the recorded values were automatically corrected using the meter's programming. If the values were not automatically corrected, record both the raw (as the calibration gas) and corrected measurements, as well as the correction factor used.

(8) Each 5-minute rolling average reading.

(9) If the vapor concentration of the storage vessel was above 25 percent of the LEL on a 5-minute rolling average basis, a description of whether the floating roof was repaired, replaced, or taken out of gasoline service.

(f) Each owner or operator complying with the provisions of § 63.424 shall keep records of the information in paragraphs (f)(1) and (2) of this section.

(1) Each owner or operator complying with the provisions of § 63.424(b) shall record the following information in the logbook for each leak that is detected:

(i) The equipment type and identification number;

(ii) The nature of the leak (*i.e.*, vapor or liquid) and the method of detection (*i.e.*, sight, sound, or smell);

(iii) The date the leak was detected and the date of each attempt to repair the leak;

(iv) Repair methods applied in each attempt to repair the leak;

(v) “Repair delayed” and the reason for the delay if the leak is not repaired within 15 calendar days after discovery of the leak;

(vi) The expected date of successful repair of the leak if the leak is not repaired within 15 days; and

(vii) The date of successful repair of the leak.

(2) Each owner or operator complying with the provisions of § 63.424(c) or § 60.503a(a)(2) of this chapter shall keep records of the following information:

(i) Types, identification numbers, and locations of all equipment in gasoline service.

(ii) For each leak inspection conducted under § 63.424(c) or § 60.503a(a)(2) of this chapter, keep the following records:

(A) An indication if the leak inspection was conducted under § 63.424(c) or § 60.503a(a)(2) of this chapter.

(B) Leak determination method used for the leak inspection.

(iii) For leak inspections conducted with Method 21 of appendix A-7 to part 60 of this chapter, keep the following additional records:

(A) Date of inspection.

(B) Inspector name.

(C) Monitoring instrument identification.

(D) Identification of all equipment surveyed and the instrument reading for each piece of equipment.

(E) Date and time of instrument calibration and initials of operator performing the calibration.

(F) Calibration gas cylinder identification, certification date, and certified concentration.

(G) Instrument scale used.

(H) Results of the daily calibration drift assessment.

(iv) For leak inspections conducted with OGI, keep the records specified in section 12 of appendix K to part 60 of this chapter.

(v) For each leak that is detected during a leak inspection or by audio/visual/olfactory methods during normal duties, record the following information:

(A) The equipment type and identification number.

(B) The date the leak was detected, the name of the person who found the leak, nature of the leak (*i.e.*, vapor or liquid) and the method of detection (*i.e.*, audio/visual/olfactory, Method 21 of appendix A–7 to part 60 of this chapter, or OGI).

(C) The date of each attempt to repair the leak and the repair methods applied in each attempt to repair the leak.

(D) The date of successful repair of the leak, the method of monitoring used to confirm the repair, and if Method 21 of appendix A–7 to part 60 of this chapter is used to confirm the repair, the maximum instrument reading measured by Method 21 of appendix A–7 to part 60. If OGI is used to confirm the repair, keep video footage of the repair confirmation.

(E) For each repair delayed beyond 15 calendar days after discovery of the leak, record “Repair delayed”, the reason for the delay, and the expected date of successful repair. The owner or operator (or designate) whose decision it was that repair could not be carried out in the 15-calendar day timeframe must sign the record.

(F) For each leak that is not repairable, the maximum instrument reading measured by Method 21 of appendix A–7 to part 60 of this chapter at the time the leak is determined to be not repairable, a video captured by the OGI camera showing that emissions are still visible, or a signed record that the leak is still detectable via audio/visual/olfactory methods.

(g) Each owner or operator of a bulk gasoline terminal or pipeline breakout station subject to the provisions of this subpart shall keep the following records for each deviation of an emissions limitation (including operating limit), work practice standard, or operation and maintenance requirement in this subpart.

(1) Date, start time, and duration of each deviation.

(2) List of the affected sources or equipment for each deviation, an estimate of the quantity of each regulated pollutant emitted over any

emission limit and a description of the method used to estimate the emissions.

(3) Actions taken to minimize emissions.

(h) Any records required to be maintained by this subpart that are submitted electronically via the U.S. Environmental Protection Agency (EPA) Compliance and Emissions Data Reporting Interface (CEDRI) may be maintained in electronic format. This ability to maintain electronic copies does not affect the requirement for facilities to make records, data, and reports available upon request to a delegated authority or the EPA as part of an on-site compliance evaluation.

(i) Records of each performance test or performance evaluation conducted and each notification and report submitted to the Administrator for at least 5 years. For each performance test, include an indication of whether liquid product loading is assumed to be loaded into gasoline cargo tanks or periods when liquid product is loaded but no gasoline cargo tanks are being loaded are excluded in the determination of the combustion zone temperature operating limit according to the provision in § 60.503a(c)(8)(ii) of this chapter. If complying with the alternative in § 63.427(f), for each performance test or performance evaluation conducted, include the pressure every 5 minutes while a gasoline cargo tank is being loaded and the highest instantaneous pressure that occurs during each loading.

(j) Prior to November 4, 2024, each owner or operator of an affected source under this subpart shall submit performance test reports to the Administrator according to the requirements in § 63.13. Beginning on November 4, 2024, within 60 days after the date of completing each performance test and each CEMS performance evaluation required by this subpart, you must submit the results of the performance test following the procedure specified in § 63.9(k). As required by § 63.7(g)(2)(iv), you must include the value for the combustion zone temperature operating parameter limit set based on your performance test in the performance test report. If the monitoring alternative in § 63.427(f) is used, indicate that this monitoring alternative is being used, identify each loading rack that loads gasoline cargo tanks at the bulk gasoline terminal subject to the provisions of this subpart, and report the highest instantaneous pressure monitored during the performance test or performance evaluation for each identified loading rack. Data collected using test methods supported by the EPA’s Electronic

Reporting Tool (ERT) and performance evaluations of CEMS measuring RATA pollutants that are supported by the EPA’s ERT as listed on the EPA’s ERT website (<https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert>) at the time of the test or performance evaluation must be submitted in a file format generated using the EPA’s ERT. Alternatively, you may submit an electronic file consistent with the extensible markup language (XML) schema listed on the EPA’s ERT website. Data collected using test methods that are not supported by the EPA’s ERT and performance evaluations of CEMS measuring RATA pollutants that are not supported by the EPA’s ERT as listed on the EPA’s ERT website at the time of the test must be included as an attachment in the ERT or alternate electronic file.

(k) The owner or operator must submit all Notification of Compliance Status reports in PDF format to the EPA following the procedure specified in § 63.9(k), except any medium submitted through mail must be sent to the attention of the Gasoline Distribution Sector Lead.

(l) Prior to May 8, 2027, each owner or operator of a source subject to the requirements of this subpart shall submit reports as specified in paragraphs (l)(1) through (5) of this section, as applicable.

(1) Each owner or operator subject to the provisions of § 63.424 shall report to the Administrator a description of the types, identification numbers, and locations of all equipment in gasoline service. For facilities electing to implement an instrument program under § 63.424(b)(4), the report shall contain a full description of the program.

(i) In the case of an existing source or a new source that has an initial startup date before December 14, 1994, the report shall be submitted with the notification of compliance status required under § 63.9(h), unless an extension of compliance is granted under § 63.6(i). If an extension of compliance is granted, the report shall be submitted on a date scheduled by the Administrator.

(ii) In the case of new sources that did not have an initial startup date before December 14, 1994, the report shall be submitted with the application for approval of construction, as described in § 63.5(d).

(2) Each owner or operator of a bulk gasoline terminal or pipeline breakout station subject to the provisions of this subpart shall include in a semiannual

report to the Administrator the following information, as applicable:

(i) Each loading of a gasoline cargo tank for which vapor tightness documentation had not been previously obtained by the facility;

(ii) Periodic reports as specified in § 60.115b of this chapter; and

(iii) The number of equipment leaks not repaired within 5 days after detection.

(3) Each owner or operator of a bulk gasoline terminal or pipeline breakout station subject to the provisions of this subpart shall submit an excess emissions report to the Administrator in accordance with § 63.10(e)(3), whether or not a CMS is installed at the facility. The following occurrences are excess emissions events under this subpart, and the following information shall be included in the excess emissions report, as applicable:

(i) Each exceedance or failure to maintain, as appropriate, the monitored operating parameter value determined under § 63.425(b)(3). The report shall include the monitoring data for the days on which exceedances or failures to maintain have occurred, and a description and timing of the steps taken to repair or perform maintenance on the vapor collection and processing systems or the CMS.

(ii) Each instance of a nonvapor-tight gasoline cargo tank loading at the facility in which the owner or operator failed to take steps to assure that such cargo tank would not be reloaded at the facility before vapor tightness documentation for that cargo tank was obtained.

(iii) Each reloading of a nonvapor-tight gasoline cargo tank at the facility before vapor tightness documentation for that cargo tank is obtained by the facility in accordance with § 63.422(c).

(iv) For each occurrence of an equipment leak for which no repair attempt was made within 5 days or for which repair was not completed within 15 days after detection:

(A) The date on which the leak was detected;

(B) The date of each attempt to repair the leak;

(C) The reasons for the delay of repair; and

(D) The date of successful repair.

(4) Each owner or operator of a facility meeting the criteria in § 63.420(c) shall perform the requirements of this paragraph (l)(4), all of which will be available for public inspection:

(i) Document and report to the Administrator not later than December 16, 1996, for existing facilities, within 30 days for existing facilities subject to § 63.420(c) after December 16, 1996, or

at startup for new facilities the methods, procedures, and assumptions supporting the calculations for determining criteria in § 63.420(c);

(ii) Maintain records to document that the facility parameters established under § 63.420(c) have not been exceeded; and

(iii) Report annually to the Administrator that the facility parameters established under § 63.420(c) have not been exceeded.

(iv) At any time following the notification required under paragraph (l)(4)(i) of this section and approval by the Administrator of the facility parameters, and prior to any of the parameters being exceeded, the owner or operator may submit a report to request modification of any facility parameter to the Administrator for approval. Each such request shall document any expected HAP emission change resulting from the change in parameter.

(5) Each owner or operator of a facility meeting the criteria in § 63.420(d) shall perform the requirements of this paragraph (l)(5), all of which will be available for public inspection:

(i) Document and report to the Administrator not later than December 16, 1996, for existing facilities, within 30 days for existing facilities subject to § 63.420(d) after December 16, 1996, or at startup for new facilities the use of the emission screening equations in § 63.420(a)(1) or (b)(1) and the calculated value of E_T or E_P ;

(ii) Maintain a record of the calculations in § 63.420 (a)(1) or (b)(1), including methods, procedures, and assumptions supporting the calculations for determining criteria in § 63.420(d); and

(iii) At any time following the notification required under paragraph (l)(5)(i) of this section, and prior to any of the parameters being exceeded, the owner or operator may notify the Administrator of modifications to the facility parameters. Each such notification shall document any expected HAP emission change resulting from the change in parameter.

(m) On or after May 8, 2027, you must submit to the Administrator semiannual reports with the applicable information in paragraphs (m)(1) through (8) of this section following the procedure specified in paragraph (n) of this section.

(1) Report the following general facility information:

(i) Facility name.

(ii) Facility physical address, including city, county, and State.

(iii) Latitude and longitude of facility's physical location. Coordinates

must be in decimal degrees with at least five decimal places.

(iv) The following information for the contact person:

(A) Name.

(B) Mailing address.

(C) Telephone number.

(D) Email address.

(v) The type of facility (bulk gasoline terminal or pipeline breakout station).

(vi) Date of report and beginning and ending dates of the reporting period. You are no longer required to provide the date of report when the report is submitted via CEDRI.

(vii) Statement by a responsible official, with that official's name, title, and signature, certifying the truth, accuracy, and completeness of the content of the report. If your report is submitted via CEDRI, the certifier's electronic signature during the submission process replaces the requirement in this paragraph (m)(1)(vii).

(2) For each thermal oxidation system used to comply with the emission limit in § 60.502a(c)(1) of this chapter by monitoring the combustion zone temperature as specified in § 60.502a(c)(1)(ii), for each pressure CPMS used to comply with the requirements in § 60.502a(h), and for each vapor recovery system used to comply with the emission limitations in § 60.502a(c)(2), report the following information for the CMS:

(i) For all instances when the temperature CPMS measured 3-hour rolling averages below the established operating limit or when the vapor collection system pressure exceeded the maximum loading pressure specified in § 60.502a(h) of this chapter when liquid product was being loaded into gasoline cargo tanks or when the TOC CEMS measured 3-hour rolling average concentrations higher than the applicable emission limitation when the vapor recovery system was operating:

(A) The date and start time of the deviation.

(B) The duration of the deviation in hours.

(C) Each 3-hour rolling average combustion zone temperature, average pressure, or 3-hour rolling average TOC concentration during the deviation. For TOC concentration, indicate whether methane is excluded from the TOC concentration.

(D) A unique identifier for the CMS.

(E) The make, model number, and date of last calibration check of the CMS.

(F) The cause of the deviation and the corrective action taken.

(ii) For all instances that the temperature CPMS for measuring the

combustion zone temperature or pressure CPMS was not operating or out of control when liquid product was loaded into gasoline cargo tanks, or the TOC CEMS was not operating or was out of control when the vapor recovery system was operating:

(A) The date and start time of the deviation.

(B) The duration of the deviation in hours.

(C) A unique identifier for the CMS.

(D) The make, model number, and date of last calibration check of the CMS.

(E) The cause of the deviation and the corrective action taken. For TOC CEMS outages where the limited alternative for vapor recovery systems in § 60.504a(e) of this chapter is used, the corrective action taken shall include an indication of the use of the limited alternative for vapor recovery systems in § 60.504a(e).

(F) For TOC CEMS outages where the limited alternative for vapor recovery systems in § 60.504a(e) of this chapter is used, report either an indication that there were no deviations from the operating limits when using the limited alternative or report the number of each of the following types of deviations that occurred during the use of the limited alternative for vapor recovery systems in § 60.504a(e).

(1) The number of adsorption cycles when the quantity of liquid product loaded in gasoline cargo tanks exceeded the operating limit established in § 60.504a(e)(1) of this chapter. Enter 0 if no deviations of this type.

(2) The number of desorption cycles when the vacuum pressure was below the average vacuum pressure as specified in § 60.504a(e)(2)(i) of this chapter. Enter 0 if no deviations of this type.

(3) The number of desorption cycles when the quantity of purge gas used was below the average quantity of purge gas as specified in § 60.504a(e)(2)(ii) of this chapter. Enter 0 if no deviations of this type.

(4) The number of desorption cycles when the duration of the vacuum/purge cycle was less than the average duration as specified in § 60.504a(e)(2)(iii) of this chapter. Enter 0 if no deviations of this type.

(3) For each flare used to comply with the emission limitations in § 60.502a(c)(3) of this chapter and for each thermal oxidation system using the flare monitoring alternative as provided in § 60.502a(c)(1)(iii), report:

(i) The date and start and end times for each of the following instances:

(A) Each 15-minute block during which there was at least one minute

when gasoline vapors were routed to the flare and no pilot flame was present.

(B) Each period of 2 consecutive hours during which visible emissions exceeded a total of 5 minutes. Additionally, report the number of minutes for which visible emissions were observed during the observation or an estimate of the cumulative number of minutes in the 2-hour period for which emissions were visible based on best information available to the owner or operator.

(C) Each 15-minute period for which the applicable operating limits specified in § 63.670(d) through (f) were not met. You must identify the specific operating limit that was not met. Additionally, report the information in paragraphs (m)(3)(i)(C)(1) through (3) of this section, as applicable.

(1) If you use the loading rate operating limits as determined in § 60.502a(c)(3)(vii) of this chapter alone or in combination with the supplemental gas flow rate monitoring alternative in § 60.502a(c)(3)(viii) of this chapter, the required minimum ratio and the actual ratio of gasoline loaded to total product loaded for the rolling 15-minute period and, if applicable, the required minimum quantity and the actual quantity of gasoline loaded, in gallons, for the rolling 15-minute period.

(2) If you use the supplemental gas flow rate monitoring alternative in § 60.502a(c)(3)(viii) of this chapter, the required minimum supplemental gas flow rate and the actual supplemental gas flow rate including units of flow rates for the 15-minute block.

(3) If you use parameter monitoring systems other than those specified in paragraphs (m)(3)(i)(C)(1) and (2) of this section, the value of the net heating value operating parameter(s) during the deviation determined following the methods in § 63.670(k) through (n) as applicable.

(ii) The start date, start time, and duration in minutes for each period when “vapors displaced from gasoline cargo tanks during product loading” were routed to the flare or thermal oxidation system and the applicable monitoring was not performed.

(iii) For each instance reported under paragraphs (m)(3)(i) and (ii) of this section that involves CMS, report the following information:

(A) A unique identifier for the CMS.

(B) The make, model number, and date of last calibration check of the CMS.

(C) The cause of the deviation or downtime and the corrective action taken.

(4) For any instance in which liquid product was loaded into a gasoline cargo tank for which vapor tightness documentation required under § 60.502a(e)(1) of this chapter was not provided or available in the terminal's records, report:

(i) Cargo tank owner and address.

(ii) Cargo tank identification number.

(iii) Date and time liquid product was loaded into a gasoline cargo tank without proper documentation.

(iv) Date proper documentation was received or statement that proper documentation was never received.

(5) For each instance when liquid product was loaded into gasoline cargo tanks not using submerged filling, as defined in § 63.421, not equipped with vapor collection equipment that is compatible with the terminal's vapor collection system, or not properly connected to the terminal's vapor collection system, report:

(i) Date and time of liquid product loading into gasoline cargo tank not using submerged filling, improperly equipped, or improperly connected.

(ii) The type of deviation (e.g., not submerged filling, incompatible equipment, not properly connected).

(iii) Cargo tank identification number.

(6) Report the following information for each leak inspection required and each leak identified under § 63.424(c) and § 60.503a(a)(2) of this chapter.

(i) For each leak detected during a leak inspection required under § 63.424(c) and § 60.503a(a)(2) of this chapter, report:

(A) The date of inspection.

(B) The leak determination method (OGI or Method 21).

(C) The total number and type of equipment for which leaks were detected.

(D) The total number and type of equipment for which leaks were repaired within 15 calendar days.

(E) The total number and type of equipment for which no repair attempt was made within 5 calendar days of the leaks being identified.

(F) The total number and types of equipment that were placed on the delay of repair, as specified in § 60.502a(j)(8) of this chapter.

(ii) For leaks identified under § 63.424(c) by audio/visual/olfactory methods during normal duties report:

(A) The total number and type of equipment for which leaks were identified.

(B) The total number and type of equipment for which leaks were repaired within 15 calendar days.

(C) The total number and type of equipment for which no repair attempt was made within 5 calendar days of the leaks being identified.

(D) The total number and type of equipment placed on the delay of repair, as specified in § 60.502a(j)(8) of this chapter.

(iii) The total number of leaks on the delay of repair list at the start of the reporting period.

(iv) The total number of leaks on the delay of repair list at the end of the reporting period.

(v) For each leak that was on the delay of repair list at any time during the reporting period, report:

(A) Unique equipment identification number.

(B) Type of equipment.

(C) Leak determination method (OGI, Method 21, or audio/visual/olfactory).

(D) The reason(s) why the repair was not feasible within 15 calendar days.

(E) If applicable, the date repair was completed.

(7) For each gasoline storage vessel subject to requirements in § 63.423, report:

(i) The information specified in § 60.115b(a) or (b) of this chapter or deviations in measured parameter values from the plan specified in § 60.115b(c) of this chapter, depending upon the control equipment installed, or, if applicable, the information specified in § 63.1066(b).

(ii) If you are complying with § 63.423(b)(2), for each deviation in LEL monitoring, report:

(A) Date and start and end times of the LEL monitoring, and the storage vessel being monitored.

(B) Description of the monitoring event, *e.g.*, monitoring conducted concurrent with visual inspection required under § 60.113b(a)(2) of this

chapter or § 63.1063(d)(2); monitoring that occurred on a date other than the visual inspection required under § 60.113b(a)(2) or § 63.1063(d)(2); re-monitoring due to high winds; re-monitoring after repair attempt.

(C) Wind speed in miles per hour at the top of the storage vessel on the date of LEL monitoring.

(D) The highest 5-minute rolling average reading during the monitoring event.

(E) Whether the floating roof was repaired, replaced, or taken out of gasoline service. If the floating roof was repaired or replaced, also report the information in paragraphs (m)(7)(ii)(A) through (D) of this section for each re-monitoring conducted to confirm the repair.

(8) If there were no deviations from the emission limitations, operating parameters, or work practice standards, then provide a statement that there were no deviations from the emission limitations, operating parameters, or work practice standards during the reporting period. If there were no periods during which a continuous monitoring system (including a CEMS or CPMS) was inoperable or out-of-control, then provide a statement that there were no periods during which a continuous monitoring system was inoperable or out-of-control during the reporting period.

(n) Each owner or operator of an affected source under this subpart shall submit semiannual compliance reports with the information specified in paragraph (l) or (m) of this section to the Administrator according to the

requirements in § 63.13. Beginning on May 8, 2027, or once the report template for this subpart has been available on the CEDRI website (<https://www.epa.gov/electronic-reporting-air-emissions/cedri>) for one year, whichever date is later, you must submit all subsequent semiannual compliance reports using the appropriate electronic report template on the CEDRI website for this subpart and following the procedure specified in § 63.9(k), except any medium submitted through mail must be sent to the attention of the Gasoline Distribution Sector Lead. The date report templates become available will be listed on the CEDRI website. Unless the Administrator or delegated State agency or other authority has approved a different schedule for submission of reports, the report must be submitted by the deadline specified in this subpart, regardless of the method in which the report is submitted.

■ 14. Section 63.429 is amended by revising paragraph (c) introductory text and adding paragraph (c)(5) to read as follows:

§ 63.429 Implementation and enforcement.

* * * * *

(c) The authorities that cannot be delegated to State, local, or Tribal agencies are as specified in paragraphs (c)(1) through (5) of this section.

* * * * *

(5) Approval of an alternative to any electronic reporting to the EPA required by this subpart.

■ 15. Table 1 to subpart R of part 63 is revised to read as follows:

TABLE 1 TO SUBPART R OF PART 63—GENERAL PROVISIONS APPLICABILITY TO THIS SUBPART

Reference	Applies to this subpart	Comment
63.1(a)(1)	Yes.	
63.1(a)(2)	Yes.	
63.1(a)(3)	Yes.	
63.1(a)(4)	Yes.	
63.1(a)(5)	No	Section reserved.
63.1(a)(6)	Yes.	
63.1(a)(7) through (9)	No	Sections reserved.
63.1(a)(10)	Yes.	
63.1(a)(11)	Yes.	
63.1(a)(12)	Yes.	
63.1(b)(1)	No	This subpart specifies applicability in § 63.420.
63.1(b)(2)	Yes.	
63.1(b)(3)	Yes	Except this subpart specifies additional reporting and recordkeeping for some large area sources in § 63.428. These additional requirements only apply prior to the date the applicability equations are no longer applicable.
63.1(c)(1)	Yes.	
63.1(c)(2)	Yes	Some small sources are not subject to this subpart.
63.1(c)(3)	No	Section reserved.
63.1(c)(4)	No	Section reserved.
63.1(c)(5)	Yes.	
63.1(c)(6)	Yes.	
63.1(d)	No	Section reserved.
63.1(e)	Yes.	

TABLE 1 TO SUBPART R OF PART 63—GENERAL PROVISIONS APPLICABILITY TO THIS SUBPART—Continued

Reference	Applies to this subpart	Comment
63.2	Yes	Additional definitions in § 63.421.
63.3(a)–(c)	Yes.	
63.4(a)(1) and (2)	Yes.	
63.4(a)(3) through (5)	No	Sections reserved.
63.4(b)	Yes.	
63.4(c)	Yes.	
63.5(a)(1)	Yes.	
63.5(a)(2)	Yes.	
63.5(b)(1)	Yes.	
63.5(b)(2)	No	Section reserved.
63.5(b)(3)	Yes.	
63.5(b)(4)	Yes.	
63.5(b)(5)	No	Section reserved.
63.5(b)(6)	Yes.	
63.5(c)	No	Section reserved.
63.5(d)(1)	Yes.	
63.5(d)(2)	Yes.	
63.5(d)(3)	Yes.	
63.5(d)(4)	Yes.	
63.5(e)	Yes.	
63.5(f)(1)	Yes.	
63.5(f)(2)	Yes.	
63.6(a)	Yes.	
63.6(b)(1)	Yes.	
63.6(b)(2)	Yes.	
63.6(b)(3)	Yes.	
63.6(b)(4)	Yes.	
63.6(b)(5)	Yes.	
63.6(b)(6)	No	Section reserved.
63.6(b)(7)	Yes.	
63.6(c)(1)	No	This subpart specifies the compliance date.
63.6(c)(2)	Yes.	
63.6(c)(3) and (4)	No	Sections reserved.
63.6(c)(5)	Yes.	
63.6(d)	No	Section reserved.
63.6(e)	No	See § 62.420(k) for general duty requirement.
63.6(f)(1)	No.	
63.6(f)(2)	Yes.	
63.6(f)(3)	Yes.	
63.6(g)	Yes.	
63.6(h)	No	This subpart does not require COMS; this subpart specifies requirements for visible emissions observations for flares.
63.6(i)(1) through (14)	Yes.	
63.6(i)(15)	No	Section reserved.
63.6(i)(16)	Yes.	
63.6(j)	Yes.	
63.7(a)(1)	Yes.	
63.7(a)(2)	Yes.	
63.7(a)(3)	Yes.	
63.7(a)(4)	Yes.	
63.7(b)	Yes.	
63.7(c)	Yes.	
63.7(d)	Yes.	
63.7(e)(1)	No	This subpart specifies performance test conditions.
63.7(e)(2)	Yes.	
63.7(e)(3)	Yes.	
63.7(e)(4)	Yes.	
63.7(f)	Yes.	
63.7(g)	Yes	Except this subpart specifies how and when the performance test and performance evaluation results are reported.
63.7(h)	Yes.	
63.8(a)(1)	Yes.	
63.8(a)(2)	Yes.	
63.8(a)(3)	No	Section reserved.
63.8(a)(4)	Yes.	
63.8(b)(1)	Yes.	
63.8(b)(2)	Yes.	
63.8(b)(3)	Yes.	
63.8(c)(1) introductory text	Yes.	
63.8(c)(1)(i)	No.	
63.8(c)(1)(ii)	Yes.	
63.8(c)(1)(iii)	No.	

TABLE 1 TO SUBPART R OF PART 63—GENERAL PROVISIONS APPLICABILITY TO THIS SUBPART—Continued

Reference	Applies to this subpart	Comment
63.8(c)(2)	Yes.	This subpart does not require COMS.
63.8(c)(3)	Yes.	
63.8(c)(4)	Yes.	
63.8(c)(5)	No	
63.8(c)(6) through (8)	Yes.	
63.8(d)(1) and (2)	Yes.	This subpart specifies CMS records requirements. Except this subpart specifies how and when the performance evaluation results are reported.
63.8(d)(3)	No	
63.8(e)	Yes	
63.8(f)(1) through (5)	Yes.	
63.8(f)(6)	Yes.	
63.8(g)	Yes.	Except this subpart allows additional time for existing sources to submit initial notification. Section 63.428(a) specifies submittal by 1 year after being subject to the rule or December 16, 1996, whichever is later.
63.9(a)	Yes.	
63.9(b)(1)	Yes.	
63.9(b)(2)	Yes	
63.9(b)(3)	No	
63.9(b)(4)	Yes.	Section reserved.
63.9(b)(5)	Yes.	
63.9(c)	Yes.	
63.9(d)	Yes.	
63.9(e)	Yes.	
63.9(f)	No.	Except this subpart specifies how to submit the Notification of Compliance Status. Section reserved.
63.9(g)	Yes.	
63.9(h)(1) through (3)	Yes	
63.9(h)(4)	No	
63.9(h)(5) and (6)	Yes.	
63.9(i)	Yes.	This subpart specifies recordkeeping requirements for deviations.
63.9(j)	Yes.	
63.9(k)	Yes.	
63.10(a)	Yes.	
63.10(b)(1)	Yes.	
63.10(b)(2)(i), (ii), (iv), and (v)	No	Sections reserved.
63.10(b)(2)(iii) and (vi) through (xiv)	Yes.	
63.10(b)(3)	Yes.	
63.10(c)(1)	Yes.	
63.10(c)(2) through (4)	No	
63.10(c)(5) through (8)	Yes.	Section reserved.
63.10(c)(9)	No	
63.10(c)(10) through (14)	Yes.	
63.10(c)(15)	No.	
63.10(d)(1)	Yes.	This subpart specifies how and when the performance test results are reported.
63.10(d)(2)	No	
63.10(d)(3)	No	
63.10(d)(4)	Yes.	
63.10(d)(5)	No.	
63.10(e)(1)	Yes.	This subpart specifies reporting requirements for visible emissions observations for flares.
63.10(e)(2) through (4)	No	
63.10(f)	Yes.	
63.11(a) and (b)	Yes	
63.11(c), (d), and (e)	Yes	
63.12	Yes.	Except these provisions no longer apply upon compliance with the provisions in §§ 63.422(b)(2) and 63.425(d)(2) for flares to meet the requirements specified in §§ 60.502a(c)(3) and 60.504a(c) of this chapter.
63.13	Yes.	
63.14	Yes.	
63.15	Yes.	
63.16	Yes.	
63.11(c), (d), and (e)	Yes	Except these provisions do not apply to monitoring required under § 63.425(b)(1) or (c)(1) and these provisions no longer apply upon compliance with the provisions in § 63.424(c).

Subpart BBBBBB—National Emission Standards for Hazardous Air Pollutants for Source Category: Gasoline Distribution Bulk Terminals, Bulk Plants, and Pipeline Facilities

■ 16. Section 63.11081 is amended by revising paragraphs (c) and (f) to read as follows:

§ 63.11081 Am I subject to the requirements in this subpart?

* * * * *

(c) Gasoline storage tanks that are located at affected sources identified in paragraphs (a)(1) through (4) of this section, and that are used only for dispensing gasoline in a manner consistent with tanks located at a gasoline dispensing facility as defined in § 63.11132, are not subject to any of the requirements in this subpart. These tanks must comply with subpart CCCCCC of this part.

* * * * *

(f) If your affected source's throughput ever exceeds an applicable throughput threshold in the definition of "bulk gasoline terminal" or in item 1 in table 2 to this subpart, the affected source will remain subject to the requirements for sources above the threshold, even if the affected source throughput later falls below the applicable throughput threshold. If your bulk gasoline plant's annual average gasoline throughput ever reaches or exceeds 4,000 gallons per day, the bulk gasoline plant will remain subject to the vapor balancing requirements, even if the affected source annual average gasoline throughput later falls below 4,000 gallons per day.

* * * * *

■ 17. Section 63.11082 is amended by revising paragraph (a) to read as follows:

§ 63.11082 What parts of my affected source does this subpart cover?

(a) The emission sources to which this subpart applies are gasoline storage tanks, gasoline loading racks, vapor collection-equipped gasoline cargo tanks, and equipment components in vapor or liquid gasoline service that meet the criteria specified in tables 1 through 4 to this subpart.

* * * * *

■ 18. Revise § 63.11083 to read as follows:

§ 63.11083 When do I have to comply with this subpart?

(a) Except as specified in paragraphs (d) and (e) of this section, if you have a new or reconstructed affected source, you must comply with this subpart according to paragraphs (a)(1) and (2) of this section.

(1) If you start up your affected source before January 10, 2008, you must comply with the standards in this subpart no later than January 10, 2008.

(2) If you start up your affected source after January 10, 2008, you must comply with the standards in this subpart upon startup of your affected source.

(b) Except as specified in paragraphs (d) and (e) of this section, if you have an existing affected source, you must comply with the standards in this subpart no later than January 10, 2011.

(c) If you have an existing affected source that becomes subject to the control requirements in this subpart because of an increase in the daily throughput, as specified in § 63.11086(a) or in option 1 of table 2 to this subpart, you must comply with the standards in this subpart no later than 3 years after the affected source becomes subject to the control requirements in this subpart.

(d) All affected sources that commenced construction or reconstruction on or before June 10, 2022, must comply with the requirements in paragraphs (d)(1) through (5) of this section upon startup or on May 8, 2027, whichever is later. All affected sources that commenced construction or reconstruction after June 10, 2022, must comply with the requirements in paragraphs (d)(1) through (5) of this section upon startup, or on July 8, 2024, whichever is later.

(1) For bulk gasoline plants, the requirements specified in § 63.11086(a)(4) through (6).

(2) For storage vessels at bulk gasoline terminals, pipeline breakout stations, or pipeline pumping stations, the requirements specified in items 1(b), 2(c), and 2(f) in table 1 to this subpart and §§ 63.11087(g) and 63.11092(f)(1)(ii).

(3) For loading racks at bulk gasoline terminals, the requirements specified in items 1(c), 1(f), and 2(c) in table 2 to this subpart.

(4) For equipment leak inspections at bulk gasoline terminals, bulk gasoline plants, pipeline breakout stations, or pipeline pumping stations, the requirements in § 63.11089(c).

(5) For gasoline cargo tanks, the requirements specified in § 63.11092(g)(1)(ii).

(e) All affected sources that commenced construction or reconstruction on or before June 10, 2022, must comply with the requirements specified in items 2(d) and 2(e) in table 1 to this subpart upon startup or the next time the storage vessel is completely emptied and degassed, or by May 8, 2034, whichever occurs first. All affected sources that commenced construction or

reconstruction after June 10, 2022, must comply with the requirements specified in items 2(d) and 2(e) in table 1 to this subpart upon startup, or on July 8, 2024, whichever is later.

■ 19. Revise § 63.11085 to read as follows:

§ 63.11085 What are my general duties to minimize emissions?

Each owner or operator of an affected source under this subpart must comply with the requirements of paragraphs (a) through (c) of this section.

(a) You must, at all times, operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions. The general duty to minimize emissions does not require the owner or operator to make any further efforts to reduce emissions if levels required by the applicable standard have been achieved. Determination of whether such operation and maintenance procedures are being used will be based on information available to the Administrator, which may include, but is not limited to, monitoring results, review of operation and maintenance procedures, review of operation and maintenance records, and inspection of the source.

(b) You must not allow gasoline to be handled in a manner that would result in vapor releases to the atmosphere for extended periods of time. Measures to be taken include, but are not limited to, the following:

(1) Minimize gasoline spills;
(2) Clean up spills as expeditiously as practicable;

(3) Cover all open gasoline containers and all gasoline storage tank fill-pipes with a gasketed seal when not in use; and

(4) Minimize gasoline sent to open waste collection systems that collect and transport gasoline to reclamation and recycling devices, such as oil/water separators.

(c) You must keep applicable records and submit reports as specified in §§ 63.11094(g) and 63.11095(d) or § 63.11095(e).

■ 20. Section 63.11086 is amended by:

- a. Revising the introductory text and paragraph (a) introductory text;
- b. Adding paragraphs (a)(4) through (6);
- c. Revising paragraphs (b) and (c);
- d. Removing and reserving paragraph (d); and
- e. Revising paragraphs (e) and (i).

The revisions and additions read as follows:

§ 63.11086 What requirements must I meet if my facility is a bulk gasoline plant?

Each owner or operator of an affected bulk gasoline plant, as defined in § 63.11100, must comply with the requirements of paragraphs (a) through (j) of this section.

(a) Except as specified in paragraph (b) of this section, you must only load gasoline into storage tanks and cargo tanks at your facility by utilizing submerged filling, as defined in § 63.11100, and as specified in paragraph (a)(1), (2), or (3) of this section. The applicable distances in paragraphs (a)(1) and (2) of this section shall be measured from the point in the opening of the submerged fill pipe that is the greatest distance from the bottom of the storage tank. Additionally, for bulk gasoline plants with an annual average gasoline throughput of 4,000 gallons per day or more (calculated by summing the current day's throughput, plus the throughput for the previous 364 days, and then dividing that sum by 365), you must only load gasoline utilizing vapor balancing as specified in paragraphs (a)(4) through (6) of this section.

* * * * *

(4) Beginning no later than the dates specified in § 63.11083, each bulk gasoline plant with an annual average gasoline throughput of 4,000 gallons per day or more shall be equipped with a vapor balance system between fixed roof gasoline storage tank(s) other than storage tank(s) vented through a closed vent system to a control device and incoming gasoline cargo tank(s) designed to capture and transfer vapors displaced during filling of fixed roof gasoline storage tank(s) other than storage tank(s) vented through a closed vent system to a control device. These lines shall be equipped with fittings that are vapor tight and that automatically and immediately close upon disconnection.

(5) Beginning no later than the dates specified in § 63.11083, each bulk gasoline plant with an annual average gasoline throughput of 4,000 gallons per day or more shall be equipped with a vapor balance system between fixed roof gasoline storage tank(s) other than storage tank(s) vented through a closed vent system to a control device and outgoing gasoline cargo tank(s) designed to capture and transfer vapors displaced during the loading of gasoline cargo tank(s). The vapor balance system shall be designed to prevent any vapors collected at one loading rack from passing to another loading rack.

(6) Beginning no later than the dates specified in § 63.11083, each owner or

operator of a bulk gasoline plant subject to this subpart shall act to ensure that the following procedures are followed during all loading, unloading, and storage operations:

(i) The vapor balance system shall be connected between the cargo tank and storage tank during all gasoline transfer operations between a cargo tank and a fixed roof gasoline storage tank other than a storage tank vented through a closed vent system to a control device;

(ii) All storage tank openings, including inspection hatches and gauging and sampling devices shall be vapor tight when not in use;

(iii) No pressure relief device on a gasoline storage tank shall begin to open at a tank pressure less than 18 inches of water to minimize breathing losses;

(iv) The gasoline cargo tank compartment hatch covers shall not be opened during the gasoline transfer;

(v) All vapor balance systems shall be designed and operated at all times to prevent gauge pressure in the gasoline cargo tank from exceeding 18 inches of water and vacuum from exceeding 6 inches of water during product transfers;

(vi) No pressure vacuum relief valve in the bulk gasoline plant vapor balance system shall begin to open at a system pressure of less than 18 inches of water or at a vacuum of less than 6 inches of water; and

(vii) No gasoline shall be transferred into a cargo tank that does not have a current annual certification for vapor-tightness pursuant to the requirements in § 60.502a(e) of this chapter.

(b) Gasoline storage tanks with a capacity of less than 250 gallons are not required to comply with the control requirements in paragraph (a) of this section but must comply only with the requirements in § 63.11085(b).

(c) You must perform a leak inspection of all equipment in gasoline service and repair leaking equipment according to the requirements specified in § 63.11089.

* * * * *

(e) You must submit an Initial Notification that you are subject to this subpart by May 9, 2008, or no later than 120 days after the source becomes subject to this subpart, whichever is later unless you meet the requirements in paragraph (g) of this section. The Initial Notification must contain the information specified in paragraphs (e)(1) through (4) of this section. The notification must be submitted to the applicable U.S. Environmental Protection Agency (EPA) Regional Office and the delegated State authority, as specified in § 63.13.

(1) The name and address of the owner and the operator.

(2) The address (*i.e.*, physical location) of the bulk gasoline plant.

(3) A statement that the notification is being submitted in response to this subpart and identifying the requirements in paragraphs (a), (b), and (c) of this section that apply to you.

(4) A brief description of the bulk gasoline plant, including the number of storage tanks in gasoline service, the capacity of each storage tank in gasoline service, and the average monthly gasoline throughput at the affected source.

* * * * *

(i) You must keep applicable records and submit reports as specified in §§ 63.11094 and 63.11095.

■ 21. Section 63.11087 is amended by revising paragraph (c) and adding paragraph (g) to read as follows:

§ 63.11087 What requirements must I meet for gasoline storage tanks if my facility is a bulk gasoline terminal, pipeline breakout station, or pipeline pumping station?

* * * * *

(c) You must comply with the applicable testing and monitoring requirements specified in § 63.11092(f).

* * * * *

(g) No later than the dates specified in § 63.11083, if your gasoline storage tank is subject to, and complies with, the control requirements of § 60.112b(a)(2), (3), or (4) of this chapter, your storage tank will be deemed in compliance with this section. If your gasoline storage tank is subject to the control requirements of § 60.112b(a)(1) of this chapter, you must conduct lower explosive limit (LEL) monitoring as specified in § 63.11092(f)(1)(ii) to demonstrate compliance with this section. You must report this determination in the Notification of Compliance Status report under § 63.11093(b). The requirements in paragraph (f) of this section do not apply when demonstrating compliance with this paragraph (g).

■ 22. Section 63.11088 is amended by revising the section heading and paragraph (d) to read as follows:

§ 63.11088 What requirements must I meet for gasoline loading racks if my facility is a bulk gasoline terminal?

* * * * *

(d) You must comply with the applicable testing and monitoring requirements specified in § 63.11092. As an alternative to the pressure monitoring requirements specified in § 60.504a(d) of this chapter, you may

comply with the requirements specified in § 63.11092(h).

* * * * *

■ 23. Revise § 63.11089 to read as follows:

§ 63.11089 What requirements must I meet for equipment leak inspections if my facility is a bulk gasoline terminal, bulk gasoline plant, pipeline breakout station, or pipeline pumping station?

(a) Each owner or operator of a bulk gasoline terminal, bulk gasoline plant, pipeline breakout station, or pipeline pumping station subject to the provisions of this subpart shall implement a leak detection and repair program for all equipment in gasoline service according to the requirements in paragraph (b) or (c) of this section, as applicable based on the compliance dates specified in § 63.11083.

(b) Perform a monthly leak inspection of all equipment in gasoline service, as defined in § 63.11100. For this inspection, detection methods incorporating sight, sound, and smell are acceptable.

(1) A logbook shall be used and shall be signed by the owner or operator at the completion of each inspection. A section of the logbook shall contain a list, summary description, or diagram(s) showing the location of all equipment in gasoline service at the facility.

(2) Each detection of a liquid or vapor leak shall be recorded in the logbook. When a leak is detected, an initial attempt at repair shall be made as soon as practicable, but no later than 5 calendar days after the leak is detected. Repair or replacement of leaking equipment shall be completed within 15 calendar days after detection of each leak, except as provided in paragraph (b)(3) of this section.

(3) Delay of repair of leaking equipment will be allowed if the repair is not feasible within 15 days. The owner or operator shall provide in the semiannual report specified in § 63.11095(c), the reason(s) why the repair was not feasible and the date each repair was completed.

(c) No later than the dates specified in § 63.11083, comply with the requirements in § 60.502a(j) of this chapter except as provided in paragraphs (c)(1) through (4) of this section. The requirements in paragraph (b) of this section do not apply when demonstrating compliance with this paragraph (c).

(1) The frequency for optical gas imaging (OGI) monitoring shall be annually rather than quarterly as specified in § 60.502a(j)(1)(i) of this chapter.

(2) The frequency for Method 21 monitoring of pumps and valves shall be annually rather than quarterly as specified in § 60.502a(j)(1)(ii)(A) and (B) of this chapter.

(3) The frequency of monitoring of pressure relief devices shall be annually and within 5 calendar days after each pressure release rather than quarterly and within 5 calendar days after each pressure release as specified in § 60.502a(j)(4)(i) of this chapter.

(4) Any pressure relief device that is located at a bulk gasoline plant or pipeline pumping station that is monitored only by non-plant personnel may be monitored after a pressure release the next time the monitoring personnel are onsite, but in no case more than 30 calendar days after a pressure release.

(d) You must comply with the requirements of this subpart by the applicable dates specified in § 63.11083.

(e) You must submit the applicable notifications as required under § 63.11093.

(f) You must keep records and submit reports as specified in §§ 63.11094 and 63.11095.

■ 24. Section 63.11092 is amended by:

■ a. Revising paragraphs (a)(1) introductory text and (b)(1)(i)(B)(1) introductory text;

■ b. Removing and reserving paragraph (b)(1)(i)(B)(2)(iv);

■ c. Revising paragraphs (b)(1)(i)(B)(2)(v) and (b)(1)(iii) introductory text;

■ d. Removing and reserving paragraph (b)(1)(iii)(B)(2)(iv);

■ e. Revising paragraphs (b)(1)(iii)(B)(2)(v) and (d) through (g); and

■ f. Adding paragraphs (h) and (i).

The revisions and additions read as follows:

§ 63.11092 What testing and monitoring requirements must I meet?

(a) * * *

(1) Conduct a performance test on the vapor processing and collection systems according to either paragraph (a)(1)(i) or (ii) of this section, except as provided in paragraphs (a)(2) through (4) of this section.

* * * * *

(b) * * *

(1) * * *

(i) * * *

(B) * * *

(1) Carbon adsorption devices shall be monitored as specified in paragraphs (b)(1)(i)(B)(1)(i), (ii), and (iii) of this section.

* * * * *

(2) * * *

(v) The owner or operator shall document the maximum vacuum level

observed on each carbon bed from each daily inspection and the maximum VOC concentration observed from each carbon bed on each monthly inspection, as defined in the monitoring and inspection plan, and any activation of the automated alarm or shutdown system with a written entry into a logbook or other permanent form of record. Such record shall also include a description of the corrective action taken and whether such corrective actions were taken in a timely manner, as defined in the monitoring and inspection plan, as well as an estimate of the amount of gasoline loaded.

* * * * *

(iii) Where a thermal oxidation system is used, the owner or operator shall monitor the operation of the system as specified in paragraph (b)(1)(iii)(A) or (B) of this section.

* * * * *

(B) * * *

(2) * * *

(v) The owner or operator shall document any activation of the automated alarm or shutdown system with a written entry into a logbook or other permanent form of record. Such record shall also include a description of the corrective action taken and whether such corrective actions were taken in a timely manner, as defined in the monitoring and inspection plan, as well as an estimate of the amount of gasoline loaded.

* * * * *

(d) Each owner or operator of a bulk gasoline terminal subject to the provisions of this subpart shall comply with the requirements in paragraphs (d)(1) through (3) of this section.

(1) Operate the vapor processing system in a manner not to exceed or not to go below, as appropriate, the operating parameter value for the parameters described in paragraph (b)(1) of this section.

(2) In cases where an alternative parameter pursuant to paragraph (b)(1)(iv) or (b)(5)(i) of this section is approved, each owner or operator shall operate the vapor processing system in a manner not to exceed or not to go below, as appropriate, the alternative operating parameter value.

(3) Operation of the vapor processing system in a manner exceeding or going below the operating parameter value, as appropriate, shall constitute a violation of the emission standard in § 63.11088(a).

(e) Each owner or operator of a bulk gasoline terminal subject to the emission standard in item 1(c) of table 2 to this subpart for loading racks must comply with the requirements in

paragraphs (e)(1) through (4) of this section, as applicable.

(1) For each bulk gasoline terminal complying with the emission limitations in item 1 of table 3 to this subpart (thermal oxidation system), conduct a performance test no later than 180 days after becoming subject to the applicable emission limitation in table 3 and conduct subsequent performance tests at least once every 60 calendar months following the methods specified in § 60.503a(a) and (c) of this chapter. Prior to conducting this performance test, you must continue to meet the monitoring and operating limits that apply based on the previously conducted performance test. A previously conducted performance test may be used to satisfy this requirement if the conditions in paragraphs (e)(1)(i) through (v) of this section are met.

(i) The performance test was conducted on or after May 8, 2022.

(ii) No changes have been made to the process or control device since the time of the performance test.

(iii) The operating conditions, test methods, and test requirements (e.g., length of test) used for the previous performance test conform to the requirements in paragraph (e)(1) of this section.

(iv) The temperature in the combustion zone was recorded during the performance test as specified in § 60.503a(c)(8)(i) of this chapter and can be used to establish the operating limit as specified in § 60.503a(c)(8)(ii) through (iv) of this chapter.

(v) The performance test demonstrates compliance with the emission limit specified in item 1(a) in table 3 to this subpart.

(2) For each bulk gasoline terminal complying with the emission limitations in item 1 of table 3 to this subpart (thermal oxidation system), comply with either the provisions in paragraph (e)(2)(i) or (ii) of this section.

(i) Install, operate, and maintain a CPMS to measure the combustion zone temperature according to § 60.504a(a) of this chapter and maintain the 3-hour rolling average combustion zone temperature when gasoline cargo tanks are being loaded at or above the operating limit set during the most recent performance test following the procedures specified in § 60.503a(c)(8) of this chapter. Valid operating data must exclude periods when there is no liquid product being loaded. If previous contents of the cargo tanks are known, you may also exclude periods when liquid product is loaded but no gasoline cargo tanks are being loaded provided that you excluded these periods in the determination of the combustion zone

temperature operating limit according to the provisions in § 60.503a(c)(8)(ii) of this chapter.

(ii) Operate each thermal oxidation system in compliance with the requirements for a flare in § 60.502a(c)(3) of this chapter and the monitoring requirements in § 60.504a(c) of this chapter.

(3) For each bulk gasoline terminal complying with the emission limitations in item 2 of table 3 to this subpart (flare), install, operate, and maintain flare continuous parameter monitoring systems as specified in § 60.504a(c) of this chapter.

(4) For each bulk gasoline terminal complying with the emission limitation in item 3 of table 3 to this subpart (carbon adsorption system, refrigerated condenser, or other vapor recovery system), install, operate, and maintain a continuous emission monitoring system (CEMS) to measure the total organic compounds (TOC) concentration according to § 60.504a(b) of this chapter and conduct performance evaluations as specified in § 60.503a(a) and (d) of this chapter. For periods of CEMS outages, you may use the limited alternative monitoring methods as specified in § 60.504a(e) of this chapter.

(f) Each owner or operator subject to the emission standard in § 63.11087 for gasoline storage tanks shall comply with the requirements in paragraphs (f)(1) through (3) of this section.

(1) If your gasoline storage tank is equipped with an internal floating roof,

(i) You must perform inspections of the floating roof system according to the requirements of § 60.113b(a) of this chapter if you are complying with option 2(b) in table 1 to this subpart, or according to the requirements of § 63.1063(c)(1) if you are complying with option 2(e) in table 1 to this subpart.

(ii) No later than the dates specified in § 63.11083, you must conduct LEL monitoring according to the provisions in § 63.425(j). A deviation of the LEL level is considered an inspection failure under § 60.113b(a)(2) of this chapter or § 63.1063(d)(2) and must be remedied as such. Any repairs must be confirmed effective through re-monitoring of the LEL and meeting the levels in options 2(c) and 2(f) in table 1 to this subpart within the timeframes specified in § 60.113b(a)(2) or § 63.1063(e), as applicable.

(2) If your gasoline storage tank is equipped with an external floating roof, you must perform inspections of the floating roof system according to the requirements of § 60.113b(b) of this chapter if you are complying with option 2(d) in table 1 to this subpart, or

according to the requirements of § 63.1063(c)(2) if you are complying with option 2(e) in table 1 to this subpart.

(3) If your gasoline storage tank is equipped with a closed vent system and control device, you must conduct a performance test and determine a monitored operating parameter value in accordance with the requirements in paragraphs (a) through (d) of this section, except that the applicable level of control specified in paragraph (a)(2) of this section shall be a 95-percent reduction in inlet TOC levels rather than 80 mg/l of gasoline loaded.

(g) The annual certification test for gasoline cargo tanks shall consist of the test methods specified in paragraph (g)(1) or (2) of this section. Affected facilities that are subject to subpart XX to part 60 of this chapter may elect, after notification to the subpart XX delegated authority, to comply with paragraphs (g)(1) and (2) of this section.

(1) *EPA Method 27 of appendix A–8 to part 60 of this chapter.* Conduct the test using a time period (t) for the pressure and vacuum tests of 5 minutes. The initial pressure (P_i) for the pressure test shall be 460 millimeters (mm) of water (18 inches of water), gauge. The initial vacuum (V_i) for the vacuum test shall be 150 mm of water (6 inches of water), gauge.

(i) The maximum allowable pressure and vacuum changes (Δp , Δv) for all affected gasoline cargo tanks is 3 inches of water, or less, in 5 minutes.

(ii) No later than the dates specified in § 63.11083, the maximum allowable pressure and vacuum changes (Δp , Δv) for all affected gasoline cargo tanks is provided in column 3 of table 2 in § 63.425(e). The requirements in paragraph (g)(1)(i) of this section do not apply when demonstrating compliance with this paragraph (g)(1)(ii).

(2) *Railcar bubble leak test procedures.* As an alternative to the annual certification test required under paragraph (g)(1) of this section for certification leakage testing of gasoline cargo tanks, the owner or operator may comply with paragraphs (g)(2)(i) and (ii) of this section for railcar cargo tanks, provided the railcar cargo tank meets the requirement in paragraph (g)(2)(iii) of this section.

(i) Comply with the requirements of 49 CFR 173.31(d), 179.7, 180.509, and 180.511 for the periodic testing of railcar cargo tanks.

(ii) The leakage pressure test procedure required under 49 CFR 180.509(j) and used to show no indication of leakage under 49 CFR 180.511(f) shall be a bubble leak test procedure meeting the requirements in

49 CFR 179.7, 180.505, and 180.509. Use of ASTM E515–95 (Reapproved 2000) or BS EN 1593:1999 (incorporated by reference, see § 63.14) complies with those requirements.

(iii) The alternative requirements in this paragraph (g)(2) may not be used for any railcar cargo tank that collects gasoline vapors from a vapor balance system and the system complies with a Federal, State, local, or Tribal rule or permit. A vapor balance system is a piping and collection system designed to collect gasoline vapors displaced from a storage vessel, barge, or other container being loaded, and routes the displaced gasoline vapors into the railcar cargo tank from which liquid gasoline is being unloaded.

(h) As an alternative to the pressure monitoring requirements in § 60.504a(d) of this chapter, you may comply with the pressure monitoring requirements in § 60.503(d) of this chapter during any performance test or performance evaluation conducted under § 63.11092(e) to demonstrate compliance with the provisions in § 60.502a(h) of this chapter.

(i) Performance tests conducted for this subpart shall be conducted under such conditions as the Administrator specifies to the owner or operator, based on representative performance (*i.e.*, performance based on normal operating conditions) of the affected source. Performance tests shall be conducted under representative conditions when liquid product is being loaded into gasoline cargo tanks and shall include periods between gasoline cargo tank loading (when one cargo tank is disconnected and another cargo tank is moved into position for loading) provided that liquid product loading into gasoline cargo tanks is conducted for at least a portion of each 5 minute block of the performance test. You may not conduct performance tests during periods of malfunction. You must record the process information that is necessary to document operating conditions during the test and include in such record an explanation to support that such conditions represent normal operation. Upon request, the owner or operator shall make available to the Administrator such records as may be necessary to determine the conditions of performance tests.

■ 25. Section 63.11093 is amended by revising paragraph (c) and adding paragraph (e) to read as follows:

§ 63.11093 What notifications must I submit and when?

* * * * *

(c) Each owner or operator of an affected bulk gasoline terminal under

this subpart must submit a Notification of Performance Test or Performance Evaluation, as specified in subpart A to this part, prior to initiating testing required by this subpart.

* * * * *

(e) The owner or operator must submit all Notification of Compliance Status reports in PDF format to the EPA following the procedure specified in § 63.9(k), except any medium submitted through mail must be sent to the attention of the Gasoline Distribution Sector Lead.

■ 26. Revise § 63.11094 to read as follows:

§ 63.11094 What are my recordkeeping requirements?

(a) Each owner or operator of a bulk gasoline terminal or pipeline breakout station whose storage vessels are subject to the provisions of this subpart shall keep records as specified in paragraphs (a)(1) and (2) of this section.

(1) If you are complying with options 2(a), 2(b), or 2(d) in table 1 to this subpart, keep records as specified in § 60.115b of this chapter except records shall be kept for at least 5 years. If you are complying with the requirements of option 2(e) in table 1 to this subpart, you shall keep records as specified in § 63.1065.

(2) If you are complying with options 2(c) or 2(f) in table 1 to this subpart, keep records of each LEL monitoring event as specified in paragraphs (a)(2)(i) through (ix) of this section for at least 5 years.

(i) Date and time of the LEL monitoring, and the storage vessel being monitored.

(ii) A description of the monitoring event (*e.g.*, monitoring conducted concurrent with visual inspection required under § 60.113b(a)(2) of this chapter or § 63.1063(d)(2); monitoring that occurred on a date other than the visual inspection required under § 60.113b(a)(2) or § 63.1063(d)(2); re-monitoring due to high winds; re-monitoring after repair attempt).

(iii) Wind speed at the top of the storage vessel on the date of LEL monitoring.

(iv) The LEL meter manufacturer and model number used, as well as an indication of whether tubing was used during the LEL monitoring, and if so, the type and length of tubing used.

(v) Calibration checks conducted before and after making the measurements, including both the span check and instrumental offset. This includes the hydrocarbon used as the calibration gas, the Certificate of Analysis for the calibration gas(es), the results of the calibration check, and any

corrective action for calibration checks that do not meet the required response.

(vi) Location of the measurements and the location of the floating roof.

(vii) Each measurement (taken at least once every 15 seconds). The records should indicate whether the recorded values were automatically corrected using the meter's programming. If the values were not automatically corrected, record both the raw (as the calibration gas) and corrected measurements, as well as the correction factor used.

(viii) Each 5-minute rolling average reading.

(ix) If the vapor concentration of the storage vessel was above 25 percent of the LEL on a 5-minute rolling average basis, a description of whether the floating roof was repaired, replaced, or taken out of gasoline service.

(b) Each owner or operator of a bulk gasoline terminal subject to the provisions in items 1(e), 1(f), or 2(c) in table 2 to this subpart or bulk gasoline plant subject to the requirements in § 63.11086(a)(6) shall keep records in either a hardcopy or electronic form of the test results for each gasoline cargo tank loading at the facility as specified in paragraphs (b)(1) through (3) of this section for at least 5 years.

(1) Annual certification testing performed under § 63.11092(g)(1) and periodic railcar bubble leak testing performed under § 63.11092(g)(2).

(2) The documentation file shall be kept up to date for each gasoline cargo tank loading at the facility. The documentation for each test shall include, as a minimum, the following information:

(i) Name of test: Annual Certification Test—Method 27 or Periodic Railcar Bubble Leak Test Procedure.

(ii) Cargo tank owner's name and address.

(iii) Cargo tank identification number.

(iv) Test location and date.

(v) Tester name and signature.

(vi) Witnessing inspector, if any: Name, signature, and affiliation.

(vii) Vapor tightness repair: Nature of repair work and when performed in relation to vapor tightness testing.

(viii) Test results: Tank or compartment capacity; test pressure; pressure or vacuum change, mm of water; time period of test; number of leaks found with instrument; and leak definition.

(3) If you are complying with the alternative requirements in § 63.11088(b), you must keep records documenting that you have verified the vapor tightness testing according to the requirements of the Administrator.

(c) Each owner or operator subject to the equipment leak provisions of

§ 63.11089 shall prepare and maintain a record describing the types, identification numbers, and locations of all equipment in gasoline service. For facilities electing to implement an instrument program under § 63.11089(b), the record shall contain a full description of the program.

(d) Each owner or operator of an affected source subject to equipment leak inspections under § 63.11089(b) shall record in the logbook for each leak that is detected the information specified in paragraphs (d)(1) through (7) of this section.

(1) The equipment type and identification number.

(2) The nature of the leak (*i.e.*, vapor or liquid) and the method of detection (*i.e.*, sight, sound, or smell).

(3) The date the leak was detected and the date of each attempt to repair the leak.

(4) Repair methods applied in each attempt to repair the leak.

(5) "Repair delayed" and the reason for the delay if the leak is not repaired within 15 calendar days after discovery of the leak.

(6) The expected date of successful repair of the leak if the leak is not repaired within 15 days.

(7) The date of successful repair of the leak.

(e) Each owner or operator of an affected source subject to § 63.11089(c) or § 60.503a(a)(2) of this chapter shall maintain records of each leak inspection and leak identified under § 63.11089(c) or § 60.503a(a)(2) as specified in paragraphs (e)(1) through (5) of this section for at least 5 years.

(1) An indication if the leak inspection was conducted under § 63.11089(c) or § 60.503a(a)(2) of this chapter.

(2) Leak determination method used for the leak inspection.

(3) For leak inspections conducted with Method 21 of appendix A-7 to part 60 of this chapter, keep the following additional records:

(i) Date of inspection.

(ii) Inspector name.

(iii) Monitoring instrument identification.

(iv) Identification of all equipment surveyed and the instrument reading for each piece of equipment.

(v) Date and time of instrument calibration and initials of operator performing the calibration.

(vi) Calibration gas cylinder identification, certification date, and certified concentration.

(vii) Instrument scale used.

(viii) Results of the daily calibration drift assessment.

(4) For leak inspections conducted with OGI, keep the records specified in

section 12 of appendix K to part 60 of this chapter.

(5) For each leak detected during a leak inspection or by audio/visual/olfactory methods during normal duties, record the following information:

(i) The equipment type and identification number.

(ii) The date the leak was detected, the name of the person who found the leak, the nature of the leak (*i.e.*, vapor or liquid), and the method of detection (*i.e.*, audio/visual/olfactory, Method 21, or OGI).

(iii) The date of each attempt to repair the leak and the repair methods applied in each attempt to repair the leak.

(iv) The date of successful repair of the leak, the method of monitoring used to confirm the repair, and if Method 21 of appendix A-7 to part 60 of this chapter is used to confirm the repair, the maximum instrument reading measured by Method 21 of appendix A-7. If OGI is used to confirm the repair, keep video footage of the repair confirmation.

(v) For each repair delayed beyond 15 calendar days after discovery of the leak, record "Repair delayed", the reason for the delay, and the expected date of successful repair. The owner or operator (or designate) whose decision it was that repair could not be carried out in the 15- calendar day timeframe must sign the record.

(vi) For each leak that is not repairable, the maximum instrument reading measured by Method 21 of appendix A-7 to part 60 of this chapter at the time the leak is determined to be not repairable, a video captured by the OGI camera showing that emissions are still visible, or a signed record that the leak is still detectable via audio/visual/olfactory methods.

(f) Each owner or operator of a bulk gasoline terminal subject to the loading rack provisions of item 1(c) of table 2 to this subpart or storage vessel provisions in § 63.11092(f) shall:

(1) Keep an up-to-date, readily accessible record of the continuous monitoring data required under § 63.11092(b) or (f). This record shall indicate the time intervals during which loadings of gasoline cargo tanks have occurred or, alternatively, shall record the operating parameter data only during such loadings. The date and time of day shall also be indicated at reasonable intervals on this record.

(2) Record and report simultaneously with the Notification of Compliance Status required under § 63.11093(b):

(i) All data and calculations, engineering assessments, and manufacturer's recommendations used

in determining the operating parameter value under § 63.11092(b) or (f); and

(ii) The following information when using a flare under provisions of § 63.11(b) to comply with § 63.11087(a):

(A) Flare design (*i.e.*, steam-assisted, air-assisted, or non-assisted); and

(B) All visible emissions (VE) readings, heat content determinations, flow rate measurements, and exit velocity determinations made during the compliance determination required under § 63.11092(e)(3).

(3) Keep an up-to-date, readily accessible copy of the monitoring and inspection plan required under § 63.11092(b)(1)(i)(B)(2) or (b)(1)(iii)(B)(2).

(4) Keep an up-to-date, readily accessible record as specified in § 63.11092(b)(1)(i)(B)(2)(v) or (b)(1)(iii)(B)(2)(v).

(5) If an owner or operator requests approval to use a vapor processing system or monitor an operating parameter other than those specified in § 63.11092(b), the owner or operator shall submit a description of planned reporting and recordkeeping procedures.

(g) Each owner or operator of a bulk gasoline terminal subject to the loading rack provisions of item 1(c) of table 2 to this subpart shall keep records specified in paragraphs (g)(1) through (3) of this section, as applicable, for at least 5 years unless otherwise specified.

(1) For each thermal oxidation system used to comply with the provisions in § 63.11092(e)(2)(i) by monitoring the combustion zone temperature, for each pressure CPMS used to comply with the requirements in § 60.502a(h) of this chapter, and for each vapor recovery system used to comply with the provisions in item 3 of table 3 to this subpart, maintain records, as applicable, of:

(i) The applicable operating or emission limit for the CMS. For combustion zone temperature operating limits, include the applicable date range the limit applies based on when the performance test was conducted.

(ii) Each 3-hour rolling average combustion zone temperature measured by the temperature CPMS, each 5-minute average reading from the pressure CPMS, and each 3-hour rolling average TOC concentration (as propane) measured by the TOC CEMS.

(iii) For each deviation of the 3-hour rolling average combustion zone temperature operating limit, maximum loading pressure specified in § 60.502a(h) of this chapter, or 3-hour rolling average TOC concentration (as propane), the start date and time,

duration, cause, and the corrective action taken.

(iv) For each period when there was a CMS outage or the CMS was out of control, the start date and time, duration, cause, and the corrective action taken. For TOC CEMS outages where the limited alternative for vapor recovery systems in § 60.504a(e) of this chapter is used, the corrective action taken shall include an indication of the use of the limited alternative for vapor recovery systems in § 60.504a(e).

(v) Each inspection or calibration of the CMS including a unique identifier, make, and model number of the CMS, and date of calibration check. For TOC CEMS, include the type of CEMS used (*i.e.*, flame ionization detector, nondispersive infrared analyzer) and an indication of whether methane is excluded from the TOC concentration reported in paragraph (g)(1)(ii) of this section.

(vi) TOC CEMS outages where the limited alternative for vapor recovery systems in § 60.504a(e) of this chapter is used, also keep records of:

(A) The quantity of liquid product loaded in gasoline cargo tanks for the past 10 adsorption cycles prior to the CEMS outage.

(B) The vacuum pressure, purge gas quantities, and duration of the vacuum/purge cycles used for the past 10 desorption cycles prior to the CEMS outage.

(C) The quantity of liquid product loaded in gasoline cargo tanks for each adsorption cycle while using the alternative.

(D) The vacuum pressure, purge gas quantities, and duration of the vacuum/purge cycles for each desorption cycle while using the alternative.

(2) For each thermal oxidation system used to comply with the provision in § 63.11092(e)(2)(ii) and for each flare used to comply with the provision in item 2 of table 3 to this subpart, maintain records of:

(i) The output of the monitoring device used to detect the presence of a pilot flame as required in § 63.670(b) for a minimum of 2 years. Retain records of each 15-minute block during which there was at least one minute that no pilot flame is present when gasoline vapors were routed to the flare for a minimum of 5 years. The record must identify the start and end time and date of each 15-minute block.

(ii) Visible emissions observations as specified in paragraphs (g)(2)(ii)(A) and (B) of this section, as applicable, for a minimum of 3 years.

(A) If visible emissions observations are performed using Method 22 of appendix A-7 to part 60 of this chapter,

the record must identify the date, the start and end time of the visible emissions observation, and the number of minutes for which visible emissions were observed during the observation. If the owner or operator performs visible emissions observations more than one time during a day, include separate records for each visible emissions observation performed.

(B) For each 2-hour period for which visible emissions are observed for more than 5 minutes in 2 consecutive hours but visible emissions observations according to Method 22 of appendix A-7 to part 60 of this chapter were not conducted for the full 2-hour period, the record must include the date, the start and end time of the visible emissions observation, and an estimate of the cumulative number of minutes in the 2-hour period for which emissions were visible based on best information available to the owner or operator.

(iii) Each 15-minute block period during which operating values are outside of the applicable operating limits specified in § 63.670(d) through (f) when liquid product is being loaded into gasoline cargo tanks for at least 15-minutes identifying the specific operating limit that was not met.

(iv) The 15-minute block average cumulative flows for the thermal oxidation system vent gas or flare vent gas and, if applicable, total steam, perimeter assist air, and premix assist air specified to be monitored under § 63.670(i), along with the date and start and end time for the 15-minute block. If multiple monitoring locations are used to determine cumulative vent gas flow, total steam, perimeter assist air, and premix assist air, retain records of the 15-minute block average flows for each monitoring location for a minimum of 2 years, and retain the 15-minute block average cumulative flows that are used in subsequent calculations for a minimum of 5 years. If pressure and temperature monitoring is used, retain records of the 15-minute block average temperature, pressure and molecular weight of the thermal oxidation system vent gas, flare vent gas, or assist gas stream for each measurement location used to determine the 15-minute block average cumulative flows for a minimum of 2 years, and retain the 15-minute block average cumulative flows that are used in subsequent calculations for a minimum of 5 years. If you use the supplemental gas flow rate monitoring alternative in § 60.502a(c)(3)(viii) of this chapter, the required supplemental gas flow rate (winter and summer, if applicable) and the actual monitored supplemental gas flow rate for the 15-minute block. Retain the supplemental

gas flow rate records for a minimum of 5 years.

(v) The thermal oxidation system vent gas or flare vent gas compositions specified to be monitored under § 63.670(j). Retain records of individual component concentrations from each compositional analyses for a minimum of 2 years. If NHV_v analyzer is used, retain records of the 15-minute block average values for a minimum of 5 years. If you demonstrate your gas streams have consistent composition using the provisions in § 63.670(j)(6) as specified in § 60.502a(c)(3)(vii) of this chapter, retain records of the required minimum ratio of gasoline loaded to total liquid product loaded and the actual ratio on a 15-minute block basis. If applicable, you must retain records of the required minimum gasoline loading rate as specified in § 60.502a(c)(3)(vii) and the actual gasoline loading rate on a 15-minute block basis for a minimum of 5 years.

(vi) Each 15-minute block average operating parameter calculated following the methods specified in § 63.670(k) through (n), as applicable.

(vii) All periods during which the owner or operator does not perform monitoring according to the procedures in § 63.670(g), (i), and (j) or in § 60.502a(c)(3)(vii) and (viii) of this chapter as applicable. Note the start date, start time, and duration in minutes for each period.

(viii) An indication of whether “vapors displaced from gasoline cargo tanks during product loading” excludes periods when liquid product is loaded but no gasoline cargo tanks are being loaded or if liquid product loading is assumed to be loaded into gasoline cargo tanks according to the provisions in § 60.502a(c)(3)(i) of this chapter, records of all time periods when “vapors displaced from gasoline cargo tanks during product loading”, and records of time periods when there were no “vapors displaced from gasoline cargo tanks during product loading”.

(ix) If you comply with the flare tip velocity operating limit using the one-time flare tip velocity operating limit compliance assessment as provided in § 60.502a(c)(3)(ix) of this chapter, maintain records of the applicable one-time flare tip velocity operating limit compliance assessment for as long as you use this compliance method.

(x) For each parameter monitored using a CMS, retain the records specified in paragraphs (g)(2)(x)(A) through (C) of this section, as applicable:

(A) For each deviation, record the start date and time, duration, cause, and corrective action taken.

(B) For each period when there is a CMS outage or the CMS is out of control, record the start date and time, duration, cause, and corrective action taken.

(C) Each inspection or calibration of the CMS including a unique identifier, make, and model number of the CMS, and date of calibration check.

(3) Records of all 5-minute time periods during which liquid product is loaded into gasoline cargo tanks or assumed to be loaded into gasoline cargo tanks and records of all 5-minute time periods when there was no liquid product loaded into gasoline cargo tanks.

(h) Each owner or operator of a bulk gasoline terminal subject to the provisions in items 1(e), 1(f), or 2(c) in table 2 to this subpart or bulk gasoline plant subject to the requirements in § 63.11086(a)(6) shall maintain records of each instance in which liquid product was loaded into a gasoline cargo tank for which vapor tightness documentation required under § 60.502(e)(1) or § 60.502a(e)(1) of this chapter, as applicable, was not provided or available in the terminal's or plant's records for at least 5 years. These records shall include, at a minimum:

(1) Cargo tank owner and address.

(2) Cargo tank identification number.

(3) Date and time liquid product was loaded into a gasoline cargo tank without proper documentation.

(4) Date proper documentation was received or statement that proper documentation was never received.

(i) Each owner or operator of a bulk gasoline terminal or bulk gasoline plant subject to the provisions of this subpart shall maintain records for at least 5 years of each instance when liquid product was loaded into gasoline cargo tanks not using submerged filling, or, if applicable, not equipped with vapor collection or balancing equipment that is compatible with the terminal's vapor collection system or plant's vapor balancing system. These records shall include, at a minimum:

(1) Date and time of liquid product loading into gasoline cargo tank not using submerged filling, improperly equipped, or improperly connected.

(2) Type of deviation (e.g., not submerged filling, incompatible equipment, not properly connected).

(3) Cargo tank identification number.

(j) Each owner or operator of a bulk gasoline plant subject to the requirements in § 63.11086(a)(6) shall maintain records for at least 5 years of instances when gasoline was loaded between gasoline cargo tanks and storage tanks and the plant's vapor balancing system was not properly

connected between the gasoline cargo tank and storage tank. These records shall include, at a minimum:

(1) Date and time of gasoline loading between a gasoline cargo tank and a storage tank that was not properly connected.

(2) Cargo tank identification number and storage tank identification number.

(k) Each owner or operator of an affected source under this subpart shall keep the following records for each deviation of an emissions limitation (including operating limit), work practice standard, or operation and maintenance requirement in this subpart.

(1) Date, start time, and duration of each deviation.

(2) List of the affected sources or equipment for each deviation, an estimate of the quantity of each regulated pollutant emitted over any emission limit and a description of the method used to estimate the emissions.

(3) Actions taken to minimize emissions in accordance with § 63.11085(a).

(l) Each owner or operator of a bulk gasoline terminal or bulk gasoline plant subject to the provisions of this subpart shall maintain records of the average gasoline throughput (in gallons per day) for at least 5 years.

(m) Keep written procedures required under § 63.8(d)(2) on record for the life of the affected source or until the affected source is no longer subject to the provisions of this part, to be made available for inspection, upon request, by the Administrator. If the performance evaluation plan is revised, you shall keep previous (*i.e.*, superseded) versions of the performance evaluation plan on record to be made available for inspection, upon request, by the Administrator, for a period of 5 years after each revision to the plan. The program of corrective action shall be included in the plan as required under § 63.8(d)(2).

(n) Keep records of each performance test or performance evaluation conducted and each notification and report submitted to the Administrator for at least 5 years. For each performance test, include an indication of whether liquid product loading is assumed to be loaded into a gasoline cargo tank or periods when liquid product is loaded but no gasoline cargo tanks are being loaded are excluded in the determination of the combustion zone temperature operating limit according to the provision in § 60.503a(c)(8)(ii) of this chapter. If complying with the alternative in § 63.11092(h), for each performance test or performance evaluation conducted,

include the pressure every 5 minutes while a gasoline cargo tank is being loaded and the highest instantaneous pressure that occurs during each loading.

(o) Any records required to be maintained by this subpart that are submitted electronically via the EPA's Compliance and Emissions Reporting Interface (CEDRI) may be maintained in electronic format. This ability to maintain electronic copies does not affect the requirement for facilities to make records, data, and reports available upon request to a delegated authority or the EPA as part of an on-site compliance evaluation.

■ 27. Revise § 63.11095 to read as follows:

§ 63.11095 What are my reporting requirements?

(a) *Reporting requirements for performance tests.* Prior to November 4, 2024, each owner or operator of an affected source under this subpart shall submit performance test reports to the Administrator according to the requirements in § 63.13. Beginning on November 4, 2024, within 60 days after the date of completing each performance test required by this subpart, you must submit the results of the performance test following the procedures specified in § 63.9(k). As required by § 63.7(g)(2)(iv), you must include the value for the combustion zone temperature operating parameter limit set based on your performance test in the performance test report. If the monitoring alternative in § 63.11092(h) is used, indicate that this monitoring alternative is being used, identify each loading rack that loads gasoline cargo tanks at the bulk gasoline terminal subject to the provisions of this subpart, and report the highest instantaneous pressure monitored during the performance test or performance evaluation for each identified loading rack. Data collected using test methods supported by the EPA's Electronic Reporting Tool (ERT) as listed on the EPA's ERT website (<https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert>) at the time of the test must be submitted in a file format generated using the EPA's ERT. Alternatively, you may submit an electronic file consistent with the extensible markup language (XML) schema listed on the EPA's ERT website. Data collected using test methods that are not supported by the EPA's ERT as listed on the EPA's ERT website at the time of the test must be included as an attachment in the ERT or an alternate electronic file.

(b) *Reporting requirements for performance evaluations.* Prior to November 4, 2024, each owner or operator of an affected source under this subpart shall submit performance evaluations to the Administrator according to the requirements in § 63.13. Beginning on November 4, 2024, within 60 days after the date of completing each CEMS performance evaluation, you must submit the results of the performance evaluation following the procedures specified in § 63.9(k). If the monitoring alternative in § 63.11092(h) is used, indicate that this monitoring alternative is being used, identify each loading rack that loads gasoline cargo tanks at the bulk gasoline terminal subject to the provisions of this subpart, and report the highest instantaneous pressure monitored during the performance test or performance evaluation for each identified loading rack. The results of performance evaluations of CEMS measuring relative accuracy test audit (RATA) pollutants that are supported by the EPA's ERT as listed on the EPA's ERT website at the time of the evaluation must be submitted in a file format generated using the EPA's ERT. Alternatively, you may submit an electronic file consistent with the XML schema listed on the EPA's ERT website. The results of performance evaluations of CEMS measuring RATA pollutants that are not supported by the EPA's ERT as listed on the EPA's ERT website at the time of the evaluation must be included as an attachment in the ERT or an alternate electronic file.

(c) *Reporting requirements prior to May 8, 2027.* Prior to May 8, 2027, each owner or operator of a source subject to the requirements of this subpart shall submit reports as specified in paragraphs (c)(1) through (3) of this section, as applicable.

(1) Each owner or operator of a bulk terminal or a pipeline breakout station subject to the control requirements of this subpart shall include in a semiannual compliance report to the Administrator the following information, as applicable:

(i) For storage vessels, if you are complying with options 2(a), 2(b), or 2(d) in table 1 to this subpart, the information specified in § 60.115b(a), (b), or (c) of this chapter, depending upon the control equipment installed, or, if you are complying with option 2(e) in table 1 to this subpart, the information specified in § 63.1066.

(ii) For loading racks, each loading of a gasoline cargo tank for which vapor tightness documentation had not been previously obtained by the facility.

(iii) For equipment leak inspections, the number of equipment leaks not repaired within 15 days after detection.

(iv) For storage vessels complying with § 63.11087(b) after January 10, 2011, the storage vessel's Notice of Compliance Status information can be included in the next semi-annual compliance report in lieu of filing a separate Notification of Compliance Status report under § 63.11093.

(2) Each owner or operator of an affected source subject to the control requirements of this subpart shall submit an excess emissions report to the Administrator at the time the semiannual compliance report is submitted. Excess emissions events under this subpart, and the information to be included in the excess emissions report, are specified in paragraphs (c)(2)(i) through (v) of this section.

(i) Each instance of a non-vapor-tight gasoline cargo tank loading at the facility in which the owner or operator failed to take steps to assure that such cargo tank would not be reloaded at the facility before vapor tightness documentation for that cargo tank was obtained.

(ii) Each reloading of a non-vapor-tight gasoline cargo tank at the facility before vapor tightness documentation for that cargo tank is obtained by the facility in accordance with § 63.11094(b).

(iii) Each exceedance or failure to maintain, as appropriate, the monitored operating parameter value determined under § 63.11092(b). The report shall include the monitoring data for the days on which exceedances or failures to maintain have occurred, and a description and timing of the steps taken to repair or perform maintenance on the vapor collection and processing systems or the CMS.

(iv) [Reserved]

(v) For each occurrence of an equipment leak for which no repair attempt was made within 5 days or for which repair was not completed within 15 days after detection:

(A) The date on which the leak was detected;

(B) The date of each attempt to repair the leak;

(C) The reasons for the delay of repair; and

(D) The date of successful repair.

(3) Each owner or operator of a bulk gasoline plant or a pipeline pumping station shall submit a semiannual excess emissions report, including the information specified in paragraphs (c)(1)(iii) and (c)(2)(v) of this section, only for a 6-month period during which an excess emission event has occurred. If no excess emission events have

occurred during the previous 6-month period, no report is required.

(d) *Reporting requirements for semiannual reports on or after May 8, 2027.* On or after May 8, 2027, you must submit to the Administrator semiannual reports with the applicable information in paragraphs (d)(1) through (9) of this section following the procedure specified in paragraph (e) of this section.

(1) Report the following general facility information:

(i) Facility name.

(ii) Facility physical address, including city, county, and State.

(iii) Latitude and longitude of facility's physical location. Coordinates must be in decimal degrees with at least five decimal places.

(iv) The following information for the contact person:

(A) Name.

(B) Mailing address.

(C) Telephone number.

(D) Email address.

(v) The type of facility (bulk gasoline plant with an annual average gasoline throughput less than 4,000 gallons per day; bulk gasoline plant with an annual average gasoline throughput of 4,000 gallons per day or more; bulk gasoline terminal with a gasoline throughput (total of all racks) less than 250,000 gallons per day; bulk gasoline terminal with a gasoline throughput (total of all racks) of 250,000 gallons per day or more; pipeline breakout station; or pipeline pumping station).

(vi) Date of report and beginning and ending dates of the reporting period. You are no longer required to provide the date of report when the report is submitted via CEDRI.

(vii) Statement by a responsible official, with that official's name, title, and signature, certifying the truth, accuracy, and completeness of the content of the report. If your report is submitted via CEDRI, the certifier's electronic signature during the submission process replaces the requirement in this paragraph (d)(1)(vii).

(2) For each thermal oxidation system used to comply with the provision in § 63.11092(e)(2)(i) by monitoring the combustion zone temperature, for each pressure CPMS used to comply with the requirements in § 60.502a(h) of this chapter, and for each vapor recovery system used to comply with the provisions in item 3 of table 3 to this subpart, report the following information for the CMS:

(i) For all instances when the temperature CPMS measured 3-hour rolling averages below the established operating limit or when the vapor collection system pressure exceeded the

maximum loading pressure specified in § 60.502a(h) when liquid product was being loaded into gasoline cargo tanks or when the TOC CEMS measured 3-hour rolling average concentrations higher than the applicable emission limitation when the vapor recovery system was operating:

(A) The date and start time of the deviation.

(B) The duration of the deviation in hours.

(C) Each 3-hour rolling average combustion zone temperature, average pressure, or 3-hour rolling average TOC concentration during the deviation. For TOC concentration, indicate whether methane is excluded from the TOC concentration.

(D) A unique identifier for the CMS.

(E) The make, model number, and date of last calibration check of the CMS.

(F) The cause of the deviation and the corrective action taken.

(ii) For all instances that the temperature CPMS for measuring the combustion zone temperature or pressure CPMS was not operating or out of control when liquid product was loaded into gasoline cargo tanks, or the TOC CEMS was not operating or was out of control when the vapor recovery system was operating:

(A) The date and start time of the deviation.

(B) The duration of the deviation in hours.

(C) A unique identifier for the CMS.

(D) The make, model number, and date of last calibration check of the CMS.

(E) The cause of the deviation and the corrective action taken. For TOC CEMS outages where the limited alternative for vapor recovery systems in § 60.504a(e) of this chapter is used, the corrective action taken shall include an indication of the use of the limited alternative for vapor recovery systems in § 60.504a(e) of this chapter.

(F) For TOC CEMS outages where the limited alternative for vapor recovery systems in § 60.504a(e) of this chapter is used, report either an indication that there were no deviations from the operating limits when using the limited alternative or report the number of each of the following types of deviations that occurred during the use of the limited alternative for vapor recovery systems in § 60.504a(e) of this chapter.

(1) The number of adsorption cycles when the quantity of liquid product loaded in gasoline cargo tanks exceeded the operating limit established in § 60.504a(e)(1) of this chapter. Enter 0 if no deviations of this type.

(2) The number of desorption cycles when the vacuum pressure was below the average vacuum pressure as specified in § 60.504a(e)(2)(i) of this chapter. Enter 0 if no deviations of this type.

(3) The number of desorption cycles when the quantity of purge gas used was below the average quantity of purge gas as specified in § 60.504a(e)(2)(ii) of this chapter. Enter 0 if no deviations of this type.

(4) The number of desorption cycles when the duration of the vacuum/purge cycle was less than the average duration as specified in § 60.504a(e)(2)(iii) of this chapter. Enter 0 if no deviations of this type.

(3) For each thermal oxidation system used to comply with the provision in § 63.11092(e)(2)(ii) and each flare used to comply with the provision in item 2 of table 3 to this subpart, report:

(i) The date and start and end times for each of the following instances:

(A) Each 15-minute block during which there was at least one minute when gasoline vapors were routed to the flare and no pilot flame was present.

(B) Each period of 2 consecutive hours during which visible emissions exceeded a total of 5 minutes. Additionally, report the number of minutes for which visible emissions were observed during the observation or an estimate of the cumulative number of minutes in the 2-hour period for which emissions were visible based on best information available to the owner or operator.

(C) Each 15-minute period for which the applicable operating limits specified in § 63.670(d) through (f) were not met. You must identify the specific operating limit that was not met. Additionally, report the information in paragraphs (d)(3)(i)(C)(1) through (3) of this section, as applicable.

(1) If you use the loading rate operating limits as determined in § 60.502a(c)(3)(vii) of this chapter alone or in combination with the supplemental gas flow rate monitoring alternative in § 60.502a(c)(3)(viii) of this chapter, the required minimum ratio and the actual ratio of gasoline loaded to total product loaded for the rolling 15-minute period and, if applicable, the required minimum quantity and the actual quantity of gasoline loaded, in gallons, for the rolling 15-minute period.

(2) If you use the supplemental gas flow rate monitoring alternative in § 60.502a(c)(3)(viii) of this chapter, the required minimum supplemental gas flow rate and the actual supplemental gas flow rate including units of flow rates for the 15-minute block.

(3) If you use parameter monitoring systems other than those specified in paragraphs (d)(3)(i)(C)(1) and (2) of this section, the value of the net heating value operating parameter(s) during the deviation determined following the methods in § 63.670(k) through (n) as applicable.

(ii) The start date, start time, and duration in minutes for each period when “vapors displaced from gasoline cargo tanks during product loading” were routed to the flare or thermal oxidation system and the applicable monitoring was not performed.

(iii) For each instance reported under paragraphs (d)(3)(i) and (ii) of this section that involves CMS, report the following information:

(A) A unique identifier for the CMS.

(B) The make, model number, and date of last calibration check of the CMS.

(C) The cause of the deviation or downtime and the corrective action taken.

(4) For any instance in which liquid product was loaded into a gasoline cargo tank for which vapor tightness documentation required under § 63.11094(b) was not provided or available in the terminal's records, report:

(i) Cargo tank owner and address.

(ii) Cargo tank identification number.

(iii) Date and time liquid product was loaded into a gasoline cargo tank without proper documentation.

(iv) Date proper documentation was received or statement that proper documentation was never received.

(5) For each instance when liquid product was loaded into gasoline cargo tanks not using submerged filling, as defined in § 63.11100, not equipped with vapor collection or balancing equipment that is compatible with the terminal's vapor collection system or plant's vapor balancing system, or not properly connected to the terminal's vapor collection system or plant's vapor balancing system, report:

(i) Date and time of liquid product loading into gasoline cargo tank not using submerged filling, improperly equipped, or improperly connected.

(ii) The type of deviation (e.g., not submerged filling, incompatible equipment, not properly connected).

(iii) Cargo tank identification number.

(6) For each instance when gasoline was loaded between gasoline cargo tanks and storage tanks and the plant's vapor balancing system was not properly connected between the gasoline cargo tank and storage tank, report:

(i) Date and time of gasoline loading between a gasoline cargo tank and a

storage tank that was not properly connected.

(ii) Cargo tank identification number and storage tank identification number.

(7) Report the following information for each leak inspection and each leak identified under § 63.11089(c) and § 60.503a(a)(2) of this chapter.

(i) For each leak detected during a leak inspection required under § 63.11089(c) and § 60.503a(a)(2) of this chapter, report:

(A) The date of inspection.

(B) The leak determination method (OGI or Method 21).

(C) The total number and type of equipment for which leaks were detected.

(D) The total number and type of equipment for which leaks were repaired within 15 calendar days.

(E) The total number and type of equipment for which no repair attempt was made within 5 calendar days of the leaks being identified.

(F) The total number and types of equipment placed on the delay of repair, as specified in § 60.502a(j)(8) of this chapter.

(ii) For leaks identified under § 63.11089(c) by audio/visual/olfactory methods during normal duties report:

(A) The total number and type of equipment for which leaks were identified.

(B) The total number and type of equipment for which leaks were repaired within 15 calendar days.

(C) The total number and type of equipment for which no repair attempt was made within 5 calendar days of the leaks being identified.

(D) The total number and type of equipment placed on the delay of repair, as specified in § 60.502a(j)(8) of this chapter.

(iii) The total number of leaks on the delay of repair list at the start of the reporting period.

(iv) The total number of leaks on the delay of repair list at the end of the reporting period.

(v) For each leak that was on the delay of repair list at any time during the reporting period, report:

(A) Unique equipment identification number.

(B) Type of equipment.

(C) Leak determination method (OGI, Method 21, or audio/visual/olfactory).

(D) The reason(s) why the repair was not feasible within 15 calendar days.

(E) If applicable, the date repair was completed.

(8) For each gasoline storage tank subject to requirements in item 2 of table 1 to this subpart, report:

(i) If you are complying with options 2(a), 2(b), or 2(d) in table 1 to this

subpart, the information specified in § 60.115b(a) or (b) of this chapter or deviations in measured parameter values from the plan specified in § 60.115b(c) of this chapter, depending upon the control equipment installed, or, if you are complying with option 2(e) in table 1 to this subpart, the information specified in § 63.1066(b).

(ii) If you are complying with options 2(c) or 2(e) in table 1 to this subpart, for each deviation in LEL monitoring, report:

(A) Date and start and end times of the LEL monitoring, and the tank being monitored.

(B) Description of the monitoring event, *e.g.*, monitoring conducted concurrent with visual inspection required under § 60.113b(a)(2) of this chapter or § 63.1063(d)(2); monitoring that occurred on a date other than the visual inspection required under § 60.113b(a)(2) or § 63.1063(d)(2) of this chapter; re-monitoring due to high winds; re-monitoring after repair attempt.

(C) Wind speed in miles per hour at the top of the tank on the date of LEL monitoring.

(D) The highest 5-minute rolling average reading during the monitoring event.

(E) Whether the floating roof was repaired, replaced, or taken out of gasoline service. If the floating roof was repaired or replaced, also report the information in paragraphs (d)(8)(i)(A) through (D) of this section for each re-monitoring conducted to confirm the repair.

(9) If there were no deviations from the emission limitations, operating parameters, or work practice standards, then provide a statement that there were no deviations from the emission limitations, operating parameters, or work practice standards during the reporting period. If there were no periods during which a continuous monitoring system (including a CEMS or CPMS) was inoperable or out-of-control, then provide a statement that there were no periods during which a continuous monitoring system was inoperable or out-of-control during the reporting period.

(e) *Requirements for semiannual report submissions.* Each owner or operator of an affected source under this subpart shall submit semiannual compliance reports with the information specified in paragraph (c) or (d) of this section to the Administrator according to the requirements in § 63.13.

Beginning on May 8, 2027, or once the report template for this subpart has been available on the CEDRI website ([https://www.epa.gov/electronic-reporting-air-](https://www.epa.gov/electronic-reporting-air)

emissions/cedri) for one year, whichever date is later, you must submit all subsequent semiannual compliance reports using the appropriate electronic report template on the CEDRI website for this subpart and following the procedure specified in § 63.9(k), except any medium submitted through mail must be sent to the attention of the Gasoline Distribution Sector Lead. The date report templates become available will be listed on the CEDRI website. Unless the Administrator or delegated State agency or other authority has approved a different schedule for submission of reports, the report must be submitted by the deadline specified in this subpart, regardless of the method in which the report is submitted.

■ 28. Revise § 63.11098 to read as follows:

§ 63.11098 What parts of the General Provisions apply to me?

Table 4 to this subpart shows which parts of the General Provisions apply to you.

■ 29. Section 63.11099 is amended by revising paragraphs (c) introductory text and (c)(5) to read as follows:

§ 63.11099 Who implements and enforces this subpart?

* * * * *

(c) The authorities that cannot be delegated to State, local, or Tribal agencies are as specified in paragraphs (c)(1) through (5) of this section.

* * * * *

(5) Approval of an alternative to any electronic reporting to the EPA required by this subpart.

■ 30. Section 63.11100 is amended by:

■ a. Revising the introductory text and the definitions of “Bulk gasoline terminal”, “Flare”, “Gasoline”, “Operating parameter value”, “Pipeline breakout station”, and “Pipeline pumping station;” and

■ b. Adding in alphabetical order a definition for “Thermal oxidation system”.

The revisions and addition read as follows:

§ 63.11100 What definitions apply to this subpart?

As used in this subpart, all terms not defined herein shall have the meaning given them in the Clean Air Act (CAA), in subparts A, K, Ka, Kb, and XXa of part 60 of this chapter, or in subparts A, R, and WW of this part. All terms defined in both subpart A of part 60 of this chapter and subparts A, R, and WW of this part shall have the meaning given in subparts A, R, and WW of this part. For purposes of this subpart, definitions

in this section supersede definitions in other parts or subparts.

* * * * *

Bulk gasoline terminal means:

(1) Prior to May 8, 2027, any gasoline storage and distribution facility that receives gasoline by pipeline, ship or barge, or cargo tank and has a gasoline throughput of 20,000 gallons per day or greater. Gasoline throughput shall be the maximum calculated design throughput as may be limited by compliance with an enforceable condition under Federal, State, or local law and discoverable by the Administrator and any other person.

(2) On or after May 8, 2027, any gasoline facility which receives gasoline by pipeline, ship, barge, or cargo tank and subsequently loads all or a portion of the gasoline into gasoline cargo tanks for transport to bulk gasoline plants or gasoline dispensing facilities and has a gasoline throughput of 20,000 gallons per day (75,700 liters per day) or greater. Gasoline throughput shall be the maximum calculated design throughput for the facility as may be limited by compliance with an enforceable condition under Federal, State, or local law and discoverable by the Administrator and any other person.

* * * * *

Flare means a thermal combustion device using an open or shrouded flame

(without full enclosure) such that the pollutants are not emitted through a conveyance suitable to conduct a performance test.

Gasoline means any petroleum distillate or petroleum distillate/alcohol blend having a Reid vapor pressure of 4.0 pounds per square inch (27.6 kilopascals) or greater, which is used as a fuel for internal combustion engines.

* * * * *

Operating parameter value means a value for an operating or emission parameter of the vapor processing system (e.g., temperature) which, if maintained continuously by itself or in combination with one or more other operating parameter values, determines that an owner or operator has complied with the applicable emission standard. The operating parameter value is determined using the procedures specified in § 63.11092(b) and (e).

Pipeline breakout station means:

(1) Prior to May 8, 2027, a facility along a pipeline containing storage vessels used to relieve surges or receive and store gasoline from the pipeline for reinjection and continued transportation by pipeline or to other facilities.

(2) On or after May 8, 2027, a facility along a pipeline containing storage vessels used to relieve surges or receive and store gasoline from the pipeline for

reinjection and continued transportation by pipeline to other facilities. *Pipeline breakout stations* do not have loading racks where gasoline is loaded into cargo tanks. If any gasoline is loaded into cargo tanks, the facility is a bulk gasoline terminal for the purposes of this subpart provided the facility-wide gasoline throughput (including pipeline throughput) exceeds the limits specified for bulk gasoline terminals.

Pipeline pumping station means a facility along a pipeline containing pumps to maintain the desired pressure and flow of product through the pipeline, and not containing gasoline loading racks or gasoline storage tanks other than surge control tanks.

* * * * *

Thermal oxidation system means an enclosed combustion device used to mix and ignite fuel, air pollutants, and air to provide a flame to heat and oxidize hazardous air pollutants. Auxiliary fuel may be used to heat air pollutants to combustion temperatures. *Thermal oxidation systems* emit pollutants through a conveyance suitable to conduct a performance test.

* * * * *

■ 31. Table 1 to subpart BBBBBB of part 63 is revised to read as follows:

TABLE 1 TO SUBPART BBBBBB OF PART 63—APPLICABILITY CRITERIA, EMISSION LIMITS, AND MANAGEMENT PRACTICES FOR STORAGE TANKS

If you own or operate . . .	Then you must . . .
1. A gasoline storage tank meeting either of the following conditions: (i) a capacity of less than 75 cubic meters (m³); or (ii) a capacity of less than 151 m³ and a gasoline throughput of 480 gallons per day or less. Gallons per day is calculated by summing the current day's throughput, plus the throughput for the previous 364 days, and then dividing that sum by 365.	(a) Equip each gasoline storage tank with a fixed roof that is mounted to the storage tank in a stationary manner, and maintain all openings in a closed position at all times when not in use; and (b) No later than the dates specified in § 63.11083, all pressure relief devices on each gasoline storage tank must be set to no less than 18 inches of water at all times to minimize breathing losses.

TABLE 1 TO SUBPART BBBBBB OF PART 63—APPLICABILITY CRITERIA, EMISSION LIMITS, AND MANAGEMENT PRACTICES FOR STORAGE TANKS—Continued

If you own or operate . . .	Then you must . . .
2. A gasoline storage tank with a capacity of greater than or equal to 75 m ³ and not meeting any of the criteria specified in item 1 of this table.	Do the following: (a) Reduce emissions of total organic HAP or TOC by 95 weight-percent with a closed vent system and control device, as specified in § 60.112b(a)(3) of this chapter; or (b) Equip each internal floating roof gasoline storage tank according to the requirements in § 60.112b(a)(1) of this chapter, except for the secondary seal requirements under § 60.112b(a)(1)(ii)(B) and the requirements in § 60.112b(a)(1)(iv) through (ix) of this chapter; and (c) No later than the dates specified in § 63.11083, equip, maintain, and operate each internal floating roof control system to maintain the vapor concentration within the storage tank above the floating roof at or below 25 percent of the LEL on a 5-minute rolling average basis without the use of purge gas, which may require additional controls beyond those specified in item 2(b) of this table; and (d) Equip each external floating roof gasoline storage tank according to the requirements in § 60.112b(a)(2) of this chapter, except that the requirements of § 60.112b(a)(2)(ii) of this chapter shall only be required if such storage tank does not currently meet the requirements of § 60.112b(a)(2)(i) of this chapter; by the dates specified in § 63.11083, all external floating roofs must meet the requirements of § 60.112b(a)(2)(ii) of this chapter; or (e) Equip and operate each internal and external floating roof gasoline storage tank according to the applicable requirements in § 63.1063(a)(1) and (b), except for the secondary seal requirements under § 63.1063(a)(1)(i)(C) and (D), and equip each external floating roof gasoline storage tank according to the requirements of § 63.1063(a)(2) by the dates specified in § 63.11087(b) if such storage tank does not currently meet the requirements of § 63.1063(a)(1); by the dates specified in § 63.11083, all external floating roofs must meet the requirements of § 63.1063(a)(2); and (f) No later than the dates specified in § 63.11083, equip, maintain, and operate each internal floating roof control system to maintain the vapor concentration within the storage tank above the floating roof at or below 25 percent of the LEL on a 5-minute rolling average basis without the use of purge gas, which may require additional controls beyond those specified in item 2(e) of this table.
3. A surge control tank	Equip each tank with a fixed roof that is mounted to the tank in a stationary manner and with a pressure/vacuum vent with a positive cracking pressure of no less than 0.50 inches of water. Maintain all openings in a closed position at all times when not in use.

■ 32. Table 2 to subpart BBBBBB of part 63 is revised to read as follows:

TABLE 2 TO SUBPART BBBBBB OF PART 63—APPLICABILITY CRITERIA, EMISSION LIMITS, AND MANAGEMENT PRACTICES FOR LOADING RACKS

If you own or operate . . .	Then you must . . .
1. A bulk gasoline terminal loading rack(s) with a gasoline throughput (total of all racks) of 250,000 gallons per day, or greater ("large bulk gasoline terminal"). Gallons per day is calculated by summing the current day's throughput, plus the throughput for the previous 364 days, and then dividing that sum by 365.	(a) Equip your loading rack(s) with a vapor collection system designed and operated to collect the TOC vapors displaced from cargo tanks during product loading; and (b) Reduce emissions of TOC to less than or equal to 80 mg/l of gasoline loaded into gasoline cargo tanks at the loading rack; and (c) No later than the dates specified in § 63.11083, reduce emissions of TOC to the applicable limits in table 3 to this subpart. The requirements in item 1(b) do not apply when demonstrating compliance with this item; and (d) Design and operate the vapor collection system to prevent any TOC vapors collected at one loading rack or lane from passing through another loading rack or lane to the atmosphere; and (e) Limit the loading of gasoline into gasoline cargo tanks that are vapor tight using the procedures specified in § 60.502(e) through (j) of this chapter. For the purposes of this section, the term "tank truck" as used in § 60.502(e) through (j) means "gasoline cargo tank" as defined in § 63.11100; and (f) No later than the dates specified in § 63.11083, limit the loading of liquid product into gasoline cargo tanks using the procedures specified in § 60.502a(e) through (i) of this chapter and in § 63.11092(g) and (h). The requirements in item 1(e) do not apply when demonstrating compliance with this item.

TABLE 2 TO SUBPART BBBBBB OF PART 63—APPLICABILITY CRITERIA, EMISSION LIMITS, AND MANAGEMENT PRACTICES FOR LOADING RACKS—Continued

If you own or operate . . .	Then you must . . .
2. A bulk gasoline terminal loading rack(s) with a gasoline throughput (total of all racks) of less than 250,000 gallons per day. Gallons per day is calculated by summing the current day's throughput, plus the throughput for the previous 364 days, and then dividing that sum by 365.	(a) Use submerged filling with a submerged fill pipe that is no more than 6 inches from the bottom of the cargo tank; and (b) Make records available within 24 hours of a request by the Administrator to document your gasoline throughput. (c) No later than the dates specified in § 63.11083, limit the loading of gasoline into gasoline cargo tanks that are vapor tight using the procedures specified in § 60.502a(e) of this chapter and in § 63.11092(g).

■ 33. Table 3 to subpart BBBBBB of part 63 is revised to read as follows:

TABLE 3 TO SUBPART BBBBBB OF PART 63—EMISSION LIMITATIONS AND REQUIREMENTS FOR LARGE BULK GASOLINE TERMINALS BASED ON CONTROL SYSTEM USED

If you operate . . .	Then you must . . .
1. A thermal oxidation system	(a) Reduce emissions of TOC to less than or equal to 35 mg/l of liquid product loaded into gasoline cargo tanks at the loading rack; and (b) Continuously meet the applicable operating limit as specified in § 63.11092(e)(2).
2. A flare	Operate the flare following the applicable requirements specified in § 60.502a(c)(3) of this chapter.
3. A carbon adsorption system, refrigerated condenser, or other vapor recovery system..	(a) Reduce emissions of TOC to less than or equal to 19,200 parts per million by volume as propane determined on a 3-hour rolling average considering all periods when the vapor recovery system is capable of processing gasoline vapors, including periods when liquid product is being loaded, during carbon bed regeneration, and when preparing the beds for reuse. (b) Operate the vapor recovery system to minimize air or nitrogen intrusion except as needed for the system to operate as designed for the purpose of removing VOC from the adsorption media or to break vacuum in the system and bring the system back to atmospheric pressure. Consistent with § 63.4, the use of diluents to achieve compliance with a relevant standard based on the concentration of a pollutant in the effluent discharged to the atmosphere is prohibited.

■ 34. Table 4 to subpart BBBBBB of part 63 is added to read as follows:

TABLE 4 TO SUBPART BBBBBB OF PART 63—APPLICABILITY OF GENERAL PROVISIONS

Citation	Subject	Brief description	Applies to this subpart
§ 63.1	Applicability	Initial applicability determination; applicability after standard established; permit requirements; extensions, notifications.	Yes, specific requirements given in § 63.11081.
§ 63.1(c)(2)	Title V permit	Requirements for obtaining a title V permit from the applicable permitting authority.	Yes, § 63.11081(b) exempts identified area sources from the obligation to obtain title V operating permits.
§ 63.2	Definitions	Definitions for standards in this part	Yes, additional definitions in § 63.11100.
§ 63.3	Units and Abbreviations	Units and abbreviations for standards under this part ..	Yes.
§ 63.4	Prohibited Activities and Circumvention.	Prohibited activities; circumvention, severability	Yes.
§ 63.5	Construction/Reconstruction.	Applicability; applications; approvals	Yes.
§ 63.6(a)	Compliance with Standards/Operation & Maintenance Applicability.	General Provisions apply unless compliance extension; General Provisions apply to area sources that become major.	Yes.
§ 63.6(b)(1) through (4)	Compliance Dates for New and Reconstructed Sources.	Dates standards apply for new and reconstructed sources.	Yes.
§ 63.6(b)(5)	Notification	Must notify if commenced construction or reconstruction after proposal.	Yes.
§ 63.6(b)(6)	[Reserved].		

TABLE 4 TO SUBPART BBBBBB OF PART 63—APPLICABILITY OF GENERAL PROVISIONS—Continued

Citation	Subject	Brief description	Applies to this subpart
§ 63.6(b)(7)	Compliance Dates for New and Reconstructed Area Sources that Become Major.	Area sources that become major must comply with major source standards immediately upon becoming major, regardless of whether required to comply when they were an area source.	No.
§ 63.6(c)(1) and (2)	Compliance Dates for Existing Sources.	Comply according to date in this subpart	No, § 63.11083 specifies the compliance dates.
§ 63.6(c)(3) and (4)	[Reserved].		
§ 63.6(c)(5)	Compliance Dates for Existing Area Sources that Become Major.	Area sources that become major must comply with major source standards by date indicated in this subpart or by equivalent time period (e.g., 3 years).	No.
§ 63.6(d)	[Reserved].		
§ 63.6(e)(1)(i)	General duty to minimize emissions.	Operate to minimize emissions at all times; information Administrator will use to determine if operation and maintenance requirements were met.	No. See § 63.11085 for general duty requirement.
§ 63.6(e)(1)(ii)	Requirement to correct malfunctions as soon as possible.	Owner or operator must correct malfunctions as soon as possible.	No.
§ 63.6(e)(2)	[Reserved].		
§ 63.6(e)(3)	Startup, Shutdown, and Malfunction (SSM) plan.	Requirement for SSM plan; content of SSM plan; actions during SSM.	No.
§ 63.6(f)(1)	Compliance Except During SSM.	You must comply with emission standards at all times except during SSM.	No.
§ 63.6(f)(2) and (3)	Methods for Determining Compliance.	Compliance based on performance test, operation and maintenance plans, records, inspection.	Yes.
§ 63.6(g)(1) through (3)	Alternative Standard	Procedures for getting an alternative standard	Yes.
§ 63.6(h)(1)	Compliance with Opacity/VE Standards.	You must comply with opacity/VE standards at all times except during SSM.	No.
§ 63.6(h)(2)(i)	Determining Compliance with Opacity/VE Standards.	If standard does not state test method, use EPA Method 9 for opacity in appendix A to part 60 of this chapter and EPA Method 22 for VE in appendix A to part 60 of this chapter.	No.
§ 63.6(h)(2)(ii)	[Reserved].		
§ 63.6(h)(2)(iii)	Using Previous Tests to Demonstrate Compliance with Opacity/VE Standards.	Criteria for when previous opacity/VE testing can be used to show compliance with this subpart.	No.
§ 63.6(h)(3)	[Reserved].		
§ 63.6(h)(4)	Notification of Opacity/VE Observation Date.	Must notify Administrator of anticipated date of observation.	No.
§ 63.6(h)(5)(i) and (iii) through (v)	Conducting Opacity/VE Observations.	Dates and schedule for conducting opacity/VE observations.	No.
§ 63.6(h)(5)(ii)	Opacity Test Duration and Averaging Times.	Must have at least 3 hours of observation with 30 6-minute averages.	No.
§ 63.6(h)(6)	Records of Conditions During Opacity/VE Observations.	Must keep records available and allow Administrator to inspect.	No.
§ 63.6(h)(7)(i)	Report Continuous Opacity Monitoring System (COMS) Monitoring Data from Performance Test.	Must submit COMS data with other performance test data.	No.
§ 63.6(h)(7)(ii)	Using COMS Instead of EPA Method 9.	Can submit COMS data instead of EPA Method 9 results even if this subpart requires EPA Method 9 in appendix A of part 60 of this chapter, but must notify Administrator before performance test.	No.
§ 63.6(h)(7)(iii)	Averaging Time for COMS During Performance Test.	To determine compliance, must reduce COMS data to 6-minute averages.	No.
§ 63.6(h)(7)(iv)	COMS Requirements	Owner/operator must demonstrate that COMS performance evaluations are conducted according to § 63.8(e); COMS are properly maintained and operated according to § 63.8(c) and data quality as § 63.8(d).	No.
§ 63.6(h)(7)(v)	Determining Compliance with Opacity/VE Standards.	COMS is probable but not conclusive evidence of compliance with opacity standard, even if EPA Method 9 (in appendix A to part 60 of this chapter) observation shows otherwise. Requirements for COMS to be probable evidence-proper maintenance, meeting Performance Specification 1 in appendix B to part 60 of this chapter, and data have not been altered.	No.

TABLE 4 TO SUBPART BBBBBB OF PART 63—APPLICABILITY OF GENERAL PROVISIONS—Continued

Citation	Subject	Brief description	Applies to this subpart
§ 63.6(h)(8)	Determining Compliance with Opacity/VE Standards.	Administrator will use all COMS, EPA Method 9 (in appendix A to part 60 of this chapter), and EPA Method 22 (in appendix A to part 60 of this chapter) results, as well as information about operation and maintenance to determine compliance.	No.
§ 63.6(h)(9)	Adjusted Opacity Standard	Procedures for Administrator to adjust an opacity standard.	No.
§ 63.6(i)(1) through (14)	Compliance Extension	Procedures and criteria for Administrator to grant compliance extension.	Yes.
§ 63.6(j)	Presidential Compliance Exemption.	President may exempt any source from requirement to comply with this subpart.	Yes.
§ 63.7(a)(2)	Performance Test Dates ...	Dates for conducting initial performance testing; must conduct 180 days after compliance date.	Yes.
§ 63.7(a)(3)	Section 114 Authority	Administrator may require a performance test under CAA section 114 at any time.	Yes.
§ 63.7(a)(4)	Force Majeure	Provisions for delayed performance tests due to force majeure.	Yes.
§ 63.7(b)(1)	Notification of Performance Test.	Must notify Administrator 60 days before the test	Yes.
§ 63.7(b)(2)	Notification of Re-scheduling.	If have to reschedule performance test, must notify Administrator of rescheduled date as soon as practicable and without delay.	Yes.
§ 63.7(c)	Quality Assurance (QA)/ Test Plan.	Requirement to submit site-specific test plan 60 days before the test or on date Administrator agrees with; test plan approval procedures; performance audit requirements; internal and external QA procedures for testing.	Yes.
§ 63.7(d)	Testing Facilities	Requirements for testing facilities	Yes.
§ 63.7(e)(1)	Conditions for Conducting Performance Tests.	Performance test must be conducted under representative conditions.	No, § 63.11092(i) specifies conditions for conducting performance tests.
§ 63.7(e)(2)	Conditions for Conducting Performance Tests.	Must conduct according to this subpart and EPA test methods unless Administrator approves alternative.	Yes.
§ 63.7(e)(3)	Test Run Duration	Must have three test runs of at least 1 hour each; compliance is based on arithmetic mean of three runs; conditions when data from an additional test run can be used.	Yes, except for testing conducted under § 63.11092(a) and (e).
§ 63.7(f)	Alternative Test Method	Procedures by which Administrator can grant approval to use an intermediate or major change, or alternative to a test method.	Yes.
§ 63.7(g)	Performance Test Data Analysis.	Must include raw data in performance test report; must submit performance test data 60 days after end of test with the notification of compliance status; keep data for 5 years.	Yes, except this subpart specifies how and when the performance test and performance evaluation results are reported.
§ 63.7(h)	Waiver of Tests	Procedures for Administrator to waive performance test.	Yes.
§ 63.8(a)(1)	Applicability of Monitoring Requirements.	Subject to all monitoring requirements in standard	Yes.
§ 63.8(a)(2)	Performance Specifications	Performance specifications in appendix B to part 60 of this chapter apply.	Yes.
§ 63.8(a)(3)	[Reserved].		
§ 63.8(a)(4)	Monitoring of Flares	Monitoring requirements for flares in § 63.11 apply	Yes.
§ 63.8(b)(1)	Monitoring	Must conduct monitoring according to standard unless Administrator approves alternative.	Yes.
§ 63.8(b)(2) and (3)	Multiple Effluents and Multiple Monitoring Systems.	Specific requirements for installing monitoring systems; must install on each affected source or after combined with another affected source before it is released to the atmosphere provided the monitoring is sufficient to demonstrate compliance with the standard; if more than one monitoring system on an emission point, must report all monitoring system results, unless one monitoring system is a backup.	Yes.
§ 63.8(c)(1) introductory text	Monitoring System Operation and Maintenance.	Maintain monitoring system in a manner consistent with good air pollution control practices.	Yes.
§ 63.8(c)(1)(i)	Operation and Maintenance of CMS.	Must maintain and operate each CMS as specified in § 63.6(e)(1).	No.
§ 63.8(c)(1)(ii)	Operation and Maintenance of CMS.	Must keep parts for routine repairs readily available	Yes.
§ 63.8(c)(1)(iii)	Operation and Maintenance of CMS.	Requirement to develop SSM Plan for CMS	No.

TABLE 4 TO SUBPART BBBBBB OF PART 63—APPLICABILITY OF GENERAL PROVISIONS—Continued

Citation	Subject	Brief description	Applies to this subpart
§ 63.8(c)(2) through (8)	CMS Requirements	Must install to get representative emission or parameter measurements; must verify operational status before or at performance test.	Yes.
§ 63.8(d)(1) and (2)	CMS Quality Control	Requirements for CMS quality control, including calibration, etc..	Yes.
§ 63.8(d)(3)	CMS Quality Control Records.	Must keep quality control plan on record for 5 years; keep old versions for 5 years after revisions.	No. This subpart specifies CMS records requirements.
§ 63.8(e)	CMS Performance Evaluation.	Notification, performance evaluation test plan, reports	Yes, except this subpart specifies how and when the performance evaluation results are reported.
§ 63.8(f)(1) through (5)	Alternative Monitoring Method.	Procedures for Administrator to approve alternative monitoring.	Yes.
§ 63.8(f)(6)	Alternative to Relative Accuracy Test.	Procedures for Administrator to approve alternative relative accuracy tests for CEMS.	Yes.
§ 63.8(g)	Data Reduction	COMS 6-minute averages calculated over at least 36 evenly spaced data points; CEMS 1 hour averages computed over at least 4 equally spaced data points; data that cannot be used in average.	Yes.
§ 63.9(a)	Notification Requirements	Applicability and State delegation	Yes.
§ 63.9(b)(1), (2), (4), and (5)	Initial Notifications	Submit notification of being subject to standard; notification of intent to construct/reconstruct, notification of commencement of construction/reconstruction, notification of startup; contents of each.	Yes.
§ 63.9(b)(3)	[Reserved].		
§ 63.9(c)	Request for Compliance Extension.	Can request if cannot comply by date or if installed best available control technology or lowest achievable emission rate.	Yes.
§ 63.9(d)	Notification of Special Compliance Requirements for New Sources.	Notification for new sources subject to special compliance requirements.	Yes.
§ 63.9(e)	Notification of Performance Test.	Notify Administrator 60 days prior	Yes.
§ 63.9(f)	Notification of VE/Opacity Test.	Notify Administrator 30 days prior	No.
§ 63.9(g)	Additional Notifications When Using CMS.	Notification of performance evaluation; notification about use of COMS data; notification that exceeded criterion for relative accuracy alternative.	Yes, however, there are no opacity standards.
§ 63.9(h)(1) through (3), (5), and (6).	Notification of Compliance Status.	Contents due 60 days after end of performance test or other compliance demonstration, except for opacity/VE, which are due 30 days after; when to submit to Federal vs. State authority.	Yes, except as specified in § 63.11095(c).
§ 63.9(h)(4)	[Reserved].		
§ 63.9(i)	Adjustment of Submittal Deadlines.	Procedures for Administrator to approve change when notifications must be submitted.	Yes.
§ 63.9(j)	Change in Previous Information.	Must submit within 15 days after the change	Yes.
§ 63.9(k)	Notifications	Electronic reporting procedures	Yes.
§ 63.10(a)	Recordkeeping/Reporting ..	Applies to all, unless compliance extension; when to submit to Federal vs. State authority; procedures for owners of more than one source.	Yes.
§ 63.10(b)(1)	Recordkeeping/Reporting ..	General requirements; keep all records readily available; keep for 5 years.	Yes.
§ 63.10(b)(2)(i)	Records related to SSM	Recordkeeping of occurrence and duration of startups and shutdowns.	No.
§ 63.10(b)(2)(ii)	Records related to SSM	Recordkeeping of malfunctions	No. See § 63.11094(k) for recordkeeping requirements for deviations.
§ 63.10(b)(2)(iii)	Maintenance records	Recordkeeping of maintenance on air pollution control and monitoring equipment.	Yes.
§ 63.10(b)(2)(iv)	Records Related to SSM ..	Actions taken to minimize emissions during SSM	No.
§ 63.10(b)(2)(v)	Records Related to SSM ..	Actions taken to minimize emissions during SSM	No.
§ 63.10(b)(2)(vi) through (xi)	CMS Records	Malfunctions, inoperative, out-of-control periods	Yes.
§ 63.10(b)(2)(xii)	Records	Records when under waiver	Yes.
§ 63.10(b)(2)(xiii)	Records	Records when using alternative to relative accuracy test.	Yes.
§ 63.10(b)(2)(xiv)	Records	All documentation supporting initial notification and notification of compliance status.	Yes.
§ 63.10(b)(3)	Records	Applicability determinations	Yes.
§ 63.10(c)	Records	Additional records for CMS	No. This subpart specifies CMS records.

TABLE 4 TO SUBPART BBBBBB OF PART 63—APPLICABILITY OF GENERAL PROVISIONS—Continued

Citation	Subject	Brief description	Applies to this subpart
§ 63.10(d)(1)	General Reporting Requirements.	Requirement to report	Yes.
§ 63.10(d)(2)	Report of Performance Test Results.	When to submit to Federal or State authority	No. This subpart specifies how and when the performance test results are reported.
§ 63.10(d)(3)	Reporting Opacity or VE Observations.	What to report and when	No.
§ 63.10(d)(4)	Progress Reports	Must submit progress reports on schedule if under compliance extension.	Yes.
§ 63.10(d)(5)	SSM Reports	Contents and submission	No.
§ 63.10(e)(1) and (2)	Additional CMS Reports	Must report results for each CEMS on a unit; written copy of CMS performance evaluation; 2–3 copies of COMS performance evaluation.	No.
§ 63.10(e)(3)(i) through (iii) ..	Reports	Schedule for reporting excess emissions	No.
§ 63.10(e)(3)(iv) and (v)	Excess Emissions Reports	Requirement to revert to quarterly submission if there is an excess emissions and parameter monitor exceedances (now defined as deviations); provision to request semiannual reporting after compliance for 1 year; submit report by 30th day following end of quarter or calendar half; if there has not been an exceedance or excess emissions (now defined as deviations), report contents in a statement that there have been no deviations; must submit report containing all of the information in §§ 63.8(c)(7) and (8) and 63.10(c)(5) through (13).	No.
§ 63.10(e)(3)(vi) through (viii).	Excess Emissions Report and Summary Report.	Requirements for reporting excess emissions for CMS; requires all of the information in §§ 63.8(c)(7) and (8) and 63.10(c)(5) through (13).	No.
§ 63.10(e)(4)	Reporting COMS Data	Must submit COMS data with performance test data ...	No. This subpart specifies COMS reporting.
§ 63.10(f)	Waiver for Recordkeeping/Reporting.	Procedures for Administrator to waive	Yes.
§ 63.11(a)	Applicability	Specifies applicability of control device and work practice requirements within § 63.11.	Yes.
§ 63.11(b)	Flares	Requirements for flares	Yes, except these provisions no longer apply for flares used to comply with the flare provisions in item 2 of table 3 to this subpart.
§ 63.11(c) through (e)	Alternative Work Practice for Monitoring Equipment for Leaks.	Requirements for using optical gas imaging for EPA Method 21 monitoring.	Yes, except these provisions do not apply to monitoring required under § 63.11092(a)(1)(i) or (e)(1) and these provisions no longer apply upon compliance with the provisions in § 63.11089(c).
§ 63.12	Delegation	State authority to enforce standards	Yes.
§ 63.13	Addresses	Addresses where reports, notifications, and requests are sent.	Yes.
§ 63.14	Incorporations by Reference.	Test methods incorporated by reference	Yes.
§ 63.15	Availability of Information ..	Public and confidential information	Yes.
§ 63.16	Performance Track Provisions.	Special reporting provision for Performance Track member facilities..	Yes.



FEDERAL REGISTER

Vol. 89

Wednesday,

No. 90

May 8, 2024

Part VII

Department of Health and Human Services

Centers for Medicare and Medicaid Services

42 CFR Parts 435, et al.

45 CFR Parts 152 and 155

Clarifying the Eligibility of Deferred Action for Childhood Arrivals (DACA) Recipients and Certain Other Noncitizens for a Qualified Health Plan Through an Exchange, Advance Payments of the Premium Tax Credit, Cost-Sharing Reductions, and a Basic Health Program; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 435, 457, and 600

Office of the Secretary

45 CFR Parts 152 and 155

[CMS-9894-F]

RIN 0938-AV23

Clarifying the Eligibility of Deferred Action for Childhood Arrivals (DACA) Recipients and Certain Other Noncitizens for a Qualified Health Plan through an Exchange, Advance Payments of the Premium Tax Credit, Cost-Sharing Reductions, and a Basic Health Program

AGENCY: Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: This final rule makes several clarifications and updates the definitions currently used to determine whether a consumer is eligible to enroll in a Qualified Health Plan (QHP) through an Exchange; a Basic Health Program (BHP), in States that elect to operate a BHP; and for Medicaid and Children's Health Insurance Programs (CHIPs). Specifically, Deferred Action for Childhood Arrivals (DACA) recipients and certain other noncitizens will be included in the definitions of "lawfully present" that are used to determine eligibility to enroll in a QHP through an Exchange, for Advance Payments of the Premium Tax Credit (APTC) and Cost-Sharing Reductions (CSRs), or for a BHP.

DATES: These regulations are effective on November 1, 2024.

FOR FURTHER INFORMATION CONTACT: Morgan Gruenewald, (301) 492-5141, Danielle Ojeda, (301) 492-4418, or Anna Lorschbach, (301) 492-4424, for matters related to Exchanges.

Sarah Lichtman Spector, (410) 786-3031, or Annie Hollis, (410) 786-7095, for matters related to Medicaid, CHIP, and BHP.

SUPPLEMENTARY INFORMATION:

I. Background

The Patient Protection and Affordable Care Act (ACA)¹ generally² requires that to enroll in a Qualified Health Plan (QHP) through an Exchange, an individual must be either a citizen or national of the United States or be "lawfully present" in the United States.³ The ACA also generally requires that individuals be "lawfully present" to be eligible for insurance affordability programs for their Exchange coverage such as premium tax credits (PTC),⁴ advance payments of the premium tax credit (APTC),⁵ and cost-sharing reductions (CSRs).⁶ Additionally, enrollees in a Basic Health Program (BHP) are required to meet the same citizenship and immigration requirements as QHP enrollees.⁷ Further, the ACA required that individuals be "lawfully present" to qualify for the Pre-Existing Condition Insurance Plan Program (PCIP), which expired in 2014.⁸ The ACA does not

¹ The Patient Protection and Affordable Care Act (Pub. L. 111-148) was enacted on March 23, 2010. The Healthcare and Education Reconciliation Act of 2010 (Pub. L. 111-152), which amended and revised several provisions of the Patient Protection and Affordable Care Act, was enacted on March 30, 2010. In this rulemaking, the two statutes are referred to collectively as the "Patient Protection and Affordable Care Act", "Affordable Care Act", or "ACA."

² States may pursue a waiver under section 1332 of the ACA that could waive the "lawfully present" framework in section 1312(f)(3) of the ACA. See 42 U.S.C. 18052(a)(2)(B). There is currently one State (Washington) with an approved section 1332 waiver that includes a waiver of the "lawfully present" framework to the extent necessary to permit all State residents, regardless of immigration status, to enroll in a QHP and Qualified Dental Plan (QDP) through the State's Exchange, as well as to apply for State subsidies to defray the costs of enrolling in such coverage. Consumers who are newly eligible for Exchange coverage under the waiver remain ineligible for PTC for their Exchange coverage. While neither Colorado nor New York requested a waiver of the "lawfully present" framework, both States are permitted to use pass-through funding based on Federal savings from their 1332 waivers to support programs covering immigrants who are ineligible for PTC. Colorado provides premium and cost-sharing subsidies to individuals earning up to 300 percent of the Federal poverty level (FPL) who are otherwise ineligible for Federal premium subsidies, including undocumented individuals. Under New York's section 1332 waiver, some immigrants with household incomes up to 200 percent of FPL, including DACA recipients, will be eligible for coverage under the State's Essential Plan (EP) Expansion plan. Beginning August 1, 2024 DACA recipients with incomes up to 250 percent of FPL will also be eligible for coverage under the State's EP Expansion. For more information on the Colorado, Washington, and New York section 1332 waivers, see <https://www.cms.gov/marketplace/states/section-1332-state-innovation-waivers>.

³ 42 U.S.C. 18032(f)(3).

⁴ 26 U.S.C. 36B(e)(2).

⁵ 42 U.S.C. 18082(d).

⁶ 42 U.S.C. 18071(e).

⁷ 42 U.S.C. 18051(e).

⁸ 42 U.S.C. 18001(d)(1).

define "lawfully present" beyond specifying that an individual is only considered lawfully present if they are reasonably expected to be lawfully present for the period of their enrollment.⁹ The ACA requires an Exchange to verify that Exchange applicants are lawfully present in the United States.¹⁰

Consistent with our statutory authority under the ACA and to facilitate the operation of its programs, CMS issued regulations in 2010 to define "lawfully present" for the purposes of determining eligibility for PCIP (75 FR 45013); in 2012 for purposes of determining eligibility to enroll in a QHP through an Exchange by cross-referencing the existing PCIP definition (77 FR 18309); and in 2014 to cross-reference the existing definition for purposes of determining eligibility to enroll in a BHP (79 FR 14111). In the proposed rule (88 FR 25313), we proposed to amend these three regulations to update the definition of "lawfully present" currently at 45 CFR 152.2, which is used to determine whether a consumer is eligible to enroll in a QHP through an Exchange and for a BHP.¹¹ Exchange regulations apply this definition to the eligibility standards for APTC and CSRs by requiring an applicant to be eligible to enroll through an Exchange in a QHP to be eligible for APTC and CSRs.¹² Accordingly, in the proposed rule, when we referred to the regulatory definition of "lawfully present" used to determine whether a consumer is eligible to enroll in a QHP through an Exchange, we were also referring to the regulatory definition used to determine whether a consumer is eligible for APTC and CSRs.

In the proposed rule, we proposed a similar definition of "lawfully present" applicable to eligibility for Medicaid and the Children's Health Insurance Program (CHIP) in States that elect to cover "lawfully residing" pregnant women and children under section 214 of the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA) (hereinafter "CHIPRA 214 option"), codified at section 1903(v)(4) of the Social Security Act (the Act) for Medicaid (42 U.S.C. 1396b(v)(4)) and section 2107(e)(1)(O) of the Act (42 U.S.C. 1397gg(e)(1)(O)) for CHIP. In July 2010, CMS interpreted "lawfully residing" to mean individuals who are "lawfully present" in the United States and who are residents of the State in

⁹ 42 U.S.C. 18032(f)(3), 42 U.S.C. 18071(e)(2).

¹⁰ 42 U.S.C. 18081(c)(2)(B).

¹¹ 42 CFR. § 600.5.

¹² 45 CFR 155.305(f)(1)(ii)(A) and (g)(1)(i)(A).

which they are applying under the State's Medicaid or CHIP residency rules.¹³ The definitions of “lawfully present” and “lawfully residing” used for Medicaid and CHIP are set forth in a 2010 State Health Official (SHO) letter (SHO #10–006, hereinafter “2010 SHO”) and further clarified in a 2012 SHO letter (SHO #12–002, hereinafter “2012 SHO”).¹⁴

We proposed several modifications to the definition of “lawfully present” currently articulated at 45 CFR 152.2 and described in the SHO letters for Medicaid and CHIP. First, we proposed to remove an exception that excludes Deferred Action for Childhood Arrivals (DACA) recipients from the definitions of “lawfully present” used to determine eligibility to enroll in a QHP through an Exchange, a BHP, or Medicaid and CHIP under the CHIPRA 214 option. We noted in the proposed rule that if this proposal were finalized, DACA recipients would be considered lawfully present for purposes of eligibility for these insurance affordability programs¹⁵ based on a grant of deferred action, just like other similarly situated noncitizens who are granted deferred action. We also proposed to incorporate additional technical changes into the proposed “lawfully present” definition at 45 CFR 152.2, as well as to the proposed “lawfully present” definition at 42 CFR 435.4.

We received a large volume of comments, many in favor, and some opposed to a definition of “lawfully present” that includes DACA recipients. We are not finalizing a “lawfully present” definition for Medicaid and CHIP at this time. Rather, we are taking more time to evaluate and carefully consider the comments regarding our proposal with respect to Medicaid and CHIP, and specifically, to continue evaluating the potential impact of our proposed definition of “lawfully present” on State Medicaid and CHIP agencies. We received comments noting the many urgent and competing demands on State resources, raising concerns that finalizing the proposal for Medicaid and CHIP would add to that burden and divert resources dedicated

to other matters. For example, State Medicaid and CHIP agencies continue to experience a significant workload to “unwind” (that is, to return to regular eligibility renewal operations) following the expiration of the continuous enrollment condition in section 6008(b)(3) of the Families First Coronavirus Response Act (FFCRA) on March 31, 2023.¹⁶ During unwinding, States must, over time, process renewals, consistent with Federal requirements, for all individuals who were enrolled in their Medicaid program as of March 31, 2023. States must disenroll individuals who are no longer eligible for Medicaid, determine their potential eligibility for other insurance affordability programs, and as appropriate, transfer the individual's account to the other insurance affordability programs.¹⁷ We recognize, in addition to the concerns raised by the commenters, that States are dedicating significant additional resources to implement new statutory requirements, including mandatory 12-month continuous eligibility periods for children younger than 19 years old in Medicaid and CHIP in effect as of January 1, 2024 under the Consolidated Appropriations Act (CAA), 2023,¹⁸ new requirements for State Medicaid and CHIP programs related to justice-involved individuals under CAA, 2023,¹⁹ and several new requirements

¹⁶ See Centers for Medicare & Medicaid Services (CMS), State Health Official letter (SHO) # 23–002, “Medicaid Continuous Enrollment Condition Changes, Conditions for Receiving the FFCRA Temporary FMAP Increase, Reporting Requirements, and Enforcement Provisions in the Consolidated Appropriations Act, 2023,” January 27, 2023, available at <https://www.medicaid.gov/media/149291>; additional guidance for State Medicaid and CHIP agencies is available at <https://www.medicaid.gov/unwinding>.

¹⁷ CMS, SHO # 22–001, “Promoting Continuity of Coverage and Distributing Eligibility and Enrollment Workload in Medicaid, the Children's Health Insurance Program (CHIP), and Basic Health Program (BHP) Upon Conclusion of the COVID–19 Public Health Emergency,” March 3, 2022, available at <https://www.medicaid.gov/media/135211>.

¹⁸ Title V, Subtitle B, Section 5112 of the Consolidated Appropriations Act, 2023 (CAA, 2023) amended titles XIX and XXI of the Act to require that States provide 12 months of continuous eligibility for children under the age of 19 in Medicaid and CHIP effective January 1, 2024. See also, CMS, SHO #23–004: Section 5112 Requirement for all States to Provide Continuous Eligibility to Children in Medicaid and CHIP under the Consolidated Appropriations Act, 2023 (issued September 29, 2023). Available at: <https://www.medicaid.gov/media/163771>.

¹⁹ Under Division FF, Title V, Section 5121 of the Consolidated Appropriations Act, 2023, starting January 1, 2025, State Medicaid and CHIP programs are required to have a plan in place and, in accordance with such plan, provide certain services to eligible juveniles within 30 days of their scheduled date of release from a public institution following adjudication, and CHIP programs are

for State Medicaid and CHIP agencies regarding benefits, data collection, and eligibility under the Consolidated Appropriations Act, 2024 (CAA, 2024).²⁰ Many States are implementing various systems modernization initiatives to address lessons learned from unwinding, and States may also need to make system changes necessary to comply with the statutory changes described above. Given the significant comments that CMS continues to consider, including comments regarding these competing State Medicaid and CHIP priorities, increased workload, and finite resources, we are not finalizing definitions for “lawfully present” and “lawfully residing” for Medicaid and CHIP in this rule at this time. The rulemaking process with regard to that portion of the proposal is ongoing.

As a result, the definition of “lawfully present” used in determining eligibility for Medicaid and CHIP under the CHIPRA 214 option, the current policy, based on the 2010 SHO and the 2012 SHO, continues to apply. Individuals, including DACA recipients, who are not considered “lawfully present” under the 2010 and 2012 SHOs for purposes of Medicaid and CHIP under the CHIPRA 214 option, will remain ineligible under that specific Medicaid and CHIP State option. DACA recipients, however, may continue to be eligible for limited Medicaid coverage for the treatment of an emergency medical condition consistent with 8 U.S.C. 1611(b)(1)(A) and the regulation at 42 CFR 435.406(b). Because we are continuing to evaluate and consider public comments and State burdens in connection with our proposal for Medicaid and CHIP for DACA recipients, the discussion on the definition of “lawfully present” in this final rule will focus exclusively on eligibility for enrollment through the Exchanges and BHP.

The definitions finalized in this rule are solely for the purpose of determining eligibility for specific Department of Health and Human Services (HHS) health programs and are not intended to define lawful presence for purposes of any other law or program. This rule does not provide any

required to suspend, rather than terminate, CHIP coverage.

²⁰ Division G, Title I, Subtitle B of the Consolidated Appropriations Act (CAA), 2024 requires that State Medicaid agencies provide certain services for beneficiaries; that Medicaid and CHIP agencies engage in certain data collection and monitoring activities; and that Medicaid and CHIP agencies must no longer terminate eligibility for incarcerated adults, including targeted low-income pregnant individuals, and must instead suspend eligibility in Medicaid. States may also suspend eligibility in CHIP.

¹³ Centers for Medicare & Medicaid Services. (2010). *SHO #10–006: Medicaid and CHIP Coverage of “Lawfully Residing” Children and Pregnant Women*. Available at: <https://downloads.cms.gov/cmsgov/archived-downloads/smdl/downloads/sho10006.pdf>.

¹⁴ SHO #10–006, see footnote 13; Centers for Medicare & Medicaid Services. State Health Official letters (SHO) #12–002: *Individuals with Deferred Action for Childhood Arrivals* (issued August 28, 2012). Available at <https://www.medicaid.gov/federal-policy-guidance/downloads/sho-12-002.pdf>.

¹⁵ See the definition of “insurance affordability program” at 45 CFR 155.300(a) and 42 CFR 435.4.

noncitizen relief or protection from removal or convey any immigration status or other authority for a noncitizen to remain in the United States under existing immigration laws or to become eligible for any immigration benefit available under the U.S. Department of Homeland Security (DHS)'s or Department of Justice (DOJ)'s purview.

II. Summary of the Provisions of the Proposed Rule and Analysis of and Responses to Public Comments

A. Pre-Existing Condition Insurance Plan Program (45 CFR 152.2)

We proposed to remove the definition of “lawfully present” currently at 45 CFR 152.2 and insert the proposed definition of “lawfully present” at 45 CFR 155.20. The regulations at 45 CFR 152.2 apply to the PCIP program, which ended in 2014. Further, we proposed to update BHP regulations at 42 CFR 600.5 that currently cross-reference 45 CFR 152.2 to instead cross-reference the definition proposed in the proposed rule at 45 CFR 155.20. While we do not believe the definition at 45 CFR 152.2 is used for any other current CMS programs, we proposed to modify the regulation at 45 CFR 152.2 to cross-reference Exchange regulations at 45 CFR 155.20 to help ensure alignment of definitions for other programs. We sought comment on whether, alternatively, we should remove the definition of “lawfully present” currently at 45 CFR 152.2 instead of replacing it with a cross-reference to 45 CFR 155.20.

We did not receive public comments on these proposals to remove the definition of “lawfully present” at 45 CFR 152.2, to insert a definition of “lawfully present” at 45 CFR 155.20, and to update 45 CFR 152.2 and 42 CFR 600.5 to cross-reference the definition at 45 CFR 155.20. We are finalizing these provisions as proposed.

B. Exchange Establishment Standards and Other Related Standards Under the ACA (45 CFR 155.20)

1. DACA Recipients

The ACA generally requires that to enroll in a QHP through an Exchange, an individual must be a “citizen or national of the United States or an alien lawfully present in the United States.”²¹ While individuals who are not eligible to enroll in a QHP are also not eligible for APTC, PTC, or CSRs to lower the cost of the QHP, the ACA specifies that individuals who are not lawfully present are also not eligible for such insurance affordability programs

for their Exchange coverage.²² The ACA does not include a definition of “lawfully present.”²³

In a 2022 rulemaking, DHS discussed its definition of individuals who are considered “lawfully present” for purposes of applying for Social Security benefits in 8 CFR 1.3, reiterating that it is a “specialized term of art” that does not confer lawful status or authorization to remain in the United States, but instead describes noncitizens who are eligible for certain benefits as set forth in 8 U.S.C. 1611(b)(2) (*Deferred Action for Childhood Arrivals*, final rule, (87 FR 53152, 53156) (August 30, 2022) (“DHS DACA final rule”). DHS also stated that HHS and “other agencies whose statutes independently link eligibility for benefits to lawful presence may have the authority to construe such language for purposes of those statutory provisions.” (87 FR 53211). We discuss this authority in further detail later in this section.

We first established a regulatory definition of “lawfully present” for purposes of the PCIP program in 2010 (75 FR 45013). In that 2010 rulemaking, we adopted the definition of “lawfully present” already established for Medicaid and CHIP eligibility for children and pregnant individuals under the CHIPRA 214 option articulated in the 2010 SHO establishing eligibility for lawfully present individuals. The definition of “lawfully present” articulated in the 2010 SHO was also informed by DHS regulations now codified at 8 CFR 1.3(a) defining “lawfully present” for the purpose of eligibility for certain Social Security benefits, with some revisions necessary for updating or clarifying purposes, or as otherwise deemed appropriate for the Medicaid and CHIP programs consistent with the Act.

In March 2012, we issued regulations regarding eligibility to enroll in a QHP through an Exchange that cross-referenced the definition of “lawfully present” set forth in the 2010 PCIP regulations (77 FR 18309). As the DACA policy had not yet been implemented, the definitions of “lawfully present” set forth in the 2010 PCIP regulations and the 2012 QHP regulations did not explicitly reference DACA recipients. However, these definitions specified that individuals granted deferred action were considered lawfully present for purposes of eligibility to enroll in a QHP through an Exchange.

In June 2012, DHS issued the memorandum “Exercising Prosecutorial

Discretion for Individuals Who Came to the United States as Children,” announcing the DACA policy.²⁴ DHS noted in this memorandum that DACA is a form of deferred action, and the forbearance of immigration enforcement action afforded to a DACA recipient is identical for immigration purposes to the forbearance afforded to any individual who is granted deferred action in other exercises of enforcement discretion. DHS stated that the DACA policy was “necessary to ensure that [its] enforcement resources are not expended on these low priority cases.”²⁵ DHS did not address DACA recipients’ ability to access any insurance affordability programs, as the statutory authority to address matters related to eligibility for such programs rests with HHS, not DHS.

In August 2012, we amended the regulatory definition of “lawfully present” at 45 CFR 152.2, used for both PCIP and Exchange purposes, to add an exception stating that an individual granted deferred action under DHS’ DACA policy was not considered lawfully present for purposes of qualifying for the PCIP program or to enroll in a QHP through an Exchange (77 FR 52614), thereby treating DACA recipients differently from other deferred action recipients for purposes of these benefit programs. We also issued the 2012 SHO excluding DACA recipients from the definition of “lawfully residing” for purposes of Medicaid or CHIP eligibility under the CHIPRA 214 option. In 2014, we issued regulations establishing the framework governing a BHP, which also adopted the definition of “lawfully present” at 45 CFR 152.2, thereby aligning the definition of “lawfully present” for a BHP with Exchanges, Medicaid, and CHIP. As a result, DACA recipients, unlike all other deferred action recipients, are not currently eligible to enroll in a QHP through an Exchange, or for APTC or CSRs in connection with enrollment in a QHP through an Exchange, nor are they eligible to enroll in a BHP or Medicaid or CHIP under the CHIPRA 214 option because they are not considered lawfully present for purposes of these programs. In the August 2012 rulemaking that excluded

²⁴ U.S. Department of Homeland Security. (2012). Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children. <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

²⁵ U.S. Department of Homeland Security. (2012). Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children. <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

²² 26 U.S.C. 36B(e)(2), 42 U.S.C. 18082(d), 42 U.S.C. 18071(e).

²³ 42 U.S.C. 18001(d)(1).

²¹ 42 U.S.C. 18032(f)(3).

DACA recipients from CMS definitions of “lawfully present,” we reasoned that, because the rationale that DHS offered for adopting the DACA policy did not pertain to eligibility for insurance affordability programs, these benefits should not be extended as a result of DHS deferring action under DACA.

HHS has now reconsidered its position and proposed to change its interpretation of the statutory phrase “lawfully present” to treat DACA recipients the same as other deferred action recipients as described in current regulations in paragraph (4)(iv) of the definition at 45 CFR 152.2. As proposed, DACA recipients would be considered lawfully present to the same extent as other deferred action recipients for purposes of the ACA at 42 U.S.C. 18032(f)(3) for the Exchange, and 42 U.S.C. 18051(e) for a BHP. We also proposed to establish rules in the Medicaid and CHIP programs to recognize that DACA recipients are “lawfully residing” in the United States for purposes of the CHIPRA 214 option. We are finalizing our proposal to consider DACA recipients to be lawfully present for purposes of the ACA at 42 U.S.C. 18032(f)(3) for the Exchange, and 42 U.S.C. 18051(e) for a BHP. We are not finalizing a definition for purposes of Medicaid and CHIP eligibility at this time, for the reasons detailed in section I.

In previously excluding DACA recipients from the definition of “lawfully present,” we had posited that other definitions of lawful presence should not be used as a touchstone for eligibility if the program in question was not established with the explicit objective of expanding access to health insurance affordability programs. However, given the broad aims of the ACA to increase access to health coverage, we now assess that this rationale for excluding certain noncitizen groups from such coverage was not mandated by the ACA, and it failed to best effectuate congressional intent in the ACA. Additionally, HHS previously reasoned that considering DACA recipients eligible for insurance affordability programs was inconsistent with the relief that the DACA policy afforded. However, on further review and consideration, it is clear that the DACA policy is intended to provide recipients with a degree of stability and assurance that would allow them to obtain education and lawful employment, including because recipients remain lower priorities for removal. Extending eligibility to these individuals is consistent with those goals. There also was no statutory mandate to distinguish between

recipients of deferred action under the DACA policy and other deferred action recipients.

While HHS’ administration of insurance affordability programs and DHS’ administration of the DACA policy are separate matters, HHS has determined that changing its own definitions of “lawfully present” for purposes of Exchange and BHP eligibility is consistent with DHS’ explanation of this definition in the DHS DACA final rule. In the DHS DACA Final Rule, DHS suggested that an individual “whose temporary presence in the United States the Government has chosen to tolerate for reasons of resource allocation, administrability, humanitarian concern, agency convenience, and other factors” could be lawfully present (87 FR 53152, 53156).²⁶ This rule’s change to no longer exclude DACA recipients from definitions of “lawfully present” applicable to Exchanges and the BHP is consistent with DHS’ stated conception of lawful presence. It also aligns with the longstanding DHS definition of lawful presence for purposes of applying for Social Security benefits under 8 CFR 1.3. We are not finalizing a definition for purposes of Medicaid or CHIP under the CHIPRA 214 option at this time, for the reasons detailed in section I.

DHS issued a proposed rule, “Deferred Action for Childhood Arrivals,” on September 28, 2021 (86 FR 53736), and the DHS DACA final rule on August 30, 2022 (87 FR 53152).²⁷ Among other things, the DHS DACA final rule reiterated USCIS’s longstanding policy that a noncitizen who has been granted deferred action is deemed “lawfully present”—a specialized term of art that the Congress has used in other statutes, including in 8 U.S.C. 1611(b)(2) with respect to receipt of certain Social Security benefits. We are aware that DHS received public comments about the “HHS exclusion of DACA recipients from participation in Medicaid, the Children’s Health Insurance Program (CHIP), and the ACA health insurance

marketplace” (87 FR 53210). In response, DHS noted that it did not have the authority to make changes to the definitions of “lawfully present” used to determine eligibility for insurance affordability programs and affirmed that such authority rests with HHS (87 FR 53212). While review of the DHS DACA final rule in part prompted HHS to revisit its own interpretation of “lawfully present,” HHS’ administration of insurance affordability programs implicates separate statutory authority and policy considerations. HHS has independently decided that these changes reflect the best policy for the insurance affordability programs addressed in this rule, and also determined that the changes finalized in this rule align with longstanding DHS policy predating the DHS DACA final rule, under which deferred action recipients have been considered lawfully present for purposes of certain Social Security benefits under 8 CFR 1.3.

Further, since HHS first interpreted “lawfully present” to exclude DACA recipients in 2012, new information regarding DACA recipients’ access to health insurance coverage has emerged. In the proposed rule, we cited a 2021 survey of DACA recipients that found while DACA may facilitate access to health insurance through employer-based plans, 34 percent of DACA recipient respondents reported that they were not covered by health insurance.²⁸ Since the proposed rule was published, an updated version of this survey has become available. According to 2022 survey data, 27 percent of DACA recipients are not covered by health insurance.²⁹ While this represents a modest improvement in the uninsured rate among DACA recipients, it is important to note that DACA recipients are still more than three times more likely to be uninsured than the general U.S. population, which had a national uninsured rate of 7.7 percent.^{30 31}

²⁸ National Immigration Law Center. *Tracking DACA Recipients’ Access to Health Care* (2022). https://www.nilc.org/wp-content/uploads/2022/06/NILC_DACA-Report_060122.pdf.

²⁹ National Immigration Law Center. *Tracking DACA Recipients’ Access to Health Care* (2023). https://www.nilc.org/wp-content/uploads/2023/05/NILC_DACA-Report_2023.pdf.

³⁰ National Immigration Law Center. *Tracking DACA Recipients’ Access to Health Care* (2023). https://www.nilc.org/wp-content/uploads/2023/05/NILC_DACA-Report_2023.pdf.

³¹ U.S. Department of Health and Human Services. *New HHS Report Shows National Uninsured Rate Reached All-Time Low in 2023 After Record-Breaking ACA Enrollment Period* (2023). <https://www.hhs.gov/about/news/2023/08/03/new-hhs-report-shows-national-uninsured-rate-reached-all-time-low-2023-after-record-breaking-aca-enrollment-period.html>.

²⁶ See “Deferred Action for Childhood Arrivals” (87 FR 53152). Specifically, see 87 FR 53206 for DHS’s discussion of the rule’s provisions regarding lawful presence. <https://www.federalregister.gov/d/2022-18401/p-744>

²⁷ Current court orders prohibit DHS from fully administering the DACA final rule. However, a partial stay permits DHS to continue processing DACA renewal requests and related applications for employment authorization documents. See USCIS, *DACA Litigation Information and Frequently Asked Questions* (Nov. 3, 2022), <https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/daca-litigation-information-and-frequently-asked-questions>.

Individuals without health insurance are less likely to receive preventive or routine health screenings and may delay necessary medical care, incurring high costs and debts.³² In the proposed rule, we noted that the 2021 survey of DACA recipients also found that 47 percent of respondents attested to having experienced a delay in medical care due to their immigration status and 67 percent of respondents stated that they or a family member were unable to pay medical bills or expenses.³³ According to newly available 2022 survey data, both of these rates have increased, with 48 percent of respondents experiencing a delay in medical care due to their immigration status, and 71 percent of respondents unable to pay medical bills or expenses.³⁴ These outcomes can have downstream impacts that further disrupt individuals' health and financial stability, and therefore their ability to work or study. Delays in care can lead to negative health outcomes including longer hospital stays and increased mortality, whereas being unable to pay medical bills puts individuals at higher risk of food and housing insecurity.^{35 36 37}

The COVID-19 PHE also highlighted the need for this population to have access to high quality, affordable health coverage. According to a demographic estimate by the Center for Migration Studies, over 200,000 DACA recipients served as essential workers during the COVID-19 PHE.³⁸ This figure

encompasses 43,500 DACA recipients who worked in health care and social assistance occupations, including 10,300 in hospitals and 2,000 in nursing care facilities.³⁹ During the height of the pandemic, essential workers were disproportionately likely to contract COVID-19.^{40 41} These factors emphasize how increasing access to health insurance would improve the health and well-being of many DACA recipients currently without coverage. In addition to improving health outcomes, these individuals could be even more productive and better economic contributors to their communities and society at large with improved access to health care, as evidenced by a 2016 study finding that a worker with health insurance is estimated to miss 77 percent fewer days than an uninsured worker.⁴²

Our proposal to include DACA recipients in the definition of "lawfully present" for purposes of Exchange and BHP coverage aligns with the goals of the ACA—specifically, to lower the number of people who are uninsured in the United States and make affordable health insurance available to more people. In the proposed rule, we noted that DACA recipients represent a pool of relatively young, healthy adults; at an average age of 30 per U.S. Citizenship and Immigration Services (USCIS) data, they are younger than the general Exchange population.⁴³ Thus, there may be a slight positive effect on the Exchange or BHP risk pools as a result of this proposed change, discussed further in the Regulatory Impact

Analysis in section V.C. of this final rule.

As discussed above, HHS sees no reason to treat DACA recipients differently from other noncitizens who have been granted deferred action for purposes of eligibility for health insurance coverage through an Exchange or BHP. Accordingly, we proposed to amend our regulations at 42 CFR 600.5 and 45 CFR 152.2 and 155.20 so that DACA recipients would be considered lawfully present for purposes of eligibility for health insurance coverage through an Exchange or a BHP, just like other individuals granted deferred action (88 FR 25313). Specifically, we proposed to amend QHP regulations at 45 CFR 155.20 to remove the current cross-reference to 45 CFR 152.2 and to instead add a definition of "lawfully present" for purposes of determining eligibility to enroll in a QHP through an Exchange. In section II.B of the preamble of the proposed rule, we explained the proposal to remove the definition of "lawfully present" currently in the PCIP regulations at 45 CFR 152.2 and add a cross reference to 45 CFR 155.20 to align the Exchange regulations. In section II.B of preamble of the proposed rule, we also explained the proposal to remove the existing exception in 45 CFR 152.2 that excludes DACA recipients from the definition of "lawfully present," and to clarify that references to noncitizens who are granted deferred action who are lawfully present for purposes of this provision include DACA recipients. Finally, in section II.E of preamble of the proposed rule, we explained the proposal to amend BHP regulations at 42 CFR 600.5 to cross-reference the definition of "lawfully present" proposed at 45 CFR 155.20. Under these proposed changes, we estimated that approximately 124,000 DACA recipients would enroll in a QHP through an Exchange or a BHP. We received public comments on these proposals. The following is a summary of the comments we received and our responses.

General Support

Comment: Many commenters noted general support for CMS' proposal to include DACA recipients in the definition of "lawfully present," such that DACA recipients may be eligible for CMS insurance affordability programs, including enrolling in a QHP and obtaining APTC and CSRs through an Exchange, or enrolling in a BHP.

Response: We appreciate comments that we received in support of this rule's change to no longer exclude DACA recipients from definitions of "lawfully present" used to determine eligibility to

³² Kaiser Family Foundation. Key Facts About the Uninsured Population (2023). <https://www.kff.org/uninsured/issue-brief/key-facts-about-the-uninsured-population/>.

³³ National Immigration Law Center. *Tracking DACA Recipients' Access to Health Care* (2022). https://www.nilc.org/wp-content/uploads/2022/06/NILC_DACA-Report_060122.pdf.

³⁴ National Immigration Law Center. *Tracking DACA Recipients' Access to Health Care* (2023). https://www.nilc.org/wp-content/uploads/2023/05/NILC_DACA-Report_2023.pdf.

³⁵ Weissman JS, Stern R, Fielding SL, Epstein AM. (1991). Delayed access to health care: risk factors, reasons, and consequences. *Ann Intern Med*. 1991 Feb 15;114(4):325–31. <https://doi.org/10.7326/0003-4819-114-4-325>.

³⁶ Hanna, T.P., King, W.D., Thibodeau, S., Jalink, M., Paulin, G.A., Harvey-Jones, E., O'Sullivan, D.E., Booth, C.M., Sullivan, R., & Aggarwal, A. (2020). Mortality due to cancer treatment delay: systematic review and meta-analysis. *BMJ (Clinical research ed.)*, 371, m4087. <https://doi.org/10.1136/bmj.m4087>.

³⁷ Himmelstein, D. U., Dickman, S. L., McCormick, D., Bor, D. H., Gaffney, A., & Woolhandler, S. (2022). Prevalence and Risk Factors for Medical Debt and Subsequent Changes in Social Determinants of Health in the US. *JAMA network open*, 5(9), e2231898. <https://doi.org/10.1001/jamanetworkopen.2022.31898>.

³⁸ Center for Migration Studies. *DACA Recipients are Essential Workers and Part of the Front-line Response to the COVID-19 Pandemic, as Supreme Court Decision Looms* (2020). <https://cmsny.org/daca-essential-workers-covid/>.

³⁹ Center for Migration Studies. *DACA Recipients are Essential Workers and Part of the Front-line Response to the COVID-19 Pandemic, as Supreme Court Decision Looms* (2020). <https://cmsny.org/daca-essential-workers-covid/>.

⁴⁰ Nguyen, L.H., Drew, D.A., Graham, M.S., Joshi, A.D., Guo, C.-G., Ma, W., Mehta, R.S., Warner, E.T., Sikavi, D.R., Lo, C.-H., Kwon, S., Song, M., Mucci, L.A., Stampfer, M.J., Willett, W.C., Eliassen, A.H., Hart, J.E., Chavarro, J. E., Rich-Edwards, J.W., . . . Zhang, F. (2020). Risk of COVID-19 among front-line health-care workers and the general community: A prospective cohort study. *The Lancet Public Health*, 5(9). [https://doi.org/10.1016/S2468-2667\(20\)30164-X](https://doi.org/10.1016/S2468-2667(20)30164-X).

⁴¹ Barrett, E.S., Horton, D.B., Roy, J., Gennaro, M.L., Brooks, A., Tischfield, J., Greenberg, P., Andrews, T., Jagpal, S., Reilly, N., Carson, J.L., Blaser, M.J., & Panettieri, R.A. (2020). Prevalence of SARS-COV-2 infection in previously undiagnosed health care workers in New Jersey, at the onset of the U.S. covid-19 pandemic. *BMC Infectious Diseases*, 20(1). <https://doi.org/10.1186/s12879-020-05587-2>.

⁴² Dzioli, Allan and Pinheiro, Roberto. (2016). *Health Insurance as a Productive Factor*. Labour Economics. <https://doi.org/10.1016/j.labeco.2016.03.002>.

⁴³ Count of Active DACA Recipients by Month of Current DACA Expiration as of September 30, 2023. U.S. Citizenship and Immigration Services. https://www.uscis.gov/sites/default/files/document/data/active_daca_recipients_fy23_q4.pdf.

enroll in a QHP, for APTC and CSRs through an Exchange, and for a BHP.

Comment: Commenters noted support for CMS' clarification that the provisions in the proposed rule only pertained to the definitions of "lawfully present" to determine eligibility for certain health care benefits—including eligibility to enroll in a QHP or a BHP—and that nothing in the proposed rule provided any noncitizen relief or protection from removal, or conveyed any immigration status or other authority for a noncitizen to remain in the United States under existing immigration laws or to become eligible for any immigration benefit available under the DHS' or DOJ's purview.

Response: We reiterate that the provisions in this final rule, only apply to eligibility to enroll in a QHP and a BHP.

Comment: Some commenters stated that the proposed rule was a lawful exercise of the Department's authority under the ACA to define "lawfully present" for use in determining eligibility in HHS programs, and that the provisions in the proposed rule better effectuated the ACA's purposes than the current regulatory scheme. One commenter indicated that the rule corrects an error of CMS' 2012 regulation, which treated DACA recipients as a *sui generis* class of deferred action recipients, rather than what the commenter described as one in a long line of deferred action policies in the nation's history.

One commenter noted that the ACA uses the phrase "lawfully present" as an eligibility criterion in multiple provisions. The commenter believed that the Congress's policy directive, to consider individuals who are lawfully present, and only those lawfully present, as eligible for the ACA's benefits, was clear. The commenter noted that although the ACA did not define "lawfully present," that this phrase was also used at 8 U.S.C. 1611(b)(2), which predates the ACA, as an eligibility criterion for Title II Social Security benefits. The commenter noted that 8 U.S.C. 1611(b)(2) grants authority to the Attorney General (now the Secretary of Homeland Security) to define who is lawfully present for purposes of Title II Social Security benefits. The commenter noted that when we changed course after DACA was announced, DHS did not change the definition of "lawfully present" used in their regulations.

The commenter described the status quo as incongruous, particularly given how DHS treats DACA recipients for purposes of immigration law. The commenter noted that although DACA,

and deferred action generally, is not a form of "lawful status," DHS does not consider deferred action recipients to be unlawfully present in the United States as long as their deferred action is in effect. The commenter further noted that unlawful presence has serious ramifications, including inadmissibility to the United States. The commenter stated that DACA recipients are, due to decades-old DHS regulations, eligible for work authorization. As a result of CMS' prior rulemaking, this meant that although DACA recipients have been eligible to live and work in the United States and have been eligible to receive benefits like Social Security, they are barred from accessing crucial aspects of the health care system. The commenter supported the elimination of this inconsistency, which would "thereby harmonize the definition of a single statutory phrase across agencies and applications, following the lead of the Federal agency best suited to make immigration determinations—DHS."

Response: We agree that this rule is a lawful exercise of CMS' authority to interpret the statutes it is charged with implementing, as described in detail throughout this rule. We agree with commenters that the changes proposed in this rule better effectuate the goals of the ACA by expanding access to affordable health insurance coverage and are consistent with DHS' rules for Social Security defining "lawfully present" at 8 CFR 1.3. We further acknowledge that this rule will eliminate the discrepancy by which DACA recipients are currently treated differently from other recipients of deferred action for purposes of eligibility for enrollment in a QHP or a BHP.

Because we are not finalizing a definition of "lawfully present" for purposes of Medicaid and CHIP eligibility under the CHIPRA 214 option at this time, there will be differences between who is considered "lawfully present" for Medicaid and CHIP and who is considered "lawfully present" for Exchange coverage and the BHP. We acknowledge commenters' interest in having a uniform definition across our insurance affordability programs, as uniformity was a factor we considered in our proposals. However, we are not finalizing a definition of "lawfully present" for purposes of Medicaid and CHIP eligibility at this time due to the reasons detailed in section I. Accordingly, we will consider, along with the comments we received on the proposed amendments to the definitions for purposes of Medicaid and CHIP, the potential benefits of such uniformity in any future rulemaking on this topic.

Comment: Many commenters stated that they agreed that DACA recipients should be treated the same as other recipients of deferred action, and that there is no reason for CMS to treat DACA recipients differently from other recipients of deferred action. One commenter stated that they believed deferred action recipients were eligible for QHP and BHP per the ACA, and that CMS' prior policy "undermined this statutory eligibility" and appreciated CMS updating the current policy of exclusion.

A comment submitted by some State attorneys general referred to the current exclusion as a "discrepancy in the current regulatory scheme." This commenter also noted that the Federal Government has a long history of granting deferred action, including 17 different deferred action policies prior to DACA, and that none of the deferred action recipients under any of these other policies were categorically denied access to health insurance affordability programs. The commenter noted that the current exclusion bars DACA recipients from health insurance affordability programs that their tax contributions help fund. Another commenter stated this would bring greater consistency to Federal policy in this area and would advance the goals of the ACA.

Response: We agree with the commenters that DACA recipients should be treated the same as other recipients of deferred action for purposes of eligibility for Exchanges and the BHP. Commenters are correct that, up until now, DACA recipients have been the only category of deferred action recipients excluded from eligibility for these insurance affordability programs. We acknowledge that this policy did not best effectuate the ACA's directive to consider individuals who are "lawfully present" to be otherwise eligible for coverage. We agree with the commenter who characterized this exclusion of DACA recipients as a "discrepancy in the regulatory scheme." When this final rule is effective on November 1, 2024, this discrepancy between DACA recipients, who are deferred action recipients, and other deferred action recipients will be corrected with respect to Exchange and BHP coverage, and all noncitizens granted deferred action by DHS will be considered as lawfully present for the purposes of eligibility for these programs. We will consider the impacts of eliminating this discrepancy for purposes of Medicaid and CHIP eligibility under the CHIPRA 214 option in future rulemaking.

Comment: Some commenters questioned whether the ACA provided an adequate legal basis for CMS to treat DACA recipients differently from other recipients of deferred action. Commenters further stated that they believed that CMS' 2012 IFR excluding DACA recipients from the definition of "lawfully present" was not aligned with the ACA's goal to expand access to affordable health coverage to the uninsured.

Response: The ACA does not define the term "lawfully present," but our regulations implementing the ACA have recognized that noncitizens with a currently valid period of deferred action were lawfully present. For the reasons stated above, we believe that the ACA supports our proposed change in policy for DACA recipients as these individuals will be treated as lawfully present just like other individuals granted deferred action for the purposes of eligibility for health insurance through an Exchange or a BHP.

We agree with the comment that our prior policy did not fully align with the ACA's goal to expand access to affordable health coverage for the uninsured. We agree with commenters that the changes in this rule better effectuate the congressional intent in the ACA, given the ACA's broad aims to expand access to affordable health insurance coverage. As mentioned throughout this rule, new information regarding DACA recipients' difficulty in accessing health insurance coverage has become available since we adopted our prior policy. As mentioned previously in this rule, despite some DACA recipients being able to access health insurance coverage through their employers as a result of the employment authorization provided under the DACA policy, DACA recipients are still more than three times more likely to be uninsured than the general U.S. population, which had a national uninsured rate of 7.7 percent.^{44 45}

Comment: Some commenters noted that the current exclusion of DACA recipients from CMS definitions of "lawfully present" is inconsistent with other rules pertaining to public benefits eligibility for individuals with deferred action, including DHS regulations at 8

CFR 1.3 for the purposes of eligibility for Title II Social Security benefits. Commenters supported CMS' proposal to better align with DHS' policies.

Response: This rule would bring eligibility for health insurance through an Exchange and a BHP into alignment with DACA recipients' treatment under rules used by the Social Security Administration for Title II Social Security Benefits, as articulated in DHS regulations at 8 CFR 1.3. As we are not finalizing a definition of "lawfully present" for purposes of eligibility for Medicaid or CHIP under the CHIPRA 214 option at this time, due to the reasons detailed in section I, the definition used for purposes of those programs will continue to differ from DHS regulations at 8 CFR 1.3 with respect to DACA recipients. We will consider the impacts of updating the Medicaid and CHIP definition of "lawfully present" in future rulemaking.

Comment: Some commenters, including nonprofit advocacy organizations and State government agencies, stated the belief that no longer excluding DACA recipients from Exchange coverage could have a positive impact on Exchange risk pools. One government agency noted that improving the risk pool in this way will benefit insurers, and commenters further noted that improving risk pools in this way is expected to exert downward pressure on QHP premiums and to improve market stability. In support of the argument that allowing DACA recipients to access Exchange coverage could improve individual market risk pools, multiple commenters cited a study that found that DACA recipients had similar self-reported health status to U.S. born individuals, with 92 percent of survey respondents eligible for DACA reporting excellent, very good, or good health.⁴⁶ Commenters noted that DACA recipients are also younger, on average, than current Exchange enrollees, with an average age of 30.⁴⁷

Response: While we are unable to quantify the potential impacts of this policy on Exchange risk pools, we believe it is reasonable to predict that allowing DACA recipients to enroll in Exchange coverage may have a positive impact. DACA recipients, whose average age is now 30, are younger than

the existing population of Exchange enrollees, of whom 64 percent are age 35 or older.^{48 49} As commenters noted, DACA recipients are also generally in good health, due in part to the fact that DACA recipients are a relatively young population. However, we note that there does exist a slight gap between DACA recipients who report they are in excellent or very good health (64 percent) as compared to U.S. citizens (71 percent).⁵⁰ We are not able to assess how DACA recipients' health status compares to that of the existing population of Exchange enrollees, or to predict any downstream impacts on Exchange risk pools as a result. However, we are hopeful that allowing DACA recipients to access Exchange coverage may help address these existing disparities due to the positive health impacts of having health insurance, which are detailed later in this section.

Comment: One State government agency noted that extending QHP eligibility for DACA recipients is particularly important because DACA recipients may lose access to State-funded Medi-Cal during unwinding. Another commenter noted that extending QHP eligibility for DACA recipients is particularly important because even in the State of California, where DACA recipients may qualify for State-funded Medi-Cal if they are income-eligible, 57 percent of individuals likely eligible for DACA have incomes above 200 percent of the FPL. Allowing these DACA recipients to enroll in health coverage through a QHP provides an important source for affordable health insurance coverage that is not currently available.

Response: We appreciate a commenter pointing out the importance of making Exchange coverage available to DACA recipients who may not be eligible for, or who may be losing, State-funded health coverage during unwinding. While we are not finalizing a definition for purposes of Medicaid and CHIP eligibility at this time, due to the reasons detailed in section I, we will take this comment into consideration as part of any future rulemaking on this topic.

⁴⁴ National Immigration Law Center. *Tracking DACA Recipients' Access to Health Care* (2023). https://www.nilc.org/wp-content/uploads/2023/05/NILC_DACA-Report_2023.pdf.

⁴⁵ U.S. Department of Health and Human Services. *New HHS Report Shows National Uninsured Rate Reached All-Time Low in 2023 After Record-Breaking ACA Enrollment Period* (2023). <https://www.hhs.gov/about/news/2023/08/03/new-hhs-report-shows-national-uninsured-rate-reached-all-time-low-2023-after-record-breaking-aca-enrollment-period.html>.

⁴⁶ Key Facts on Deferred Action for Childhood Arrivals (DACA) (2023), <https://www.kff.org/racial-equity-and-health-policy/fact-sheet/key-facts-on-deferred-action-for-childhood-arrivals-daca/>.

⁴⁷ Count of Active DACA Recipients by Month of Current DACA Expiration as of September 30, 2023. U.S. Citizenship and Immigration Services. https://www.uscis.gov/sites/default/files/document/data/active_daca_recipients_fy23_q4.pdf.

⁴⁸ Count of Active DACA Recipients by Month of Current DACA Expiration as of September 30, 2023. U.S. Citizenship and Immigration Services. https://www.uscis.gov/sites/default/files/document/data/active_daca_recipients_fy23_q4.pdf.

⁴⁹ Centers for Medicare and Medicaid Services. *2024 Open Enrollment Report*. <https://www.cms.gov/files/document/health-insurance-exchanges-2024-open-enrollment-report-final.pdf>.

⁵⁰ Key Facts on Deferred Action for Childhood Arrivals (DACA) (2023), <https://www.kff.org/racial-equity-and-health-policy/fact-sheet/key-facts-on-deferred-action-for-childhood-arrivals-daca/>.

General Opposition

Comment: Some commenters noted general opposition to CMS' proposal to consider DACA recipients lawfully present for purposes of insurance affordability programs. Some commenters urged CMS to withdraw the rule, or alternatively, to remove the proposed changes that would no longer exclude DACA recipients from the definitions of "lawfully present" used to determine eligibility for CMS insurance affordability programs.

Some commenters noted opposition to this rule on the basis that they believe DACA recipients entered the United States unlawfully, that they believe DACA recipients are undocumented, or that they believe DACA recipients have broken the law. Commenters stated that rules such as the one that CMS has proposed further incentivize illegal immigration, increase fraud and abuse of government systems, and encourage dependency on Federal programs.

Response: We recognize that some of the public commenters are opposed to the change this rule would make, and there is significant public debate concerning the availability of some public benefits for noncitizens. Although we recognize that the Congress has made a general statement of the immigration policy of the United States at 8 U.S.C. 1601, the Congress has provided some express exceptions that enable certain noncitizens to obtain certain public benefits under other authorities. For example, as noted in the proposed rule, individuals who are either U.S. citizens or nationals or lawfully present in the United States are eligible to enroll in a QHP and are eligible for PTCs, APTCs, and CSRs (88 FR 25313). We submit that our rule is consistent with the relevant statutory authorities.

In addition, DHS has recognized that even individuals who did not enter the United States legally could become "lawfully present" under the statutes governing particular benefit programs (87 FR 53152, 53156). DHS notes that "the term 'lawful presence' historically has been applied to some persons who are subject to removal (and who may in fact have no 'lawful status'), and whose immigration status affords no protection from removal, but whose temporary presence in the United States the Government has chosen to tolerate for reasons of resource allocation, administrability, humanitarian concern, agency convenience, and other factors. Lawful presence also encompasses situations in which the Secretary, under express statutory authorization, designates certain categories of

noncitizens as lawfully present for particular statutory purposes, such as receipt of Social Security benefits" (87 FR 53152). As discussed throughout this rule, we have the authority to modify our definition of "lawfully present" used as an eligibility criterion for the programs we administer and for which we have oversight responsibilities.

We reiterate in response to the public comments that this rule aims to establish eligibility criteria only for Exchanges and a BHP and does not address or revise immigration policy, including DHS' DACA policy. We also reiterate that other recipients of deferred action have long been considered lawfully present under our regulations and policies, and this rule is removing the exception for DACA recipients for the purposes of eligibility for Exchanges and a BHP. We note that while we are not addressing the definition of "lawfully present" for purposes of Medicaid and CHIP eligibility in this final rule, we will consider commenters' concerns about negative impacts of DACA recipients being considered eligible for Medicaid or CHIP under the CHIPRA 214 option in future rulemaking. The rulemaking process with regard to that portion of the proposal is ongoing.

We also do not believe that this rule will encourage irregular migration, fraud or abuse of government systems, or encourage dependency on Federal programs. While the factors contributing to irregular migration are complex and multifaceted, DHS has clearly indicated from the beginning of the DACA policy that only certain noncitizens continuously residing in the United States since June 15, 2007 can be considered for deferred action under DACA.⁵¹ We do not believe it is reasonable to conclude that no longer excluding DACA recipients from eligibility for insurance through an Exchange or a BHP will have any material impact on rates of illegal immigration. Individuals must have their lawful presence electronically verified by DHS to enroll in our insurance affordability programs, which ensures that noncitizens who are not lawfully present, as defined in this final rule, will not be able to enroll in health insurance through an Exchange and a BHP.

Comment: A few commenters stated their belief that DACA recipients should

not be able to access the insurance affordability programs discussed in this rule because they do not pay into the U.S. health care system via taxes.

Response: Contrary to the commenter's assertion, we note that DACA recipients do pay Federal, State, and local taxes. One analysis estimated that DACA recipients contribute \$6.2 billion in Federal taxes and \$3.3 billion in State and local taxes each year.⁵² In addition, we note that only DACA recipients who attest that they will file a Federal income tax return will be eligible for APTCs for Exchange coverage.

Comment: A few commenters stated their belief that DACA recipients should not be able to access the insurance affordability programs addressed in this rule unless they become U.S. citizens, or that DACA recipients and other noncitizens should not be able to access more benefits than U.S. citizens. A few commenters expressed their belief that DACA recipients should use employer sponsored coverage or other private coverage. One commenter indicated that they would be in favor of making subsidized health insurance coverage available to DACA recipients only if they are employed.

Response: Limiting access to the insurance affordability programs addressed in this rule to U.S. citizens, as some commenters suggested, is beyond our authority under the ACA. Further, the changes in this rule result in DACA recipients becoming potentially eligible for health insurance through an Exchange or a BHP for which U.S. citizens, U.S. nationals, and other noncitizens determined to be lawfully present are already considered eligible. Nothing in this rule restricts or changes the insurance affordability programs available to U.S. citizens, U.S. nationals, or other such lawfully present noncitizens.

Finally, we do not have authority under the ACA to limit the availability of coverage to individuals who are employed, although there is evidence that the majority of DACA recipients are employed.⁵³

Comment: One nonprofit organization opposed the proposal stating that by expanding the definition of "lawfully present," DACA recipients would rely

⁵¹ See U.S. Department of Homeland Security. (2012) *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*. <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>, and 8 CFR 236.22(b)(2).

⁵² Center for American Progress. The Demographic and Economic Impacts of DACA Recipients: Fall 2021 Edition. (2022). <https://www.americanprogress.org/article/the-demographic-and-economic-impacts-of-daca-recipients-fall-2021-edition/>.

⁵³ Center for American Progress. Results from Tom K. Wong et al., 2022 National DACA Study. <https://www.americanprogress.org/wp-content/uploads/sites/2/2023/04/DACA-Survey-2022-Toplines.pdf>.

on Federal and State benefits that might be taken away if a court rules against DHS' DACA policy as codified in its 2022 DACA final rule (87 FR 53152).

Response: An individual could cease to be "lawfully present" for a number of reasons, including because DHS terminates an individual's grant of deferred action on a case-by-case basis, because the Congress enacts a statute that makes changes to current law, or, as the commenter suggests, because of a judicial decision. Regardless of whether any of these situations may come to pass in the future, we see no compelling reason not to update our regulations, consistent with our statutory and regulatory authority, as we have found that our current regulations do not best effectuate the ACA. As is detailed throughout this rule, we believe there are significant physical health, mental health, and financial benefits associated with having access to health insurance coverage. For both DACA recipients and other noncitizens who may no longer be considered "lawfully present" under our regulations at some point in the future, we do not believe that the potential risk of losing coverage in the future outweighs the potential benefit of increasing access to coverage at present.

Comment: Some commenters noted general opposition to this proposed rule stating that they believe more resources should go towards ensuring that U.S. citizens have access to the health insurance coverage and health care services that they need, before directing funds towards DACA recipients and other noncitizens. A few commenters stated frustration that the cost of health insurance for U.S. citizens, especially those who work, who have families, who are low income, or who own small businesses is too high, and they are suffering without access to affordable health care. Commenters requested that more work should go to fixing the current health care system and that American citizens or those who entered the United States legally should be receiving better care.

Response: We are committed to ensuring access to quality, affordable health insurance coverage and health care for everyone who is eligible for programs we regulate or administer. The insurance affordability programs being made available to DACA recipients in this rule—Exchange coverage and the BHP, specifically—have been and will continue to be available to eligible U.S. citizens, U.S. nationals, and other lawfully present noncitizens. The purpose of this rule is to establish eligibility requirements for health insurance through an Exchange and a BHP rather than dictate where tax

dollars are directed. We note that nothing in this rule will restrict or eliminate the availability of these insurance affordability programs to U.S. citizens. In fact, it is possible that allowing DACA recipients to enroll in QHPs through an Exchange could lower QHP premiums for all enrollees. Given that DACA recipients are, on average, younger than current Exchange enrollees, having DACA recipients in the QHP risk pools may lower the associated premiums of such plans.

Comment: Some commenters believe the policies in this proposed rule are outside of the President's purview, are not permitted under the ACA, and should be policies established by the Congress. Some commenters noted that the ACA was passed after extensive discussions within the Congress and specific statements were made regarding "lawful presence" and who would receive ACA benefits. A few commenters further noted that the DACA policy was implemented to prevent deportation, and to provide work permits for those individuals, not to extend government benefits to them. Additional commenters expressed their belief that whether to provide health insurance to individuals who are DACA recipients falls to the Congress, and the President has no legal authority. A few commenters also pointed out that a prior administration originally prevented DACA recipients from accessing ACA coverage.

Response: We do not agree with the suggestion that the proposed rule exceeds our legal authority. We have identified the relevant statutory authority that supports our proposed and final rule. Moreover, we have identified specific reasons for proposing a change of policy and have sought public comments consistent with the requirements of the Administrative Procedure Act (APA). We have demonstrated that the rule is consistent with our existing authority under the law.

Comment: Commenters stated their view that the DACA policy is unlawful, and that this rule runs counter to immigration laws including statute, case law, and ongoing litigation in the Fifth Circuit Court of Appeals. One commenter stated that CMS was correct in its initial judgment that there was good reason to treat DACA recipients differently from other recipients of deferred action. The commenter further asserted that unlike other forms of prosecutorial discretion, DACA was "plainly unlawful," as it was not authorized by the Congress, conflicted with other statutes, and did not

originally undergo notice and comment rulemaking.

One nonprofit organization cited the Fifth Circuit's ruling in which the court found that DHS does not have authority to "broaden the categories of aliens who are entitled to lawful presence in the United States."⁵⁴ The commenter also cited the court's findings that the DACA Memorandum "contradicts significant portions of the Immigration and Nationality Act (INA)," and that the 2012 Memorandum by then-DHS Secretary Janet Napolitano which announced the DACA policy violated the procedural requirements of the APA. One commenter further stated that the Congress identified in the INA several discrete categories of noncitizens that may be eligible for deferred action, nowhere granting the executive branch authority to unilaterally expand on those categories. One nonprofit organization cited the court's finding that the DACA policy "failed under step one of the Chevron framework." One nonprofit organization noted that the Supreme Court has consistently held that the Congress holds plenary authority over immigration. The commenter cited *Kleindienst v. Mandel*,⁵⁵ in which the Court noted that the Congress has "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which the Congress has forbidden."

One commenter further stated that they believed that by including DACA recipients in CMS' definition of "lawfully present," CMS was "reinforcing" DACA, which they viewed to be an "unlawful program." One nonprofit research organization stated that because the DACA policy is not a lawful exercise of deferred action, and because the DACA policy violates procedural and substantive Federal law, that CMS must exclude DACA recipients from its definitions of "lawfully present."

Response: We believe that the DACA final rule is lawful. As DHS articulates in detail in their final rule, the DACA final rule represents a lawful exercise of the Secretary of Homeland Security's authority and discretion regarding deferred action (87 FR 53152).

Perhaps more importantly, this rule does not in any way change existing immigration policy, nor does it confer lawful immigration status. As we explained in the proposed rule, "[t]hese proposed definitions are solely for the purposes of determining eligibility for

⁵⁴ *Texas et al. v. United States et al.*, 50 F.4th 498 (5th Cir. 2022).

⁵⁵ 408 U.S. 753, 766 (1972).

specific HHS health programs and are not intended to define lawful presence for purposes of any other law or program.” We also noted that the proposed rule would not provide any noncitizen relief or protection from removal or convey any immigration status or other authority for a noncitizen to remain in the United States under existing immigration laws or to become eligible for any immigration benefit available under the DHS’s or DOJ’s purview.

The ACA uses the term “lawfully present” as an eligibility criterion for health insurance through an Exchange or a BHP. As noted previously in this final rule, those terms were not defined in the operative statute, and we have the authority to define these terms for the purposes of determining eligibility for health insurance through an Exchange and a BHP.

Comment: One commenter, a nonprofit research organization, stated that because CMS’ proposed change in policy is not based on a reasonable rationale, that extending benefits to DACA recipients is *ultra vires* and violates the APA. The commenter further stated that it believed that CMS’ rationale for changing its interpretation is not justified by the facts and is therefore unlawful under the APA. The commenter asserted that CMS has failed to meet the standards of the APA by proposing to consider DACA recipients as “lawfully present” despite the DACA policy’s “serious legal deficiencies.” The commenter specifically stated that CMS’ explanation that, upon further review, the DACA policy “was intended to provide recipients with the stability and assurance that would allow them to obtain education and lawful employment, and to integrate as productive members of society” is inconsistent with the inherent nature of deferred action, which DHS has specified can be “terminated at any time, in its discretion.” The commenter noted that if DACA is truly a form of prosecutorial discretion, then DACA grants must be case-by-case and based on prioritization of cases, rather than a class-based benefits program intended to provide stability to a specific class of beneficiaries in a manner similar to standard immigration benefits. The commenter stated that any stability DACA recipients may receive as a part of the policy is unwarranted, and that deferred action does not provide lawful status or a right to remain in the United States nor does it excuse past or future periods of unlawful presence.

Response: We have met our obligations under the APA to explain our proposed policy change to no longer

exclude DACA recipients from the group of individuals with deferred action in our definitions of lawful presence for purposes of eligibility for health insurance through an Exchange and a BHP. As noted above, we have the authority to define the term “lawfully present” as an eligibility criterion for health insurance through an Exchange or a BHP as the term was previously not defined in the operative statute.

Additionally, as discussed in this final rule and in the proposed rule, new information regarding DACA recipients’ difficulty accessing health insurance coverage and health care has become available since we first excluded DACA recipients from our definitions of “lawfully present” in 2012. In this rule, we are adopting a policy that better effectuates the goals of the ACA to promote access to affordable health insurance coverage through Exchanges and BHPs. Further, we disagree with the commenter’s characterization that any stability that DACA recipients receive related to the DACA policy is unwarranted. While deferred action does not confer legal immigration status or a right to remain in the United States, it does provide a degree of stability to recipients, including through providing eligibility to request employment authorization.

Comment: One government agency stated that it is illogical to consider DACA recipients and other deferred action recipients to be “lawfully present” because the “action” that is deferred under DACA and other deferred action policies is action on their recipients’ unlawful presence. In support of this argument, the commenter cited an Eleventh Circuit opinion, which has noted that DACA recipients are “given a reprieve from potential removal; that does not mean they are in any way ‘lawfully present’ under the [INA].”⁵⁶

Response: As DHS explained in their DACA final rule, the concept of “lawful presence” is a term of art used in certain benefit statutes and without a single controlling statutory definition. Still, we acknowledge that lawful presence is not an immigration status and does not connote a “lawful immigration status.” As DHS states in its DACA final rule, “[a]n individual’s lawful presence can include situations in which the executive branch tolerates an individual being present in the United States at a certain, limited time or for a particular, well-defined period. The term is

reasonably understood to include someone who is (under the law as enacted by the Congress) subject to removal, and whose immigration status affords no protection from removal, but whose temporary presence in the United States the Government has chosen to tolerate, including for reasons of resource allocation, administrability, humanitarian concern, agency convenience, and other factors.” (87 FR 53152).

Deferred action recipients have been considered lawfully present under regulations for many years for purposes of eligibility for Social Security, the Exchange, BHP, and under existing CMS policy outlined in the 2010 SHO for Medicaid and CHIP under the CHIPRA 214 option, and thus may be receiving benefits if they meet all other eligibility requirements for those programs.

The INA does not include a definition of “lawfully present.” As noted by DHS in their DACA final rule, there is no singular definition of “lawfully present” for all purposes and the term is not a legal immigration status. Similar to how DHS considers deferred action recipients lawfully present for purposes of Title II Social Security benefits under 8 CFR 1.3, this rule only addresses eligibility for specific programs. Under the authority granted the HHS Secretary by the ACA, we are defining “lawfully present” for purposes of Exchanges and BHP programs and believe we have adopted a reasonable approach in doing so.

Comment: A few commenters stated that CMS’ changes to consider DACA recipients as “lawfully present” for purposes of its programs should go through the Congress, and that this rule reaches beyond the jurisdiction of the Executive branch. Commenters further indicated that they believed that bypassing the Congress was inappropriate because of the Congress’s role in appropriating funding.

Response: Where the Congress uses a term like “lawfully present” but does not define the term, the agency is required to interpret the statute, particularly where the Congress grants the agency broad rulemaking authority to implement the statute, as it has done in the ACA.⁵⁷ We do not agree with the commenters’ suggestion that we have acted beyond our statutory authority by proposing to include DACA recipients within the term “lawfully present” for purposes of eligibility for health insurance through an Exchange or a BHP as addressed in this rule. After review, we believe that the revised definition of “lawfully present” for

⁵⁶ *Estrada v. Becker*, 917 F.3d 1298, 1305 (11th Cir. 2019) (citing *Ga. Latino All. for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1258 n.2 (11th Cir. 2012)).

⁵⁷ 42 U.S.C. 18041(a)(1).

purposes of eligibility for health insurance through an Exchange or BHP is the most accurate interpretation of the ACA's text and better effectuates the Congressional intent in the ACA.

Access to Care

Comment: Many advocacy organizations, government agencies, and health insurers noted that despite DACA recipients' relatively high rates of employment, DACA recipients continue to face barriers to accessing health insurance coverage and health care. Some commenters cited a 2021 study that found that over one-third of DACA recipients were uninsured, and others cited an analysis of 2022 Current Population Survey Annual Social and Economic Supplement data that found that nearly half of individuals likely eligible for DACA are uninsured. Commenters noted that high proportions of DACA recipients reported being unable to pay medical bills. Another commenter noted that while DACA recipients initially realized some health improvements when the 2012 DACA policy was established, that those improvements slowed as uncertainty surrounding the policy grew. Commenters stated that this rule was urgently necessary to help DACA recipients gain access to needed health insurance coverage and close the insurance gap, in line with the goals of the ACA.

One nonprofit organization noted that individuals who would benefit from this rule likely have limited incomes and it is very unlikely that these individuals can afford health insurance. Another commenter cited data showing that in the State of New York, approximately two-thirds of DACA recipients have incomes below 100 percent of the FPL. By gaining access to insurance affordability programs, the commenter noted that this population would have an opportunity to enroll that is currently not available.

Several commenters noted that a significant proportion of DACA recipients are parents, citing estimates ranging from 30 percent to 48 percent of DACA recipients, and noted that 250,000 to 300,000 U.S.-born children have a parent who is a DACA recipient. Commenters cited studies showing that children are more likely to be insured when their parents have health insurance, and that therefore, expanding the health insurance options available to DACA recipients through this rule would also likely improve access to insurance for their children. One commenter noted U.S. citizen children with at least one noncitizen parent are

twice as likely to be uninsured as those with two U.S. citizen parents.

Response: We agree with commenters' view that DACA recipients face disproportionately high rates of uninsurance, which has negative downstream health and economic impacts, discussed in further detail below. We believe that no longer barring DACA recipients from accessing health insurance through an Exchange or a BHP will enable previously uninsured DACA recipients to enroll in affordable and quality health insurance coverage and ultimately improve health outcomes for communities that have faced historical inequities.

We note that, in line with 26 U.S.C. 36B(c)(1)(B) and 42 U.S.C. 18071(b)(2), under the policy outlined in this rule, DACA recipients would generally be considered eligible for APTC and CSRs even if their household income is below 100 percent of the FPL, as individuals who are lawfully present but are ineligible for Medicaid due to their "alien status." Under the enhanced subsidies made available through the American Rescue Plan Act and the Inflation Reduction Act, DACA recipients with household incomes up to 150 percent of the FPL would be eligible for zero-dollar premium silver plans, if otherwise eligible for APTC.⁵⁸ While we are not finalizing a definition of "lawfully present" for purposes of eligibility for Medicaid or CHIP under the CHIPRA 214 option at this time, we believe that most DACA recipients who may have been eligible for Medicaid or CHIP under the CHIPRA 214 option under our proposed rule will be eligible to enroll in a QHP with generous APTC and CSRs, or in the BHP, under this final rule. Because of this, we believe that this final rule will still decrease rates of uninsurance among DACA recipients.

Finally, we appreciate commenters' illustrations of how this rule may not only increase access to insurance coverage for DACA recipients and other individuals who would be newly considered lawfully present as a result of the final rule, hereinafter "impacted noncitizens," but also for their children. We agree with commenters who noted that addressing the needs of DACA recipients and their families' need for access to affordable health insurance coverage through an Exchange or a BHP is in line with the goals of the ACA.

⁵⁸ See Section 9661 of the American Rescue Plan Act of 2021, Public Law 117-2 (March 11, 2021), and Section 12001 of the Inflation Reduction Act of 2022, Public Law 117-169 (August 16, 2022), which established enhanced premium tax credits for Exchange coverage through 2025.

Comment: Some commenters noted the negative impacts of the COVID-19 pandemic on DACA recipients. Commenters provided a range of estimates of the number of DACA recipients working as essential employees during the COVID-19 pandemic. One nonprofit organization cited a study by the Center for American Progress that found that more than three quarters of DACA recipients in the workforce worked in "essential" occupations during the public health emergency, and other commenters cited estimates ranging from around 200,000 to 343,000 workers at the height of the pandemic. Commenters further cited a range of estimates of the number of DACA recipients who worked in health care occupations during the pandemic, ranging from 30,000 to about 45,000. As essential workers, these DACA recipients often put their own and their families' health at risk.

One commenter noted that the COVID-19 pandemic exacerbated deep-seated disparities in health equity, particularly among communities of color, and that systemic barriers have amplified high uninsurance rates and the frequency of postponed medical care among communities of color. Commenters noted that DACA recipients are much more likely than the general population to have coverage through an employer or union. Commenters stated that of those with health insurance, 80 percent of DACA recipients had coverage through an employer or union, as compared to about 50 percent of the general population. As a result, DACA recipients' access to health insurance coverage was very directly tied to their employment status, and losing their job likely meant losing access to health insurance coverage. Commenters cited a 2021 survey of DACA recipients that found that nearly one in five had lost employer health coverage during the COVID-19 pandemic and noted that DACA recipients who lose employer coverage had very limited alternative options for obtaining health insurance coverage.

Response: We agree with the commenters' perspectives on the negative impacts that the COVID-19 pandemic had on DACA recipients, especially as essential workers. Additionally, we recognize the burden that DACA recipients faced when they lost employer-sponsored coverage in the midst of a pandemic. We believe that this rule's change to no longer exclude DACA recipients from the definition of "lawfully present" will enable this population to access health insurance through an Exchange or a BHP, options

that were previously unavailable. We believe that by updating the eligibility requirements for DACA recipients to enroll in a QHP through an Exchange or a BHP, some of the deep-seated disparities in health equity that commenters referenced may be reduced.

Comment: Several commenters encouraged CMS to invest in outreach and to create and maintain partnerships with assisters, who are certified and trusted community partners who provide free and impartial enrollment assistance to consumers (hereinafter “assisters”), and community-based organizations to spread awareness about DACA recipients’ access to care. One commenter suggested considering the geographic density of DACA recipients when determining the allocation of marketing resources in media markets.

Some commenters also urged CMS to provide adequate funding to community-based organizations so that they are able to contribute to the important work required to implement this rule. Commenters articulated how community-based organizations have worked for years to build relationships with DACA recipients and urged CMS to leverage these organizations’ expertise when implementing this rule to ensure the maximum benefit for consumers. Commenters noted the importance of multilingual materials when conducting outreach and education related to this rule.

A few commenters further noted that targeted outreach is necessary to address DACA recipients’ fears that accessing health care coverage and services could negatively affect their immigration status, given persistent fears related to the DHS 2019 public charge rule (84 FR 41292).⁵⁹

Response: We are committed to conducting outreach and education to reach individuals impacted by this rule. We plan to analyze the population impacted by this rule and build strategies and tactics to educate them that they may be eligible for health insurance through an Exchange or a BHP. As noted previously in this final rule, we also plan to leverage existing channels for outreach and education utilized during the individual market Exchange Open Enrollment Period, including multilingual channels, to ensure that impacted noncitizens are aware that they may be newly eligible for coverage. We agree with commenters’ view that to ensure

maximization of DACA recipients’ ability to access coverage, we should partner with assisters and community-based organizations.

Comment: Many commenters detailed how increasing access to health insurance coverage has positive impacts on individual and population health. Many commenters stated that they expected the provisions in the proposed rule would result in increased health and well-being for DACA recipients and other impacted noncitizens and would provide more equitable access to sources of health care on an individual level. Commenters noted that individuals who are insured are more likely to have a regular source of care, to receive timely and appropriate preventive care, and are less likely to experience certain health complications than those who are uninsured. A medical society noted that when uninsurance rates increase, worse health outcomes result at a population level, including reduced prescription adherence and increased prevalence of obesity and malnutrition, especially for pregnant or breastfeeding women, infants, or children. Similarly, one commenter noted that in States where health benefits are extended to all individuals regardless of immigration status, there are lower rates of foregoing medical, dental, and preventive care at a population level. One commenter noted that expanding access to health insurance coverage is particularly critical as the DACA population ages and faces new and different health challenges.

Response: We appreciate commenters’ recognition of the many ways that this rule has the potential to improve health and decrease mortality for impacted noncitizens. While we are unable to quantify these potential impacts, we are hopeful that the coverage gains facilitated by this rule will positively impact the health and wellbeing of DACA recipients and other impacted noncitizens who will be newly considered “lawfully present” as a result of this rule’s changes to the “lawfully present” definition for the purposes of eligibility for health insurance through an Exchange or a BHP.

Comment: Some commenters provided detailed analysis of the ways in which increased access to health insurance can contribute to individuals’ financial stability. One commenter cited a study that found that when an uninsured individual becomes hospitalized, negative financial outcomes, including reduced access to credit and higher risk of filing for bankruptcy, persist for the following

four years. Another commenter mentioned that without consistent access to care, costs of treatment are higher not only for the individual, but for society as a whole.

Some commenters expected that increased access to health insurance would help reduce medical debt for DACA recipients. Commenters noted that individuals with medical debt often have to cut spending on basic necessities. Because medical debt can threaten individuals’ food and housing security, it has detrimental effects on social determinants of health associated with adverse health outcomes. Some commenters also noted that medical debt can have significant financial consequences, including having bills going to collections, lower credit scores, bankruptcy, home foreclosures, or evictions. Commenters cited a 2022 survey in which 71 percent of DACA recipient respondents reported being unable to pay medical bills or expenses in the past. Commenters further noted that the financial stability provided by the provisions in this rule may enable DACA recipients to seek education and employment opportunities they may not have otherwise been able to access.

Response: We appreciate commenters’ analysis of the many ways that this rule has the potential to improve economic stability for impacted noncitizens. While we are unable to quantify these potential impacts, we are hopeful that the coverage gains facilitated by this rule, via the Exchange or a BHP, will positively impact the financial stability of DACA recipients, other impacted noncitizens and their families.

Comment: Several commenters further outlined how increasing access to health insurance coverage, or extending it to those who are uninsured, has positive impacts not only on individual financial well-being, but also on community-level economic health. One commenter stated that increasing access to affordable health coverage is expected to benefit communities, workforce, education systems, arts and culture, and many sectors of the economy. One commenter noted agreement with CMS’ discussion in the proposed rule preamble of the positive impacts that the rule is expected to have on the workforce, given that insured individuals miss 77 percent fewer workdays than those who are uninsured. One nonprofit organization cited studies illustrating that access to affordable coverage allows individuals to spend more disposable income on essential goods and services, which increases tax revenues and produces a “multiplier effect” where increased business revenues benefit both suppliers

⁵⁹ In 2022, DHS issued the rule “Public Charge Ground of Inadmissibility” (87 FR 55472), which is applicable to applications for adjustment of status postmarked or electronically filed on or after December 23, 2022; DHS’ 2019 Public Charge final rule (84 FR 41292) is no longer applicable.

and employees. This study found that the “multiplier effect” of Medicaid expansion was as much as 1.5 to 2 times as great as the amount of new Federal Medicaid spending. Similarly, one commenter cited a study finding that every \$100,000 of additional Medicaid spending resulted in 3.8 net job-years (that is, one job that lasts one year), demonstrating that expanding health benefits creates jobs. One nonprofit organization stated that expanding eligibility for DACA recipients will continue to pay dividends for years to come at the community and national level.

Some members of the Congress, in their public comment, noted that a large portion of DACA recipients are medical and health professional students who will play a critical role in the U.S. health care system in the future, and they deserve the same access to health care. They noted that DACA recipients’ access to health care during their education is vital to growing the health care workforce.

Response: We appreciate commenters’ analysis of the many ways that this rule has the potential to benefit the economies and other social systems and institutions in impacted noncitizens’ communities. We also appreciate the point that ensuring that DACA recipients who are medical and health professional students have access to health insurance coverage during their training is crucial to growing the health care workforce, which benefits communities’ health and helps drive down health care costs. While we are unable to quantify these potential benefits, we believe it is reasonable to predict that the improvements in access to health insurance coverage through Exchanges and the BHP that will be facilitated by this rule would produce similar positive impacts to those we have seen with other expansion efforts.

Comment: Many commenters noted that excluding DACA recipients from definitions of “lawfully present” used to determine eligibility for CMS programs contributed to health disparities. Commenters further noted that because more than 90 percent of DACA recipients are Latino, it is likely that the current exclusion of DACA recipients from CMS definitions of “lawfully present” has contributed to disproportionately high uninsurance rates among Latino individuals. Specifically, the commenter cited that Latinos have an uninsurance rate of 18 percent, as compared to 8.4 percent for non-Hispanic whites. Commenters similarly noted persistent disparities in insurance rates between immigrants as compared to U.S. citizens. Commenters

noted that while the ACA resulted in larger reductions in the uninsurance rate among Latinos than among any other racial or ethnic population, that DACA recipients have been excluded from these gains. Commenters stated that they expected that this rule would help mitigate these disparities and increase health equity and economic outcomes in the United States. One commenter noted that health disparities related to lack of insurance coverage were highlighted by recent infectious disease outbreaks including COVID–19 and Mpox. In the context of these outbreaks, lack of insurance often resulted in delays in seeking care, which can exacerbate outbreaks and hobble response efforts.

Response: We appreciate commenters’ assessments of the ways the current exclusion of DACA recipients from definitions of “lawfully present” can contribute to health disparities, particularly for and within the Latino population. Studies have long demonstrated the impact of health coverage on health outcomes,^{60 61 62 63 64} and the negative health consequences of even relatively short gaps in coverage.⁶⁵ Moreover, DACA recipients, with an uninsurance rate of 27 percent, are more than three times more likely to be uninsured than the general U.S. population, which had a national uninsured rate of 7.7 percent.^{66 67}

⁶⁰ Institute of Medicine (U.S.) Committee on Health Insurance Status and Its Consequences. (2009). *America’s uninsured crisis: Consequences for health and health care*. <https://www.ncbi.nlm.nih.gov/books/NBK214966/> National Academies Press.

⁶¹ Barker AR, Li L. *The cumulative impact of health insurance on health status*. *Health Serv Res*. 2020 Oct;55 Suppl 2(Suppl 2):815–822. doi: 10.1111/1475-6773.13325.

⁶² American Hospital Association. *Report: The Importance of Health Coverage*. <https://www.aha.org/guidesreports/report-importance-health-coverage#:~:text=Impact%20of%20Coverage&text=Studies%20confirm%20that%20coverage%20improves,on%20individuals%2C%20families%20and%20communities>.

⁶³ Woolhandler S, Himmelstein, D. 2017, Sept. *The Relationship of Health Insurance and Mortality: Is Lack of Insurance Deadly?* *Annals of Internal Medicine*. <https://doi.org/10.7326/M17-1403>.

⁶⁴ Kaiser Family Foundation. *Key Facts About the Uninsured Population*. (2023). <https://www.kff.org/uninsured/issue-brief/key-facts-about-the-uninsured-population/>.

⁶⁵ Gabrielle H, Amber G, Dmitry T. 2022; 25:3, 399–406. Short- and Long-Term Health Consequences of Gaps in Health Insurance Coverage among Young Adults. *Population Health Management*. doi: 10.1089/pop.2021.0211.

⁶⁶ National Immigration Law Center. *Tracking DACA Recipients’ Access to Health Care* (2023). https://www.nilc.org/wp-content/uploads/2023/05/NILC_DACA-Report_2023.pdf.

⁶⁷ U.S. Department of Health and Human Services. *New HHS Report Shows National Uninsured Rate Reached All-Time Low in 2023*

By including DACA recipients in the definition of “lawfully present” for the purposes of eligibility for health insurance through an Exchange or a BHP, we anticipate DACA recipients will have improved access to coverage through a QHP or BHP which should, in turn, improve consumers’ ability to access a range of important health services, thereby improving health outcomes and reducing health disparities for this population.

Comment: Some commenters noted that while DACA recipients who are uninsured face barriers to accessing care that are similar to other uninsured individuals, DACA recipients face additional barriers due to concern that using health care services could negatively affect their own or their family’s immigration status. Commenters cited a survey conducted in 2022 that found that nearly half (48 percent) of DACA recipient respondents reported delaying getting needed medical care because of their immigration status. One commenter stated that over 20 percent of DACA recipients were concerned that using health care services would negatively affect their or their family members’ immigration status.

One commenter cited polling conducted in 2018 that found one in four Latino voters surveyed (24 percent) had a close family member or friend delay or avoid health care because of fear related to immigration policies, and one in five (19 percent) stated the same about reproductive health care.

Some commenters urged CMS to clarify in this rule and in outreach and education materials that accessing the programs discussed in this rule does not make someone a public charge.

Response: We recognize that some previous governmental policies may have caused people to not seek certain benefits. We note, however, that the DHS public charge policy has now been significantly changed with the publication of the 2022 Public Charge final rule (87 FR 55472). DHS’ public charge policy from 2019 (84 FR 41292) has been vacated and is no longer in effect. When developing outreach and education materials related to this rule, we are committed to including content making it clear to DACA recipients and other noncitizens that accessing coverage through an Exchange or a BHP will not impact their grant of DACA, immigration status, or their future ability to adjust their status. Enrolling in

After Record-Breaking ACA Enrollment Period (2023). <https://www.hhs.gov/about/news/2023/08/03/new-hhs-report-shows-national-uninsured-rate-reached-all-time-low-2023-after-record-breaking-aca-enrollment-period.html>.

health insurance through the Exchanges, receipt of APTC or PTC, and CSRs are not considered in a public charge determination in any circumstance.

Comment: One commenter noted that the provisions in this rule will expand access to care for those DACA recipients who may be victims of child abuse, domestic violence, sexual assault, and human trafficking. The commenter noted that DACA recipients who are survivors of family violence and sexual assault may qualify for certain types of immigration relief as survivors of crime and abuse, and that ensuring that these individuals have access to health care providers who can screen for such abuse is critical for both their health and wellbeing and for ensuring that they have access to appropriate immigration relief.

Response: We appreciate this commenter's illustration of how access to health insurance coverage through an Exchange or a BHP may help ensure that DACA recipients and other impacted noncitizens who may have been victims of child abuse, domestic violence, sexual assault, and human trafficking are able to access the immigration benefits for which they may be eligible. We agree that this is yet another illustration supporting the goal of ensuring access to health insurance coverage and health care through an Exchange or a BHP for the underserved and vulnerable noncitizen populations.

Comment: One commenter noted that despite recent expansions of health insurance coverage, low-income Americans still have poor life expectancy outcomes.

Response: We do not agree that disparities in life expectancy rates between low-income and high-income Americans demonstrate that increasing access to health insurance coverage is not a worthwhile endeavor, or that it does not improve health outcomes for low-income populations. On the contrary, as other commenters have pointed out, increasing access to health insurance coverage is associated with improved health outcomes at both the individual and population levels.

Preventive Care

Comment: Many commenters stated that allowing DACA recipients to access QHPs, Medicaid, and CHIP would improve access to preventive care. Commenters noted that QHPs are required to cover certain essential health benefits, which include preventive services such as maternity and newborn care, contraception, and certain cancer screenings. Commenters cited studies finding that insured individuals are more likely to access

preventive care for major health conditions and chronic diseases, including cancer.

One commenter noted that while DACA recipients may be able to access certain safety-net health care providers if they do not have insurance, expanding access to comprehensive health insurance coverage will result in better individual and community health outcomes. Commenters further noted that many of the safety net providers that uninsured DACA recipients may rely on often have limited resources and capacity.

Response: We appreciate commenters' detailed analysis of the many ways in which this rule will, by increasing access to health insurance through an Exchange or a BHP, improve impacted noncitizens' ability to access critical preventive care. We agree with commenters' perspectives that having health insurance coverage should improve consumers' ability to access a range of important health services and, in turn, improve health outcomes and reduce health disparities for this population. While we acknowledge that some of the studies that commenters cited referred specifically to the benefits of Medicaid coverage, many of the studies cited pertained to the benefits of QHP coverage or health insurance coverage more generally, and we expect that this rule will result in increased access to preventive care for DACA recipients and other impacted noncitizens through Exchanges and the BHP. Comments pertaining to the potential health benefits of Medicaid and CHIP coverage specifically will be addressed in future rulemaking.

We also appreciate commenters' illustration of how lack of access to preventive care can increase strain on the health care system. While safety net providers are an important source of care for uninsured individuals, helping more people access coverage that enables them to utilize a fuller range of providers both improves health outcomes and reduces the strain on safety-net provider resources.

Comment: Some commenters stated that the provisions in this rule will expand access to sexual and reproductive health care and women's health care services for DACA recipients. Commenters noted that the need for such services is high among DACA recipients, 53 percent of whom are women and the majority of whom are of reproductive age. Commenters detailed gaps in access to sexual and reproductive health care for noncitizens; one commenter cited a study that found that one in five noncitizens had not seen sexual and reproductive health services

provider in the past year and that 30 percent had not had a Papanicolaou (Pap) test in the past 3 years. One commenter noted that uninsured pregnant individuals receive fewer prenatal care visits and have increased rates of harmful maternal and fetal outcomes.

A few commenters noted that women who are immigrants experience higher breast and cervical cancer incidence and mortality rates and lower screening rates compared to U.S.-born women, and that lack of health insurance coverage is associated with more advanced-stage cancer diagnoses. Commenters stated that they expected this rule would help mitigate existing racial and ethnic disparities related to sexual and reproductive health care outcomes.

A few commenters further noted that QHPs are required to cover a range of sexual and reproductive health care services without cost-sharing, including well-woman visits, contraceptive services, and breast and cervical cancer screenings.

A few commenters noted the importance of expanding access to sexual and reproductive health care services in light of the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), which overturned *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992). One commenter noted that in 2022, nearly 40 percent of the Latina women who lived in States that were likely to ban abortion were born outside of the United States, and that this group likely includes many DACA recipients.

Response: We acknowledge commenters' notes on the importance of expanding access to sexual and reproductive health care services, and we agree that it is critically important to close gaps in access to insurance coverage and care and to drive down existing disparities in sexual and reproductive health and improve maternal and child health outcomes.

We agree with commenters' perspectives that insurance coverage provides enrollees with access to a range of reproductive health services to the benefit of their own and their families' health and financial security. We believe this rule will result in increased access to sexual and reproductive health care for previously uninsured DACA recipients and other impacted noncitizens by increasing coverage through Exchanges and the BHP.

Comment: Some commenters noted that the rule would meaningfully expand access to mental and behavioral

health care services for DACA recipients. Commenters stated that the need for mental health care services is high among DACA recipients, who may experience feelings of depression, anxiety, and fear related to the future of their immigration status. Commenters cited a 2022 survey in which 48 percent of DACA recipient respondents indicated they were not receiving any health care services for their mental or behavioral health issues. Commenters stated that expanding access to health insurance coverage for DACA recipients would likely improve DACA recipients' mental and behavioral health outcomes. One nonprofit organization noted that access to behavioral health services is protective against intimate partner violence, child abuse and neglect, and suicidality. Another commenter mentioned that a 2022 survey found that half of DACA recipients who were uninsured wanted to access mental health services but were not doing so because of the associated cost.

Response: We appreciate commenters' description of the many ways in which allowing DACA recipients and other impacted noncitizens to access health insurance is expected to promote access to mental and behavioral health care services and to improve health care outcomes. We expect that this rule will result in increased access to mental and behavioral health services for DACA recipients and other impacted noncitizens by increasing coverage through Exchanges and the BHP.

Emergency Care

Comment: Several commenters suggested that the final rule will help shift health care visits made by noncitizens from emergency department (ED) care to preventive care. Commenters noted that uninsured individuals may delay or avoid seeking vital care, which can result in needing to utilize a hospital ED. Commenters further noted that uninsured individuals are more likely to seek care both non-emergency care and emergency care in a hospital ED, where they often receive more costly care, fewer services, and have higher mortality rates compared to individuals with insurance or individuals who routinely seek preventive care. Additionally, commenters noted that routine ED visits have the potential to divert resources from patients with more urgent health needs. A few commenters noted that visits to the ED by uninsured individuals are often more costly than preventive care visits and institutions often absorb the cost for uninsured individuals. Commenters suggested that by providing DACA recipients with

more health insurance options, ED costs can shift from institutions to insured individuals, which can ultimately reduce costs to taxpayers. Commenters expressed their belief that expanding coverage to DACA recipients would promote a more efficient health care system. Commenters further suggested that the proposed rule would help decrease the amount of uncompensated care that EDs provide and would help maintain the emergency care safety net by mitigating existing financial risks. One commenter noted that emergency care providers face unique costs related to staffing EDs 24 hours per day, 7 days per week. The commenter further stated that by lessening barriers to enrollment in health insurance programs, uncompensated care costs could decline, leading to better financial sustainability for emergency care safety net providers.

Response: We appreciate commenters' analysis of the many ways in which this rule will shift the opportunity for impacted noncitizens to seek health care from EDs to more comprehensive health care that includes preventive care. Uninsured populations are more likely than those who are insured to postpone seeking care due to cost, which can increase the complexity and cost of care that they eventually require.⁶⁸ We agree with commenters' analysis that emergency care tends to be more costly and complex and that this rule could help decrease the amount of uncompensated care that EDs provide which could lead to better financial sustainability for emergency care safety net providers.^{69 70}

We agree with commenters who pointed out that uninsured individuals might delay seeking vital care, which can result in ED use. We are hopeful that expanding access to QHPs and the BHP to previously uninsured DACA recipients and other impacted noncitizens may similarly drive down emergency department use. As noted by commenters, we believe this rule could promote a lower cost and more efficient health care system by reducing high-cost emergency care, increasing lower-

cost preventive care, and ultimately decreasing the number of DACA recipients and other impacted noncitizens who qualify only for the treatment of an emergency medical condition under Medicaid due to their immigration status, rather than more comprehensive coverage that may be available through the Exchange or a BHP.

After thorough consideration of public comments, we are finalizing the inclusion of DACA recipients in the definition of "lawfully present" at 45 CFR 155.20(9) as proposed.

Out of Scope

Comment: Several commenters stated general opposition to the current administration for its handling of both immigration and health care policy and reform, but without referring to the proposed rule at all. Some commenters stated direct opposition to specific political parties, and some stated they believe that this rule is a political maneuver to garner votes.

Response: We appreciate these comments but note that these comments are out of scope as related to the provisions laid out in this rule and no response is required.

Comment: Some commenters shared perspectives on DACA recipients' contributions to the workforce and economy and requests to create pathways for citizenship.

Response: We appreciate these comments. This rule does not address the DACA policy itself, only the eligibility of DACA recipients for coverage under an Exchange or BHP. While these comments are related to the DACA policy broadly, they do not seek to support or change specific provisions set forth in the proposed rule and no response is required.

Comment: Multiple commenters shared the challenges they faced seeking affordable health insurance, including as small business owners or low-income families, without referring to the substance of this rulemaking. Many commenters proposed other changes to the United States health care system or to other benefit programs such as the Supplemental Nutrition Assistance Program (SNAP).

Response: We appreciate these comments and note commenter concerns and requests, but these topics are out of scope for this final rule.

Comment: One public health system provider stated that they supported the rule's measures to enhance consumer protections, such as establishing an appeals process and extending the grace period for premium payments,

⁶⁸ Kaiser Family Foundation. *Key Facts About the Uninsured Population* (2023) <https://www.kff.org/uninsured/issue-brief/key-facts-about-the-uninsured-population/>.

⁶⁹ United Health Group. *18 Million Avoidable Hospital Emergency Department Visits Add \$32 Billion in Costs to the Health Care System Each Year*. (2019) <https://www.unitedhealthgroup.com/content/dam/UHG/PDF/2019/UHG-Avoidable-ED-Visits.pdf>.

⁷⁰ Center on Budget and Policy Priorities. *Uncompensated Care Costs Fell in Nearly Every State as ACA's Major Coverage Provisions Took Effect*. (2018) <https://www.cbpp.org/research/health/uncompensated-care-costs-fell-in-nearly-every-state-as-acas-major-coverage>.

safeguarding the rights of consumers who face unforeseen circumstances.

Response: We appreciate this comment but there were no specific proposals about an appeals process, grace periods for premium payments, or rights of consumers in unforeseen circumstances, so the comment is outside the scope of this rulemaking and no response is required.

2. Other Changes to the “Lawfully Present” Definition

In addition to including DACA recipients in the definition of “lawfully present” for the purposes of eligibility to enroll in a QHP through an Exchange and a BHP, we proposed several other clarifications and technical adjustments to the definition proposed at 45 CFR 155.20, as compared to the definition currently at 45 CFR 152.2.

First, in paragraph (1) of the proposed definition of “lawfully present” at 45 CFR 155.20, we proposed some revisions as compared to paragraph (1) of the definition currently at 45 CFR 152.2. In the current regulations at 45 CFR 152.2, paragraph (1) provides that qualified aliens, as defined in the PRWORA at 8 U.S.C. 1641, are lawfully present. Throughout the proposed definition at 45 CFR 155.20, we proposed a nomenclature change to use the term “noncitizen” instead of “alien” when appropriate to align with more modern terminology. Additionally, in paragraph (1) of the proposed definition at 45 CFR 155.20, we proposed to cite the definition of “qualified noncitizen” at 42 CFR 435.4, rather than the definition of “qualified alien” in PRWORA. The definition of “qualified noncitizen” currently at 42 CFR 435.4 includes the term “qualified alien” as defined at 8 U.S.C. 1641(b) and (c).

We noted in the preamble of the proposed rule that for purposes of Exchange coverage and APTC eligibility, citizens of the Freely Associated States (FAS) living in the United States under the Compacts of Free Association (COFA), commonly referred to as COFA migrants, were not considered qualified noncitizens because the statutory provision at 8 U.S.C. 1641(b)(8) making such individuals qualified noncitizens only applied with respect to the Medicaid program (88 FR 25317). Instead, COFA migrants were considered lawfully present under a different category, 45 CFR 152.2(2), that applied to noncitizens in a valid nonimmigrant status. After the proposed rule was issued, the Congress amended 8 U.S.C. 1641(b)(8) to eliminate the language restricting COFA migrants as qualified noncitizens only for purposes of the Medicaid program. The CAA,

2024,⁷¹ effective March 9, 2024, recognizes that COFA migrants would be qualified noncitizens, and, therefore, lawfully present for the purposes of our regulation as qualified noncitizens at 45 CFR 152.2(1). COFA migrants will be considered lawfully present based on both sections 155.20(1) and 155.20(2) of this final rule.

In section II.D.2 of the proposed rule, we discussed whether to provide a more detailed definition of “qualified noncitizen” at 42 CFR 435.4. Pending such comments, and to ensure alignment across our programs, we proposed that the Exchange regulations at 45 CFR 155.20 define “qualified noncitizen” by including a citation to the Medicaid regulations at 42 CFR 435.4, rather than to PRWORA.

We received public comments on this proposal. The following is a summary of the comments we received and our responses.

Comment: Commenters supported this proposal, noting that it aligned with CMS’ effort to replace instances of “alien” in its current regulatory definition of “lawfully present” with “noncitizen.”

Response: We appreciate commenters’ support for this proposal and note that no comments opposed this proposal. We understand that the term “alien” is outdated and has been ascribed with a negative, dehumanizing connotation, and we agree with commenters that the proposal to cross-reference the definition of “qualified noncitizen” at 42 CFR 435.4 aligns with our efforts to replace the term “alien” with “noncitizen” in our regulations. This is also consistent with DHS’ replacement of the term “alien” with “noncitizen” wherever possible. Given that we are finalizing a more detailed definition of “qualified noncitizen” at 42 CFR 435.4, CMS also believes that providing this cross-reference helps to promote transparency and maintain consistency across programs.

Comment: One commenter noted that they supported cross-referencing to DHS regulations to the extent that it clarifies definitions and verifications but did not support cross-referencing if there is potential that the cross-reference changes the HHS definition of “lawfully present.” The commenter stated that it should be made clear in any phrasing surrounding the cross-reference that DHS defines and regulates immigration statuses, which HHS uses and references, but that “lawful presence” for the purpose of HHS regulation is determined by HHS, not DHS.

⁷¹ Div G, Title II, sec. 209(f), Public Law 118–42 (March 9, 2024).

Response: We generally agree with the commenter. We wish to clarify that we are not cross-referencing DHS’ definition of “lawfully present” at 8 CFR 1.3 in the final rule. After considering public comments, we are adopting our own regulatory definition of “lawfully present” for purposes of eligibility to enroll in a QHP through an Exchange and the BHP.

After consideration of public comments, we are finalizing 45 CFR 155.20(1), which cross-references the definition of “qualified noncitizen” at 42 CFR 435.4, as proposed.

In the current definition of “lawfully present” at 45 CFR 152.2, we include in paragraph (2), a noncitizen in a nonimmigrant status who has not violated the terms of the status under which they were admitted or the status to which they have changed since their admission. In the proposed rule, we proposed, in paragraph (2) of 45 CFR 155.20, to modify this language such that a noncitizen in a valid nonimmigrant status would be deemed lawfully present. We noted that determining whether an individual has violated the terms of their status is a responsibility of DHS, not CMS or States. Accordingly, as proposed, the change would ensure coverage of noncitizens in a nonimmigrant status that has not expired, as long as DHS has not determined those noncitizens have violated their status.

Under the proposed change, Exchanges and BHPs would continue to submit requests to verify an applicant’s nonimmigrant status through a data match with DHS via the Hub using DHS’ Systematic Alien Verification for Entitlements (SAVE) system. If SAVE indicated that the applicant did not have an eligible immigration status, the applicant would not be eligible for coverage. This modification will simplify the eligibility verification process, so that a nonimmigrant’s immigration status can be verified solely using the existing SAVE process, which can often provide verification in real time when an application is submitted and reduce the number of individuals for whom an Exchange or a BHP may need to request additional information. We note that this change will promote simplicity, consistency in program administration, and program integrity given the reliance on a Federal trusted data source, while eliminating the agency’s responsibility to understand and evaluate the complexities of the various immigration statuses and regulations.

We received public comments on this proposal. The following is a summary of

the comments we received and our responses.

Comment: We received several comments in support of this change, with commenters noting that the existing language regarding whether a nonimmigrant has violated the terms of their status is confusing and that the changes proposed to this regulation will promote efficiency and consistency in eligibility determinations and verification processes. Commenters further noted that this would clarify that an individual's nonimmigrant status can be verified through DHS SAVE, streamlining eligibility verification processes and promoting program administration and integrity through alignment with DHS processes.

Response: We appreciate commenters' perspectives on this proposal and agree that the wording changes will promote more efficient and consistent eligibility determinations.

Comment: One commenter noted that CMS' proposal to adjust the language regarding nonimmigrant visa-holders to remove language relating to nonimmigrants not having violated the terms of their status would streamline eligibility determinations and verifications for COFA migrants who are otherwise eligible for Exchange coverage. Commenters stated that they supported proposed changes that would enable migrants under the COFA who are lawfully present as "nonimmigrants" to enroll in Exchange coverage.

Response: We appreciate commenters' feedback on how this change may streamline immigration status verifications and benefit eligibility determinations for COFA migrants, who are and will continue to be considered "lawfully present" for purposes of health insurance coverage through an Exchange or a BHP as addressed in this rule, as COFA migrants are nonimmigrants under current regulations at 42 CFR 152.2(2), and are both qualified noncitizens and nonimmigrants under the provisions finalized in this rule at 45 CFR 155.20(1) and (2), respectively. We agree that the change to remove language regarding whether a nonimmigrant has violated the terms of their status will streamline the eligibility and enrollment process for COFA migrants and other nonimmigrants, increasing access to health insurance through an Exchange or a BHP.

We wish to further clarify that under our existing regulations, COFA migrants are considered "lawfully present" by virtue of their nonimmigrant status and are therefore currently eligible to enroll in a QHP or BHP. While the changes in

this rule may provide additional clarity for COFA migrants and streamline the ability of CMS to verify their immigration status and determine benefit eligibility, nothing in this rule changes whether COFA migrants are considered eligible for the insurance affordability programs addressed in this rule.

After consideration of public comments, we are finalizing 45 CFR 155.20(2), pertaining to noncitizens in a valid nonimmigrant status, as proposed.

We proposed a minor technical change in paragraph (4) of the proposed definition of "lawfully present" at 45 CFR 155.20, as compared to the definition of "lawfully present" currently in paragraph (4)(i) of 45 CFR 152.2, to refer to individuals who are "granted," rather than "currently in" temporary resident status, as this language more accurately refers to how this status is conferred. We similarly proposed a minor technical change in paragraph (5) of the proposed definition of "lawfully present" at 45 CFR 155.20, as compared to the definition of "lawfully present" currently in paragraph (4)(ii) of 45 CFR 152.2, to refer to individuals who are "granted," rather than "currently under" Temporary Protected Status (TPS), as this language more accurately refers to how DHS confers this temporary status upon individuals.

We did not receive public comments on these provisions, and therefore, we are finalizing 45 CFR 155.20(4) and 45 CFR 155.20(5) as proposed.

Paragraph (4)(iii) of the current definition at 45 CFR 152.2 provides that noncitizens who have been granted employment authorization under 8 CFR 274a.12(c)(9), (10), (16), (18), (20), (22), or (24) are considered lawfully present. In paragraph (6) of the proposed definition of "lawfully present" at 45 CFR 155.20, we proposed to cross reference 8 CFR 274a.12(c) in its entirety to simplify the regulatory definition and verification process. We proposed this modification to the regulatory text to include all noncitizens who have been granted employment authorization under 8 CFR 274a.12(c), as USCIS has authorized these noncitizens to accept employment in the United States. USCIS may grant noncitizens employment authorization under this regulatory provision based on the noncitizen's underlying immigration status or category, an application for such status or other immigration relief, or other basis. Almost all noncitizens granted employment authorization under 8 CFR 274a.12(c) are already considered lawfully present under existing regulations, either in paragraph

(4)(iii) of the definition at 45 CFR 152.2 or within 45 CFR 152.2 more broadly. We noted in the proposed rule that this modification would add two minor categories to the proposed definition: noncitizens granted employment authorization under 8 CFR 274a.12(c)(35) and (36). Individuals covered under 8 CFR 274a.12(c)(35) and (36) are noncitizens with certain approved employment-based immigrant visa petitions who are transitioning from an employment-based nonimmigrant status to lawful permanent resident (LPR) status and their spouses and children, for whom immigrant visa numbers are not yet available. These categories act as a "bridge" to allow these noncitizens to maintain employment authorization after their nonimmigrant status expires while they await an immigrant visa to become available. Because these individuals were previously eligible for insurance programs by virtue of their nonimmigrant status, the proposed rule would simply allow their eligibility to continue until they are eligible to apply to adjust to LPR status.

This change to consider "lawfully present" all individuals with employment authorization under 8 CFR 274a.12(c) is beneficial because Exchanges and BHPs can verify that an individual has been granted employment authorization under 8 CFR 274a.12(c) in real time through SAVE, at the initial step of the verification process. Thus, the proposed revision to the definition will help to streamline and expedite verification of status for individuals who have been granted employment authorization under this regulatory provision.

Further, to reduce duplication and confusion, we proposed to remove the clause currently in paragraph (4)(ii) of the definition at 45 CFR 152.2, referring to "pending applicants for TPS who have been granted employment authorization," as these individuals would be covered under proposed paragraph (6) of the definition of "lawfully present" at 45 CFR 155.20.

We received public comments on this proposal. The following is a summary of the comments we received and our responses.

Comment: We received several comments in support of this change, with commenters agreeing that all individuals granted employment authorization under 8 CFR 274a.12(c) should be considered lawfully present, and that this change should simplify verification of lawful presence for impacted consumers.

Response: We appreciate commenters' feedback and agree that this

modification will simplify the agency's benefit eligibility determinations and verification of lawful presence for individuals granted employment authorization.

Comment: One commenter encouraged CMS to consider all individuals who are eligible to apply for employment authorization as "lawfully present" for the purposes of the programs addressed in this rule. The commenter suggested that a noncitizen's lawful presence should not depend on whether they have been granted employment authorization, as eligibility for employment authorization should signify lawful presence regardless of whether employment authorization has actually been granted. The commenter noted that considering individuals who are eligible for employment authorization would reduce administrative burden on eligibility determination agencies by no longer requiring agencies to determine whether an individual had applied for employment authorization and how long their application had been pending. The commenter noted that the current requirement to obtain employment authorization imposes burdens on individuals who may not otherwise need employment authorization, such as children and individuals with disabilities, who may also face accessibility barriers when applying for employment authorization. The commenter also pointed out that low-income noncitizens may not be able to afford the fees required to apply for and obtain employment authorization, and that the waiting periods required before certain noncitizens can obtain employment authorization result in coverage and care delays.

Response: We believe that the authority to determine whether an individual is eligible to apply for employment authorization rests with DHS, not CMS, Exchanges, or BHP agencies. We do not believe that it is appropriate or possible for Exchanges or BHP agencies to evaluate whether someone may be eligible to apply for employment authorization. We outline elsewhere in the rule why it is not appropriate for CMS, Exchanges, or BHP agencies to evaluate whether a nonimmigrant has violated the terms of their status, and that this is within DHS' purview. We believe that evaluating an individual's eligibility to apply for employment authorization is similarly within DHS' purview.

Additionally, we do not agree that including individuals who are eligible to apply for employment authorization, but have not been granted employment authorization, in our definitions of

"lawfully present" would reduce administrative burden. Requestors are not able to verify through SAVE whether an individual is eligible to apply for employment authorization in the same way that they can verify that an individual has been granted employment authorization through the SAVE system, which can be provided as a real-time step 1 response. Therefore, verifying that an individual is eligible to apply for employment authorization would require CMS, Exchanges, and BHP agencies to develop complex manual processes to evaluate eligibility on this basis.

Furthermore, while having employment authorization can help facilitate verification, as we discussed above, virtually all noncitizens eligible for employment authorization under 8 CFR 274a.12(c) are already lawfully present because of their underlying immigration category (e.g., deferred action), whether or not they obtain employment authorization. That underlying category can be determined for purposes of eligibility for the CMS programs, without the additional significant complexity of further trying to determine whether the noncitizen's category authorized them to apply for employment authorization on a case-by-case basis, and then trying to verify that. Therefore, this suggestion would add little substantive value in terms of actual expanded access to these programs, compared to the significant burden of trying to implement it by revising our definitions of "lawfully present" for purposes of health insurance through an Exchange or a BHP. While we have the authority to define "lawfully present" for the purposes of our programs, we also intend to codify a definition of "lawfully present" that is aligned with DHS' conceptions of lawful presence as articulated at 8 CFR 1.3 to the extent practicable and appropriate for our programs, given DHS' deep expertise in this area.

For these reasons, we are not finalizing a provision to include individuals who are eligible to apply for employment authorization in CMS definitions of "lawfully present."

Comment: One commenter stated that CMS' proposal ran counter to the Congress's statutory scheme because the proposal considers noncitizens who are granted employment authorization under 8 CFR 274a.12(c) to be "lawfully present." The commenter noted that the Congress's definition of a "qualified alien" does not depend on whether an individual has been granted employment authorization by DHS. The commenter further noted that a grant of

employment authorization does not confer lawful presence under either the INA or PRWORA, and that CMS' proposal is therefore contrary to law and should be withdrawn.

Response: As previously stated, we are required under the ACA to consider individuals who are "lawfully present" as eligible to enroll in a QHP or a BHP, and the ACA, like the INA and PRWORA, does not provide a definition of "lawfully present."

We agree that a grant of employment authorization does not result in an individual being considered a "qualified alien" under 8 U.S.C. 1641(b) or (c). However, we are not proposing in this rule that an individual should be considered a "qualified alien" if they are granted employment authorization under 8 CFR 274a.12(c). Eligibility for enrollment in a QHP and for APTC and CSRs as well as BHP does not depend entirely on whether an individual is a "qualified alien" under PRWORA. This issue is discussed in further detail later in this section.

We are acting consistent with our statutory authority by codifying a regulatory definition of "lawfully present" for use in determining eligibility for QHP and BHP coverage. We note that individuals granted employment authorization under 8 CFR 274a.12(c) are permitted to accept employment because DHS has determined that the individual has an immigration status or category that qualifies them for employment authorization under this subsection. Thus, we believe it is appropriate to include all individuals with such employment authorization because DHS has made an affirmative determination that the individual has an underlying immigration status or category that authorizes them to work legally in the United States.

After consideration of public comments, we are finalizing the proposal at 45 CFR 155.20(6) to consider individuals granted employment authorization under 8 CFR 274a.12(c) as lawfully present, as proposed.

We proposed a minor technical modification to the citation in paragraph (7) of the definition of "lawfully present" to describe Family Unity beneficiaries more accurately. Family Unity beneficiaries are individuals who entered the United States, have been continuously residing in the United States since May 1988, and who have a family relationship (spouse or child) to a noncitizen with "legalized status."⁷²

⁷² See USCIS Form I-817 (Application for Family Unity Benefits) and Instructions available at <https://www.uscis.gov/817>.
Continued

The current definition of “lawfully present” at 45 CFR 152.2 includes Family Unity beneficiaries eligible under section 301 of the Immigration Act of 1990 (Pub. L. 101–649, enacted November 29, 1990), as amended. However, DHS also considers as Family Unity beneficiaries individuals who are granted benefits under section 1504 of the Legal Immigration and Family Equity (LIFE) Act Amendments of 2000 (enacted by reference in Pub. L. 106–554, enacted December 21, 2000, referred to hereinafter as the LIFE Act Amendments). In the proposed rule, we proposed to amend the “lawfully present” definition to include individuals who are granted benefits under section 1504 of the LIFE Act Amendments for consistency with DHS’ policy to consider such individuals Family Unity beneficiaries.

We did not receive public comments on this provision, and therefore, we are finalizing 45 CFR 155.20(7) as proposed.

As discussed previously, in paragraph (9) of the proposed definition of “lawfully present” at 45 CFR 155.20, we proposed an additional clause clarifying that all recipients of deferred action, including DACA recipients, are lawfully present for purposes of 45 CFR part 155, which concerns eligibility to enroll in a QHP through an Exchange, and by cross-reference at 42 CFR 600.5, eligibility for a BHP. Please see section II.B.1 for a detailed discussion of the comments we received on this proposal.

In paragraph (10) of the proposed definition of “lawfully present” at 45 CFR 155.20, we proposed to clarify that individuals with a pending application for adjustment of status to LPR are not required to have an approved immigrant visa petition to be considered lawfully present. We proposed this change because in some circumstances, DHS does not require a noncitizen to have an approved immigrant visa petition to apply for adjustment of status. For example, USCIS allows noncitizens in some employment-based categories, as well as immediate relatives of U.S. citizens, to concurrently file a visa petition with an application for adjustment of status. Further, there are some scenarios where individuals need not have an approved visa petition at all, such as individuals applying for adjustment of status under the Cuban Adjustment Act. In addition, the SAVE verification system generally does not currently return information to requestors on the status of underlying immigrant visa petitions associated with

the adjustment of status response. As proposed, the modification would simplify verification for these noncitizens, reduce the burden on States and individual applicants, and align with current DHS procedures.

We received public comments on this proposal. The following is a summary of the comments we received and our responses.

Comment: We received several comments in support of this change, with commenters noting that the existing requirement that individuals with a pending application for adjustment of status also have an approved visa petition unnecessarily includes family-based and other immigrants who are not required to have an approved visa petition when they apply to adjust their status. Commenters also noted that the proposed simplification will simplify eligibility verification processes, reduce administrative burden, and align with DHS procedures.

Response: We agree that the current requirement that individuals with a pending application for adjustment of status also have an approved visa petition does not align with DHS policy or practice and believe that lifting this requirement will simplify verification of lawful presence for these consumers. We received no comments opposing this proposal.

After consideration of public comments, we are finalizing 45 CFR 155.20(10) as proposed.

Paragraph (5) of the current definition of “lawfully present” pertains to applicants for asylum, withholding of removal, or protection under the regulations implementing U.S. obligations under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (hereinafter “CAT”). In the proposed rule, we proposed to move this text to paragraph (12) of the definition of “lawfully present” at 45 CFR 155.20, and remove the portion of the text pertaining to noncitizens age 14 and older who have been granted employment authorization, as these individuals are noncitizens granted employment authorization under 8 CFR 274a.12(c)(8), and as such, are included in paragraph (6) of our proposed definition of “lawfully present” at 45 CFR 155.20. We noted that the proposed change was intended to reduce duplication and would not have a substantive impact on the definition of “lawfully present.”

We further proposed to remove the requirement in the current definition that individuals under age 14 who have filed an application for asylum,

withholding of removal, or protection under CAT have had their application pending for 180 days to be deemed lawfully present. We originally included this 180-day waiting period for children under 14 in our definition of “lawfully present” to align with the statutory waiting period before applicants for asylum and other related forms of protection can be granted employment authorization. We proposed to change this so that children under 14 are considered lawfully present without linking their eligibility to the 180-day waiting period for employment authorization. We noted in the proposed rule that children under age 14 generally are not permitted to work in the United States under the Fair Labor Standards Act,⁷³ and therefore, the employment authorization waiting period has no direct nexus to their eligibility for coverage. Under the proposed rule, Exchanges and States would continue to verify that a child has the relevant pending application or is listed as a dependent on a parent’s⁷⁴ pending application for asylum or related protection using DHS’ SAVE system. As proposed, the modification captures the same population of children that was previously covered as lawfully present, without respect to how long their applications have been pending.

We received public comments on this proposal. The following is a summary of the comments we received and our responses.

Comment: We received several comments in support of this change, with commenters supporting CMS’ proposal to no longer require children under the age of 14 who are applicants for asylum, withholding of removal, or protection under CAT, to have had their application pending for 180 days before they can be considered “lawfully present” under CMS regulations. Commenters agreed with CMS’ reasoning that while this waiting period was initially meant to parallel the amount of time an applicant must wait before pursuing employment authorization based on a pending asylum application, the waiting period held little significance for children who generally are not legally able to work and presented an unnecessary barrier to health coverage access.

Commenters further cited significant physical and mental health care needs faced by children seeking asylum or humanitarian protection. Commenters cited studies finding that as many as 64 percent of child asylum seekers are

⁷³ See 29 CFR 570.2.

⁷⁴ See 8 U.S.C. 1101(b)(2) (definition of “parent”).

diagnosed with post-traumatic stress disorder (PTSD), as many as 75 percent of child asylum applicants are suspected or diagnosed to have at least one significant mental health diagnosis, and children seeking asylum experience delays in obtaining basic preventive medical care like vaccines.

Response: We agree with commenters that, in the context of eligibility for Exchange and BHP coverage, the 180-day waiting period for individuals who are lawfully present based on an application for asylum, withholding of removal, or protection under CAT, is not significant for children under the age of 14 because they would generally not be permitted to work in the United States. We agree with commenters that the 180-day waiting period could delay access to health coverage and care for this population.

Comment: Some commenters further urged CMS to eliminate the requirement that applicants for asylum, withholding of removal, or protection under CAT who are age 14 and older obtain employment authorization to be considered lawfully present. Commenters noted that these applicants for humanitarian relief often have significant physical and mental health needs, and that eliminating this requirement would have a positive impact on access to health care, primarily for children and pregnant individuals. Commenters noted that this change could help reduce barriers for individuals who already may have limited access to Exchange coverage due to requirements to commit to filing a Federal income tax return and to project their income based on limited or no work experience.

Response: We understand that some individuals who are age 14 and older obtain employment authorization for purposes beyond employment, such as for identification purposes. We are taking more time to evaluate and consider comments suggesting that the age at which applicants for these forms of humanitarian protection are required to have employment authorization be raised or eliminated. Specifically, we are evaluating the potential impacts of a change to the age 14 requirement—as raised by commenters—on these applicants and on program integrity. The rulemaking process with regard to that portion of the proposal is ongoing. As a result, we are not finalizing any change to the age 14 requirement at this time.

After consideration of public comments, we are finalizing the proposal at 45 CFR 155.20(12) to no longer require children under the age of 14 who are applicants for asylum,

withholding of removal, or protection under CAT to have had their application pending for 180 days before they can be considered “lawfully present,” as proposed.

In paragraph (13) of the proposed definition of “lawfully present” at 45 CFR 155.20, we proposed to include individuals with an approved petition for Special Immigrant Juvenile (SIJ) classification. The definition currently at paragraph (7) of 45 CFR 152.2 refers imprecisely to noncitizens with a “pending application for [SIJ] status” and therefore unintentionally excludes from the definition of “lawfully present,” children whose petitions for SIJ classification have been approved but who cannot yet apply for adjustment of status due to lack of an available visa number.⁷⁵ Due to high demand for visas in this category, for many SIJ-classified noncitizens, it can take several years for a visa number to become available. SIJs are an extremely vulnerable population and as such, we proposed to close this unintentional gap so that all children with an approved petition for SIJ classification are deemed lawfully present.

In May 2022, USCIS began considering granting deferred action to noncitizens with approved petitions for SIJ classification but who are unable to apply for adjustment of status solely due to unavailable immigrant visa numbers.⁷⁶ Accordingly, based on the proposed changes at 45 CFR 155.20, SIJs could be considered “lawfully present” under three possible categories, as applicable: paragraph (9), deferred action; paragraph (10), a pending adjustment of status application; or paragraph (13), a pending or approved SIJ petition. While proposed paragraph (9) would cover individuals with approved SIJ petitions who cannot yet

⁷⁵ Moreover, SIJ classification is not itself a status and should not be described as such in the regulation. The current regulatory reference to a “pending application for SIJ status” has been construed to encompass noncitizens with a pending SIJ petition. It is not limited to noncitizens with a pending application for adjustment of status based on an approved SIJ petition. Therefore, the proposed regulatory change does not modify the current practice of determining lawful presence for noncitizens in the SIJ process based on a pending petition, rather than based on a pending adjustment application (as with other categories of noncitizens seeking LPR status). The modification we proposed instead clarifies the language so that both pending and approved SIJ petitions convey lawful presence for the purposes of eligibility for health insurance coverage through an Exchange or BHP, whether or not an individual with an approved SIJ petition has an adjustment application pending.

⁷⁶ U.S. Citizenship and Immigration Services. *Policy Alert: Special Immigrant Juvenile Classification and Deferred Action*. (2022). <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220307-SIJAndDeferredAction.pdf>.

apply for adjustment of status, there may be a small number of SIJs with approved petitions who have not yet been considered for deferred action or for whom USCIS has declined to defer action. The proposed modification to paragraph (13) of the definition of “lawfully present” at 45 CFR 155.20 would capture individuals who have petitioned for or established eligibility for SIJ classification but do not qualify under paragraph (9) or (10) of the proposed definition of “lawfully present” at 45 CFR 155.20 and eliminate an unintentional gap in the definition.

We received public comments on this proposal. The following is a summary of the comments we received and our responses.

Comment: CMS received several comments in support of this change, with commenters noting that SIJs are extremely vulnerable children and that updating this policy will correct the unintentional exclusion of individuals with an approved SIJ petition who have not yet been able to adjust to lawful permanent resident status and who are not otherwise covered under CMS definitions of lawfully present.

Commenters noted that these children tend to have profound mental health needs. Commenters further noted that this change will streamline eligibility verifications for impacted individuals.

Response: We agree with commenters that the current exclusion of certain individuals with an approved SIJ petition from our regulatory definitions is unintentional, and that this change will ensure that vulnerable children do not face unnecessary barriers to accessing health insurance coverage.

After consideration of public comments, we are finalizing 45 CFR 155.20(13) as proposed.

We also proposed a nomenclature change to the definitions currently at 45 CFR 152.2 to use the term “noncitizen,” rather than “alien” in the definition proposed at 45 CFR 155.20 to align with more modern terminology. Public comments on this proposal are discussed earlier in this section. After consideration of public comments, we are finalizing these nomenclature changes as proposed.

We received general comments on the clarifications and technical adjustments to the definition of “lawfully present” at 45 CFR 155.20. The following is a summary of the comments we received and our response.

Comment: Many commenters stated general support for CMS’ proposals to make technical corrections further clarifying the definition of “lawfully present” for other noncitizens, for purposes of these programs.

Commenters stated that the proposed technical changes would decrease operational burden on CMS programs. Commenters noted that these changes would be easier for noncitizen consumers to understand and would also make it easier for individuals and entities conducting outreach and enrollment assistance to assist immigrant consumers.

Response: We appreciate commenters' support for making technical clarifications to our definition of "lawfully present." We agree that these changes will result in simplifications to lawful presence verification operations that will have a positive impact on Exchanges, BHP agencies, and consumers. We also believe that these new policies will be easier for both consumers and consumer advocates to navigate, and we are committed to providing high-quality education and technical assistance on the policy changes in this rule for the many interested parties who assist immigrant communities with health coverage enrollment. We intend to begin providing such education and technical assistance after the publication date of this rule, in advance of the rule's November 1, 2024 effective date.

We received several comments recommending additional modifications or clarifications to the definition of "lawfully present" in this rule. The following is a summary of the comments we received and our responses.

Comment: One commenter recommended that CMS expand access to other noncitizen populations, such as nonelderly nonimmigrants, who make up one third of the nation's projected uninsured.

Response: Our proposed definition of "lawfully present" included all nonimmigrants in a valid status or category regardless of age. These individuals would be eligible for Exchange or BHP coverage if they meet all other eligibility requirements for these programs.

Comment: One commenter noted that immigrant crime victims who are permanently residing under color of law (PRUCOL) should be considered lawfully present and have the same extended ACA coverage.

Response: Victims of qualifying crimes and certain family members who have been granted U nonimmigrant status under 8 U.S.C. 1101(a)(15)(U) ⁷⁷

are already considered to be lawfully present for HHS insurance affordability programs as nonimmigrants. The classification of PRUCOL—describing any noncitizen living in the United States with the knowledge and consent of DHS, and whose departure DHS does not contemplate enforcing—is not used under the current law. Noncitizens under PRUCOL were previously eligible for certain public benefits, such as Medicaid, if they met all other eligibility requirements in the State plan. However, the PRWORA further limited eligibility so that noncitizens and individuals under PRUCOL could no longer be eligible for such benefits. Such individuals are not considered to be "lawfully present" under HHS health programs, unless they have another immigration status that is considered to be "lawfully present." Unlike the other categories of lawful presence discussed in this rule, PRUCOL is not an immigration classification recognized or verifiable by DHS, or otherwise supported by current Federal law. We are not expanding the definition of lawful presence to include PRUCOL in this final rule.

Comment: One commenter encouraged CMS to amend the proposed definitions of "lawfully present" to consider individuals who have petitioned for a U visa as nonimmigrants to be lawfully present. The commenter noted that the U visa program provides immigration protections to victims of certain serious crimes, and that victims must submit a statement from a law enforcement official certifying that they have been helpful to the investigation of criminal activity to be eligible. The commenter further noted that there are currently years-long delays for U visa petitioners to receive visas, employment authorization, or decisions relating to deferred action, and that these delays impact both principal U visa petitioners and their children.

The commenter stated that such U visa petitioners are unlikely to be priorities for immigration enforcement and should therefore be considered "lawfully present" for purposes of the CMS programs addressed in this rule. The commenter noted that such a modification to CMS' definitions of "lawfully present" would align with

Congressional intent to protect survivors of domestic violence, sexual assault, and human trafficking as stated in legislation including the Violence Against Women Act (VAWA), the Family Violence Prevention and Services Act (FVPSA) and the Victims of Crime Act (VOCA).

The commenter further detailed the severe physical and mental health needs of U visa petitioners, who are likely to be survivors of domestic violence, sexual assault, human trafficking, and other forms of gender-based violence. The commenter cited adverse physical health effects of abuse including chronic pain, migraines and frequent headaches, sexually transmitted infections, and stomach ulcers. The commenter also noted that survivors of domestic and sexual violence tend to face chronic health issues including depression, alcohol and substance abuse, and HIV/AIDS, which can limit the ability of survivors to manage other chronic conditions like diabetes or hypertension. Given that U visa petitioners are likely to have many severe and complex health needs, the commenter stated that it is particularly important to ensure that this population has access to health insurance coverage.

Response: We appreciate commenters' concern for U nonimmigrant status petitioners, and we recognize that such petitioners are a vulnerable population often with profound health care needs. Generally, applicants and petitioners for statuses or categories who do not have an underlying approved status or category are not considered to be lawfully present, except in very limited circumstances. We note that once an individual has deferred action, including under DHS policy or regulations providing deferred action to certain U nonimmigrant status petitioners in the United States with a pending bona fide petition,⁷⁸ has been placed on the U nonimmigrant status waiting list,⁷⁹ or has U nonimmigrant status, they are considered lawfully present under the deferred action or valid nonimmigrant part of the definition of "lawfully present" at paragraphs (9) and (2), respectively.

Comment: One commenter urged HHS to consider expanding its definition of "lawfully present" to include all individuals regardless of their immigration status. The commenter noted that undocumented immigrants are typically barred from accessing

⁷⁷ Victims of Trafficking and Violence Protection Act of 2000, div. B., Violence Against Women Act of 2000 (VTVPA 2000), tit. V, Battered Immigrant Women Protection Act of 2000, Public Law 106–386, sec. 1513, 114 Stat. 1464, 1533–37 (2000), amended by Violence Against Women Department of Justice Reauthorization Act of 2005, tit. VIII,

Public Law 109–162, 119 Stat. 2960 (Jan. 5, 2006), amended by Violence Against Women and Department of Justice Reauthorization Act—Technical Corrections, Public Law 109–271, 120 Stat. 750 (Aug. 12, 2006), amended by TVPRA 2008, Public Law 110–147, 122 Stat. 5044 (Dec. 23, 2008), amended by VAWA 2013, Public Law 113–4, 127 Stat. 110, 111–118, 140, 144, 156–159 (Mar. 7, 2013).

⁷⁸ USCIS Policy Manual, Vol. 3, Part C, Chap. 5, available at <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5> (last visited July 27, 2023).

⁷⁹ 8 CFR 214.14(d)(2).

health coverage and health care despite performing essential jobs and services in their communities.

Response: The ACA states that if an individual is not considered “lawfully present,” the individual will not be treated as a qualified individual and may not be covered under a QHP. We believe that including all individuals regardless of their immigration status in the definition of “lawfully present” is beyond our regulatory authority without further legislative clarification.

Comment: A few commenters encouraged CMS to include language in the final rule, or to release additional guidance, that supports States that are interested in pursuing section 1332 waivers to allow individuals who are not “lawfully present” to enroll in Exchange coverage or a BHP and access State-funded subsidies. Commenters noted that thus far only Washington State has pursued a section 1332 waiver to waive section 1312(f)(3) of the ACA to the extent it would otherwise require excluding certain State residents from enrolling in QHPs and qualified dental plans (QDPs) through the State Exchange and that other States may be interested in adopting similar policies.

Response: We appreciate the commenters’ suggestions regarding section 1332 waivers and will consider releasing additional guidance on the subject in the future. We note that BHP-eligible individuals must be lawfully present in the United States under section 1331(e)(1) of the ACA. Therefore, BHP Trust Funds may not be used toward BHP coverage for individuals who are not lawfully present. Additionally, section 1331(e)(1) of the ACA is not a waivable provision under section 1332(a)(2) of the ACA, and BHP Trust Funds may not be used to finance activities under a section 1332 waiver. We note, however, that there is no prohibition on using section 1332 statutory guardrails and other applicable requirements.

Comment: One commenter stated that premium tax credits and cost-sharing reductions to lower the cost of a QHP purchased through an Exchange constitute a “Federal public benefit” under PRWORA, and that such financial assistance may only be made available to individuals who are “qualified aliens” as defined under PRWORA.

Response: We do not believe PRWORA’s restriction on “Federal public benefits” to “qualified aliens” at

8 U.S.C. 1611(a) applies to the ACA. The ACA, enacted after PRWORA, directly addresses the question of which noncitizens are entitled to benefits or subsidies, and it does so through a framework that irreconcilably conflicts with the earlier statute’s approach. In particular, the ACA restricts benefits and subsidies to noncitizens who are “lawfully present”—a group that is, and was understood to be, more expansive than the group of “qualified aliens.” The specific approach that the Congress chose to apply to the particular benefits and subsidies created by the ACA overtakes the broader approach to “public benefits” in general in the earlier-enacted PRWORA.

The ACA departed from PRWORA’s restriction that only “qualified aliens” could receive covered benefits. Instead, in multiple provisions related to Exchanges, the Congress allowed various benefits or subsidies for individuals who were “lawfully present in the United States.”⁸⁰ In fact, the “lawfully present” language is similar to the exceptions that the Congress used in 8 U.S.C. 1611(b)(2), (3), and (4) to permit certain non-qualified aliens to obtain Social Security, Medicare, and Railroad Retirement benefits.

The ACA did not expressly define “lawfully present,” but the legislative history supports that the ACA Exchanges and subsidies were intended to allow immigrants who are lawfully present in the United States, who are otherwise ineligible for Medicaid, to be eligible to receive tax credits and purchase coverage through Exchanges.⁸¹ In particular, the Congress was aware of the intersection and intended to depart from the PRWORA framework when enacting the ACA. The Congressional Research Service (CRS) has recognized that the “lawful presence” framework the Congress adopted in the ACA irreconcilably conflicts with PRWORA, stating:

It is rather clear, for instance, that PRWORA does not restrict alien eligibility for the health benefits authorized in the Patient Protection and Affordable Care Act (ACA) of 2010. The ACA does not override PRWORA expressly but does extend eligibility to “lawfully present” aliens, a more expansive category than “qualified aliens” under PRWORA.⁸²

⁸⁰ See 42 U.S.C. 18001(d)(1), 18032(f)(3), 18071(e), 18081(a)(1), and 18082(d).

⁸¹ See 156 Cong. Rec. S2079 (2010) <https://www.congress.gov/crec/2010/03/25/CREC-2010-03-25-senate.pdf>.

⁸² See CRS Report R46510, *PRWORA’s Restrictions on Noncitizen Eligibility for Federal Public Benefits: Legal Issues*, by Ben Harrington (Sept. 3, 2020) <https://crsreports.congress.gov/product/pdf/R/R46510>.

In a separate report, the CRS identified the ACA as an example of the establishment of “clear rules for alien eligibility in the new legislation that conflict irreconcilably with PRWORA.”⁸³

The ACA also expressly provides that noncitizens who are lawfully present but who are ineligible for Medicaid “by reason of such alien status” are considered eligible for PTCs⁸⁴ and CSRs⁸⁵ even if their household income is below the otherwise applicable threshold of 100 percent of the FPL. This clearly demonstrates that the Congress intended and understood that the “lawfully present” standard applicable to APTC and CSRs was broader than the “qualified alien” standard applicable to Medicaid programs.

We previously issued regulations defining “lawfully present” for various ACA programs, specifically PCIP, Exchanges, and the BHP, that differed from the PRWORA restrictions and extended eligibility to a more expansive category than “qualified aliens” under PRWORA. As previously discussed in this rule, CMS first defined “lawfully present” as an eligibility criterion for purposes of PCIP shortly after the ACA’s enactment, with regulations published in 2010 (75 FR 45013). This definition of “lawfully present,” was later applied to eligibility for other ACA programs; regulations pertaining to Exchanges were issued in 2012 (77 FR 18309) and regulations pertaining to the BHP were issued in 2014 (79 FR 14111). In all of these regulations, consistent with direction from the Congress, CMS provided a definition of “lawfully present” that was more expansive than the definition of “qualified aliens” under PRWORA. We are modifying these regulatory definitions of “lawfully present” for Exchanges and the BHP as described in this final rule.

Comment: One commenter urged HHS to amend its regulatory definition of “lawfully present” for purposes of enrollment in a QHP through an Exchange, APTC, CSRs, and a BHP to exclude immigrants who do not have “lawful immigration status” and who therefore “may not be reasonably expected to be lawfully present in the United States for the duration of enrollment,” as required by the ACA at 42 U.S.C. 18032(f)(3) and 42 U.S.C. 18071(e)(2). The commenter further

⁸³ CRS Report LSB10526, *PRWORA and the CARES Act: What’s the Prospective Power of a “Notwithstanding” Clause?* by Ben Harrington (July 27, 2020). <https://crsreports.congress.gov/product/pdf/LSB/LSB10526>.

⁸⁴ 26 U.S.C. 36B(c)(1)(B).

⁸⁵ 42 U.S.C. 18071(b)(2).

specified that because recipients of deferred action, TPS, Deferred Enforced Departure (DED), and parole do not have a legal right to remain in the United States, CMS does not have a reasonable basis to assume that such individuals will remain lawfully present for the duration of their potential enrollment.

One commenter agreed with CMS that “lawful presence” is a statutory term of art that is distinct from “lawful status,” and that it is a statutory prerequisite for receipt of certain benefits. The commenter suggested that *DHS v. Regents* found that lawful presence “is not the same as forbearance nor does it flow inexorably from forbearance. Thus, while deferred action recipients have been designated lawfully present for purposes of Social Security and Medicare eligibility . . . agencies can also exclude them from this designation.”⁸⁶ The commenter stated that because lawful presence is “context-dependent” and “there is no express definition of ‘lawfully present’ . . . for all purposes,” that CMS should exclude all recipients of deferred action, TPS, and DED from its regulatory definition of “lawfully present” for purposes of ACA benefits eligibility. The commenter noted that even if such individuals are considered “lawfully present” for other purposes, that the ACA’s requirement that noncitizens be “reasonably expected” to be lawfully present for the duration of their QHP enrollment means that they must be excluded from the definition of “lawfully present” used to determine eligibility to enroll in a QHP.

In arguing that TPS recipients cannot be reasonably expected to be lawfully present for the duration of their QHP enrollment, the commenter stated that TPS is a form of forbearance from removal proceedings. The commenter noted that under 8 U.S.C. 1254(a), the Secretary of Homeland Security is only authorized to designate a country for TPS for a period of up to 18 months. The commenter noted that while the Secretary is also authorized to extend a country’s TPS designation, a country’s TPS designation could end during the time period that a TPS recipient is enrolled in a QHP. The commenter further noted that DHS has authority to rescind prior TPS designations, and that TPS is not intended to provide long-term or permanent immigration status. In arguing that deferred action recipients, DED recipients, and parolees cannot be reasonably expected to be lawfully present for the duration of their QHP enrollment, the commenter noted

that deferred action, DED, and parole do not provide legal immigration status or a right to remain in the United States, and such categories may be revoked or terminated at any time.

The commenter further noted that the INA stipulates that, for parolees, “when the purposes of such parole shall . . . have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.”⁸⁷ The commenter acknowledged that the Congress did designate parolees who are paroled for periods of at least one year as “qualified aliens” for purposes of general Federal public benefits eligibility under 8 U.S.C. 1641(b), but noted that this standard does not apply to QHP eligibility, as the Congress specified the “lawfully present” standard in the ACA instead.

Response: We do not agree that deferred action, TPS, DED, and parole recipients cannot reasonably be expected to be lawfully present in the United States for the duration of enrollment as required by the ACA. More specifically, we do not agree with the assertion that we must exclude all recipients of deferred action, TPS, DED, and parole from our regulatory definition of “lawfully present” for purposes of ACA benefits eligibility to meet the ACA’s requirement that individuals only be considered “lawfully present” as long as they are reasonably expected to be lawfully present for the duration of their enrollment. Our existing policy and operations, as well as the policies in this final rule, are in line with the ACA’s statutory requirements.

As the commenter indicated, the ACA requires both that individuals who are lawfully present be considered eligible to enroll in a QHP, and that individuals only be considered lawfully present if they are expected to be lawfully present for the duration of enrollment.

As we noted in a 2012 rulemaking (77 FR 18309, 18350), we do not interpret the ACA’s “reasonably expected” standard to mean that an applicant must be lawfully present for an entire coverage year. Rather, we noted that the lawful presence verification processes would address whether an applicant’s lawful presence is time-limited, and if so, the Exchange would determine his or her eligibility for the period of time for which his or her lawful presence has been verified. We have verification processes in place for applicants whose immigration status or category is

temporary and would be able to terminate enrollment for consumers in a hypothetical situation where their deferred action, TPS, DED, or parole designation expired, or was rescinded or terminated. Thus, Exchanges on the Federal platform currently balance these statutory directives by considering whether someone is lawfully present at the time of their application, and by generally requiring applicants whose immigration status or category is expiring within the next 90 days to submit additional information demonstrating their continuing lawful presence.

We note that many individuals in these categories have been in the United States for extended periods of time. For example, TPS recipients have been in the United States for 20 years, on average; we would be incorrect to assert that a TPS recipient was not “reasonably expected” to remain lawfully present during their Exchange enrollment solely on the basis of their receipt of TPS.⁸⁸ We also clarify that the Supreme Court in *DHS v. Regents* in no way suggested that agencies could not consider deferred action recipients to be “lawfully present.”⁸⁹ We note that we have considered recipients of deferred action under policies other than DACA—including TPS, DED, and parole—to be “lawfully present” for purposes of eligibility for Exchange coverage since 2012 (77 FR 18309). For the reasons discussed here, we do not believe it is necessary or appropriate to exclude recipients of deferred action, TPS, DED, and parole from our definitions of “lawfully present.”

3. Severability

We proposed to add a new section at 45 CFR 155.30 addressing the severability of the provisions proposed in the proposed rule. In the event that any portion of a final rule is declared invalid, we intended that the various provisions of the definition of “lawfully present” be severable, and that the changes to the definition of “lawfully present” in 45 CFR 155.20 would continue even if some of the changes to any individual category are found invalid. The severability of these provisions, and the public comments we received on our proposal to add severability clauses, are discussed in detail in section III. of this rule.

⁸⁸ Council on Foreign Relations. What is temporary protected status? (2023). <https://www.cfr.org/background/what-temporary-protected-status>.

⁸⁹ *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1911 n.5 (2020).

⁸⁶ *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1911 n.5 (2020).

⁸⁷ 8 U.S.C. 1182(a)(5)(A).

C. Proposed Effective Date

In the proposed rule, we had targeted a potential effective date of November 1, 2023 to align with the Open Enrollment Period for most individual market Exchanges. We were not able to establish a final rule prior to that date. However, we continue to believe that Open Enrollment is a critical opportunity for consumers to shop for and enroll in insurance coverage, and implementation of these changes would be most effective during a period when there are many outreach and enrollment activities occurring from CMS, State Exchanges, assisters, and other interested parties.

We noted in the proposed rule that DACA recipients would qualify for the Special Enrollment Period (SEP) at 45 CFR 155.420(d)(3) for individuals who become newly eligible for enrollment in a QHP through an Exchange due to newly meeting the requirement at 45 CFR 155.305(a)(1) that an enrollee be lawfully present. Despite the availability of the SEP, we believed that proposing to align this rule's effective date with the individual market Exchange Open Enrollment Period would significantly increase the opportunity for individuals to enroll for coverage through the Exchange or a BHP due to the extensive outreach and enrollment activities occurring during this time and the longer period of time individuals have to enroll in a QHP through an Exchange during the individual market Exchange Open Enrollment Period (75 days from November 1 through January 15 for Exchanges on the Federal platform) compared with an SEP (60 days from the effective date of the rule). Further, even though the individual market Exchange Open Enrollment Period is, among CMS insurance affordability programs, currently only applicable to Exchanges, we expressed in the proposed rule that it was important to align effective dates between Exchanges, BHP, Medicaid, and CHIP to promote consistency, and because eligibility for these programs is typically evaluated through a single application.^{90 91}

While we are not finalizing a definition of "lawfully present" for purposes of Medicaid and CHIP eligibility at this time for the reasons

detailed in section I, we believe that this rule will still have positive health and financial benefits for DACA recipients and other impacted noncitizens who may be eligible in an Exchange or a BHP, as detailed in section II.B.1 and II.B.2. While this final rule will result specifically in changes to the Exchange and BHP definitions of "lawfully present," we believe that any negative effects of the resulting misalignment following the rule's effective date are outweighed by the expected positive impacts of the rule.

In the proposed rule, we sought comment on the feasibility of the November 1, 2023 proposed target effective date and whether to consider a different target effective date. We noted our commitment to working with State agencies and providing technical assistance regarding implementation of these proposed changes, if finalized. We also acknowledged, as outlined above, that State Medicaid and CHIP agencies were experiencing a significant increase in workload to "unwind" (*i.e.*, to return to regular eligibility renewal operations) following the expiration of the continuous enrollment condition in section 6008(b)(3) of the FFCRA on March 31, 2023.⁹² We sought comment about the impact of this workload or any other operational barriers to implementation for State Exchanges, and State Medicaid, CHIP, and BHP agencies. While the proposed rule's target effective date of November 1, 2023 has passed, similar considerations regarding feasibility and State impacts are still relevant.

We received public comments on this proposed target effective date. The following is a summary of the comments we received and our responses.

Comment: The majority of comments that CMS received supported the November 1, 2023 effective date and noted the benefits of aligning with the individual market Exchange Open Enrollment Period and related education and outreach activities. One commenter, a State department of insurance, stated that aligning with such outreach would support ongoing efforts to lower rates of uninsurance.

Response: We agree that it is important for impacted noncitizens and other interested parties, such as enrollment assisters, that this rule be

implemented in time to align with the individual market Exchange Open Enrollment period to maximize enrollment in health coverage for impacted noncitizens who will be affected by the final rule. Given that the initially proposed effective date of November 1, 2023 has now passed, we believe that aligning the effective date of this rule with the individual market Exchange Open Enrollment Period on November 1, 2024 will help ensure that the maximum number of newly eligible impacted noncitizens are able to seamlessly enroll in coverage through the Exchange or BHP. CMS plans to leverage existing channels for outreach and education utilized during the individual market Exchange Open Enrollment Period to ensure that impacted noncitizens are aware that they may be eligible for coverage. We appreciate commenters' perspectives on the feasibility of operationalizing the changes in this rule by the initially proposed effective date of November 1, 2023, and we are committed to assisting our partners and interested parties with their implementation efforts. CMS is finalizing an effective date of November 1, 2024, for Exchanges and the BHP and, as described in section I, is not finalizing the proposed definition of "lawfully present" for Medicaid and CHIP agencies at this time.

Comment: We received some comments urging the agency to adopt an earlier effective date than November 1, 2023. These comments varied in proposed effective date. Some commenters, including advocacy organizations, professional trade associations, and State government agencies, urged us to consider the rule effective upon publication in the **Federal Register**. Other commenters recommended that the rule take effect 30 days after publication in the **Federal Register**. Commenters that supported an earlier effective date noted the importance of making health insurance affordability programs available to impacted noncitizens as quickly as possible, and noted that they did not believe it was necessary to wait for the individual market Exchange Open Enrollment Period given that Exchange applicants would qualify for an SEP and that Medicaid, CHIP, and BHP currently allow for year-round enrollment.⁹³ One

⁹⁰ Pursuant to 42 CFR 600.320(d), a State operating a BHP must either offer open enrollment periods pursuant to Exchange regulations at 45 CFR 155.410 or follow Medicaid's continuous open enrollment process. As of April 1, 2024, only Minnesota currently operates a BHP, and it follows Medicaid's continuous open enrollment process.

⁹¹ See 42 CFR 435.907, 42 CFR 457.330, and 45 CFR 155.405 for requirements related to a single streamlined application for all insurance affordability programs.

⁹² See CMS, SHO # 23-002, "Medicaid Continuous Enrollment Condition Changes, Conditions for Receiving the FFCRA Temporary FMAP Increase, Reporting Requirements, and Enforcement Provisions in the Consolidated Appropriations Act, 2023," January 27, 2023, available at <https://www.medicaid.gov/media/149291>; Additional guidance for State Medicaid and CHIP agencies is available at <https://www.medicaid.gov/unwinding>.

⁹³ See 42 CFR 600.320(d). Pursuant to 42 CFR 600.320(d), a State operating a BHP must either offer open enrollment periods pursuant to Exchange regulations at 45 CFR 155.410 or follow Medicaid's continuous open enrollment process. As of April 1, 2024, only Minnesota currently operates a BHP and it follows Medicaid's continuous open enrollment process.

health care organization emphasized the importance of finalizing the rule as soon as possible given the uncertain future of the DACA policy. One commenter urged CMS to implement the final rule as quickly as possible, ideally by the upcoming SEP.

Response: We note commenters' interest in seeing the rule implemented as soon as possible, and we agree that DACA recipients and other impacted noncitizens should be able to access the Exchange or BHP coverage for which they will be eligible as soon as possible. However, we also acknowledge the importance of giving Exchanges, including Exchanges on the Federal platform and State Exchanges operating their own platforms, BHPs, assisters, and other entities who support enrollment in Exchange and BHP coverage sufficient time to prepare for the changes in this rule. Given the time required for us to closely review and respond to all public comments received and to develop the operational changes required to implement the rule's provisions, we do not believe it is feasible for Exchanges on the Federal platform to implement this rule prior to its effective date on November 1, 2024. We acknowledge that some DACA recipients will be eligible under this final rule for a BHP (we estimate that 1,000 DACA recipients will enroll in BHP), to which the individual market Exchange Open Enrollment Period does not currently apply.⁹⁴ However, BHPs will also need to make operational changes as a result of this rule, and we believe that a November 1, 2024 effective date will allow BHPs sufficient time to implement the operational changes required.

CMS also acknowledges that DACA recipients and other impacted noncitizens who are newly considered to be lawfully present as a result of this rule will qualify for an SEP; however, as stated previously, we are not able to effectively implement the rule with an effective date earlier than November 1, 2024. We are committed to working with impacted State Exchanges operating their own platforms and BHP agencies to provide technical assistance and educational materials to facilitate successful implementation of this rule.

For the reasons detailed in section I., we are not finalizing a definition of "lawfully present" for purposes of Medicaid and CHIP eligibility at this

time. We acknowledge that commenters urged us to ensure that DACA recipients and other impacted noncitizens would be able to access these programs as soon as possible. During this time, we believe that many DACA recipients and other impacted noncitizens who may have been eligible for Medicaid or CHIP under the policies in the proposed rule will instead be able to access coverage by enrolling in a QHP via the Exchange or BHP coverage.⁹⁵

For the commenter who urged us to implement the rule by the upcoming SEP, we believe that the commenter may have been referring to the individual market Exchange Open Enrollment Period; the benefits of aligning with the Exchange Open Enrollment Period are addressed above. Alternatively, this commenter may be referring to the SEP for individuals who lose Medicaid or CHIP coverage due to the end of the continuous enrollment condition in Medicaid, also referred to as the "Unwinding SEP." This SEP has been available on [HealthCare.gov](https://www.healthcare.gov) to consumers since March 31, 2023 and remains in effect.⁹⁶ As noted previously, this final rule will be effective for the 2024 individual market Exchange Open Enrollment Period which will begin on November 1, 2024.

Comment: Many commenters agreed with CMS that DACA recipients and other impacted noncitizens would qualify for the existing SEP for individuals who are newly considered to be lawfully present for the 60 days following the effective date of the rule. One nonprofit organization urged CMS to implement an SEP for DACA recipients that would last for 12 months after the effective date of the rule, to ensure that individuals have sufficient time to enroll.

Response: Commenters are correct that noncitizens who are newly considered lawfully present under the definition in the final rule will qualify for the existing 60-day SEP for individuals who are newly lawfully present under 45 CFR 155.420(d)(3) as of the applicability date of the final rule. We acknowledge the suggestion that we make an extended SEP, greater than 60 days, available for this population. However, we believe that the individual market Open Enrollment Period and the

existing 60-day SEP should give impacted noncitizens sufficient time to apply for and enroll in coverage. In our prior experience implementing changes to Exchange eligibility rules that align with the individual market Open Enrollment Period, such as changes related to employer-sponsored coverage affordability and premium tax credit eligibility (87 FR 61979), we are not aware of significant issues related to consumers having sufficient time to enroll. In nearly all situations where consumers become newly eligible to enroll in a QHP or for APTC or CSRs, we provide a 60-day SEP, and we believe that is generally an appropriate approach. Additionally, as indicated above, pursuant to 42 CFR 600.320(d), Minnesota's BHP has elected to follow Medicaid's continuous enrollment process and therefore an extended SEP would not apply to this population.

We acknowledge that there may be unique challenges relevant to the consumers impacted by this rule, and we are committed to working with State Exchanges not on the Federal platform, BHPs, assisters, and community-based organizations to conduct targeted outreach to facilitate efficient enrollment processes for DACA recipients and other impacted noncitizens who may be eligible for coverage. We also note that some State Exchanges not on the Federal platform, including those in California and New Jersey, where an estimated 168,120 and 14,760 DACA recipients live, respectively, have individual market Open Enrollment Periods that are longer than the one provided in the Exchanges on the Federal platform, giving consumers up to 90 days to enroll in a QHP.

Comment: A minority of State Exchanges not on the Federal platform that commented on the rule raised concerns that the proposed effective date of November 1, 2023, may not be feasible. These commenters urged CMS to provide State Exchanges not on the Federal platform with flexibility on the timeframe for full implementation of the rule's provisions. Some of these commenters also stated concerns that changes would not be available for testing through the Federal Data Services Hub (hereinafter "the Hub") in a timely manner. Additionally, some commenters noted the importance of finalizing the rule as soon as possible, to give interested parties, including State Exchanges not on the Federal platform, assisters, and community-based organizations as much time as possible to prepare for the policy and operational changes in the rule prior to its effective date.

⁹⁴ Pursuant to 42 CFR 600.320(d), a State operating a BHP must either offer open enrollment periods pursuant to Exchange regulations at 45 CFR 155.410 or follow Medicaid's continuous open enrollment process. The one State that currently operates a BHP, Minnesota, follows Medicaid's continuous open enrollment process.

⁹⁵ DACA recipients who qualify to enroll in a QHP will generally be eligible for APTC and CSRs (subject to other eligibility requirements) even if their income is under 100 percent of FPL, as individuals who are lawfully present but ineligible for Medicaid due to their "alien status" may be eligible for APTC and CSRs. See 26 U.S.C. 36B(c)(1)(B) and 42 U.S.C. 18071(b)(2).

⁹⁶ See <https://www.medicaid.gov/resources-for-states/downloads/extn-sep-cnsms-lsg-chip-cvrg-adndm-faq.pdf>.

Response: We acknowledge commenters' concerns about challenges with implementation of the provisions of this rule. To address these concerns, we plan to release technical guidance to State Exchanges not on the Federal platform and to BHP agencies to assist those agencies with implementing provisions of the rule. We are committed to supporting readiness for State Exchanges not on the Federal platform and BHP agencies, while also removing barriers to coverage for eligible individuals and supporting their enrollment through the Exchange or a BHP for which they are eligible. We will be available to work with State Exchanges not on the Federal platform and BHP agencies individually to facilitate their compliance by November 1, 2024.

We also acknowledge the possibility that some State Exchanges not on the Federal platform may not be able to fully implement the provisions of this rule by the November 1, 2024 effective date. We further acknowledge that if State Exchanges are not able to implement by November 1, 2024, that there is a risk that DACA recipients and other impacted noncitizens could have limited opportunity to access QHP coverage through the SEP for which they are eligible under 45 CFR 155.420(d)(3), given that the trigger event for the SEP is the November 1, 2024 effective date of this rule and only provides 60 days after the triggering event to select a QHP. If a delay in State Exchange implementation results in newly eligible consumers being unable to enroll in coverage during their initial 60-day SEP window, State Exchanges could consider granting a pathway into QHP coverage for eligible applicants on a case-by-case basis under exceptional circumstances authority at 45 CFR 155.420(d)(9).

Comment: A few commenters urged CMS to consider a later effective date than November 1, 2023 due to ongoing litigation concerning a separate DHS final rule. One nonprofit organization urged CMS to refrain from finalizing the rule and setting an effective date until the challenge to DACA in *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022), has reached a final disposition. The commenter further stated concern that pursuing this rulemaking while litigation continues could result in unnecessary expenditures and investment of staff time by DHS and HHS. A comment submitted by some State attorneys general urged CMS to postpone the effective date of the final rule pending judicial review.

Response: We do not believe it is necessary to delay this final rule in its

entirety pending a resolution of litigation concerning DHS's final rule. We are not finalizing a definition of "lawfully present" for purposes of Medicaid and CHIP eligibility at this time, for the reasons detailed in section I. Moreover, this rule makes other changes to the definitions of "lawfully present," in 45 CFR 155.20 and impacts other noncitizens in addition to DACA recipients.

We acknowledge that current court orders prohibit DHS from fully administering the DHS DACA final rule (87 FR 53152). Those orders, however, have been subject to judicial stays since their issuance and, as a result, the DACA policy has remained in effect with respect to current DACA recipients. Additionally, the policies in this rule solely address eligibility for specific HHS health programs and are separate from DHS regulations. As described in detail throughout this rule, this rule reflects our independent statutory authority under the ACA to define "lawfully present" for purposes of eligibility to enroll in a QHP or the BHP.

After careful consideration of public comments, we are finalizing November 1, 2024 as the effective date of this final rule. This means that, effective November 1, 2024, the definitions of "lawfully present" used to determine eligibility to enroll in a QHP, and for APTC and CSRs, as well as for the BHP, will no longer exclude DACA recipients and will also reflect the changes detailed in section II.B.2. The proposed definitions of "lawfully present" for Medicaid and CHIP are not being addressed in this final rule. For purposes of these programs, the definitions established in the 2010 SHO and 2012 SHO will continue to apply.

D. Eligibility in States, the District of Columbia, the Northern Mariana Islands, and American Samoa and Children's Health Insurance Programs (CHIPs) (42 CFR 435.4 and 457.320(c))

1. Lawfully Residing and Lawfully Present Definitions

We proposed to define the term "lawfully present" at 42 CFR 435.4 for Medicaid eligibility under the CHIPRA 214 option, consistent with the Exchange definitions described in the proposed rule at 45 CFR 155.20, including the minor technical changes and clarifications to the lawfully present definition described in preamble section II.B.2 of this final rule. We also proposed to add a cross-reference to this definition at 42 CFR 457.320(c) for purposes of determining eligibility for CHIP under the CHIPRA 214 option. We

proposed a definition of "lawfully residing" in 42 CFR 435.4 to mirror the definition in the 2010 SHO, discussed previously in this rule—that an individual is "lawfully residing" if they are "lawfully present" in the United States and are a resident of the State in which they are applying under the State's Medicaid residency rules. For CHIP, we also proposed to add a cross-reference at 42 CFR 457.320(c) to the "lawfully residing" definition at 42 CFR 435.4, except that States must comply with CHIP residency requirements at 42 CFR 457.320(e).

Due to the reasons discussed in section I of this final rule, we are not finalizing a "lawfully present" definition for Medicaid and CHIP at this time. This means that for the definition of "lawfully present" used in determining eligibility for Medicaid and CHIP under the CHIPRA 214 option, the current policy, based on the 2010 SHO and the 2012 SHO, continues to apply.

We received comments regarding the proposals to define the term "lawfully present" for Medicaid and CHIP eligibility under the CHIPRA 214 option. As we are continuing to consider and evaluate these comments, we are not providing our responses to comments in the final rule at this time. Comments that expressed general support for or opposition to the policies in the proposed rule without reference to a specific insurance affordability program have been addressed above in sections II.B.1 and II.B.2 with respect to Exchange and BHP coverage.

2. Defining Qualified Noncitizen

Under our current Medicaid regulations, a "qualified non-citizen" is defined at 42 CFR 435.4, which includes an individual described in 8 U.S.C. 1641(b) and (c). Similarly, 42 CFR 457.320(b)(6) defines a "qualified alien" for CHIP with a cross-reference to section 431 of PRWORA, which is codified at 8 U.S.C. 1641. The definitions are currently used for determining Medicaid and CHIP eligibility under our regulations at 42 CFR 435.406 and 42 CFR 457.320, and the definition is also used when determining eligibility of individuals under the CHIPRA 214 option. In the proposed rule, we considered whether the current definition of "qualified noncitizen" at 42 CFR 435.4 should be modified to provide greater clarity and increase transparency for the public. Specifically, we noted that we were considering whether the definition should be modified to expressly include all of the categories of noncitizens covered by 8 U.S.C. 1641(b) and (c), as well as additional categories of

noncitizens that Medicaid agencies are required to cover (if they meet all eligibility requirements in the State) as a result of subsequently enacted legislation that was not codified in 8 U.S.C. 1641(b) or (c). For example, Federal law requires certain populations to be treated as “refugees” for certain purposes of eligibility for certain means tested benefit programs, including Medicaid and CHIP. Because refugees are listed in 8 U.S.C. 1641(b)(3) as a category of noncitizens who are “qualified aliens” and are also exempt from the 5-year waiting period under 8 U.S.C. 1613, these noncitizens also are treated as qualified noncitizens for purposes of Medicaid and CHIP and are exempt from the 5-year waiting period. In the proposed rule, we indicated that we were considering including these additional categories of noncitizens who are treated as refugees under other Federal statutes as specifically included in the definition of “qualified noncitizen” in 42 CFR 435.4, and we sought comment on this possibility. Examples of such noncitizens include victims of trafficking and certain Afghan and Ukrainian parolees.⁹⁷ A full list can be found below in section II.D.2. of this rule. Because noncitizens who are treated as refugees for purposes of Medicaid eligibility are also treated as refugees for purposes of CHIP eligibility, these categories of noncitizens (discussed previously in the proposed rule) were considered for the definition of qualified noncitizen for purposes of CHIP.

We also noted in the proposed rule that there was at least one difference in how the term “qualified noncitizen” applies to Medicaid compared to the other programs discussed in the proposed rule. Specifically, we noted that COFA migrants were only considered “qualified aliens” for purposes of the Medicaid program, under the Consolidated Appropriations Act, 2021.⁹⁸ However, after the proposed rule was issued, Congress

amended 8 U.S.C. 1641(b)(8) through CAA, 2024⁹⁹ to remove the language that limited COFA migrants as qualified noncitizens only for purposes of the Medicaid program. Since CHIP is identified as a Federal public benefit as defined at 8 U.S.C. 1611(c),¹⁰⁰ COFA migrants are now considered qualified noncitizens for the purposes of CHIP eligibility. Further, CAA, 2024 amended 8 U.S.C. 1613(b)(3) to expand the exception for COFA migrants from the 5-year waiting period for all Federal means-tested public benefits, allowing immediate eligibility for CHIP effective March 9, 2024, if the individual meets all other eligibility requirements in the State plan. Since the new legislation supersedes our proposed rule, we will remove the proposed limitations considering COFA migrants from the definition of qualified noncitizen in this final rule.

We solicited comments on our proposal to add more detailed information to the definition of qualified noncitizen under Medicaid and CHIP to promote clarity, transparency, and administrative ease.

We also proposed a nomenclature change to the definition of “citizenship,” “noncitizen,” and “qualified noncitizen” in 42 CFR 435.4 to remove the hyphen in the term “noncitizen” and use the term “noncitizen” throughout those definitions. We proposed this change to ensure alignment with terminology used by DHS. We noted that these changes do not affect eligibility for Medicaid and CHIP programs and only streamline the use of terminology for clarity and administrative ease. We did not receive any public comments regarding those changes. We are finalizing the changes as proposed in 42 CFR 435.4.

We received several public comments on our request to provide additional detail to the definition of qualified noncitizen used for Medicaid and CHIP at 42 CFR 435.4 and 42 CFR 457.320(c). No commenters opposed our proposal.

Comment: Some commenters supported CMS’ proposal to include a detailed definition of “qualified noncitizen” at 42 CFR 435.4 and to expressly list all the categories of noncitizens that Medicaid and CHIP agencies are required to cover. One commenter supported a definition that includes categories of noncitizens covered by 8 U.S.C. 1641(b) and (c), any additional categories that Medicaid

agencies are required to cover as a result of subsequently enacted legislation not currently codified in Title 8, as well as a “residual category that encompasses any statuses created by subsequent legislation or other changes to the statute after the proposed rule is finalized.”

These commenters noted that codifying a clear definition of “qualified noncitizen” would reduce confusion among individuals applying for Medicaid coverage, those helping them apply for coverage, and for Medicaid agencies.

Response: We agree with commenters that including a detailed definition of “qualified noncitizen” in our regulations will help clarify our policy for beneficiaries, State Medicaid agencies, and other partners and interested parties, and we are including a definition of “qualified noncitizen” in the final rule at 42 CFR 435.4, which is incorporated by cross reference in the CHIP regulations at 42 CFR 457.320(c).

We are declining the commenter’s suggestion to include a broad catchall category that would include future changes in statute. Adding a provision to accommodate potential future legislation would add ambiguity and uncertainty to the final rule that may be confusing for States that may be applying the regulation once it is effective. Should the Congress make further changes to the definition of qualified noncitizen, we will provide additional guidance.

Comment: One nonprofit organization stated that CMS should include petitioners for U-visas in the definition of qualified noncitizen.

Response: We do not have the statutory authority to include U nonimmigrant status petitioners in our definition of “qualified noncitizen,” because the definition of qualified noncitizen is based on PRWORA’s definition of “qualified alien” at 8 U.S.C. 1641 and other specific statutory changes authorizing treatment of certain noncitizens as a “refugee” for purposes of Medicaid and CHIP eligibility, among other purposes. Neither the statutory definition at 8 U.S.C. 1641 nor any other Federal statute expressly addresses U nonimmigrant status petitioners’ treatment as a refugee or eligibility for Federal public benefits, nor is there a statute that includes nonimmigrants more broadly. Thus, we are not adopting the commenter’s suggestion to include U visa petitioners in the definition of qualified noncitizen. See preamble section II.B.2 for additional information on the use of deferred action for certain U nonimmigrant status petitioners.

⁹⁷ To date, these other Federal laws include the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7105(b)), relating to certain victims of trafficking; section 602(b)(8) of the Afghan Allies Protection Act of 2009, Public Law. 111–8 (8 U.S.C. 1101 note), relating to certain Afghan special immigrants; section 1244(g) of the Refugee Crisis in Iraq Act of 2007 (8 U.S.C. 1157 note), relating to certain Iraqi special immigrants; section 584(c) of Public Law. 100–202 (8 U.S.C. 1101 note), relating to Amerasian immigrants; section 2502(b) of the Extending Government Funding and Delivering Emergency Assistance Act of 2021, Public Law. 117–43, relating to certain Afghan parolees; and section 401 of the Additional Ukraine Supplemental Appropriations Act of 2022, Public Law. 117–128, relating to certain Ukrainian parolees.

⁹⁸ Div. CC, Title II, sec. 208, Public Law. 116–260.

⁹⁹ Div. G, Title II, sec. 209(f), Public Law. 118–42.

¹⁰⁰ For a list of HHS programs that provide “Federal public benefits,” see 63 FR 41658 (Aug. 4, 1998).

Comment: A few commenters noted that they supported the proposed changes to expand eligibility for noncitizens who are treated as refugees, such as certain Afghan and Ukrainian parolees,¹⁰¹ which would enable these individuals to enroll in an Exchange plan, Medicaid and CHIP.

Response: We appreciate the support for including in the regulatory definition of “qualified noncitizen” both the noncitizens who are included in the definition of “qualified alien” under 8 U.S.C. 1641(b) and (c) as well as the noncitizens who are treated as refugees for purposes of eligibility for Medicaid and CHIP under other Federal statutes, and we are including both groups of noncitizens in the definition at 42 CFR 435.4 and 42 CFR 457.320(c) of the final rule. We wish to clarify that the final rule does not expand eligibility for these noncitizens but merely expressly reflects in our regulations individuals who may be eligible for Medicaid and CHIP under existing statutes, including the expansion of CHIP eligibility for COFA migrants as authorized by CAA, 2024. Individuals who are treated as refugees under other Federal laws are already required by statute to be covered by State Medicaid and CHIP programs if the individual meets all other eligibility requirements in the State plan. Additionally, these individuals are included in the existing Exchange definition of “lawfully present” as qualified noncitizens at 45 CFR 152.2(1), cross-referenced in our current regulation at 45 CFR 155.20 and 42 CFR 600.5, and are therefore eligible for QHP and BHP coverage if they meet other eligibility requirements.

Comment: One commenter requested that we include within the definition of “qualified noncitizen” a list of each category of human trafficking victims separately, while explaining that the list of subsections included is not exclusive. The commenter mentioned that Afghans, Ukrainians, and Iraqis should be specifically listed. The commenter further specified that CMS’ definition of “qualified noncitizen” should include T visa holders, “T visa applicants with bona fide determinations” and HHS Office of Trafficking in Persons (OTIP) certifications, human trafficking victims who have been granted continued presence by DHS and receive OTIP certifications, and noncitizen child victims of human trafficking (sex or labor) with eligibility letters from OTIP.

Response: We wish to clarify that victims of a severe form of trafficking in persons under the Trafficking Victims Protection Act of 2000, Public Law 106–386 and family members of trafficking victims granted derivative T nonimmigrant status are considered qualified noncitizens because they are eligible for benefits and services to the same extent as refugees. 22 U.S.C. 7105(b). This statutory provision includes individuals who received a certification from HHS under 22 U.S.C. 7105(b)(1)(E). A victim of a severe form of trafficking in persons may receive an HHS certification if they have complied with any reasonable request for assistance in the detection, investigation, or prosecution of the trafficking (or qualify for an exemption due to their age or an exception due to physical or psychological trauma) and have made a bona fide application for T nonimmigrant status or were granted continued presence by DHS. Such individuals who receive an HHS certification are included as individuals treated as refugees when meeting the requirements of 22 U.S.C. 7105(b). Additionally, we note that T nonimmigrants and T nonimmigrant status applicants who have set forth a prima facie case for such nonimmigrant status are considered qualified noncitizens under 8 U.S.C. 1641(c)(4). We are including these classifications of victims of trafficking and applicants for T nonimmigrant status in our revised definition of qualified noncitizen at 42 CFR 435.4 of this final rule.

After consideration of public comments, we are including in our definition of “qualified noncitizen” in this final rule noncitizens who are considered “qualified aliens” under 8 U.S.C. 1641(b) and (c), and other immigration statuses and categories that are not included in the statutory definition of “qualified aliens” but whom the Congress has specifically authorized be treated as refugees for purposes of eligibility for certain benefits, including Medicaid and CHIP. Specifically, we are including the following noncitizens in the definition of “qualified noncitizen” in 42 CFR 435.4 of the final rule:

- Noncitizens who are victims of a severe form of trafficking in persons, who are eligible for Medicaid and CHIP to the same extent as refugees under section 107 of the Victims of Trafficking and Violence Protection Act of 2000 and the members of a trafficking victim’s family who are granted derivative T nonimmigrant status, in accordance with 22 U.S.C. 7105(b)(1)(A);
- Iraqi and Afghan special immigrants, who are eligible for

Medicaid and CHIP to the same extent as refugees under the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181, enacted January 28, 2008); the Omnibus Appropriations Act, 2009 (Pub. L. 111–8, enacted March 11, 2009); the Department of Defense Appropriations Act, 2010 (Pub. L. 111–118, enacted December 19, 2009); and the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113–291, enacted December 19, 2014);

- Amerasian immigrants, who are treated the same as refugees for purposes of Medicaid and CHIP eligibility in accordance with a joint resolution making further continuing appropriations for the fiscal year 1988, and for other purposes (Pub. L. 100–202, enacted December 22, 1987);

- Certain Afghan parolees who are eligible for Medicaid and CHIP to the same extent as refugees in accordance with section 2502 of the Extending Government Funding and Delivering Emergency Assistance Act (Pub. L. 117–43 as amended, enacted September 30, 2021); and

- Certain Ukrainian parolees who are also eligible for Medicaid and CHIP to the same extent as refugees under section 401 of the Additional Ukraine Supplemental Appropriations Act (Pub. L. 117–128 as amended, enacted May 21, 2022).

We are also making a conforming technical change to 42 CFR 435.406(2)(i) to replace the current cross-reference to “qualified noncitizens” as defined in section 431 of PRWORA (8 U.S.C. 1641) to the modified definition of “qualified noncitizen” at 42 CFR 435.4 that is being finalized in this rule. Likewise, in response to public comments and to align CHIP with Medicaid and to include COFA migrants as qualified noncitizens for the purposes of CHIP eligibility as authorized by CAA, 2024, we have finalized a definition of “qualified noncitizen” for purposes of CHIP eligibility at 42 CFR 457.320(c), which cross references to the definition of “qualified noncitizen” at 42 CFR 435.4. We are also finalizing an amendment at 42 CFR 457.320(b)(6) to replace “qualified aliens” with “qualified noncitizens” and to replace the reference to section 431 of PRWORA with the new definition of “qualified noncitizen” at 42 CFR 457.320(c).

Comment: One commenter recommended that we include in the definition of “qualified noncitizen” other individuals who are required to be covered in Medicaid under the Federal statute at 8 U.S.C. 1612(b) but are not considered qualified aliens under 8 U.S.C. 1641 or treated as refugees under other Federal statutes (for example,

¹⁰¹ See Section 2502 of the Extending Government Funding and Delivering Emergency Assistance Act, Public Law. 117–43 (Sept. 30, 2021), as amended, and Section 401 of the Additional Ukraine Supplemental Appropriations Act, 2022, Public Law. 117–128 (May 21, 2022).

American Indians born in Canada or members of a Federally-recognized tribe, 8 U.S.C. 1612(b)(2)(E); 8 U.S.C. 1613(d)(1)). This commenter recommended that CMS include these additional individuals required to be covered by Medicaid in our revised definition of “qualified noncitizen” to promote clarity and transparency to the public specifying those individuals who must be covered in Medicaid, if meeting all other eligibility requirements.

Response: We agree with the commenter that there are additional groups of noncitizens who are required to be covered in Medicaid under 8 U.S.C. 1612(b)(2), but do not agree that these individuals are considered qualified noncitizens under 8 U.S.C. 1641. We also appreciate that there is some confusion regarding the noncitizens for whom coverage under Medicaid and CHIP is required. States are required to provide full Medicaid benefits to certain noncitizens under 8 U.S.C. 1612(b)(2) if they meet all other eligibility requirements in the State plan. We are not adopting the commenter’s suggestion to include these individuals in the definition of “qualified noncitizen” in 42 CFR 435.4, as they are not qualified aliens under 8 U.S.C. 1641 or based on other Federal statutes. Moreover, we did not propose a rule that would identify all the individuals required to be covered in Medicaid under 8 U.S.C. 1612(b).

While we are not adopting a final rule, pursuant to the request for clarification, we are identifying in this preamble the individuals that States are required by statute to cover in Medicaid under 8 U.S.C. 1612(b) and are exempt from the 5-year bar under 8 U.S.C. 1613.

Under 8 U.S.C. 1612(b)(2)(A), States must cover for at least 7 years refugees; asylees; noncitizens whose deportation is withheld under specified sections of the INA; Cuban and Haitian entrants; Amerasian immigrants; and other noncitizens treated as if they were refugees for purposes of Medicaid eligibility.

Under 8 U.S.C. 1612(b)(2)(B), States are required to cover lawful permanent residents who have worked or can be credited with 40 qualifying quarters, as defined under title II of the Social Security Act. Quarters worked either by the individual or his or her spouse or parents may be counted if certain conditions, described in 8 U.S.C. 1612(b)(2)(B) and 8 U.S.C. 1645, are met. Under 8 U.S.C. 1612(b)(2)(C), States must provide full Medicaid coverage to all lawfully residing noncitizens who are an honorably discharged veteran or an active-duty service member in the United States

Armed Forces as well as to spouses and dependent children of such individuals who meet all other eligibility requirements under the State plan.

In accordance with 8 U.S.C. 1612(b)(2)(E) and (F), States must provide full Medicaid benefits to certain American Indians and noncitizens receiving SSI. Finally, in accordance with 8 U.S.C. 1612(b)(2)(G), States must provide full Medicaid benefits to COFA migrants who live in one of the 50 States or the District of Columbia. Covering COFA migrants in the U.S. territories, including Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa is at the territory’s option. All such individuals described in 8 U.S.C. 1612(b)(2) must meet all other eligibility requirements in the State to be eligible for Medicaid coverage.

Since CHIP is not a “designated Federal program” under 8 U.S.C. 1612(b)(3), none of the individuals described in 8 U.S.C. 1612 are eligible for separate CHIP based on this statute, though some of these individuals may be eligible for CHIP under other statutes.

E. Administration, Eligibility, Essential Health Benefits, Performance Standards, Service Delivery Requirements, Premium and Cost Sharing, Allotments, and Reconciliation (42 CFR Part 600)

Section 1331 of the ACA provides States with an option to establish a BHP.¹⁰² In States that elect to implement a BHP, the program makes affordable health benefits coverage available for lawfully present individuals under age 65 with household incomes between 133 percent and 200 percent of the FPL (or in the case of lawfully present noncitizens who are ineligible for Medicaid or CHIP due to immigration status, with household incomes between zero and 200 percent of the FPL) who are not otherwise eligible for other minimum essential coverage including Medicaid, CHIP, or affordable employer-sponsored coverage. As of April 1, 2024, there is one State that operates a BHP—Minnesota.¹⁰³

In the proposed rule, we proposed conforming amendments to the BHP regulations to remove the current cross-

reference to 45 CFR 152.2 in the definition of “lawfully present” at 42 CFR 600.5. We proposed to amend the definition of “lawfully present” in the BHP regulations at 42 CFR 600.5 to instead cross-reference the definition of “lawfully present” proposed at 45 CFR 155.20. We noted that this proposal, if finalized, would result in DACA recipients being considered lawfully present for purposes of eligibility to enroll in a BHP in a State that elects to implement such a program, if otherwise eligible. We also noted that, if the proposals were finalized, the modification would ensure that the definition of “lawfully present” used to determine eligibility for coverage under a BHP is aligned with the definition of “lawfully present” used for the other insurance affordability programs. While we are not finalizing a lawfully present definition for Medicaid or CHIP in this final rule for the reasons detailed in section I, we are finalizing a definition of “lawfully present” for purposes of BHP eligibility that will align the definitions used for Exchanges and for BHP.

We received public comments on these proposals. The following is a summary of the comments we received and our responses.

Comment: One nonprofit organization commenter noted that in Minnesota, a bill was recently passed to expand the State’s BHP to all individuals who are otherwise eligible, regardless of immigration status, using State funds. The commenter notes that CMS’ rule aligns with Minnesota’s ongoing efforts to reduce uncompensated care costs and improve population health.

Response: We appreciate this commenter’s support for the rule’s provisions to no longer exclude DACA recipients from eligibility for a BHP.

Comment: Commenters noted and appreciated CMS’ foresight to ensure that DACA recipients will be able to enroll in a BHP should other States choose this option in the future.

Response: We agree that, should any other States elect to operate a BHP in the future, that DACA recipients in the State would be considered lawfully present for purposes of eligibility for the BHP. Since the proposed rule was published, Oregon has indicated that they intend to begin operating a BHP effective July 1, 2024, and the definition of “lawfully present” finalized in this rule will apply to Oregon’s BHP which is currently pending approval with CMS.

After consideration of public comments, we are finalizing the proposal to include a cross-reference to

¹⁰² See 42 U.S.C. 18051. See also 42 CFR part 600.

¹⁰³ Minnesota’s program began January 1, 2015. New York’s BHP program began April 1, 2015 and was suspended effective April 1, 2024. For more information, see <https://www.medicaid.gov/basic-health-program/index.html>. Also see, for example, 87 FR 77722, available at <https://www.govinfo.gov/content/pkg/FR-2022-12-20/pdf/2022-27211.pdf>. Oregon is proposing to implement a BHP effective July 1, 2024, and it is currently pending approval with CMS.

45 CFR 155.20 at 42 CFR 600.5 as proposed.

III. Severability

As described in the background section of this rule, the ACA generally¹⁰⁴ requires that to enroll in a QHP through an Exchange, an individual must be either a citizen or national of the United States or be “lawfully present” in the United States.¹⁰⁵ The ACA also generally requires that individuals be “lawfully present” to be eligible for insurance affordability programs such as PTC,¹⁰⁶ APTC,¹⁰⁷ and CSRs¹⁰⁸ for their Exchange coverage. Additionally, enrollees in a BHP are required to meet the same citizenship and immigration requirements as QHP enrollees.¹⁰⁹ The ACA does not define “lawfully present” beyond specifying that an individual is only considered lawfully present if they are reasonably expected to be lawfully present for the period of their enrollment,¹¹⁰ and that CMS is required to verify that Exchange applicants are lawfully present in the United States.¹¹¹

Since 1996, when the DOJ’s Immigration and Naturalization Service issued an interim final rule defining the term “lawfully present” as used in the then-recently enacted PRWORA,

Federal agencies have considered deferred action recipients to be “lawfully present” for purposes of certain Social Security benefits (see *Definition of the Term Lawfully Present in the United States for Purposes of Applying for Title II Benefits Under Section 401(b)(2) of Public Law 104–193*, interim final rule, 61 FR 47039). Given the lack of a statutory definition of “lawfully present” in the ACA and given the rulemaking authority granted to CMS under 42 U.S.C. 18051 and 42 U.S.C. 18041, HHS has discretion to determine the best legal interpretations of these terms for purposes of administering its programs. As previously described, CMS’ authority to remove the exclusion that treated DACA recipients differently from other noncitizens with deferred action under the definition of “lawfully present” for purposes of eligibility for health insurance through an Exchange and a BHP is supported by law and should be upheld in any legal challenge.

Similarly, we are finalizing technical changes to the definition of “lawfully present” for the purposes of eligibility for a QHP through an Exchange or a BHP, and we believe those changes are also well-supported in law and practice and should be upheld in any legal challenge. We also believe that our exercise of our authority reflects sound policy.

However, in the event that any portion of this final rule is declared invalid, we intend that the other changes to the definition of “lawfully present” would be severable. For example, if a court were to stay or invalidate the inclusion of one provision in the definition of “lawfully present,” for purposes of eligibility for the Exchanges or the BHP, we intended the remaining features in sections II.B.1 and II.B.2 of this rule to stand. Likewise, CMS intends that if one provision of the changes to the definition of “lawfully present” is stayed or invalidated, that other provisions within this regulation be severable to the extent possible. For example, if one of the provisions discussed in section II.B.2 (Other Changes to the “Lawfully Present” Definition) of the proposed rule is stayed or invalidated, CMS intends that the other provisions discussed in that section be severable.

Additionally, individual portions of this final rule have significant benefits and would be worthwhile in themselves. For example, a rule consisting only of the technical and clarifying changes in section II.B.2 of this final rule, applied through cross-reference to Exchanges and BHPs, would allow CMS and Exchanges to

more effectively verify the lawful presence of noncitizens for purposes of eligibility for health insurance affordability programs. A rule consisting solely of the changes in section II.B.1 of this rule would have significant benefits because it would increase access to health coverage for DACA recipients. These reasons alone would justify the continued implementation of these policies.

In the proposed rule, we proposed a severability provision at 45 CFR 155.30 indicating that the provisions regarding the definition of “lawfully present” proposed at 45 CFR 155.20 were intended to be severable from each other, as well as from the definitions of “lawfully present” and “lawfully residing” proposed at 42 CFR 435.4. We also proposed a provision at 42 CFR 435.12 regarding the severability of the definitions of “lawfully present” and “lawfully residing” that were proposed at 42 CFR 435.4.

We received public comments on these proposals. The following is a summary of the comments we received and our responses.

Comment: Commenters stated support for CMS’ inclusion of severability clauses in the rule. Commenters stated that they agreed with HHS that the proposed changes are well-supported in law and practice and that they reflect sound policy, but that they also recognized that the rule’s changes are not dependent on each other and could be implemented independently.

Response: We appreciate commenters’ agreement that the changes in this rule are well-supported in law and practice. We further appreciate commenters’ recognition that the provisions of this rule are not dependent on each other and could be implemented independently.

After consideration of public comments, we are finalizing the severability clause at 45 CFR 155.30 as proposed, with one modification to no longer reference the definitions of “lawfully present” and “lawfully residing” proposed at 42 CFR 435.4, given that we are not finalizing those definitions at this time. Because we are not finalizing definitions of “lawfully present” or “lawfully residing” at 42 CFR 435.4 at this time, we are also not finalizing the proposed severability clause that references those definitions at 42 CFR 435.12 at this time. The rulemaking process with regard to these portions of the proposal is ongoing.

IV. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*),

¹⁰⁴ States may pursue a waiver under section 1332 of the ACA that could waive the “lawfully present” framework in section 1312(f)(3) of the ACA. See 42 U.S.C. 18052(a)(2)(B). There is currently one State (Washington) with an approved section 1332 waiver that includes a waiver of the “lawfully present” framework to the extent necessary to permit all State residents, regardless of immigration status, to enroll in a QHP and QDP through the State’s Exchange, as well as to apply for State subsidies to defray the costs of enrolling in such coverage. Consumers who are newly eligible for Exchange coverage under the waiver remain ineligible for PTC for their Exchange coverage. While neither Colorado nor New York requested a waiver of the “lawfully present” framework, both States are permitted to use pass-through funding based on Federal savings from their 1332 waivers to support programs covering immigrants who are ineligible for PTC. Colorado provides premium and cost-sharing subsidies to individuals earning up to 300 percent of FPL who are otherwise ineligible for Federal premium subsidies, including undocumented individuals. Under New York’s section 1332 waiver, some immigrants with household incomes up to 200 percent of FPL, including DACA recipients, will be eligible for coverage under the State’s EP Expansion plan. Beginning August 1, 2024, DACA recipients with incomes up to 250 percent of FPL will also be eligible for coverage under the State’s EP Expansion. For more information on the Colorado, Washington, and New York section 1332 waivers, see https://www.cms.gov/ccio/programs-and-initiatives/state-innovation-waivers/section_1332_state_innovation_waivers-.

¹⁰⁵ 42 U.S.C. 18032(f)(3).

¹⁰⁶ 26 U.S.C. 36B(e)(2).

¹⁰⁷ 42 U.S.C. 18082(d).

¹⁰⁸ 42 U.S.C. 18071(e).

¹⁰⁹ 42 U.S.C. 18051(e).

¹¹⁰ 42 U.S.C. 18032(f)(3), 42 U.S.C. 18071(e)(2).

¹¹¹ 42 U.S.C. 18081(c)(2)(B).

we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. To fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.

- The quality, utility, and clarity of the information to be collected.
 - Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.
- We solicited public comment on each of these issues for the following sections of this document that contain information collection requirements.
- A. Wage Estimates*
- To derive average costs in the proposed rule, we used data from the U.S. Department of Labor’s Bureau of Labor Statistics’ (BLS’s) May 2021

National Occupational Employment and Wage Estimates for all salary estimates (https://www.bls.gov/oes/current/oes_nat.htm).¹¹² Since publishing the proposed rule, more recent data has become available, so we are modifying all salary estimates in this final rule to use BLS’s May 2023 National Occupational Employment and Wage Estimates (https://www.bls.gov/oes/current/oes_nat.htm). In this regard, Table 1 presents BLS’s median hourly wage, our estimated cost of fringe benefits and overhead (calculated at 100 percent of salary), and our adjusted hourly wage.

TABLE 1: National Occupational Employment and Wage Estimates

Occupation Title	Occupational Code	Median Wage (\$/hr)	Fringe Benefits and Other Indirect Costs (\$/hr)	Adjusted Hourly Wage (\$/hr)
Computer Programmer	15-1251	47.94	47.94	95.88
Database and Network Administrator & Architect	15-1240	50.83	50.83	101.66
General and Operations Manager	11-1021	48.69	48.69	97.38
Business Operations Specialist	13-1000	37.74	37.74	75.48
Eligibility Interviewers, Govt Programs	43-4061	24.17	24.17	48.34

For States and the private sector, employee hourly wage estimates have been adjusted by a factor of 100 percent to account for fringe benefits and other indirect costs. This is necessarily a rough adjustment, both because fringe benefits and other indirect costs vary significantly across employers, and because methods of estimating these costs vary widely across studies. Nonetheless, there is no practical alternative, and we believe that doubling the hourly wage to estimate total cost is a reasonably accurate estimation method.

We adopt an hourly value of time based on after-tax wages to quantify the opportunity cost of changes in time use for unpaid activities. This approach matches the default assumptions for valuing changes in time use for individuals undertaking administrative and other tasks on their own time, which are outlined in an Assistant Secretary for Planning and Evaluation (ASPE) report on “Valuing Time in U.S.

Department of Health and Human Services Regulatory Impact Analyses: Conceptual Framework and Best Practices.”¹¹³ We started with a measurement of the usual weekly earnings of wage and salary workers of \$1,117.¹¹⁴ We divided this weekly rate by 40 hours to calculate an hourly pre-tax wage rate of \$27.93. We adjusted this hourly rate downwards by an estimate of the effective tax rate for median income households of about 17 percent, resulting in a post-tax hourly wage rate of \$23.18. We adopt this as our estimate of the hourly value of time for changes in time use for unpaid activities.

B. Information Collection Requirements (ICRs)

1. ICRs Regarding Medicaid and CHIP

a. Medicaid and CHIP and the CHIPRA 214 Option (42 CFR 435.4 and 457.320(c))

Changes related to our Medicaid and CHIP proposals related to the CHIPRA

214 option were submitted to OMB for review under OMB Control Number 0938–1147 (CMS–10410). We are not finalizing these provisions at this time and as such, are not updating PRA burden estimates.

We continue to consider the public comments on the Medicaid and CHIP proposals that we received; thus, we are not responding to these comments in the final rule at this time.

b. CHIP Changes Related to the CAA, 2024 (42 CFR 435.4 and 457.320(b))

Since the time of the proposed rule, and as discussed earlier in this final rule, under the CAA, 2024 COFA migrants are now considered qualified noncitizens for the purposes of eligibility for CHIP, effective March 9, 2024, if they meet all other eligibility requirements for CHIP. This change does not impact Medicaid, Exchanges, or BHP. Therefore, we have updated our regulations to reflect the statutory change extending eligibility for CHIP to COFA migrants.

¹¹² See 88 FR 25322 through 25323 for more information on the wage estimates used in the proposed rule.

¹¹³ Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation. “Valuing Time in U.S. Department of Health and Human Services Regulatory Impact

Analyses: Conceptual Framework and Best Practices.” (2017) <https://aspe.hhs.gov/reports/valuing-time-us-department-health-human-services-regulatory-impact-analyses-conceptual-framework>.

¹¹⁴ U.S. Bureau of Labor Statistics. Employed full time: Median usual weekly nominal earnings (second quartile): Wage and salary workers: 16

years and over [LEU0252881500A], retrieved from FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/series/LEU0252881500A>. Annual Estimate, 2023.

The impact of this change will be very minimal and will impact only those States that have a separate CHIP, and that have not elected the CHIPRA 214 option for at least one population of pregnant individuals or children in their separate CHIPS. Since COFA migrants are already eligible for CHIP in States that have elected the CHIPRA 214 option, as reflected in a 2021 SHO letter,¹¹⁵ we only estimate impact for States with a separate CHIP that have not elected the CHIPRA 214 option. Using data from the GAO for the most recent year we could obtain,¹¹⁶ which estimated that the total US population of COFA migrants was 94,000, and then estimating how many may be living in States under the previously described conditions, we estimate approximately 12,225 COFA migrants live in States impacted by this change, primarily within six of those States. Accounting further for how many would actually be eligible under the remaining CHIP eligibility criteria, and then would seek to enroll, we believe the impact of this change to be very minimal. Therefore, and because this change is based on a statutory change and not the result of a policy in this final rule, we are not including more extensive burden estimates in this or section V. of this final rule.

2. ICRs Regarding the BHP (42 CFR 600.5)

The following changes were submitted to OMB for review under OMB Control Number 0938–1218 (CMS–10510).

In the proposed rule, we estimated a one-time burden of 200 hours at a cost of \$18,863 for completing the necessary updates to a BHP application. We are modifying the estimates in this final rule to reflect the updated wage estimates as outlined in section IV.A of this final rule. We did not receive public comments on the method of deriving these burden estimates in the proposed rule, and we are therefore finalizing them using the proposed methodology with the updated wage estimates.

The impact of completing the necessary changes to the BHP application is with regards to the two States that will operate BHPs as of the effective date of this rule—Minnesota and Oregon.¹¹⁷ Although Oregon's BHP

is still pending CMS approval, we are including it in our estimate in order to best reflect which States we anticipate may be impacted when this rule becomes effective. We estimate that it will take each State 100 hours to develop and code the changes to its BHP eligibility and verification system to correctly evaluate eligibility under the revised definition of “lawfully present” to include DACA recipients and certain other limited groups of noncitizens as outlined in section II.B.2 of this final rule. This estimate is based on past experience with similar system changes. To be conservative in our estimates, we assume 100 hours per State, but it is important to note that it may take each State less than 100 hours given the overlap in State eligibility and verification systems, as work completed for the State Exchange system may be the same for its BHP.

Of those 100 hours, we estimate it would take a database and network administrator and architect 25 hours at \$101.66 per hour and a computer programmer 75 hours at \$95.88 per hour. In the aggregate, we estimate a one-time burden of 200 hours (2 States × 100 hours) at a cost of \$19,465 (2 States × [(25 hours × \$101.66 per hour) + (75 hours × \$95.88 per hour)]) for completing the necessary updates to a BHP application.

We note that the policies in this final rule will impose additional costs on BHP agencies to process the applications for individuals impacted by these policies. Those impacts are accounted for under OMB Control Number 0938–1191 (Data Collection to Support Eligibility Determinations for Insurance Affordability Programs and Enrollment through Health Insurance Marketplaces, Medicaid and Children's Health Insurance Program Agencies (CMS–10440)), discussed in section IV.B.3 of this final rule, which pertains to the streamlined application.

3. ICRs Regarding the Exchanges and Processing Streamlined Applications (45 CFR 152.2 and 155.20, and 42 CFR 600.5)

The following changes were submitted to OMB for review under OMB Control Number 0938–1191 (CMS–10440).

In the proposed rule, we estimated a one-time burden of 1,900 hours at a cost of \$179,199 for completing the necessary updates to eligibility and enrollment platforms. We are modifying

the estimates in this final rule to reflect the updated wage estimates as outlined in section IV.A of this final rule. As discussed previously, the changes to the definition of “lawfully present” will impact eligibility to enroll in a QHP through an Exchange and for APTC and CSRs. This change applies to the 18 State Exchanges not on the Federal platform, as well as the Federal Government, which will make changes to the Federal eligibility and enrollment platform for the States with Federally-facilitated Exchanges (FFE) and State-based Exchanges on the Federal platform (SBE-FPs). We estimate that it will take the Federal Government and each of the State Exchanges not on the Federal platform 100 hours in 2024 to develop and code the changes to their eligibility systems to correctly evaluate and verify eligibility under the definition of “lawfully present” that is revised to include DACA recipients and certain other limited groups of noncitizens as outlined in section II.B.2 of this final rule. We do not expect States operating SBE-FPs to incur any implementation costs related to Exchange eligibility and enrollment platform changes. These estimates are based on past experience with similar system changes.

Of those 100 hours, we estimate it would take a database and network administrator and architect 25 hours at \$101.66 per hour and a computer programmer 75 hours at \$95.88 per hour. In aggregate for the State Exchanges not on the Federal platform, we estimate a one-time burden in 2024 of 1,800 hours (18 State Exchanges × 100 hours) at a cost of \$175,185 (18 States × [(25 hours × \$101.66 per hour) + (75 hours × \$95.88 per hour)]) for completing the necessary updates to State Exchange systems. For the Federal Government, we estimate a one-time burden in 2024 of 100 hours at a cost of \$9,733 ((25 hours × \$101.66 per hour) + (75 hours × \$95.88 per hour)). In total, the burden associated with all system updates will be 1,900 hours at a cost of \$184,918.

“Data Collection to Support Eligibility Determinations for Insurance Affordability Programs and Enrollment through Health Benefits Exchanges, Medicaid and CHIP Agencies,” OMB Control Number 0938–1191 (CMS–10440), accounts for burdens associated with the streamlined application for enrollment in the programs impacted by this rule. As such, the following information collection addresses the burden of processing applications and assisting enrollees with BHP and QHP enrollment, and those impacts are not reflected in the ICRs for BHPs,

¹¹⁵ See SHO #21–005, available at <https://www.medicaid.gov/federal-policy-guidance/downloads/sho21005.pdf>.

¹¹⁶ Compacts of Free Association: Populations in U.S. Areas Have Grown, with Varying Reported Effects, June 2020, available at <https://www.gao.gov/assets/gao-20-491.pdf>.

¹¹⁷ Minnesota's BHP began January 1, 2015. Oregon's BHP is projected to begin July 1, 2024, and

is pending CMS approval. New York suspended its BHP effective April 1, 2024. For more information, see <https://www.medicaid.gov/basic-health-program/index.html>.

discussed in section IV.B.2 of this final rule. In the proposed rule, we estimated that the total burden of application processing and assisting enrollees with Medicaid, CHIP, BHP, and QHP enrollment would be 34,000 hours for a total cost of \$1,587,800, where the total burden on States would be 18,397 hours annually at a cost of \$859,140, and the total burden on the Federal Government would be 15,603 hours annually at a cost of \$728,660. We sought comment on these estimates and the methodology and assumptions used to calculate them. We are updating the estimates in this final rule to reflect that we are not finalizing the proposed changes for Medicaid and CHIP and that we have modified the estimates with the updated wage estimates as outlined in section IV.A of this final rule and the most recent available data on DACA recipients.

For assisting additional eligible enrollees and processing their applications, we estimate this will take a government programs eligibility interviewer 10 minutes (0.17 hours) per application at a rate of \$48.34 per hour, for a cost of approximately \$8.22 per application. This estimate is based on past experience with similar application changes. As outlined further in section IV.B.4 of this final rule, we anticipate that approximately 147,000 individuals impacted by this final rule will complete the application annually. Therefore, the total application processing burden associated with the policies in this final rule will be 24,990 hours (0.17 hours $\times$ 147,000 applications) for a total cost of \$1,208,017 (24,990 hours $\times$ \$48.34 per hour). As discussed further in this section, we anticipate that approximately 52 percent of the application processing burden will fall on States, while the remaining approximately 48 percent will be borne by the Federal Government. We estimate these proportions as follows.

To start, we estimate the percentage of applications that will be processed for the Exchanges and BHPs. We assume that the proportion of applications that will be processed for each program will be equivalent to the proportion of individuals impacted by the policies in this final rule that would enroll in each program. As outlined in section V.C. of this final rule, we estimate that of the 100,000 individuals impacted by the policies in this rule, 99,000 will enroll in the Exchanges (99 percent), and 1,000 (1 percent) in BHPs on average each year, including redeterminations and re-enrollments. Using these same proportions, out of the 147,000 applications anticipated to result from

the policies in this final rule, we estimate 145,000 applications will be processed for the Exchanges, and 2,000 will be processed for BHPs on average each year.

Next, we calculate the proportion of each program's application processing costs that are borne by States compared to the Federal Government. The entire information collection burden associated with changes to BHPs falls on the two States with BHPs—Minnesota and Oregon.¹¹⁸ As such, we assume 100 percent of the BHP application processing costs will fall on these two States. For the Exchanges, we use data from the 2024 Open Enrollment Period to estimate the proportion of applications that are processed by States compared to the Federal Government, and we determined that 49 percent of Exchange applications were submitted to FFEs/SBE-FPs, and are therefore processed by the Federal Government, while 51 percent were submitted to and processed by the 18 State Exchanges not on the Federal platform.¹¹⁹ As such, we anticipate that 49 percent of Exchange application processing costs will fall on the Federal Government and 51 percent of Exchange application processing costs will fall on States using their own eligibility and enrollment platforms. We do not expect States operating SBE-FPs to incur any application processing costs as these applications, and the costs associated with them, will fall on the Federal Government.

Finally, we apply the proportion of applications we estimated for each program we discussed earlier to the State and Federal burden proportions. Using the per-application processing burden discussed earlier in this ICR (10 minutes, or 0.17 hours, per application at a rate of \$48.34 per hour) for BHPs, if we estimate 2,000 applications will be processed, the burden for all of those will be borne by the States. Using the per-application processing burden of 10 minutes (0.17 hours) per application at a rate of \$48.34 per hour, this results in a burden of 340 hours, or \$16,436, for States to process BHP applications. For the Exchanges, if we estimate 145,000 applications will be processed, 51 percent of those (73,950) will be processed by State Exchanges not on the Federal platform and 49 percent (71,050) will be processed by the

Federal Government. Using the per-application processing burden of 10 minutes (0.17 hours) per application at a rate of \$48.34 per hour, this results in a burden of 12,572 hours, or \$607,706, for State Exchanges not on the Federal platform and 12,079 hours, or \$583,875, for the Federal Government.

Therefore, the total burden on State Exchanges not on the Federal platform to assist eligible beneficiaries and process their applications will be 12,912 hours annually (340 hours for BHP + 12,572 hours for State Exchanges not on the Federal platform) at a cost of \$624,142, and the total burden on the Federal Government will be 12,079 hours annually (entirely for Exchanges) at a cost of \$583,875.

We received public comments on the estimates outlined in the proposed rule. We are finalizing the proposed methodology of deriving these burden estimates with the updated wage estimates as outlined in section IV.A of this final rule and the most recent available data on DACA recipients and application processing. The following is a summary of the comments we received and our responses.

Comment: Some State Exchanges stated concerns about whether they would be able to implement the rule's provisions by the November 1, 2023 proposed effective date but did not express concern about the overall burden on State agencies of making systems changes or processing new applications for impacted populations.

Response: We understand that some State Exchanges not on the Federal platform will need to make changes to their eligibility and enrollment systems to correctly determine eligibility for DACA recipients and the other individuals impacted by the revised lawfully present definition. We are committed to providing State Exchanges with technical assistance and any additional support needed to ensure that States are able to correctly determine eligibility for DACA recipients and other impacted noncitizens by this final rule's November 1, 2024 effective date. We are also committed to working with State Exchanges not on the Federal platform and BHP agencies to identify any potential manual workarounds that may be needed to correctly determine eligibility prior to full systems changes being in place.

Comment: Commenters noted that they expected that the technical changes made to the definition of lawfully present discussed in section II.B.2 of this final rule would reduce application processing burdens for State Exchanges in the future, given that they are

¹¹⁸ Minnesota's BHP began January 1, 2015. Oregon's BHP is projected to begin July 1, 2024, and is pending CMS approval. For more information, see <https://www.medicaid.gov/basic-health-program/index.html>.

¹¹⁹ Centers for Medicare & Medicaid Services. (2024). 2024 Open Enrollment Report. <https://www.cms.gov/files/document/health-insurance-exchanges-2024-open-enrollment-report-final.pdf>.

expected to make it easier for State Exchanges to verify applicants' lawful presence through DHS SAVE.

Response: We agree that including DACA recipients and making the technical changes discussed in this rule will streamline application processing and make electronic verification of immigration status through SAVE more efficient, by both decreasing DHS' workload in verifying immigration status at Steps Two and Three, which require manual intervention, and by no longer requiring eligibility caseworkers to resubmit a request for additional information or provide additional documentation.

After consideration of public comments, we are finalizing these burden estimates using the proposed methodology with the most recent available data as described above.

4. ICRs Regarding the Application Process for Applicants

The following changes were submitted to OMB for review under OMB Control Number 0938–1191 (CMS–10440).

As required by the ACA, there is one application through which individuals may apply for health coverage in a QHP through an Exchange and for other insurance affordability programs like Medicaid, CHIP, and a BHP.¹²⁰ In the proposed rule, we assumed the burden of completing an Exchange application was essentially the same as applying with a State Medicaid or CHIP agency, and therefore we did not distinguish between these populations. In the proposed rule, we estimated the total annual additional burden on all individuals impacted by the proposed changes by completing the application or submitting documentation to verify their lawful presence would be approximately 163,000 hours with an equivalent cost of approximately \$3,375,730. We sought comment on these burden estimates. We are updating the estimates in this final rule to reflect that we are not finalizing the proposed changes for Medicaid and CHIP and to reflect the most recent available data, which includes the updated wage estimates in section IV.A of this rule, and the most recent available data on DACA recipients and open enrollment.

Based on the enrollment projections discussed in the Regulatory Impact Analysis section later in this rule, we anticipate that DACA recipients will represent the majority of individuals impacted by this final rule, and we are unable to quantify the number of non-DACA recipients impacted by the other

changes in this rule, but we expect the number to be small. We estimate that there are 147,000 uninsured DACA recipients based on USCIS data on active DACA recipients (545,000 in 2023)¹²¹ and a 2022 survey by the National Immigration Law Center stating that 27 percent of DACA recipients are uninsured,¹²² and we assume that 100 percent of uninsured DACA recipients will apply for coverage.¹²³ As such, we anticipate that approximately 147,000 individuals impacted by the proposals in this rule will complete the application annually.

In the existing information collection request for this application OMB Control Number 0938–1191, we estimate that the application process will take an average of 30 minutes (0.5 hours) to complete for those applying for insurance affordability programs and 15 minutes (0.25 hours) for those applying without consideration for insurance affordability programs.¹²⁴ We estimate that of the 147,000 individuals impacted by the proposed changes, 98 percent will be applying for insurance affordability programs and 2 percent will be applying without consideration for insurance affordability programs. Using the hourly value of time for changes in time use for unpaid activities discussed in section IV.A of this final rule (at an hourly rate of \$23.18), the average opportunity cost to an individual for completing this task is estimated to be approximately 0.495 hours ((0.5 hours × 98 percent) + (0.25 hours × 2 percent)) at a cost of \$11.47. The total annual additional burden on the 147,000 individuals impacted by the changes in this final rule will be approximately 72,765 hours with an equivalent cost of approximately \$1,686,693.

¹²¹ Count of Active DACA Recipients by Month of Current DACA Expiration as of September 30, 2023. U.S. Citizenship and Immigration Services. https://www.uscis.gov/sites/default/files/document/data/active_daca_recipients_fy23_q4.pdf.

¹²² National Immigration Law Center. DACA Recipients' Access to Health Care: 2023 Report. (2023) https://www.nilc.org/wp-content/uploads/2023/05/NILC_DACA-Report_2023.pdf.

¹²³ While some individuals impacted by the changes in this final rule may not apply for coverage, we are unable to quantify the proportion of uninsured DACA recipients who would choose not to apply. Because uninsured DACA recipients would likely benefit from becoming insured, we assume 100 percent of DACA recipients will apply for coverage.

¹²⁴ It is possible that some individuals impacted by the proposed changes to the definition of lawful presence in this rule would apply using the paper application, but internal CMS data show that this would be less than 1 percent of applications. Therefore, we are using estimates in this analysis to reflect that nearly all applicants would apply using the electronic application.

As stated earlier in this final rule, Exchanges and BHP agencies will require individuals completing the application to submit supporting documentation to confirm their lawful presence if they are unable to be verified electronically. An applicant's lawful presence may not be able to be verified electronically if, for example, the applicant opts to not include information about their immigration documentation, such as their alien number or Employment Authorization Document (EAD) number, when they fill out the application. We estimate that of the 147,000 individuals impacted by the changes as finalized, approximately 54 percent (or 79,380) of applicants will be able to have their lawful presence electronically verified, and the remaining 46 percent (or 67,620) of applicants will be unable to have their lawful presence electronically verified and will therefore have to submit supporting documentation to confirm their lawful presence.¹²⁵ We estimate that a consumer will, on average, spend approximately 1 hour gathering and submitting required documentation. Using the hourly value of time for changes in time use for unpaid activities discussed in section IV.A of this final rule (at an hourly rate of \$23.18), the opportunity cost for an individual to complete this task is estimated to be approximately \$23.18. The total annual additional burden on the 67,620 individuals impacted by the changes finalized in this rule who are unable to electronically verify their lawful presence and therefore need to submit supporting documentation will be approximately 67,620 hours with an equivalent cost of approximately \$1,567,432.

As previously stated, for the 147,000 individuals impacted by this rule, the annual additional burden of completing the application will be 0.495 hours per individual on average, which totals to 72,765 hours at a cost of \$1,686,693. For the 67,620 individuals who are unable to have their lawful presence electronically verified, the total annual burden of submitting documentation to verify their lawful presence will be 67,620 hours at a cost of \$1,567,432. Therefore, the average annual burden per respondent will be 0.955 hours ((0.495 hours × 54 percent of individuals) + (1.495 hours × 46 percent of individuals)), and the total annual

¹²⁵ This estimate is informed by recent data from the FFEs and SBE-FPs. While certain changes proposed in this rule may result in an increase in the proportion of applicants who are able to have their lawful presence electronically verified, we do not have a reliable way to quantify any potential increase.

¹²⁰ 42 U.S.C. 18083.

burden on all of these individuals impacted by the proposed changes in this rule will be 140,385 hours at a cost of \$3,254,124.

We received public comments on the estimates outlined in the proposed rule. As previously mentioned, we are updating the estimates in this final rule to reflect that we are not finalizing the proposed changes for Medicaid and CHIP and to reflect the most recent available data. The following is a summary of the comments we received and our responses.

Comment: One commenter agreed with CMS' assumption that regardless of where an individual applies, the burden of completing an application is essentially the same. The commenter further affirmed CMS' statement that, as required by the ACA, there is generally one application through which

individuals may apply for health coverage in a QHP through an Exchange and for other insurance affordability programs like a BHP.

Response: We agree that the burden of completing an application is essentially the same regardless of whether the individual was to apply directly with their BHP agency or with an Exchange. As we are not finalizing our proposals related to Medicaid and CHIP at this time, there will not be a change in the application process for Medicaid and CHIP.

Comment: One commenter stated that the changes in the rule “will not result in an increased application burden for impacted individuals.”

Response: We have considered this comment and continue to believe that the burden estimates associated with the policies in this final rule are reasonable

and in line with the burden estimates in the currently approved PRA package OMB Control Number 0938–1191. However, we acknowledge that the actual application burden may vary depending on the applicant. We are hopeful that the changes in this rule will not overburden individuals in the application process. Additionally, we clarify that as discussed earlier in this ICR section, we submitted the burden changes associated with this ICR to OMB for review under OMB Control Number 0938–1191.

After consideration of public comments, we are finalizing these burden estimates using the methodology as proposed with the most recent available data.

C. Burden Estimate Summary

TABLE 2: Summary of Final Burden Estimates

Regulation Section(s)/ ICR Provision	OMB Control No./ CMS-ID	Year	Number of Respondents	Number of Responses	Time per Response (hrs)	Total Time (hr)	Hourly Labor Rate (\$/hr)	Total Labor Cost (\$)	State Share (\$)	Total Beneficiary Cost (\$)
42 CFR 600.5 BHP System Changes	0938–1218 (CMS-10510)	2024	2	2	100	200	Varies	\$19,465	\$19,465	N/A
45 CFR 152.2 and 155.20 Exchange System Changes	0938-1191 (CMS-10440)	2024	19	19	100	1,900	Varies	\$184,918	\$175,185	N/A
42 CFR 600.5, 45 CFR 152.2 and 155.20 Streamlined Application Processing	0938-1191 (CMS-10440)	2025-2028	147,000	147,000	0.17	24,990	\$48.34	\$1,208,017	\$624,142	N/A
42 CFR 600.5, 45 CFR 152.2 and 155.20 Application Process for Applicants	0938-1191 (CMS-10440)	2025-2028	147,000	147,000	0.96	140,385	\$23.18	\$3,254,124	N/A	\$3,254,124

V. Regulatory Impact Analysis

A. Statement of Need

This final rule updates the definition of “lawfully present” in our regulations for certain CMS programs. This definition is currently used to determine whether a consumer is eligible to enroll in a QHP through an Exchange and for APTC and CSRs, and whether a consumer is eligible to enroll in a BHP in States that elect to operate a BHP. In addition, we are removing the exception

for DACA recipients from the definitions of “lawfully present” used to determine eligibility to enroll in a QHP through an Exchange or a BHP, and we are instead treating DACA recipients the same as other deferred action recipients. We are also finalizing some modifications to the “lawfully present” definition currently at 45 CFR 152.2 that incorporate additional detail, clarifications, and some technical modifications for the Exchanges and BHPs. We are not finalizing changes to

the Medicaid and CHIP programs with respect to the definitions of “lawfully present” at this time.

B. Overall Impact

We have examined the impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), Executive Order 14094 on Modernizing Regulatory Review (April

6, 2023), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Section 3(f) of Executive Order 12866, as amended by Executive Order 14094, defines a “significant regulatory action” as an action that is likely to result in a rule that may: (1) have an annual effect on the economy of \$200 million or more (adjusted every 3 years by the Administrator of OMB’s Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product), or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review will meaningfully further the President’s priorities or the principles set forth in the Executive order, as specifically authorized in a timely manner by the Administrator of OIRA.

Based on our estimates, OIRA has determined that this rulemaking is a significant regulatory action under section 3(f)(1) Executive Order 12866. Accordingly, we have prepared a regulatory impact analysis (RIA) that to the best of our ability presents the costs and benefits of the rulemaking. Therefore, OMB has reviewed these final regulations, and we have provided the following assessment of their impact.

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act, 5 U.S.C 801 *et seq.*), OIRA has determined that this rule does meet the criteria set forth in 5 U.S.C. 804(2). Accordingly, this rule has been submitted to each House of the Congress and to the Comptroller General a report containing a copy of the rule along with other specified information.

C. Detailed Economic Analysis

We prepared the economic impact estimates utilizing a baseline of “no action,” comparing the effect of the policies against not finalizing the rule at all.

This analysis reviews the amendments finalized under 42 CFR 600.5, and 45 CFR 152.2 and 155.20, which will add the following changes to the definition of lawfully present by making technical modifications to add the following new categories of noncitizens to this definition via this regulation:

- Those granted deferred action under DACA;
- Those granted employment authorization under 8 CFR 274a.12(c)(35) and (36);
- Additional Family Unity beneficiaries;
- Individuals with a pending application for adjustment of status, without regard to whether they have an approved visa petition;
- Children under 14 with a pending application for asylum, withholding of removal, or protection under CAT or children under 14 who are listed as a dependent on a parent’s pending application, without regard to the length of time that the application has been pending; and
- Individuals with an approved petition for SIJ classification.

The amendments finalized under 42 CFR 600.5 and 45 CFR 152.2 and 155.20 will also:

- Revise the description of noncitizens who are nonimmigrants to include all nonimmigrants who have a valid and unexpired status;
- Remove individuals with a pending application for asylum, withholding of removal, or CAT protection who are over age 14 from the definition, as these individuals are covered elsewhere; and

- Simplify the definition of noncitizens with an EAD to include all individuals granted employment authorization under 8 CFR 274a.12(c), as these individuals are already covered elsewhere, with the exception of a modest expansion to those granted employment authorization under 8 CFR 274a.12(c)(35) and (36), discussed earlier in this final rule.

In these respects, the technical modifications that do not relate to DACA recipients contained in this rule are generally technical changes or revisions to simplify verification processes, and therefore, we anticipate a modest impact on individuals’ eligibility as a result of these changes. We sought comment on estimates or data sources we could use to provide quantitative estimates for the benefit to these individuals. The proposed regulation also adds those granted deferred action under DACA to the definition. As noted further in this section, we estimate that 100,000 DACA recipients will enroll in health coverage and benefit from the proposals in this rule.¹²⁶ We are unable to quantify the number of additional Family Unity beneficiaries, individuals with a pending application for adjustment of status, children under age 14 with a pending application for asylum or related protection or children listed as dependents on a parent’s application for asylum or related protection, and individuals with approved petition for SIJ classification, or individuals granted employment authorization under 8 CFR 274a.12(c)(35) or (36) that could enroll in health coverage and benefit from the proposals in this rule, but we expect this number to be small. We sought comment on estimates or data sources we could use to provide quantitative estimates for the benefit to these individuals.

The changes to 42 CFR 600.5 will no longer exclude DACA recipients from the definition of “lawfully present” used to determine eligibility for a BHP in those States that elect to operate the program, if otherwise eligible. The changes to 45 CFR 152.2 and 155.20 will make DACA recipients eligible to enroll in a QHP through an Exchange, and for APTC and CSRs, if otherwise eligible. We present enrollment estimates for these populations in Table 3.

¹²⁶ The estimates in this RIA are based on DHS’ current implementation of the DHS DACA final rule, consistent with the court orders in *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022) and

Texas v. United States, 1:18–cv–0068 (S.D. Tex. Oct. 14, 2022), whereby DHS continues to accept the filing of both initial and renewal DACA requests and related applications for employment

authorization but is only processing renewal requests.

TABLE 3: Enrollment Estimates by Program, Coverage Years 2024 – 2028

	2024	2025	2026	2027	2028
BHP Enrollment	0	1,000	1,000	1,000	1,000
Exchange Enrollment	0	99,000	85,000	85,000	85,000
Total Enrollment	0	100,000	86,000	86,000	86,000

In the proposed rule, we estimated an enrollment impact of about 129,000.¹²⁷ We sought comment on these estimates and the assumptions and methodology used to calculate them. We are modifying the estimates in this final rule to reflect that we are not finalizing the proposed changes for Medicaid and CHIP and to reflect the States that will operate BHPs as of the effective date of this rule and the most recent available data on DACA recipients.^{128 129} To estimate the enrollment impact on the Exchanges and the BHPs, we started with an estimate of the DACA population. USCIS has estimated this count to be 545,000 persons as of September 30, 2023.¹³⁰ Based on a 2022 survey from the National Immigration Law Center,¹³¹ roughly 27 percent of DACA recipients were uninsured. In addition, we assume that approximately 70 percent of this group will opt to enroll in the Exchanges and BHPs. This results in an enrollment impact of about 100,000 persons for both the Exchanges and BHP.¹³² Based on internal

enrollment data, we estimate that 1,000 people will enroll in the BHPs in Minnesota and Oregon,¹³³ and the remaining 99,000 will enroll in the Exchanges.

The changes to 42 CFR 600.5 will no longer exclude DACA recipients from the definition of lawfully present used to determine eligibility for a BHP in those States that elect to operate the program, if otherwise eligible. There may be an effect on the BHP risk pool as a result of this change, as DACA recipients are relatively younger and healthier than the general population, based on USCIS data showing an average age of 30 years.^{134 135}

The changes to 45 CFR 152.2 and 155.20 will make DACA recipients eligible to enroll in a QHP through an Exchange, and for APTC and CSRs, if otherwise eligible. Similar to BHP eligibility, there may be a slight effect on the States' individual market risk pools. In addition, the modifications to the definition of "lawfully present" discussed in section II.B.2. of this rule will reduce burden on Exchanges and BHPs by allowing them to more frequently verify a noncitizen's status with a trusted source of data and to not have to request additional information from consumers. This change will promote simplicity and consistency in program administration, and further program integrity resulting from the increased reliance on a trusted Federal source of data. We sought comment on estimates or data sources we could use

to provide quantitative estimates for this benefit.

In addition, increased access to health coverage for DACA recipients and other noncitizens impacted by the proposals in this rule will ensure increased access to health care services for these populations, which in turn may decrease costs for emergency medical expenditures. Further, the policies in this rule will improve the health and well-being of many individuals that are currently without coverage, as having health insurance makes individuals healthier. Individuals without insurance are less likely to receive preventive or routine health screenings and may delay necessary medical care, incurring high costs and debts. In addition to the improvement of health outcomes, these individuals will be more productive and better able to contribute economically, as studies have found that workers with health insurance are estimated to miss 77 percent fewer workdays than uninsured workers.¹³⁶

We sought comment on these effects and any other potential benefits that may result from the proposals in this rule.

We received public comments on these effects. The following is a summary of the comments we received and our responses.

Comment: Commenters provided comments related to CMS' estimates for the number of individuals who will newly enroll in health insurance coverage through an Exchange, Medicaid, CHIP, or a BHP. Commenters agreed with CMS' assumption that no longer excluding DACA recipients from eligibility for APTC and CSRs would make such individuals more likely to enroll in coverage.

Commenters also offered details specific to their States and localities. One State department of insurance cited an estimate that of the 40,000 uninsured DACA recipients in California with incomes above the Medi-Cal threshold, 30,000 would enroll in subsidized

¹²⁷ See 88 FR 25327 through 25329 for a discussion of the proposed enrollment estimates by program.

¹²⁸ The Exchange enrollment estimates in this final rule have been updated to account for the DACA recipients that would have enrolled in Medicaid under the policies in the proposed rule but will now enroll in a QHP through an Exchange based on the finalized policies.

¹²⁹ The BHP enrollment estimates in the proposed rule assumed that New York and Minnesota would be States impacted by the BHP changes in the proposed rule. The BHP enrollment estimates in this final rule reflect that Minnesota and Oregon will be States impacted by the finalized BHP changes. The data on the number of DACA recipients, as well as the average age of DACA recipients and the percent of DACA recipients that are uninsured has been updated since the proposed rule. See 88 FR 25327 through 25329 for more detail on the estimates in the proposed rule.

¹³⁰ Count of Active DACA Recipients by Month of Current DACA Expiration as of September 30, 2023. U.S. Citizenship and Immigration Services. https://www.uscis.gov/sites/default/files/document/data/active_daca_recipients_fy23_q4.pdf.

¹³¹ National Immigration Law Center, 2023. DACA Recipients' Access to Health Care: 2023 Report. (2023). https://www.nilc.org/wp-content/uploads/2023/05/NILC_DACA-Report_2023.pdf.

¹³² This enrollment estimate does not include DACA recipients who are now expected to be covered under New York's Essential Plan Expansion, effective April 1, 2024, as they will not be impacted by this final rule. For more information, see <https://www.cms.gov/marketplace/>

[states/section-1332-state-innovation-waivers#To%20view%20New%20York's%20application%20materials,%20please%20visit%20the%20New%20York%20waiver%20section%20of%20this%20webpage%20below](https://www.uscis.gov/sites/default/files/document/data/active_daca_recipients_fy23_q4.pdf).

¹³³ Minnesota's BHP began January 1, 2015. Oregon's BHP is projected to begin July 1, 2024, and is pending CMS approval. For more information, see <https://www.medicaid.gov/basic-health-program/index.html>.

¹³⁴ USCIS. Count of Active DACA Recipients by Month of Current DACA Expiration as of September 30, 2023. https://www.uscis.gov/sites/default/files/document/data/active_daca_recipients_fy23_q4.pdf.

¹³⁵ In the proposed rule, the available USCIS data at the time showed an average age of 29 years. We sought comment on any estimates or data sources we could use to provide quantitative estimates for the associated effects, including benefit to these individuals. See 88 FR 25328.

¹³⁶ Dizioli, Allan and Pinheiro, Roberto. (2016). *Health Insurance as a Productive Factor*. Labour Economics. <https://doi.org/10.1016/j.labeco.2016.03.002>.

coverage through Covered California.¹³⁷ One commenter agreed with CMS' assumption that none of the proposed technical changes to the definition of "lawfully present" would result in a significant number of individuals gaining coverage. Nevertheless, the commenter believed that such changes were still important given their potential to significantly benefit impacted individuals and their families, often at very vulnerable points in their lives.

Response: These enrollment projections align with our projections as presented in the proposed rule and in this final rule. As previously stated, we are not finalizing the proposed changes for Medicaid and CHIP at this time, and therefore the enrollment projections in this final rule only reflect the BHP and Exchange enrollment impact. Additionally, we agree that the technical changes to the definition of "lawfully present" are important due to the potential benefit to the individuals and families impacted by these changes.

Comment: Commenters provided detailed analysis of the benefits they expected this rule would convey. These benefits, discussed in detail in section II.B.1., include increased access to care, improved health outcomes, reduced disparities, decreased reliance on uncompensated care and emergency department care, and strengthened workforce, education systems, and local economies. Many commenters pointed out how the provisions of this rule will benefit not only DACA recipients and other impacted noncitizens, but their families and communities as well. Commenters further noted that they believed this rule would improve individual market Exchange risk pools, due to DACA recipients' age and health status as compared to current Exchange enrollees, and that improvements to the risk pool could result in cost savings for health insurance issuers in the form of lower claims costs and for individuals in the form of lower health insurance premiums. One commenter, a nonprofit organization, noted that after New York and California established State-funded Medicaid options for DACA recipients, DACA-eligible individuals were 4 percent more likely to report having health insurance in those States as compared to other States that did not expand eligibility, implying that

expanding the insurance affordability programs available to DACA recipients will result in further coverage gains.

Response: We agree that these are potential benefits of the policies finalized in this rule. We appreciate the insight from commenters that the policies in this rule will also benefit the families and communities of the DACA recipients impacted by the rule. We agree that it is possible that this rule could improve the Exchange risk pools, which could result in cost savings for issuers and individuals due to lower claims costs and premiums. We further appreciate the supporting data regarding potential coverage gains in Exchange programs in specific States.

Comment: Commenters, including State government agencies, noted that the proposed changes would result in the more efficient operation of CMS programs. Some commenters specifically stated that changes to the definition of "lawfully present" could streamline practices for caseworkers and eligibility workers at States and agencies.

Response: We agree that the changes we are finalizing will enable Exchanges and BHPs to more easily verify applicants' lawful presence. This should both simplify operations and decrease the proportion of cases in which caseworkers and eligibility workers need to ask consumers to provide additional information.

After consideration of public comments, we are finalizing these estimates using the calculation methodology as proposed with modifications to reflect that we are not finalizing the proposed changes for Medicaid and CHIP and to reflect the States that will operate BHPs as of the effective date of this rule and the most recent available data on DACA recipients.

1. Costs

The changes to 42 CFR 600.5 will treat DACA recipients the same as other recipients of deferred action, who are lawfully present under the definition used to determine eligibility for BHP, if otherwise eligible. The costs to States as a result of information collection changes associated with this proposal, which include initial system changes, costs to develop and update each State's eligibility systems and verification processes, and application processing costs to assist individuals with processing their applications, are discussed in sections IV.B.2. and IV.B.3. of this final rule, and the costs to consumers as a result of increased information collections associated with this policy, which include applying for

BHP and submitting additional information to verify their lawful presence, if necessary, are discussed in section IV.B.4. of this final rule. As previously mentioned, we updated the cost estimates discussed in sections IV.B.2., IV.B.3., and IV.B.4. of this final rule to reflect the policies being finalized in this rule and updated data since publishing the proposed rule. States operating a BHP may choose to provide additional outreach to those eligible. In the proposed rule, we included costs related to the fact that a potential increase in the number of enrollees may increase Federal payments to a State's BHP trust fund. For further information, please see the "Transfers" section.

The changes to 45 CFR 152.2 and 155.20 will make DACA recipients eligible to enroll in a QHP through an Exchange, and for PTC and CSRs, if otherwise eligible. The costs to State Exchanges not on the Federal platform and the Federal Government as a result of information collection changes, which include initial system changes costs to develop and update each State's eligibility systems and verification processes and application processing costs to assist individuals with processing their applications, are discussed in section IV.B.3. of this final rule and the costs to consumers as a result of increased information collections associated with this policy, which include applying for Exchange coverage and submitting additional information to verify their lawful presence, if necessary, are discussed in section IV.B.4. of this final rule. This change may result in slightly increased traffic during open enrollment for the 2025 coverage year and beyond. Further, there may be a potential administrative burden on States and regulated entities that choose to conduct outreach and education efforts to ensure that consumers, agents, brokers, and assisters are aware of the changes proposed in this rule associated with the updated definitions of "lawfully present" for the purposes of the Exchanges and BHP. We clarify that CMS does not require States to fund additional outreach and enrollment activities as a result of this rule. Because SBE-FPs will not be required to incur costs related to implementation, application processing, or outreach and education, we estimate no increased costs for States operating SBE-FPs as a result of this rule. We also note that both State Exchanges not on the Federal platform and SBE-FPs may see an increase in the user fees they collect from issuers as a result of increased

¹³⁷ Dietz, Miranda; Kadiyala, Srikanth, and Lucia, Laurel; "Extending Covered California subsidies to DACA recipients would fill coverage gap for 40,000 Californians"; UC Berkeley Labor Center; June 6, 2023; https://laborcenter.berkeley.edu/extending-covered-california-subsidies-to-daca-recipients-would-fill-coverage-gap-for-40000-californians/#_ftn3.

enrollment due to the policies finalized in this rule. We anticipate that the costs of additional outreach and education that States may choose to pursue would be minimal and sought comment on that assumption.

Whether the effects discussed above as “costs” are appropriately categorized depends on societal resource use. To the extent that resources (for example, labor and equipment associated with provision of medical care) are used differently in the presence of this final rule than in its absence, then the estimated effects are indeed costs. If resource use remains the same but different entities in society pay for them, then the estimated effects would instead be transfers. We requested comment that would facilitate refinement of the effect categorization.

We received public comments on these proposals. The following is a summary of the comments we received and our responses.

Comment: Commenters noted that this regulatory change will enable States that currently use State funds to cover DACA recipients to re-allocate State funding towards covering other uninsured individuals if DACA recipients are able to newly access Federally-funded QHPs. Commenters noted that 11 States and the District of Columbia currently use State-only funds to cover all income-eligible children, regardless of lawful presence status, and that certain additional States also cover pregnant and postpartum individuals. Commenters noted that New York and California currently use State funding to provide coverage to DACA recipients.

One commenter, a State government agency, noted that California currently expends approximately \$13 million out of the State’s General Fund to cover individuals who do not currently meet CMS’ definitions of “lawfully present,” and that considering DACA recipients “lawfully present” has the potential to significantly lower or offset funds currently expended for health coverage for DACA recipients.

Response: We appreciate commenters sharing information about how States may otherwise cover this population. As previously mentioned, we are not finalizing the proposed changes for Medicaid and CHIP. However, State funds used to cover DACA recipients eligible for Medicaid/CHIP may be impacted if individuals currently covered under these State-funded programs choose to enroll in QHP or BHP coverage.

Comment: One commenter agreed with CMS’ assumption that costs for outreach and education would be “minimal” since the State already

conducts robust outreach during its Open Enrollment Period. The commenter stated that they agreed that costs for outreach and education would be “minimal” if supported by Federal financial participation and State funding.

Response: We agree that State Exchanges not on the Federal platform generally conduct robust outreach during their Open Enrollment Periods. We are committed to conducting outreach and education to reach individuals impacted by this rule to educate them that they may be newly eligible for health insurance affordability programs.

Comment: Commenters stated concerns about the costs associated with this rule. Commenters noted that this rule will increase costs to taxpayers and stated that illegal immigration is a net cost to taxpayers of about \$151 billion per year, further alleging that illegal immigration costs each American taxpayer \$1,156 per year. The commenter also highlighted that the U.S. government spends \$2.3 trillion annually on Federal medical expenditures, and that it is “impossible to estimate how many illegal aliens participate in the ACA now, and what level of Federal subsidy they receive,” but that they believe this rule will place an “even greater burden” on taxpayers. Commenters stated concerns that this rule will drive the United States further into debt.

Response: We acknowledge commenters’ concerns about the costs on the Federal government and Federal taxpayers associated with this rule. We believe the benefits of this rule outweigh the potential negative impacts identified by commenters. The benefits discussed in section V.C. of this final rule, including increased health coverage and a reduction in uncompensated care costs; ensuring equitable access to coverage across all populations served by the programs addressed in this rule, including members of underserved communities; and potential impacts on the risk pool, are important to balance against the costs of the rule identified in this section. Moreover, as clarified previously in this final rule, this rule aims to establish eligibility criteria for Exchanges and BHPs and does not address immigration policy, including DHS’ DACA final rule. As discussed previously in this rule, individuals must have their immigration status or category electronically verified by DHS to enroll in Exchange or BHP coverage, which ensures that noncitizens without an eligible immigration status or category are not able to enroll. We

therefore decline to make any changes in response to these comments.

Comment: One commenter associated with an academic institution stated concerns that allowing DACA recipients to access subsidized QHPs through Exchanges would increase the prices for non-subsidized health insurance. The commenter cited a JAMA Network Open study that found that between 2011 and 2021, median unsubsidized premium for individual market plans rose by 59 percent. The commenter stated that they saw “little reason to expect that health care unaffordability will slow as government subsidies continue to grow.” The commenter further hypothesized that subsidized health insurance programs make unsubsidized health insurance unaffordable because “these programs require buy-in from powerful health care industry groups.” They stated that taxpayer money is being channeled to contribute to industry groups’ bottom lines, which inflates the cost of unsubsidized health insurance.

Response: We do not agree that allowing DACA recipients to access subsidized QHPs through Exchanges would increase the prices for unsubsidized health insurance. On the contrary, as discussed in section V.C. of this final rule, DACA recipients are generally younger than the average Exchange enrollee and comparably healthy to the general population, and their enrollment has the potential to improve the Exchange risk pool and lower health insurance premiums. Additionally, due to the medical loss ratio (MLR) requirements for issuers participating on the individual market Exchanges, if an issuer spends less than 80 percent of premiums on medical care and efforts to improve quality of care, it must refund this money to enrollees. These MLR requirements prevent excess contributions to “industry groups’ bottom lines” and protects subsidized and unsubsidized consumers alike from premiums that are too high and are not spent on medical care and quality initiatives.

Comment: Commenters believe that U.S. tax dollars should not be spent on providing benefits, including health care benefits, to DACA recipients or other noncitizens. Commenters stated that they already face high tax burdens, and that tax revenue should be directed towards meeting the health care needs of other vulnerable groups, including senior citizens, members of the military, and veterans. Commenters also stated that the U.S. government already spends too much money, is \$31 trillion in debt, and that our system is on the verge of bankruptcy. Commenters believe that

this proposed rule sets a bad precedent for expanding health care to individuals who are physically present in the United States without a valid immigration status, and that we cannot both be fiscally responsible and provide health care to noncitizens, citing Illinois as an example. Some commenters stated their belief that immigration reform is needed to stop this process from expanding to other immigrant populations. One commenter stated their belief that the parents of DACA recipients should be responsible for their children's wellbeing and provide a specific plan for obtaining independence, rather than the U.S. government being held responsible and providing government funded programs. Another commenter believes that there should be more accountability for those that use government sponsored public benefit programs.

Response: Although some of these comments are out of scope, we acknowledge the concerns noted by some commenters about the allocation of U.S. tax dollars and would like to clarify that allocating tax dollars is the purview of the Congress. As previously mentioned, the purpose of this final rule is to establish eligibility requirements for Exchanges and BHPs rather than dictate where tax dollars are directed. Moreover, as mentioned previously in this final rule, noncitizens must have their immigration status or category electronically verified by DHS to enroll in the specified insurance affordability

programs, which ensures that noncitizens without an eligible immigration status or category are not able to enroll. Additionally, we would like to emphasize that immigration reform and parental responsibility are outside of our purview and the scope of this rule. Finally, we are engaged in many accountability initiatives for our programs, including APTC and CSR audits, which verify the enrollment of qualified individuals and the subsidies they receive. We welcome suggestions from interested parties regarding accountability for CMS programs.

After consideration of public comments, we are finalizing these cost estimates as discussed in section IV.B of this final rule.

2. Transfers

Transfers are payments between persons or groups that do not affect the total resources available to society. They are a benefit to recipients and a cost to payers.

The changes to 42 CFR 600.5 will treat DACA recipients the same as other recipients of deferred action, who are lawfully present under the definition used to determine eligibility for BHP, if otherwise eligible. Due to a potential increase in the number of enrollees, there may be an increase in Federal payments to a State's BHP trust fund, which represents a transfer.

We discuss how we calculated our BHP enrollment estimates earlier in this RIA. Federal funding for a BHP under section 1331(d)(3)(A) of the ACA is

based on the amount of the PTC allowed and payments to cover required CSRs that would have been provided for the fiscal year to eligible individuals enrolled in BHP standard health plans in the State if such eligible individuals were allowed to enroll in a QHP through an Exchange.¹³⁸ These funds are paid to trusts established by the States and dedicated to the BHP, and the States then administer the payments to standard health plans within the BHP. In the proposed rule, to calculate costs, we used 2022 data from USCIS to determine the average age of a DACA recipient, which was 29, and we used PTC data to determine the average PTC for a 29-year-old, which was estimated to be \$289 per month, and multiplied this by 12 months per year and by the projected number of enrollees per year to arrive at annual costs. We are modifying the costs in this final rule to use updated data.¹³⁹ Therefore, to calculate costs, we use 2023 data from USCIS to determine the average age of a DACA recipient, which is 30, and we use PTC data to determine the average PTC for a 30-year-old, which is estimated to be \$274 per month, and multiplied this by 12 months per year and by the projected number of enrollees eligible for PTC to arrive at annual costs.¹⁴⁰ Our estimates for BHP expenditures as a result of the policies in this rule are shown in Table 4. We sought comment on these estimates and the assumptions and methodology used to calculate them.

TABLE 4: BHP Projected Expenditures, FY 2024 – 2028

	2024	2025	2026	2027	2028
Expenditures	\$0	\$5,000,000	\$5,000,000	\$5,000,000	\$5,000,000

The policies at 45 CFR 152.2 and 155.20 will generate a transfer from the Federal Government to consumers in the form of increased PTC payments due to individuals who will be eligible for Exchange coverage and APTC based on the policies in this final rule.

We discuss how we calculated our Exchange enrollment estimates earlier in this RIA. In the proposed rule, to

calculate costs, we used 2022 data from USCIS to determine the average age of a DACA recipient, which was 29. For 2024, the average PTC for a 29-year-old was estimated to be \$289 per month. We multiplied this by 12 months per FY and by the number of enrollees to arrive at annual costs. We are modifying the costs in this final rule to use updated data. Therefore, to calculate costs, we

use 2023 data from USCIS to determine the average age of a DACA recipient, which is 30. For 2025, the average PTC for a 30-year-old is estimated to be \$274 per month, and we multiplied this by 12 months per FY and by the projected number of enrollees eligible for PTC to

¹³⁸ On October 11, 2017, the Attorney General of the United States provided HHS and the Department of the Treasury (the Departments) with a legal opinion indicating that the permanent appropriation at 31 U.S.C. 1324, from which the Departments had historically drawn funds to make CSR payments, cannot be used to fund CSR payments to insurers. In light of this opinion—and in the absence of any other appropriation that could be used to fund CSR payments—HHS directed CMS to discontinue CSR payments to issuers until the

Congress provides for an appropriation. See <https://www.hhs.gov/sites/default/files/csr-payment-memo.pdf> for more information. In the absence of a Congressional appropriation for Federal funding for CSR payments, we cannot provide States with a Federal payment attributable to CSRs that would have been paid on behalf of BHP enrollees had they been enrolled in a QHP through an Exchange.

¹³⁹ These costs also reflect that the two States that will operate a BHP when these policies go into

effect are Minnesota and Oregon rather than Minnesota and New York as anticipated in the proposed rule.

¹⁴⁰ The estimate for FY 2025 only includes 11 months, assuming these individuals will enroll in a BHP beginning November 1, 2024, as the BHPs included in this analysis have, or are anticipated to have, continuous enrollment. We project no change in Federal BHP expenditures for FY 2024 as this rule will not take effect until FY 2025.

arrive at annual costs.¹⁴¹ These costs are projected to increase using the trends

assumed in the President’s FY 2025 Budget.
We present these estimates in Table 5 and sought comment on the estimates

and the assumptions and methodology used to calculate them.

TABLE 5: Exchange Projected Expenditures, FY 2024 – 2028

	FY 2024	FY 2025	FY 2026	FY 2027	FY 2028
PTC Expenditures	\$0	\$240,000,000	\$300,000,000	\$290,000,000	\$300,000,000

We did not receive public comments on the transfers estimated in this rule specific to PTC expenditures, and therefore, we are finalizing these estimates with modifications as described previously in this section.

3. Regulatory Review Cost Estimation

If regulations impose administrative costs on private entities, such as the time needed to read and interpret the proposed rule, we estimate the cost associated with regulatory review. There is uncertainty involved with accurately quantifying the number of entities that would review the rule. However, for the purposes of this final rule, we assume that the total number of unique commenters on the proposed rule (284) will be the number of reviewers of this final rule.

Using the median wage information from the BLS for medical and health service managers (Code 11–9111), we estimate that the cost of reviewing this rule is \$106.42 per hour, including overhead and fringe benefits. Assuming an average reading speed of 250 words per minute, we estimate that it will take approximately 3.3 hours for each individual to review the entire final rule (approximately 49,000 words/250 words per minute = 196 minutes). Therefore, we estimate that the total one-time cost of reviewing this regulation is approximately \$99,737 ($[\$106.42 \times 3.3$

hours per individual review] $\times$ 284 reviewers).

D. Regulatory Alternatives Considered

In developing this rule, we considered not proposing or finalizing the technical and clarifying changes to our definitions of “lawfully present,” discussed in section II.B.2 of the proposed rule, as these changes are expected to impact fewer individuals than the proposal to treat DACA recipients the same as other recipients of deferred action. However, in our comprehensive review of current CMS definitions of “lawfully present,” we determined that the proposed and finalized changes discussed in section II.B.2 of this final rule will simplify verification of applicants’ immigration status or category, our eligibility determination processes and increase efficiencies for individuals seeking health coverage and State and Federal entities administrating insurance affordability programs. Additionally, the small number of individuals included in the proposed eligibility categories will benefit from increased access to health coverage through the Exchange or a BHP.

In the proposed rule, we sought comments on these proposals, and we respond to those comments in the associated preamble sections of this final rule. As discussed in those preamble sections, we are finalizing the

Exchange and BHP policies as discussed in the associated sections of this final rule, and not finalizing the Medicaid and CHIP proposals at this time.

E. Accounting Statement and Table

As required by OMB Circular A–4 (available at https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf), we have prepared an accounting statement in Table 6 showing the classification of the impact associated with the provisions of the final rule. We prepared these impact estimates utilizing a baseline of “no action,” comparing the effect of the proposals against not proposing the rule at all.

The final rule finalizes standards for programs that will have numerous effects, including allowing DACA recipients to be treated the same as other deferred action recipients for specific health insurance affordability programs, and increasing access to affordable health insurance coverage. The effects in Table 6 reflect a qualitative assessment of impacts and the estimated direct monetary costs and transfers resulting from the provisions of the final rule for the Federal Government, State Exchanges, BHPs, and consumers.

¹⁴¹ The estimate for FY 2025 only includes 9 months, assuming these individuals will enroll in a QHP beginning January 1, 2025. It is possible that

individuals impacted by this rule could enroll in coverage effective December 1, 2024, but we do not have a reliable way to estimate how many

individuals would enroll with that coverage effective date. Therefore, we project no change in PTC expenditures in FY 2024.

TABLE 6: Accounting Table

Benefits:				
Qualitative:				
• Additional enrollment in the BHP, anticipated to be 1,000 individuals annually beginning in 2025. • Additional enrollment in the Exchanges, which will be subsidized depending on individuals' household incomes, anticipated to be 99,000 individuals in 2025 and 85,000 individuals annually beginning in 2026. • Increased access to health coverage for DACA recipients and certain other noncitizens, which will mitigate existing disparities in access to care, which in turn may also decrease costs for emergency medical expenditures. • Improved health and well-being of many DACA recipients and certain other noncitizens currently without health care coverage. • Greater economic contribution and productivity of DACA recipients and certain other noncitizens from improving their health outcomes. • Reduced burden on Exchanges and BHPs to determine applicants' immigration statuses.				
Costs:	Estimate	Year Dollar	Discount Rate	Period Covered
Annualized Monetized (\$/year)	\$3.52 Million	2024	7 percent	2024-2028
	\$3.59 Million	2024	3 percent	2024-2028
Quantitative:				
• System changes costs estimated at \$19,465 in 2024 for States that operate a BHP to develop and code changes to their eligibility systems and verification processes to include the categories of noncitizens impacted by this final rule for BHP eligibility. • System changes costs estimated at \$175,185 for State Exchanges not on the Federal platform and \$9,733 for the Federal Government in 2024 to develop and code changes to each Exchange's eligibility systems and verification processes to include the categories of noncitizens impacted by this final rule for Exchange and Exchange-related subsidy eligibility. • Application processing costs estimated at \$624,142 for States (excluding States operating SBE-FPs) and \$583,875 for the Federal Government per year starting in 2025 to assist individuals impacted by this final rule with processing their applications. • Costs to individuals impacted by the proposals in this rule of \$3,254,124 per year starting in 2025 to apply for BHP or Exchange health coverage, including costs to submit additional information to verify their lawful presence status if it is unable to be verified electronically through the application.				
Transfers:	Estimate	Year Dollar	Discount Rate	Period Covered
Annualized Monetized (\$/year)	\$220.84 Million	2024	7 percent	2024-2028
	\$226.05 Million	2024	3 percent	2024-2028
Quantitative:				
• Increased Federal BHP expenditures of \$5 million annually beginning in 2025 due to increased enrollment as a result of changes to the definition of "lawfully present" for purposes of a BHP finalized in this rule. • Increased PTC expenditures from the Federal Government to individuals of \$240 million in 2025, \$300 million in 2026, \$290 million in 2027, and \$300 million in 2028 due to increased enrollment and subsidy eligibility as a result of the changes to the definition of "lawfully present" for purposes of the Exchanges finalized in this rule.				

F. Regulatory Flexibility Act (RFA)

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, we estimated that small businesses, nonprofit organizations, and small governmental jurisdictions are small entities as that term is used in the RFA.

The great majority of hospitals and most other health care providers and suppliers are small entities, either because they are nonprofit organizations, or they meet the Small Business Administration (SBA) definition of a small business (having revenues of less than \$8.0 million to \$41.5 million in any 1 year). Individuals

and States are not included in the definition of a small entity.

For purposes of the RFA, we believe that health insurance issuers and group health plans will be classified under the North American Industry Classification System (NAICS) code 524114 (Direct Health and Medical Insurance Carriers). According to SBA size standards, entities with average annual receipts of

\$47 million or less would be considered small entities for these NAICS codes. Issuers could possibly be classified in 621491 (HMO Medical Centers) and, if this is the case, the SBA size standard would be \$44.5 million or less.¹⁴² We believe that few, if any, insurance companies underwriting comprehensive health insurance policies (in contrast, for example, to travel insurance policies or dental discount policies) fall below these size thresholds. Based on data from medical loss ratio (MLR) annual report submissions for the 2021 MLR reporting year, approximately 87 out of 483 issuers of health insurance coverage nationwide had total premium revenue of \$47 million or less.¹⁴³ This estimate may overstate the actual number of small health insurance issuers that may be affected, since over 77 percent of these small issuers belong to larger holding groups, and many, if not all, of these small companies are likely to have non-health lines of business that will result in their revenues exceeding \$47 million.

In this final rule, we are finalizing standards for eligibility for Exchange enrollment, APTC and CSRs, and BHP enrollment. Because we believe that insurance firms offering comprehensive health insurance policies generally exceed the size thresholds for “small entities” established by the SBA, we did not believe that an initial regulatory flexibility analysis is required for such firms and therefore do not believe a final regulatory flexibility analysis is required. Furthermore, the policies related to BHPs involve State governments, but as States do not constitute small entities under the statutory definition, an impact analysis for that provision is not required under the RFA.

As its measure of significant economic impact on a substantial number of small entities, HHS uses a change in revenue of more than three to five percent. We do not believe that this threshold will be reached by the requirements in this final rule. Therefore, the Secretary has certified that this final rule will not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the

RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. While this rule is not subject to section 1102 of the Act, we have determined that the final rule will not adversely affect small rural hospitals. Therefore, the Secretary has certified that this final rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

G. Unfunded Mandates Reform Act (UMRA)

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2023, that threshold is approximately \$177 million. Based on information currently available, we expect the combined impact on State, local, or Tribal governments and the private sector does not meet the UMRA definition of unfunded mandate.

H. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it issues a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications.

While developing this rule, we attempted to balance States’ interests in running their own Exchanges and BHPs with CMS’ interest in establishing a consistent definition of “lawfully present” for use in eligibility determinations across our programs, to the extent possible. We also attempted to balance States’ interests with the overall goals of the ACA, as well as the goals and provisions of the DHS DACA final rule. By doing so, we complied with the requirements of E.O. 13132.

In our view, while the provisions of this final rule related to the Exchanges (45 CFR 152.2 and 155.20) and BHPs (42 CFR 600.5) will not impose any requirement costs on State and local governments that do not operate their own Exchanges, or that operate SBE-FPs, this regulation has federalism implications for other States. State Exchanges not on the Federal platform and BHPs will be required to update their eligibility systems to accurately evaluate applicants’ lawful presence. State Exchanges not on the Federal platform and BHPs may wish to conduct

outreach to groups such as DACA recipients who will newly be considered lawfully present under the rule. By our estimate, these requirements do not impose substantial direct costs on the affected States, which in any event have chosen to operate their own Exchanges and eligibility and enrollment platforms, or the optional BHP. After establishment, Exchanges must be financially self-sustaining, with revenue sources at the discretion of the State. Current State Exchanges charge user fees to issuers, and as indicated earlier, a BHP is optional for States. Therefore, if implemented in a State, a BHP provides access to a pool of Federal funding that will not otherwise be available to the State. States that do not have a BHP and do not operate their own Exchange, including SBE-FP States, are not expected to incur any costs as a result of this rule.

We included policies in the proposed rule related to Medicaid and CHIP that might have imposed substantial direct costs on State governments. However, as discussed earlier in this rule, we are not finalizing those provisions at this time and therefore they do not have federalism implications.

Chiquita Brooks-LaSure, Administrator of the Centers for Medicare & Medicaid Services, approved this document on April 15, 2024.

List of Subjects

42 CFR Part 435

Aid to Families with Dependent Children, Grant programs-health, Medicaid, Reporting and recordkeeping requirements, Supplemental Security Income (SSI), Wages.

42 CFR Part 457

Administrative practice and procedure, Grant programs-health, Health insurance, Reporting and recordkeeping requirements.

42 CFR Part 600

Administrative practice and procedure, Health care, health insurance, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

45 CFR Part 152

Administrative practice and procedure, Health care, Health insurance, Penalties, Reporting and recordkeeping requirements.

45 CFR Part 155

Administrative practice and procedure, Advertising, Aged, Brokers, Citizenship and naturalization, Civil

¹⁴² Available at <https://www.sba.gov/document/support-table-size-standards>.

¹⁴³ Available at <https://www.cms.gov/CCIIO/Resources/Data-Resources/mlr.html>.

rights, Conflicts of interests, Consumer protection, Grant programs-health, Grants administration, Health care, Health insurance, Health maintenance organizations (HMO), Health records, Hospitals, Indians, Individuals with disabilities, Intergovernmental relations, Loan programs-health, Medicaid, Organization and functions (Government agencies), Public assistance programs, Reporting and recordkeeping requirements, Sex discrimination, State and local governments, Taxes, Technical assistance, Women, Youth.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below.

Title 42—Public Health

PART 435—ELIGIBILITY IN THE STATES, DISTRICT OF COLUMBIA, THE NORTHERN MARIANA ISLANDS, AND AMERICAN SAMOA

■ 1. The authority citation for part 435 continues to read as follows:

Authority: 42 U.S.C. 1302.

PART 435 [Amended]

- 2. Part 435 is amended by—
- a. Removing all instances of the words “non-citizen” and “non-citizens” and adding in their places the words “noncitizen” and “noncitizens”, respectively; and
- b. Removing all instances of the words “Qualified Non-citizen” and adding in their place the words “qualified noncitizen”.
- 3. Section 435.4 is amended by revising the definition of “Qualified noncitizen” to read as follows:

§ 435.4 Definitions and use of terms.

* * * * *

Qualified noncitizen means:

- (1) a “Qualified alien,” as defined in 8 U.S.C. 1641(b) and (c); who is:
 - (i) A noncitizen who is lawfully admitted for permanent residence under the Immigration and Nationality Act [8 U.S.C. 1101 *et seq.*];
 - (ii) A noncitizen who is granted asylum under section 208 of such Act [8 U.S.C. 1158];
 - (iii) A refugee who is admitted to the United States under section 207 of such Act [8 U.S.C. 1157];
 - (iv) A noncitizen who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C. 1182(d)(5)] for a period of at least 1 year;

(v) A noncitizen whose deportation is being withheld under section 243(h) of such Act [8 U.S.C. 1253] (as in effect immediately before the effective date of section 307 of division C of Public Law 104–208) or section 241(b)(3) of such Act [8 U.S.C. 1231(b)(3)] (as amended by section 305(a) of division C of Public Law 104–208);

(vi) A noncitizen who is granted conditional entry pursuant to section 203(a)(7) of such Act [8 U.S.C. 1153(a)(7)] as in effect prior to April 1, 1980;

(vii) A noncitizen who is a Cuban and Haitian entrant (as defined in section 501(e) of the Refugee Education Assistance Act of 1980);

(viii) An individual who lawfully resides in the United States in accordance with a Compact of Free Association referred to in 8 U.S.C. 1612(b)(2)(G);

(ix) A noncitizen who—

(A) Has been battered or subjected to extreme cruelty in the United States by a spouse or a parent, or by a member of the spouse or parent’s family residing in the same household as the alien and the spouse or parent consented to, or acquiesced in, such battery or cruelty, but only if (in the opinion of the agency providing such benefits) there is a substantial connection between such battery or cruelty and the need for the benefits to be provided; and

(B) Has been approved or has a petition pending which sets forth a prima facie case for—

(1) Status as a spouse or a child of a United States citizen pursuant to clause (ii), (iii), or (iv) of section 204(a)(1)(A) of the Immigration and Nationality Act [8 U.S.C. 1154(a)(1)(A)(ii), (iii), (iv)];

(2) Classification pursuant to clause (ii) or (iii) of section 204(a)(1)(B) of the Act [8 U.S.C. 1154(a)(1)(B)(ii), (iii)];

(3) Suspension of deportation under section 244(a)(3) of the Immigration and Nationality Act [8 U.S.C. 1254(a)(3)] (as in effect before the title III—A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996);

(4) Status as a spouse or child of a United States citizen pursuant to clause (i) of section 204(a)(1)(A) of such Act [8 U.S.C. 1154(a)(1)(A)(i)], or classification pursuant to clause (i) of section 204(a)(1)(B) of such Act [8 U.S.C. 1154(a)(1)(B)(i)]; or

(5) Cancellation of removal pursuant to section 240A(b)(2) of such Act [8 U.S.C. 1229b(b)(2)];

(x) A noncitizen—

(A) Whose child has been battered or subjected to extreme cruelty in the United States by a spouse or a parent of the alien (without the active participation of the alien in the battery or cruelty), or by a member of the spouse or parent’s family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, and the alien did not actively participate in such battery or cruelty, but only if (in the opinion of the agency providing such benefits) there is a substantial connection between such battery or cruelty and the need for the benefits to be provided; and

(B) Who meets the requirement of 8 U.S.C. 1641(c)(1)(B);

(xi) A noncitizen child who—

(A) Resides in the same household as a parent who has been battered or subjected to extreme cruelty in the United States by that parent’s spouse or by a member of the spouse’s family residing in the same household as the parent and the spouse consented or acquiesced to such battery or cruelty, but only if (in the opinion of the agency providing such benefits) there is a substantial connection between such battery or cruelty and the need for the benefits to be provided; and

(B) Who meets the requirement of 8 U.S.C. 1641(c)(1)(B); or

(xii) A noncitizen who has been granted nonimmigrant status under section 101(a)(15)(T) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(T)) or who has a pending application that sets forth a prima facie case for eligibility for such nonimmigrant status.

(2) Noncitizens who are treated as refugees under other Federal statutes:

(i) Noncitizens who are victims of a severe form of trafficking in persons, as described in 22 U.S.C. 7105(b)(1)(C), or who are classified as nonimmigrants under section 101(a)(15)(T)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(T)(ii)), pursuant to 22 U.S.C. 7105(b)(1)(A);

(ii) Iraqi and Afghan special immigrants, as described in Public Law 110–181, section 1244(g) (2008), Public Law 111–8, section 602(b)(8) (2009), Public Law 111–118, section 8120(b) (2010), and Public Law 113–291, section 1227 (2014);

(iii) Amerasian immigrants, described in Public Law 100–202, section 101(e) (8 U.S.C. 1101 note);

(iv) Certain Afghan parolees, in accordance with Section 2502 of Public Law 117–43, as amended; and

(v) Certain Ukrainian parolees, in accordance with Section 401 of Public Law 117–128, as amended.

* * * * *

■ 4. Section 435.406 is amended by—

■ a. Removing all instances of the words “non-citizen” and “non-citizens” and adding in their places the words “noncitizen” and “noncitizens”, respectively; and

■ b. Removing all instances of the words “Qualified Non-Citizen” and adding in its place the words “qualified noncitizen”.

■ c. Revising paragraph (a)(2)(i).

The revision reads as follows:

§ 435.406 Citizenship and noncitizen eligibility.

(a) * * *

(2)(i) Except as specified in 8 U.S.C. 1612(b)(1) (permitting States an option with respect to coverage of certain qualified noncitizens), qualified noncitizens as described in 42 CFR 435.4 (including qualified noncitizens subject to the 5-year bar) who have provided satisfactory documentary evidence of qualified noncitizen status, which status has been verified with the Department of Homeland Security (DHS) under a declaration required by section 1137(d) of the Act that the applicant or beneficiary is a noncitizen in a satisfactory immigration status.

* * * * *

PART 457—ALLOTMENTS AND GRANTS TO STATES

■ 5. The authority citation for part 457 continues to read as follows:

Authority: 42 U.S.C. 1302.

■ 6. Section 457.320 is amended by—

■ a. Removing all instances of the words “qualified aliens” and adding in its place the words “qualified noncitizens”;

■ b. Revising paragraphs (b)(6); and

■ c. Adding paragraph (c).

The revision and addition read as follows:

§ 457.320 Other eligibility standards.

* * * * *

(b) * * *

(6) Exclude individuals based on citizenship or nationality, to the extent that the children are U.S. citizens, U.S. nationals or qualified noncitizens (as defined at paragraph (c) of this section); or

* * * * *

(c) *Definitions.* As used in this subpart:

Qualified noncitizen has the meaning assigned at § 435.4 of this chapter.

* * * * *

PART 600—ADMINISTRATION, ELIGIBILITY, ESSENTIAL HEALTH BENEFITS, PERFORMANCE STANDARDS, SERVICE DELIVERY REQUIREMENTS, PREMIUM AND COST SHARING, ALLOTMENTS, AND RECONCILIATION

■ 7. The authority citation for part 600 continues to read as follows:

Authority: Section 1331 of the Patient Protection and Affordable Care Act of 2010 (Pub. L. 111–148, 124 Stat. 119), as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152, 124 Stat 1029).

■ 8. Section 600.5 is amended by revising the definition of “Lawfully present” to read as follows:

§ 600.5 Definitions and use of terms.

* * * * *

Lawfully present has the meaning given in 45 CFR 155.20.

* * * * *

For the reasons set forth in the preamble, under the authority at 5 U.S.C. 301, the Department of Health and Human Services amends 45 CFR subtitle A, subchapter B, as set forth below.

Title 45—Public Welfare

PART 152—PRE-EXISTING CONDITION INSURANCE PLAN PROGRAM

■ 9. The authority citation for part 152 continues to read as follows:

Authority: Sec. 1101 of the Patient Protection and Affordable Care Act (Pub. L. 111–148).

■ 10. Section 152.2 is amended by revising the definition of “Lawfully present” to read as follows:

§ 152.2 Definitions.

* * * * *

Lawfully present has the meaning given the term at 45 CFR 155.20.

* * * * *

PART 155—EXCHANGE ESTABLISHMENT STANDARDS AND OTHER RELATED STANDARDS UNDER THE AFFORDABLE CARE ACT

■ 11. The authority citation for part 155 continues to read as follows:

Authority: 42 U.S.C. 18021–18024, 18031–18033, 18041–18042, 18051, 18054, 18071, and 18081–18083.

■ 12. Section 155.20 is amended by revising the definition of “Lawfully present” to read as follows:

§ 155.20 Definitions.

* * * * *

Lawfully present means a noncitizen who—

(1) Is a qualified noncitizen as defined at 42 CFR 435.4;

(2) Is in a valid nonimmigrant status, as defined in 8 U.S.C. 1101(a)(15) or otherwise under the immigration laws (as defined in 8 U.S.C. 1101(a)(17));

(3) Is paroled into the United States in accordance with 8 U.S.C. 1182(d)(5) for less than 1 year, except for a noncitizen paroled for prosecution, for deferred inspection or pending removal proceedings;

(4) Is granted temporary resident status in accordance with 8 U.S.C. 1160 or 1255a;

(5) Is granted Temporary Protected Status (TPS) in accordance with 8 U.S.C. 1254a;

(6) Is granted employment authorization under 8 CFR 274a.12(c);

(7) Is a Family Unity beneficiary in accordance with section 301 of Pub. L. 101–649 as amended; or section 1504 of the LIFE Act Amendments of 2000, title XV of H.R. 5666, enacted by reference in Pub. L. 106–554 (see section 1504 of App. D to Pub. L. 106–554);

(8) Is covered by Deferred Enforced Departure (DED) in accordance with a decision made by the President;

(9) Is granted deferred action, including but not limited to individuals granted deferred action under 8 CFR 236.22;

(10) Has a pending application for adjustment of status;

(11)(i) Has a pending application for asylum under 8 U.S.C. 1158, for withholding of removal under 8 U.S.C. 1231(b)(3)(A), or for protection under the regulations implementing the Convention Against Torture; and

(ii) Is under the age of 14;

(12) Has been granted withholding of removal under the regulations implementing the Convention Against Torture; or

(13) Has a pending or approved petition for Special Immigrant Juvenile classification as described in 8 U.S.C. 1101(a)(27)(J).

* * * * *

■ 13. Section 155.30 is added to read as follows:

§ 155.30 Severability.

(a) Any part of the definition of “lawfully present” in § 155.20 held to be invalid or unenforceable, including as applied to any person or circumstance, shall be construed so as

to continue to give the maximum effect to the provision as permitted by law, along with other provisions not found invalid or unenforceable, including as applied to persons not similarly situated or to dissimilar circumstances, unless such holding is that the provision of this

subpart is invalid and unenforceable in all circumstances, in which event the provision shall be severable from the remainder of this subpart and shall not affect the remainder thereof.

(b) The provisions in § 155.20 with respect to the definition of “lawfully

present” are intended to be severable from one another.

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2024–09661 Filed 5–3–24; 8:45 am]

BILLING CODE 4120–01–P



FEDERAL REGISTER

Vol. 89

Wednesday,

No. 90

May 8, 2024

Part VIII

Department of the Treasury

Internal Revenue Service

26 CFR Part 1

Transactions With Foreign Trusts and Information Reporting on

Transactions With Foreign Trusts and Large Foreign Gifts; Proposed Rule

DEPARTMENT OF THE TREASURY**Internal Revenue Service****26 CFR Part 1****[REG-124850-08]****RIN 1545-BI04****Transactions With Foreign Trusts and Information Reporting on Transactions With Foreign Trusts and Large Foreign Gifts****AGENCY:** Internal Revenue Service (IRS), Treasury.**ACTION:** Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations that provide guidance regarding information reporting of transactions with foreign trusts and receipt of large foreign gifts and regarding loans from, and uses of property of, foreign trusts. This document also contains proposed amendments to the regulations relating to foreign trusts having one or more United States beneficiaries. The proposed regulations affect United States persons who engage in transactions with, or are treated as the owners of, foreign trusts, and United States persons who receive large gifts or bequests from foreign persons. This document also provides notice of a public hearing on the proposed regulations.

DATES:

Comments: Electronic or written public comments must be received by July 8, 2024.

Public Hearing: A public hearing on these proposed regulations has been scheduled for August 21, 2024, at 10 a.m. ET. Requests to speak and outlines of topics to be discussed at the public hearing must be received by July 8, 2024. If no outlines are received by July 8, 2024, the public hearing will be cancelled. Requests to attend the public hearing must be received by 5:00 p.m. ET on August 19, 2024.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at www.regulations.gov (indicate IRS and REG-124850-08) by following the online instructions for submitting comments. Requests for a public hearing must be submitted as prescribed in the “Comments and Requests for a Public Hearing” section. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury

Department) and the IRS will publish for public availability any comments submitted to the IRS’s public docket.

Send paper submissions to: CC:PA:01:PR (REG-124850-08), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT:

Concerning the proposed regulations, Lara A. Banjanin at (202) 317-6933 or S. Eva Wolf at (202) 317-3893 (not toll-free numbers); concerning submissions of comments, the hearing, or to be placed on the building access list to attend the hearing, Vivian Hayes at (202) 317-6901 (not a toll-free number) or by email at publichearings@irs.gov (preferred).

SUPPLEMENTARY INFORMATION:**Background***I. In General*

This document contains proposed amendments to 26 CFR part 1 under sections 643(i), 679, 6039F, 6048, and 6677 of the Internal Revenue Code (Code) (the *proposed regulations*). Section 6048, as significantly modified by the Small Business Job Protection Act of 1996 (1996 Act), Public Law 104-188 (110 Stat. 1755), and further amended by the Taxpayer Relief Act of 1997 (1997 Act), Public Law 105-34 (111 Stat. 788), and the Hiring Incentives to Restore Employment Act (HIRE Act), Public Law 111-147 (124 Stat. 71), generally requires U.S. persons to report transactions that involve foreign trusts. Section 6677, as significantly modified by the 1996 Act and further amended by the HIRE Act, imposes penalties on U.S. persons for failing to comply with section 6048. Section 6039F, which was added to the Code by the 1996 Act, and modified by the Tax Cuts and Jobs Act, Public Law 115-97 (131 Stat. 2054), requires U.S. persons to report the receipt of large gifts or bequests from foreign persons, and in the event of a failure to provide this information, section 6039F(c) imposes penalties and allows the IRS to recharacterize the purported gift or bequest as income. Section 643(i), which was added to the Code by the 1996 Act and amended by the HIRE Act, and section 679, as amended by the 1996 Act and the HIRE Act, provide additional rules intended to prevent taxpayers from avoiding U.S. income tax consequences through the use of foreign trusts.

On June 2, 1997, the Treasury Department and the IRS issued Notice 97-34, 1997-1 CB 422, which provides guidance on sections 643(i), 679, 6039F, 6048 and 6677 (the *foreign trust and gift*

provisions) as enacted or modified by the 1996 Act. On August 7, 2000, the Treasury Department and the IRS published a notice of proposed rulemaking and a notice of public hearing (REG-209038-89) under section 679 in the **Federal Register** (65 FR 48185). On July 20, 2001, the Treasury Department and the IRS published final regulations under section 679. TD 8955 (66 FR 37866).

U.S. persons currently provide information required by the foreign trust and gift provisions on Form 3520, *Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts*, and Form 3520-A, *Annual Information Return of Foreign Trust With a U.S. Owner (Under section 6048(b))*. In 2015, section 2006(b)(9) and (10) of the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 (*Surface Transportation Act*), Public Law 114-41 (129 Stat. 443), modified the due dates for Forms 3520 and 3520-A for taxable years beginning after December 31, 2015. On March 16, 2020, the Treasury Department and the IRS issued Revenue Procedure 2020-17, 2020-12 IRB 539, which exempts from section 6048 information reporting requirements certain U.S. individuals’ transactions with, and ownership of, certain tax-favored foreign trusts that are established and operated exclusively or almost exclusively to provide pension or retirement benefits, or to provide medical, disability, or educational benefits.

II. Purpose of Foreign Trust and Gift Provisions

During the mid- to late-1990s, abusive tax schemes, including offshore schemes involving foreign trusts, reemerged in the United States after last peaking in the 1980s. GAO, *Efforts to Identify and Combat Abusive Tax Schemes Have Increased, But Challenges Remain*, GAO-02-733 (Washington, DC: May 22, 2002). In these schemes, foreign trusts were used to transfer large amounts of assets offshore, where it was much more difficult for the IRS to identify whether U.S. persons owned an interest in such trusts, and whether such persons were reporting and paying the required taxes on their income from such trusts. Many of the foreign trusts were established in tax haven jurisdictions with bank secrecy laws. Before the 1996 Act amended sections 6048 and 6677, there was no requirement for U.S. persons to report distributions from foreign trusts, and the penalty for failing to report transfers to a foreign trust, or an annual foreign trust information return (on

Form 3520-A), was limited to five percent of the transfer or trust corpus, as applicable, not to exceed \$1,000. Given that, it was difficult for the IRS to obtain information about income earned by U.S.-owned foreign trusts and distributions to U.S. beneficiaries of foreign trusts, and sections 6048 and 6677 were generally ineffective at ensuring that U.S. persons provided this information. The result was “rampant tax avoidance.” 141 Cong. Rec. S13859 (daily ed. Sept. 19, 1995) (remarks of Senator Moynihan).

The foreign trust and gift provisions in the 1996 Act were designed to accommodate changes in the use of foreign trusts and to limit avoidance and evasion of U.S. tax. The most significant changes were made to sections 6048 and 6677 to enhance the IRS’s ability to obtain the information necessary to enforce the tax laws that apply to U.S. persons’ transactions with, and ownership of, foreign trusts. Other changes included enactment of new section 643(i) and amendments to section 679, each of which is designed to prevent tax avoidance through the use of foreign trusts. In addition, the legislation included new section 6039F, which enables the IRS to obtain information about large foreign gifts or bequests received by U.S. persons.

III. Overview

A. Section 643(i)

Section 643(i), as originally enacted in 1996, generally provides that, if a foreign trust makes a loan of cash or marketable securities directly or indirectly to any grantor or beneficiary of the foreign trust who is a U.S. person (other than an entity that is exempt from tax under Chapter 1 of the Code), or to a U.S. person related (under sections 267 and 707(b)) to such a grantor or beneficiary, the amount of the loan is treated as a distribution by the trust to the grantor or beneficiary. Section 643(i) also authorizes the Secretary to issue regulations providing exceptions, under which a loan by a foreign trust would not be treated as a distribution to the grantor or beneficiary of the trust. The 1996 Act’s legislative history explains that these regulations are expected to provide an exception under section 643(i) for loans with arm’s-length terms, and in applying this exception, the regulations should consider whether there is a reasonable expectation that the grantor, beneficiary, or related person would repay the loan. H.R. Conf. Rep. No. 737, 104th Cong., 2d Sess., at 334 (1996).

Section V.A of Notice 97–34 provides that a loan of cash or marketable

securities by a foreign trust to a U.S. grantor or U.S. beneficiary of the trust, or to a U.S. person who is related to a U.S. grantor or U.S. beneficiary of the trust, is treated as a distribution under section 643(i) unless the loan is made in consideration for a “qualified obligation” that satisfies certain specified requirements. Notice 97–34 states that what constitutes a qualified obligation will be provided in regulations. (Section III.C of Notice 97–34 provides similar qualified obligation rules for transfers to foreign trusts. See section III.B of this Background.)

In 2010, Congress expanded the scope of section 643(i) in response to concerns that U.S. persons were avoiding the application of section 643(i) by using trust property other than cash or marketable securities without compensating the foreign trust for the use of the property. Section 533 of the HIRE Act amended section 643(i) to provide that any uncompensated use of trust property by a U.S. grantor or U.S. beneficiary of the foreign trust, or any U.S. person related to such U.S. grantor or U.S. beneficiary, generally is treated as a distribution of the fair market value of the use of such property to the U.S. grantor or U.S. beneficiary. This rule does not apply if the foreign trust is paid fair market value for the use of the trust property within a reasonable timeframe.

Loans and use of trust property are reported on Part III of Form 3520. Taxpayers provide this information based on guidance in section V.A of Notice 97–34, as well as the instructions for Form 3520. This information allows the IRS to determine whether the loan or use of trust property should be treated as a distribution pursuant to section 643(i).

B. Section 679

1. 1976 Act

Section 679 was enacted by the Tax Reform Act of 1976 (*1976 Act*), Public Law 94–455 (90 Stat. 1520). Section 679 treats a U.S. person who directly or indirectly transfers property to a foreign trust as the owner of the portion of the foreign trust attributable to the transferred property to the extent that, under the terms of the trust, the income or corpus of the trust may be paid to or accumulated for the benefit of a U.S. person during the taxable year, including if the trust were to be terminated during the taxable year.

2. 1996 Act Amendments

Section 1903 of the 1996 Act made several important changes to section 679. For example, Congress was

concerned that taxpayers were attempting to avoid the application of section 679(a)(1) by transferring property to a foreign trust in exchange for obligations from the foreign trust that might not be repaid and arguing that such obligations satisfied the fair market value exception in section 679(a)(2). H.R. Conf. Rep. No. 737, 104th Cong., 2d Sess., at 334–35 (1996). The fair market value exception provides that section 679(a)(1) does not apply to any transfer of property to a foreign trust in exchange for consideration of at least the fair market value of the transferred property. Accordingly, Congress added new section 679(a)(3), which generally provides that obligations issued by the foreign trust, by any grantor or beneficiary of the trust, or by any person related to any grantor or beneficiary, are not taken into account in applying the fair market value exception except as provided in regulations.

Section III.C of Notice 97–34 implemented the fair market value exception of section 679(a)(2)(B) and (a)(3) by providing that, if a U.S. person transfers money or other property to a related foreign trust in exchange for an obligation issued by the trust or by a person related to the trust, the obligation is taken into account for purposes of determining whether the U.S. person received fair market value from the foreign trust only if the obligation is a *qualified obligation* that satisfies certain specified requirements. (Section V.A of Notice 97–34 provides similar qualified obligation rules that apply with respect to loans from foreign trusts under section 643(i). See section III.A of this Background.) In 2001, the Treasury Department and the IRS issued final regulations under section 679 in TD 8955 (66 FR 37886) that included the section 679 qualified obligation rules described in Notice 97–34. See § 1.679–4(d).

A U.S. person’s transfers to a foreign trust are reported on Part I of Form 3520, together with information about any qualified obligations received from the trust. Taxpayers provide this information based on the final regulations under section 679, as well as the instructions for Form 3520. This information allows the IRS to determine whether the U.S. person should be treated as an owner of the foreign trust under section 679.

3. HIRE Act Amendments

In 2010, the HIRE Act made five amendments to section 679, three of which are consistent with the final regulations under section 679, and two of which set forth new rules not reflected in the final regulations.

First, section 531(a) of the HIRE Act added new language to section 679(c)(1) to clarify that an amount is treated as accumulated for the benefit of a U.S. person even if the U.S. person's interest in the foreign trust is contingent on a future event. This statutory amendment is consistent with § 1.679-2(a)(2)(i), which states that the determination as to whether income or corpus may be paid to or accumulated for the benefit of a U.S. person is made without regard to whether the income or corpus actually is distributed to the U.S. person during the year, or whether the U.S. person's interest in the income or corpus of the trust is contingent on a future event.

Second, section 531(b) of the HIRE Act added a new paragraph (4) to section 679(c) to clarify that, if any person has the discretion to make a distribution from the foreign trust to or for the benefit of any person, the trust shall be treated as having a U.S. beneficiary unless the terms of the trust specifically identify the class of persons to whom such distributions may be made, and none of those persons are U.S. persons during the taxable year. This statutory amendment is consistent with § 1.679-2(a)(1), which provides that a foreign trust is treated as having a U.S. beneficiary unless no part of the trust's income or corpus may be paid or accumulated to or for the benefit of a U.S. person, and if the trust is terminated at any time during the taxable year, no part of the trust's income or corpus could be paid to or for the benefit of a U.S. person.

Third, section 531(c) of the HIRE Act added a new paragraph (5) to section 679(c) to clarify that, if any U.S. person who directly or indirectly transfers property to a foreign trust is directly or indirectly involved in any agreement or understanding that may result in the income or corpus of the trust being paid to or accumulated for the benefit of a U.S. person, then such an agreement or understanding shall be treated as constituting a term of the trust. This statutory amendment is consistent with § 1.679-2(a)(4)(i), which, assuming that a transferor of property to a trust is generally directly or indirectly involved with any agreements regarding the accumulation or disposition of the income and corpus of the trust, allows the IRS to treat a foreign trust as having a U.S. beneficiary by looking beyond the language of the trust instrument to all written and oral agreements and understandings related to the trust, memoranda or letters of wishes, all records that relate to the actual distribution of income and corpus, and all other documents relating to the trust,

whether or not of any purported legal effect.

Fourth, section 532 of the HIRE Act added a new paragraph (d) to section 679, which provides a presumption that a foreign trust has a U.S. beneficiary in certain circumstances. If a U.S. person directly or indirectly transfers property to a foreign trust (other than certain compensatory and charitable trusts), the IRS may treat the trust as having a U.S. beneficiary for purposes of applying section 679 to the transfer unless the U.S. person submits such information to the IRS as the IRS may require and demonstrates to the satisfaction of the IRS that the trust satisfies the requirements of section 679(c)(1).

Finally, section 533(c) of the HIRE Act added a new paragraph (6) to section 679(c), which generally treats a loan of cash or marketable securities to, or the use of any other trust property by, any U.S. person, whether or not a beneficiary under the terms of the trust, as paid to or accumulated for the benefit of a U.S. person. Section 679(c)(6) does not apply to the extent that the U.S. person repays the loan at a market rate of interest or pays the fair market value of the use of the property within a reasonable period of time. The effect of section 679(c)(6) is that, if a foreign trust is not already treated as having a U.S. beneficiary, a loan by the trust of cash or marketable securities to a U.S. person or the uncompensated use of trust property by a U.S. person may cause the foreign trust to be treated as having a U.S. beneficiary, with the result that a U.S. person who transferred property to the trust may be treated as the owner of the trust under section 679(a).

Final regulations were issued under section 679 in 2001, and although instructions for Form 3520 and Form 3520-A have been updated to take into account the HIRE Act amendments to section 679, regulations implementing these amendments have not been issued.

C. Section 6039F

Section 1905 of the 1996 Act created new reporting requirements under section 6039F for U.S. persons (other than certain exempt organizations) that receive large gifts (including bequests) from foreign persons. The new information reporting provisions require U.S. persons to provide information concerning the receipt of large amounts that they treat as foreign gifts or bequests, giving the IRS an opportunity to review the characterization of these payments and determine whether they are properly treated as gifts.

Section 6039F(b) generally defines the term *foreign gift* as any amount received

from a person other than a U.S. person that the recipient treats as a gift or bequest. However, a foreign gift does not include a qualified transfer (within the meaning of section 2503(e)(2)) or a distribution from a foreign trust. A distribution from a foreign trust must be reported as a distribution under section 6048(c) (discussed in section III.E of this Background) rather than as a gift under section 6039F.

Section 6039F(c) provides that, if a U.S. person fails, without reasonable cause, to report a foreign gift as required by section 6039F, then (i) the tax consequences of the receipt of the gift will be determined by the Secretary and (ii) the U.S. person will be subject to a penalty equal to 5 percent of the amount of the gift for each month the failure to report the foreign gift continues, with the total penalty not to exceed 25 percent of the value of the gift. Under sections 6039F(a) and (d), reporting is required if the value of the aggregate foreign gifts received by a U.S. person during any taxable year exceeds \$10,000, as modified by cost-of-living adjustments. Under section VI.B.1 of Notice 97-34, however, a U.S. person is required to report gifts from a foreign individual or foreign estate only if the aggregate amount of gifts from that foreign individual or foreign estate exceeds \$100,000 during the U.S. person's taxable year. Section VI.B.3 of Notice 97-34 provides guidance on when a U.S. person must aggregate foreign gifts received from foreign persons that the U.S. person knows or has reason to know are related to each other. Once the \$100,000 threshold has been met, the U.S. person must identify each foreign gift in excess of \$5,000 but is not required to identify the transferor.

A U.S. person who receives foreign gifts that exceed the threshold amounts must report the foreign gifts on Part IV of Form 3520. Taxpayers provide this information based on guidance in section VI of Notice 97-34, as well as the instructions for Form 3520.

D. Section 6048

Section 6048(a) through (c) contains three distinct reporting obligations with respect to a U.S. person's transactions with, and ownership of, foreign trusts.

1. Section 6048(a)

Section 6048(a) generally requires a responsible party to file information returns upon the occurrence of certain reportable events. A responsible party is the U.S. grantor of an inter vivos foreign trust, the U.S. transferor, or the executor of a U.S. decedent's estate. A reportable event is (a) the creation of any foreign trust by a U.S. person; (b) the direct or

indirect transfer of any money or property to a foreign trust by a U.S. person, including a transfer by reason of death; or (c) the death of a U.S. citizen or resident if the decedent was treated as the owner of any portion of a foreign trust or if any portion of a foreign trust was included in the gross estate of the decedent. Section 6048(a)(3)(B)(i) provides an exception for transfers for fair market value (the fair market value exception), and section 6048(a)(3)(B)(ii) provides an exception for transfers to certain deferred compensation and charitable trusts. (These exceptions correspond to the current substantive exemptions to the scope of section 679. See section 679(a)(1) and (2)(B).)

A reportable event is reported on Part I of Form 3520. Section III of Notice 97–34 and the instructions for Form 3520 provide information to taxpayers regarding this reporting. Section 6048(a) enables the IRS to obtain the information necessary to enforce sections 679 (discussed in section III.B of this Background) and 684 (added by section 1131(b) of the 1997 Act to provide for recognition of gain on certain transfers to foreign trusts).

2. Section 6048(b)

Section 6048(b)(1) generally requires a U.S. person who is treated as the owner of any portion of a foreign trust under the grantor trust rules (*U.S. owner*) to ensure that the trust (i) files an annual information return to provide a full accounting of all the trust activities for the trust's taxable year and (ii) furnishes an annual information statement to each U.S. owner and to any other U.S. person who receives (directly or indirectly) any distribution from the trust during the year (*U.S. beneficiary*). In addition, the U.S. owner must submit such information as the IRS may prescribe with respect to the foreign trust.

Section 6048(b)(2) provides that, unless a foreign trust with a U.S. owner appoints a U.S. agent, the Secretary may determine the amounts required to be taken into account with respect to such trust by the U.S. owner under the grantor trust rules. The U.S. agent will be required to act as the foreign trust's limited agent solely for purposes of applying sections 7602, 7603, and 7604 with respect to any request or summons by the Secretary in connection with the tax treatment of any items related to the trust. Certain rules (similar to the rules of section 6038A(e)(2) and (4)) relating to the enforcement of requests for certain records with respect to foreign-owned corporations will apply. Information about the U.S. agent must be reported on both the U.S. owner's

Form 3520 and the foreign trust's Form 3520–A.

The foreign trust's annual information return is Form 3520–A, and any additional information required to be submitted by the U.S. owner is provided on Part II of Form 3520. The information statements that the foreign trust must furnish to each U.S. owner and to each U.S. beneficiary who receives a distribution are the Foreign Grantor Trust Owner Statement and the Foreign Grantor Trust Beneficiary Statement, as applicable. Taxpayers provide this information based on guidance in section IV of Notice 97–34, as well as the instructions for Form 3520 and Form 3520–A. If the foreign trust fails to file Form 3520–A, section 6677 imposes a penalty on the U.S. owner. In order to avoid penalties under section 6677, the U.S. owner must complete a substitute Form 3520–A for the foreign trust and attach it to the U.S. owner's Form 3520. See instructions for Part II of Form 3520.

3. Section 6048(c)

Section 6048(c)(1) provides that any U.S. person who directly or indirectly receives any distribution from a foreign trust is required to file an information return to report the name of the trust, the aggregate amount of the distributions received, and any other information that the Secretary may prescribe. Section 6048(c)(2) generally provides that, if adequate records are not provided to the Secretary to determine the proper treatment of a distribution from a foreign trust, the distribution is treated as an accumulation distribution. However, to the extent provided in regulations, this rule does not apply if the foreign trust authorizes a U.S. person to act as its limited agent under rules similar to the rules of section 6048(b)(2)(B) (discussed in section III.D.2 of this Background). Section 6048(d)(5) (discussed in section III.D.4 of this Background) provides that a U.S. person's treatment of a distribution from a foreign trust must be consistent with the trust's treatment of such item or the Secretary must be notified of the inconsistency.

Distributions from a foreign trust are reported on Part III of Form 3520. Taxpayers provide this information based on guidance in section V of Notice 97–34, as well as the instructions for Form 3520. Section 6048(c) enables the IRS to obtain the information it needs to enforce the rules relating to the taxation of accumulation distributions (sections 665 through 669), as well as sections 672(f), 643(h), and 643(i). Section 6048(c) requires any U.S. person, including a U.S. owner and U.S. beneficiary of a foreign trust, who

receives a distribution from a foreign trust to report information about the distribution. See *Wilson v. United States*, 6 F.4th 432 (2d Cir. 2021), rev'g, No. 19–CV–5037 (BMC), 2019 WL 6118013 (E.D.N.Y. Nov. 18, 2019) (holding that when an individual is both the sole owner and beneficiary of a foreign trust and fails to timely report distributions received from the trust, the IRS may impose a penalty under section 6677 equal to 35 percent of the gross reportable amount).

4. Section 6048(d)

Section 6048(d)(1) provides that, for purposes of section 6048, in determining whether a U.S. person makes a transfer to, or receives a distribution from, a foreign trust, the fact that a portion of the trust is treated as owned by another person under the grantor trust rules is disregarded.

Section 6048(d)(2) provides that, to the extent provided in regulations, a domestic trust will be treated as a foreign trust for purposes of sections 6048 and 6677 if the trust has substantial activities, or holds substantial property, outside the United States. The legislative history includes the statement “that in exercising its regulatory authority to treat a U.S. trust as a foreign trust for purposes of information reporting purposes, the Secretary of the Treasury will take into account the information that such a trust reported under the domestic trust reporting rules.” H.R. Conf. Rep. 737, 104th Cong., 2d Sess. at 338 (1996). Section VIII.C of Notice 97–34 states that the Treasury Department and the IRS are studying the appropriate scope of section 6048(d)(2) and that, until further guidance is issued, a domestic trust is not treated as a foreign trust pursuant to section 6048(d)(2).

Section 6048(d)(3) provides that any notice or return required under section 6048 is to be made at such time and in such manner as the Secretary prescribes.

Section 6048(d)(4) authorizes the IRS to suspend or modify any requirement of section 6048 if the IRS determines that the United States has no significant tax interest in obtaining the required information. The Treasury Department and the IRS previously have issued guidance providing that information reporting under section 6048(c) is not required with respect to distributions from certain foreign compensatory trusts, provided that the U.S. person who receives the distribution reports the distribution as compensation income on an applicable Federal income tax return, and that information reporting under section 6048(a) through (c) is not required with respect to certain

Canadian retirement plans. See Section V of Notice 97–34; Rev. Proc. 2014–55, 2014–44 I.R.B. 753. In addition, on March 16, 2020, the Treasury Department and the IRS issued Revenue Procedure 2020–17, which exempts from section 6048 information reporting requirements certain U.S. individuals' transactions with, and ownership of, certain tax-favored foreign trusts that are established and operated exclusively or almost exclusively to provide pension or retirement benefits or to provide medical, disability, or educational benefits.

Section 6048(d)(5) (added by section 1027(b) of the 1997 Act) provides that a U.S. person who either is treated as an owner of any portion of a foreign trust or receives (directly or indirectly) any distribution from a foreign trust must treat any portion owned or any item distributed in a manner that is consistent with the trust's treatment of such ownership or item; otherwise, the U.S. person must notify the Secretary of the inconsistency. A similar rule in section 6034A(c) (added by section 1027(a) of the 1997 Act) generally provides that a beneficiary of an estate or trust is required to file a return in a manner that is consistent with the information received from the estate or trust, unless the beneficiary files with the return a notification of inconsistent treatment identifying the inconsistency. The Treasury Department and the IRS are of the view that the rules in sections 6034A(c) and 6048(d)(5) are to be interpreted as comparable to the consistency rules that already apply to S corporation shareholders and partners in partnerships. H.R. Conf. Rep. 220, 105th Cong., 1st Sess. at 551 (1997). Taxpayers may use Form 8082, *Notice of Inconsistent Treatment or Administrative Adjustment Request (AAR)*, to report an inconsistency.

Although regulations were issued under section 6048, these regulations now are obsolete because they were issued under an earlier version of section 6048. These regulations were removed as a result of regulations issued pursuant to Executive Order 13789. See TD 9849 (84 FR 9231).

E. Section 6677

Under section 6677, as amended by section 1901(b) of the 1996 Act, a U.S. person who fails to file a required information return under section 6048(a) or (c) is subject to an initial penalty of 35 percent of the gross reportable amount (generally, the value of the property transferred or received). If an information return required under section 6048(b) is not filed, the U.S. person who is treated as the owner of

the foreign trust is subject to an initial penalty of five percent of the gross reportable amount (the trust corpus at the end of the year). See also *Wilson v. United States*, 6 F.4th 432 (2d Cir. 2021) (holding that *gross reportable amount* has multiple meanings under section 6677(c) that differ depending on the part of section 6048 that is violated), rev'g, No. 19–CV–5037 (BMC), 2019 WL 6118013 (E.D.N.Y. 2019). In all cases, if the failure to file an information return continues for more than 90 days after the day on which the IRS mails notification of the failure, an additional \$10,000 penalty is imposed for each 30-day period (or fraction thereof) during which the failure continues. The total amount of the penalties with respect to any failure cannot exceed the gross reportable amount with respect to that failure. If the gross reportable amount is partially reported, then the penalties are applied based on the amount that is unreported. Section VII of Notice 97–34.

Section 535 of the HIRE Act strengthened the penalty structure by further amending section 6677 to allow the IRS to impose penalties when it does not have enough information to determine the gross reportable amount. Section 6677, as amended, provides that the initial penalty is the greater of \$10,000 or 35 percent (five percent in the case of a failure to comply with section 6048(b)) of the gross reportable amount. Thus, the IRS may impose an initial penalty of \$10,000 on a U.S. person who fails to report information without having any information about the foreign trust's gross reportable amount. The amendment did not change the rules for the additional penalties of \$10,000 for each 30-day period (or fraction thereof) during which the failure to report continues.

Section 6677, as amended, also provides that, if the IRS, after having assessed penalties, obtains sufficient information to determine the gross reportable amount, any subsequent penalty imposed will be reduced as necessary to ensure that the aggregate amount of the penalties does not exceed the gross reportable amount. To the extent that the amount already paid exceeds the gross reportable amount, the IRS will refund the excess to the U.S. person pursuant to section 6402.

Section 6677(d) provides that no penalty will be imposed on any failure that is shown to be due to reasonable cause and not due to willful neglect. It further provides that the fact that a foreign jurisdiction would impose a civil or criminal penalty on the U.S. person (or any other person) for disclosing the required information is not reasonable cause.

Section 6677(e) provides that subchapter B of chapter 63 (relating to deficiency procedures for income, estate, gift, and certain excise taxes) does not apply in respect of the assessment or collection of any penalty imposed under section 6677.

F. Section 643(a)(7)

Section 643(a)(7), which was added to the Code by section 1906(b) of the 1996 Act, provides that the Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of part I of subchapter J of chapter 1 of the Code (sections 641 through 685), including regulations to prevent avoidance of such purposes.

G. Information Return Due Dates

Section 2006(b) of the Surface Transportation Act provides that, in the case of returns for taxable years beginning after December 31, 2015, the Secretary, or the Secretary's designee, shall modify the appropriate regulations addressing certain due dates. Section 2006(b)(9) provides that the due date of Form 3520–A shall be the 15th day of the third month after the close of the trust's taxable year, and the maximum extension shall be a 6-month period beginning on such day. Section 2006(b)(10) states that the due date of Form 3520 for calendar year filers shall be April 15 with a maximum extension for a 6-month period ending on October 15.

Explanation of Provisions

I. Section 643(i)—Loans to and Uses of Foreign Trust Property by U.S. Persons

These proposed regulations provide rules relating to loans from foreign trusts to U.S. persons and uses of foreign trust property by U.S. persons. They generally incorporate the section 643(i) guidance that was provided in Notice 97–34 (discussed in section III.A of the Background), with certain modifications to provide procedural rules, such as how to determine a loan's yield to maturity and how to extend the period of assessment for any income tax associated with the loan, and anti-abuse rules, such as requiring payments and information reporting to be timely. In addition, the proposed regulations provide guidance implementing the HIRE Act amendments to section 643(i).

A. Application of Section 643(i) to Loans by or Uses of Property of a Foreign Trust

Proposed § 1.643(i)–1 provides rules for determining when a loan of cash or marketable securities from a foreign nongrantor trust, made to a U.S. person who is either a grantor or beneficiary of

the foreign trust or is related to a U.S. person who is a grantor or beneficiary of the foreign trust, will be treated as a distribution under subchapter J of chapter 1 of the Code (a *section 643(i) distribution*) to the U.S. grantor or beneficiary of the foreign trust. These rules also apply to determine whether a distribution is made when any such U.S. persons use the property of the foreign trust.

These rules apply solely for purposes of subparts B, C, and D (sections 651–652, 661–664, and 665–668) of part I of subchapter J of chapter 1 of the Code, and thus section 643(i) does not apply to a foreign trust to the extent that it is a grantor trust described in subpart E (sections 671 through 679) of part I of subchapter J. Although section 643(i) applies to loans of cash or marketable securities from a foreign trust to a U.S. grantor or a U.S. person related to a U.S. grantor, these provisions of section 643(i) predate the HIRE Act, which enacted section 679(c)(6). Under section 679, a U.S. person who transfers property to a foreign trust is treated as the owner of the portion of the trust attributable to the property transferred to the trust if there is a U.S. beneficiary of any portion of the trust, unless an exception applies. Section 679(c)(6) provides that any direct or indirect loan of cash or marketable securities to a U.S. person, or direct or indirect use of any other trust property by a U.S. person, whether or not the U.S. person is a beneficiary under the terms of the trust, will be treated as paid to or accumulated for the benefit of a U.S. person, unless an exception applies (see proposed § 1.679–2(a)(5)(iii)). That is, the U.S. person will be treated as a beneficiary of the foreign trust for purposes of section 679. In most circumstances, this causes the foreign trust to be a grantor trust under section 679, removing it from the purview of section 643(i). Section 643(i), therefore, will rarely apply to a U.S. grantor or a U.S. person related to a U.S. grantor. It might apply, however, if the U.S. grantor created but did not make a transfer to the foreign trust.

Proposed § 1.643(i)–1(b)(1) provides that, unless an exception applies, any loan of cash or marketable securities made from a foreign trust (whether from trust corpus or income) directly or indirectly to a U.S. grantor or beneficiary of the trust or to any U.S. person related to a U.S. grantor or beneficiary of the trust is treated as a section 643(i) distribution to such U.S. grantor or beneficiary as of the date on which the loan is made. For these purposes, a loan to a grantor trust or to a disregarded entity is treated as a loan

to the owner of the grantor trust or of the disregarded entity. For example, a loan to a single member LLC treated as a disregarded entity is treated as a loan to the owner of the LLC.

Proposed § 1.643(i)–1(b)(2)(i) describes indirect loans for purposes of section 643(i) to include loans made through an intermediary, agent, or nominee. Proposed § 1.643(i)–1(b)(2)(i) also provides three examples of indirect loans: (1) a loan made by any person to a U.S. grantor or beneficiary of a foreign trust or any U.S. person related to a U.S. grantor or beneficiary if the foreign trust guarantees (within the meaning of § 1.679–3(e)(4)) the loan; (2) a loan made by any person related (within the meaning of proposed § 1.643(i)–1(d)(9)) to the foreign trust to a U.S. grantor or beneficiary of the foreign trust or to a U.S. person related to a U.S. grantor or beneficiary; and (3) a loan made by a foreign trust to a foreign person, other than to a nonresident alien individual who is a grantor or beneficiary of the trust, if the foreign person is related (within the meaning of proposed § 1.643(i)–1(d)(9)) to a U.S. grantor or beneficiary of the trust. See proposed § 1.643(i)–1(b)(2)(i)(A) through (C). However, the loans described in examples (2) and (3) above are excepted from section 643(i) treatment if the U.S. grantor or beneficiary of the foreign trust satisfies the information reporting requirements of proposed § 1.6048–4 with respect to the loan and attaches to a Federal income tax return an explanatory statement that demonstrates to the satisfaction of the IRS that the loan would have been made without regard to the U.S. grantor's or beneficiary's relationship to the foreign trust. See proposed § 1.643(i)–1(b)(2)(ii). There is no such exception for a loan made by any person that is guaranteed (within the meaning of § 1.679–3(e)(4)) by a foreign trust because a foreign trust is unlikely to guarantee such a loan absent its relationship with the U.S. grantor or beneficiary.

Proposed § 1.643(i)–1(b)(2)(iii) provides that loans from a foreign trust to a U.S. grantor or beneficiary or U.S. person related to a U.S. grantor or beneficiary through an intermediary are treated as made directly from the foreign trust to the U.S. grantor or beneficiary or U.S. person related to a U.S. grantor or beneficiary.

In order to discourage grantors and beneficiaries of a foreign trust from changing their U.S. residence in a particular year to avoid the application of section 643(i), proposed § 1.643(i)–1(b)(3) provides an anti-abuse rule. If a nonresident alien who is a grantor or beneficiary of a foreign trust receives a

loan from the foreign trust and becomes a U.S. person within two years, that grantor or beneficiary will be subject to section 643(i) with respect to the outstanding amount of the loan as of the date the grantor or beneficiary acquires U.S. residence or citizenship if the loan was not a qualified obligation as of the date that it was made.

Proposed § 1.643(i)–1(c) provides that any direct or indirect use of other property of a foreign trust by a U.S. grantor or beneficiary or any U.S. person related to a U.S. grantor or beneficiary is treated as a section 643(i) distribution to the U.S. grantor or beneficiary in the taxable year in which the use occurs. Use of property of a foreign trust by a grantor trust or a disregarded entity is treated as use by the owner of the grantor trust or of the disregarded entity. For example, use of trust property by a single member LLC treated as a disregarded entity would be treated as use by the owner of the LLC.

Proposed § 1.643(i)–1(c)(2)(i) describes indirect use of trust property to include use by an agent or nominee. Indirect use of trust property also includes use by a foreign person, other than a nonresident alien individual who is a beneficiary of the foreign trust, if the foreign person is related to a U.S. grantor or beneficiary of the trust, unless the U.S. grantor or beneficiary reports the use of trust property on Part III of Form 3520, as required by proposed § 1.6048–4, and attaches to the U.S. grantor's or beneficiary's Federal income tax return an explanatory statement that demonstrates to the satisfaction of the IRS that the use of trust property would have been made without regard to the U.S. grantor's or beneficiary's relationship to the foreign trust. See proposed § 1.643(i)–1(c)(2).

B. Exceptions

Proposed § 1.643(i)–2(a) provides four exceptions to the general rule of proposed § 1.643(i)–1(b)(1):

First, the general rule will not apply to any loan of cash in exchange for a qualified obligation within the meaning of proposed § 1.643(i)–2(b)(2)(iii). The proposed regulations do not provide an exception from the general rule for loans of marketable securities as such a rule would be more difficult to apply, and it is less likely that a foreign trust would make a loan of marketable securities. The Treasury Department and the IRS request comments on whether qualified obligation rules are needed for loans of marketable securities.

Second, in the case of a use of trust property other than a loan of cash or marketable securities, the general rule will not apply to the extent that the

foreign trust receives the fair market value of such use within a reasonable period (described in proposed § 1.643(i)-2(a)(2)(ii) as 60 days or less) from the start of the use of the trust property. The fair market value of the use will be based on all the facts and circumstances, including the type of property used and the period of use.

Third, the general rule will not apply to any de minimis use of trust property (described in proposed § 1.643(i)-2(a)(3) as aggregate use by members of a group consisting of the U.S. grantors and beneficiaries and the U.S. persons related to them for a total of 14 days or less during the taxable year), other than a loan of cash or marketable securities, by a U.S. grantor or beneficiary or a U.S. person related to a U.S. grantor or beneficiary.

Fourth, the general rule will not apply to a loan of cash that is made by a foreign corporation to a U.S. beneficiary of the foreign trust to the extent the aggregate amount of all such loans to the beneficiary does not exceed undistributed earnings and profits of the foreign corporation attributable to amounts that are, or have been, included in the beneficiary's gross income under section 951, 951A, or 1293. This exception is intended to prevent double taxation that could result by reason of the application of section 643(i) to an amount that has already been included in the U.S. beneficiary's gross income as a subpart F income inclusion, a global intangible low-taxed income inclusion, an inclusion by reason of a controlled foreign corporation's investment of earnings in United States property, or a qualified electing fund inclusion. The Treasury Department and the IRS request comments on whether the scope of the exception is appropriate, and whether ordering rules to determine the sourcing of loan amounts, for example, rules based on the principles of section 959 or similar to the provisions of § 1.672(f)-4(c)(3), or other clarifications on the exception's application, are necessary.

C. Qualified Obligations

Proposed § 1.643(i)-2(b) provides rules for determining whether a loan of cash is made in exchange for a qualified obligation. Proposed § 1.643(i)-2(b)(2) defines the terms *obligor*, *obligation*, and *qualified obligation*. The definitions of obligation and qualified obligation are consistent with the amended definitions of obligation and qualified obligation in proposed § 1.679-1(c)(6) and § 1.679-4(d), respectively. The term *obligor* means a person who issues an obligation (within the meaning of

proposed § 1.643(i)-2(b)(2)(i)) to a foreign trust in exchange for a loan of cash. The term *obligation* means any instrument or contractual arrangement that constitutes indebtedness under general principles of Federal income tax law (for example, a bond, note, debenture, certificate, bill receivable, account receivable, note receivable, open account, or other evidence of indebtedness), and an annuity contract that would not otherwise be classified as indebtedness under general principles of Federal income tax law. Under proposed § 1.643(i)-2(b)(2)(iii)(A), the term *qualified obligation* means an obligation that satisfies all of the following requirements:

First, the obligation must be in writing.

Second, the term of the obligation must not exceed five years.

Third, all payments on the obligation must be made in cash in U.S. dollars. The Treasury Department and the IRS stress this requirement to make all payments in cash in U.S. dollars, in light of abusive transactions in which taxpayers have used an inflated valuation of in-kind property to purportedly repay an obligation.

Fourth, the obligation must be issued at par and must provide for stated interest at a fixed rate or a qualified floating rate within the meaning of § 1.1275-5(b).

Fifth, the yield to maturity must be not less than 100 percent and not greater than 130 percent of the applicable Federal rate in effect under section 1274(d) on the day on which the obligation is issued. The yield to maturity and the applicable Federal rate must be based on the same compounding period. If an obligation is a variable rate debt instrument that provides for stated interest at a qualified floating rate, the rules in §§ 1.1274-2(f)(1) and 1.1275-5(e) apply to determine the obligation's yield to maturity.

Sixth, all stated interest on the obligation must be qualified stated interest within the meaning of § 1.1273-1(c).

In addition to these six initial requirements, for both the first year and each succeeding year in which the obligation remains outstanding, the three requirements of proposed § 1.643(i)-2(b)(2)(iii)(B) must be satisfied in order for the obligation to remain a qualified obligation. First, the U.S. grantor or beneficiary (as the person who would be subject to income tax if an obligation either is not a qualified obligation or ceases to be a qualified obligation) must extend the

period for assessment on Part III of Form 3520 (under rules described in proposed § 1.643(i)-2(b)(2)(iii)(B)(1)) of any income tax attributable to the loan and any consequent income tax changes for each year that the obligation is outstanding to a date not earlier than three years after the maturity date of the obligation issued in consideration for the loan. Second, the U.S. grantor or beneficiary must report the status of the obligation, including any payments made, on Part III of Form 3520. Third, the obligor must make all payments of principal and interest on the obligation according to the terms of the obligation.

Proposed § 1.643(i)-2(b)(3) provides that, if the terms of the obligation are modified and the modification is treated as an exchange under § 1.1001-3, the new obligation that is deemed issued in the exchange under § 1.1001-3 must satisfy the requirements in proposed § 1.643(i)-2(b)(2)(iii) to be a qualified obligation using the original obligation's issue date. If the modification is not treated as an exchange under § 1.1001-3, then the obligation is retested as of the date of the modification to determine whether the obligation, as modified, continues to satisfy the requirements to be a qualified obligation.

Proposed § 1.643(i)-2(b)(4) provides that if, while the obligation is outstanding, the U.S. obligor directly or indirectly issues another obligation to the foreign trust in exchange for cash, the outstanding obligation is deemed to have the maturity date of the new obligation for purposes of determining whether the term of the outstanding obligation exceeds five years. The outstanding obligation must be retested as of the issue date of the new obligation to determine whether the outstanding obligation continues to be a qualified obligation. The new obligation also must be separately tested to see if it satisfies the requirements to be a qualified obligation.

Proposed § 1.643(i)-2(b)(5) provides that the IRS may treat two or more obligations issued by a U.S. obligor as a single obligation that is not a qualified obligation if they are structured with a principal purpose to avoid the application of section 643(i).

Proposed § 1.643(i)-2(b)(6) provides that, if a qualified obligation ceases to be a qualified obligation (for example, because a modification causes the term of the obligation to exceed five years), the U.S. grantor or beneficiary is treated as receiving a section 643(i) distribution from the foreign trust. In general, the amount of the section 643(i) distribution is the obligation's outstanding stated principal amount plus any accrued but

unpaid qualified stated interest (within the meaning of § 1.1273-1(c)) as of the date of the event that causes the obligation to no longer be a qualified obligation. If the IRS treats two or more obligations as a single obligation that is not a qualified obligation under proposed § 1.643(i)-2(b)(5), then the amount of the section 643(i) distribution will not exceed the sum of the outstanding stated principal amounts of the obligations plus any accrued but unpaid qualified stated interest as of the date determined by the IRS.

D. Trust Property Attributable to Nongrantor Trust Portion

Proposed § 1.643(i)-2(c) provides rules for determining the extent to which a loan or use of trust property from a partial nongrantor trust will be attributable to the nongrantor trust portion. Generally, a loan or use of trust property from a partial nongrantor trust must be apportioned in a manner that is reasonable based on all the facts and circumstances, including the terms of the governing instrument, local law, and the practice of the trustee, if it is reasonable and consistent. However, if a loan or use of trust property can be made from only one portion of the foreign trust because the type of property loaned or used is held only by that portion, then the loan or use of property is attributable to that portion.

E. Reporting

The Treasury Department and the IRS are of the view that it is appropriate to require reporting, pursuant to the authority granted to the Treasury Department and the IRS by section 643(a)(7), of all loans and uses of trust property that are potentially subject to section 643(i), in order to ensure that the IRS has the information necessary to enforce taxpayer compliance with these rules. Thus, proposed § 1.643(i)-2(d) provides that any loan of cash or marketable securities by a foreign trust to a U.S. person and any use by a U.S. person of property belonging to a foreign trust, without regard to whether such loan or use of property is treated as a section 643(i) distribution, also is a distribution within the meaning of proposed § 1.6048-4(b) and subject to the information reporting described under proposed § 1.6048-4(a). See proposed § 1.6048-4(b)(3)(ii) and (iii) and (b)(4)(ii) and (iii).

F. Amount Treated as Section 643(i) Distribution

Proposed § 1.643(i)-3(a) provides rules for determining the amount that is treated as a section 643(i) distribution if an exception does not apply. In the case

of a loan of cash, the amount of the section 643(i) distribution is the issue price of the loan as of the date the loan is treated as a distribution from the foreign trust. In the case of a loan of marketable securities, the amount of the section 643(i) distribution is the fair market value of the securities as of the date the loan is treated as a distribution from the foreign trust. In the case of the use of trust property without fair market value compensation, the amount of the section 643(i) distribution is the fair market value of the use of the property less any payments made for the use of the property within a reasonable period of time.

G. Allocation of Section 643(i) Distribution Among Multiple U.S. Grantors and Beneficiaries

Proposed § 1.643(i)-3(b) provides a rule for allocating a section 643(i) distribution among multiple U.S. grantors and beneficiaries. If a U.S. person who is not a U.S. grantor or beneficiary of a foreign trust but who is related to more than one U.S. grantor or beneficiary of the foreign trust receives a loan of cash or marketable securities from the trust, or uses trust property, and the loan or use is treated as a section 643(i) distribution, then each U.S. grantor or beneficiary who is related to the U.S. person receiving the loan or using trust property is treated as receiving an equal share of the section 643(i) distribution.

H. Tax Consequences of a Section 643(i) Distribution

Proposed § 1.643(i)-3(c) provides rules to determine the tax consequences of a section 643(i) distribution to a foreign trust treated as making a section 643(i) distribution and to a U.S. grantor or beneficiary treated as receiving the distribution. Proposed § 1.643(i)-3(c)(2) provides that a foreign trust generally must treat the section 643(i) distribution as an amount properly paid, credited, or required to be distributed by the trust as described in section 661(a)(2) for which the trust may be allowed a distribution deduction in computing its taxable income. In addition, a section 643(i) distribution of marketable securities would cause a foreign trust to be deemed to have elected to have section 643(e)(3) apply to such distribution, which would cause the trust to recognize gain or loss as if the marketable securities had been sold at fair market value. Any capital gain recognized by the foreign trust would be included in the trust's distributable net income (DNI) pursuant to section 643(a)(6)(C). As a result of the deemed election, a U.S. grantor or beneficiary

would be treated as including in gross income under section 662(a)(2) the fair market value of the marketable securities, and in computing its taxable income, the foreign trust would be allowed to deduct the fair market value of the marketable securities to the extent allowed under section 661(a)(2).

Proposed § 1.643(i)-3(c)(2)(iii) provides that the foreign trust may issue a Foreign Nongrantor Trust Beneficiary Statement (described in proposed § 1.6048-4(c)(2)) to each U.S. grantor or beneficiary who receives any loan of cash or marketable securities or uses other trust property during the taxable year of the trust or is related to a U.S. person who receives any loan of cash or marketable securities or uses other trust property during the taxable year of the trust, whether or not such U.S. grantor or beneficiary would be required to take the amount into account as a section 643(i) distribution. A U.S. grantor or beneficiary who does not receive a Foreign Nongrantor Trust Beneficiary Statement with respect to a section 643(i) distribution is required to determine the tax consequences of the distribution under the default calculation method in proposed § 1.643(i)-3(c)(3)(ii).

Proposed § 1.643(i)-3(c)(3) provides that a U.S. grantor or beneficiary who is treated as receiving a section 643(i) distribution must determine the tax consequences of the distribution using either the actual calculation method or the default calculation method. Under the actual calculation method, set out under proposed § 1.643(i)-3(c)(3)(i), a U.S. grantor or beneficiary must treat a section 643(i) distribution as an amount properly paid, credited, or required to be distributed by the foreign trust as described in section 662(a)(2) (relating to inclusions in gross income by beneficiaries of trusts accumulating income or distributing corpus). The tax consequences of the section 643(i) distribution to a U.S. grantor or beneficiary are determined by using information provided in the Foreign Nongrantor Trust Beneficiary Statement and applying the rules of subparts C and D of part I of subchapter J of chapter 1 of the Code.

Under the default calculation method, as provided in proposed § 1.643(i)-3(c)(3)(ii), a U.S. grantor or beneficiary must determine the tax consequences of the section 643(i) distribution under the rules provided in proposed § 1.6048-4(d)(3). For an explanation of the default calculation method, see section IV.C of this Explanation of Provisions.

A U.S. grantor or beneficiary may not use the actual calculation method unless the U.S. grantor or beneficiary

has received a Foreign Nongrantor Trust Beneficiary Statement (described in proposed § 1.6048-4(c)(2)) from the foreign trust. A U.S. grantor or beneficiary who previously has used the default calculation method must consistently use the default calculation method to determine the tax consequences of all subsequent distributions from the same foreign trust (including distributions other than section 643(i) distributions), except in the year in which the foreign trust terminates. See proposed § 1.6048-4(b) for the definition of the term *distribution*, and see proposed § 1.6048-4(d)(3)(iii) for rules relating to the tax consequences to a U.S. grantor or beneficiary in the year in which a foreign trust terminates.

I. Subsequent Transactions

Proposed § 1.643(i)-3(d)(1) provides rules regarding the treatment of any subsequent transaction between a foreign trust and an obligor regarding the principal of any loan of cash or marketable securities (or use of trust property) that is treated as a section 643(i) distribution, including complete or partial repayment, satisfaction, cancellation, discharge, return of trust property, or otherwise, but not including payments of interest. Proposed § 1.643(i)-3(d)(2) provides that any subsequent transaction with respect to the principal of any loan of cash or marketable securities or return of trust property treated as a section 643(i) distribution has no tax consequences to a foreign trust. However, payment to a foreign trust other than the repayment of principal of any loan treated as a section 643(i) distribution, such as the payment of interest, is treated as income to the trust.

Proposed § 1.643(i)-3(d)(3) provides the consequences to an obligor of subsequent transactions between a foreign trust and the obligor related to a section 643(i) distribution. Generally, any subsequent transaction regarding the principal of any loan of cash or marketable securities or return of trust property treated as a section 643(i) distribution is treated as a transfer that is not a gratuitous transfer by a U.S. person for purposes of § 1.671-2(e)(2)(i) and chapter 1 of the Code. Thus, the repayment of principal would not cause an obligor to be treated as the owner of the foreign trust. However, if an obligor satisfies the principal of any loan of cash or marketable securities treated as a section 643(i) distribution through a transfer of property to the foreign trust, the obligor will recognize as gain or loss the difference between the fair market value of the property transferred and its

adjusted basis in the hands of the obligor under the rules of section 1001 and the regulations issued under section 1001.

II. Section 679—Foreign Trusts Treated as Having a U.S. Beneficiary

The proposed regulations amend the definition of *U.S. person* in § 1.679-1(c)(2), the definition of *obligation* in § 1.679-1(c)(6), and the definition of *qualified obligation* in § 1.679-4(d). The amended definitions generally are consistent with the definitions of the same terms in proposed §§ 1.643(i)-1(d)(12) and 1.643(i)-2(b)(2), except that the definition of a *U.S. person* in proposed § 1.679-1(c)(2) does not exclude tax-exempt entities.

The proposed regulations also make two additions to § 1.679-2 that provide guidance on two statutory provisions added to section 679 by the HIRE Act. First, proposed § 1.679-2(a)(5) and proposed § 1.679-2(b)(3) provide guidance to determine when a loan from a foreign trust to a U.S. person or the use of foreign trust property by a U.S. person causes the foreign trust to be treated as having a U.S. beneficiary. Second, proposed § 1.679-2(d) implements section 679(d), which generally provides that, if a U.S. person directly or indirectly transfers property to a foreign trust, the trust is presumed to have a U.S. beneficiary in certain circumstances.

A. Definition of U.S. Person

Proposed § 1.679-1(c)(2) amends the current definition of *U.S. person* for purposes of §§ 1.679-1 through 1.679-6 to remove the explicit statement that a nonresident alien individual who elects under section 6013(g) to be treated as a resident of the United States is a U.S. person for purposes of section 679 without intending a substantive change from the existing regulation regarding the treatment of persons who make an election under section 6013(g). Additionally, a U.S. person for purposes of section 679 will include a nonresident alien individual who elects under section 6013(h) to be treated as a resident of the United States. An election under either section 6013(g) or (h) is effective for all purposes of chapter 1 of the Code, including section 679, and thus, no specific reference to either rule should be required.

Under the definition of *U.S. person* in the proposed regulations, however, a dual resident taxpayer (within the meaning of § 301.7701(b)-7(a)(1)) is not treated as a U.S. person with respect to any taxable year (or portion of a taxable year) for which such person computes U.S. tax liability as a nonresident alien

pursuant to § 301.7701(b)-7. The Treasury Department and the IRS are of the view that it is not necessary to treat a dual resident taxpayer who has elected to compute such person's income tax liability as a nonresident alien as a U.S. person for purposes of §§ 1.679-1 through 1.679-6 in order to carry out the purposes of section 679. However, see § 1.679-5 for rules that may apply if a dual resident taxpayer who has been computing U.S. tax liability as a nonresident alien begins to compute tax liability as a U.S. resident.

B. Definition of Obligation

Proposed § 1.679-1(c)(6) amends the current definition of *obligation* for purposes of §§ 1.679-1 through 1.679-6 to conform to the definition of *obligation* in proposed § 1.643(i)-2(b)(2)(i).

C. Loans From Foreign Trusts and Uses of Trust Property

Proposed § 1.679-2(a)(5)(i) provides guidance under section 679(c)(6), which was added to the Code by the HIRE Act. As a general rule, any direct or indirect loan of cash or marketable securities (whether from trust income or corpus) by a foreign trust to, or the direct or indirect use of any other property of a foreign trust by, any U.S. person (whether or not a beneficiary under the terms of the trust) will be treated as causing trust income or corpus to be paid to or accumulated for the benefit of a U.S. person for purposes of § 1.679-2(a)(1). For these purposes, a loan to, or use of any other property of a foreign trust by, a grantor trust or a disregarded entity is treated as a loan to, or use of trust property by, the owner of the grantor trust or of the disregarded entity. (For example, a loan to a single member LLC treated as a disregarded entity would be treated as a loan to the owner of the LLC.) Consequently, a foreign trust that is not already treated as having a U.S. beneficiary under § 1.679-2 is treated as having a U.S. beneficiary for purposes of § 1.679-1, with the result that a U.S. grantor who has made a transfer to the foreign trust is treated as the owner of the trust (or a portion of the trust). See proposed § 1.6048-4 for rules relating to information reporting with respect to loans from foreign trusts and the use of property of a foreign trust.

Proposed § 1.679-2(a)(5)(ii) provides that an indirect loan from a foreign trust to a U.S. person includes a loan made by any person, whether U.S. or foreign, if the foreign trust provides a guarantee (within the meaning of § 1.679-3(e)(4)) for the loan. An indirect loan from a foreign trust to a U.S. person also

includes a loan made through an intermediary, such as an agent or nominee of the foreign trust or of the U.S. beneficiary, and a loan from a person related (within the meaning of proposed § 1.643(i)–1(d)(9)) to the foreign trust.

Proposed § 1.679–2(a)(5)(iii) provides three exceptions to the general rule of proposed § 1.679–2(a)(5)(i).

First, the general rule does not apply if the U.S. person who receives the loan of cash or marketable securities, or who uses trust property, is described in section 501(c)(3).

Second, the general rule does not apply to any loan of cash received by a U.S. person in exchange for a qualified obligation within the meaning of proposed § 1.643(i)–2(b)(2)(iii)(A), provided the obligor timely makes all payments within the meaning of proposed § 1.643(i)–2(b)(2)(iii)(B)(3).

Third, the general rule does not apply if the U.S. person who uses trust property (other than a loan of cash or marketable securities) pays the foreign trust the fair market value of the use of such property within a reasonable period from the date of the start of the use of the property. The fair market value is based on all the facts and circumstances, including the type of property used and the period of use. Proposed § 1.679–2(a)(5)(iv) provides two safe harbors in which this fair market value exception applies.

Proposed § 1.679–2(a)(5)(v) addresses the interaction of proposed § 1.679–2(a)(5) with section 643(i) and confirms that section 643(i) does not apply to the extent a foreign trust is treated as having acquired a U.S. beneficiary and is treated as owned by a U.S. person under section 679 (discussed in section I.A of this Explanation of Provisions).

Proposed § 1.679–2(b)(3) provides that a loan of cash or marketable securities or the use of trust property that does not qualify for the exceptions described in proposed § 1.679–2(a)(5)(iii) is treated as paid to or accumulated for the benefit of a U.S. person if the loan is made to, or the property is used by, a foreign entity described in § 1.679–2(b)(1), or if the loan is made through, or the property is used by, an intermediary or is made by any other means where a U.S. person may obtain an actual or constructive benefit, as described in § 1.679–2(b)(2).

D. Presumption That Foreign Trust Has U.S. Beneficiary

Proposed § 1.679–2(d)(1) provides guidance under section 679(d) regarding whether a foreign trust is deemed to have a U.S. beneficiary. As a general rule, if a U.S. person directly or indirectly transfers property to a foreign

trust (other than a compensatory or charitable trust described in § 1.679–4(a)(2) or (3)), the IRS may treat the trust as having a U.S. beneficiary for purposes of applying § 1.679–1 unless the U.S. person, for the tax year in which the transfer is made, (i) satisfies the information reporting requirements of proposed § 1.6048–2 with respect to the transfer, and (ii) attaches an explanatory statement to the U.S. person's Federal income tax return demonstrating to the satisfaction of the IRS that the trust satisfies the requirements of § 1.679–2(a)(1) immediately after the transfer. Section 1.679–2(a)(1) provides that a foreign trust is treated as having a U.S. beneficiary unless, during the taxable year in which the U.S. person made the transfer, (i) no part of the income or corpus of the foreign trust may be paid to or accumulated for the benefit of, directly or indirectly, a U.S. person, and (ii) if the foreign trust is terminated at any time during the taxable year, no part of the income or corpus of the trust could be paid to or for the benefit of, directly or indirectly, a U.S. person.

Proposed § 1.679–2(d)(2) provides that the IRS may request additional information related to the foreign trust and its potential beneficiaries to determine whether the trust satisfies the requirements of § 1.679–2(a)(1). Unless the U.S. person provides such additional information within 60 days (90 days if the U.S. person is outside the United States) after the IRS's written notice and request, the trust will be presumed to have a U.S. beneficiary.

E. Definition of Qualified Obligation

Proposed § 1.679–4(d) amends the current definition of *qualified obligation* for purposes of § 1.679–4 to conform to the definition of qualified obligation in proposed § 1.643(i)–2(b)(2)(iii) and the additional rules in proposed §§ 1.643(i)–2(b)(3) through (6) (discussed in section I.C of this Explanation of Provisions).

III. Section 6039F—Information Reporting Rules for U.S. Recipients of Foreign Gifts

The proposed regulations provide information reporting rules for U.S. recipients of foreign gifts by generally incorporating the section 6039F guidance that was provided in Notice 97–34 (discussed in section III.C of the Background). They also provide additional guidance that is needed to implement all of section 6039F and to address certain abuses of which the IRS has become aware and relevant statutory developments since 1997, including the enactment of section 2801 dealing with

gifts and bequests from certain expatriates.

A. In General

Proposed § 1.6039F–1(a)(1) provides that any U.S. person who treats an amount received from a foreign person as a foreign gift during a taxable year must report that amount on Part IV of Form 3520 by the fifteenth day of the fourth month after the close of the U.S. person's taxable year. Proposed § 1.6039F–1(a)(2) provides that, if the U.S. person qualifies for an automatic extension of time to file an income tax return under section 6081 and § 1.6081–5(a)(5) because the U.S. person resides outside of the United States and Puerto Rico, and the U.S. person's main place of business or post of duty is outside of the United States or Puerto Rico, Form 3520 must be filed by the fifteenth day of the sixth month after the close of the U.S. person's taxable year. In either case, if the U.S. person has been granted an extension of time to file an income tax return pursuant to section 6081, an extension of time for filing Form 3520 is automatically granted to the fifteenth day of the tenth month following the close of the U.S. person's taxable year. See proposed § 1.6039F–1(a)(1) and (2). Proposed § 1.6039F–1(a)(3) provides that, if the U.S. person dies, the executor of the U.S. person's estate must report the foreign gift on Part IV of Form 3520 by the fifteenth day of the fourth month following the close of the 12-month period which began with the first day of the U.S. person's final taxable year or, if the executor has been granted an extension of time to file the U.S. person's final income tax return pursuant to section 6081, by the fifteenth day of the tenth month following the close of the 12-month period which began with the first day of the U.S. person's final taxable year. No additional extension of time to file Form 3520 is allowed.

For purposes of proposed § 1.6039F–1, the term *U.S. person* means a United States person as defined under section 7701(a)(30). However, under proposed § 1.6039F–1(f), consistent with the approach in proposed §§ 1.643(i)–1(d)(12)(ii) and 1.679–1(c)(2)(ii), neither a dual resident taxpayer nor a dual status taxpayer is treated as a U.S. person for purposes of proposed § 1.6039F–1 for a taxable year or any portion of a taxable year that the taxpayer is treated as a nonresident alien for purposes of computing U.S. tax liability. See section III.F of this Explanation of Provisions.

B. Definition of “Foreign Gift” and Coordination With Section 6048(c)

For purposes of proposed § 1.6039F–1, the term *foreign gift* is defined to include any amount received from a person other than a U.S. person that the recipient treats as a gift, bequest, devise, or inheritance for Federal income tax purposes. The term, however, does not include any qualified transfer within the meaning of section 2503(e)(2) (relating to certain transfers for educational or medical expenses) or any transfer from a foreign trust that is treated as a distribution (within the meaning of proposed § 1.6048–4(b)) and reported on a return under proposed § 1.6048–4. Proposed § 1.6039F–1(b)(1) also provides that a U.S. person who receives a transfer from a foreign trust must treat the transfer as a distribution from the trust that is reportable under proposed § 1.6048–4, rather than reportable as a foreign gift under proposed § 1.6039F–1(a), even if the U.S. person treats the transfer as a gift for another purpose, such as computing the U.S. person’s Federal income tax liability.

Proposed § 1.6039F–1(b)(2) includes an anti-avoidance rule that provides that the term *foreign gift* includes transfers from a person other than a U.S. person that the recipient does not treat as a gift, bequest, devise, or inheritance for Federal income tax purposes, such as a purported loan, if based on all the facts and circumstances the IRS determines that the transfer is in substance a gift. The IRS has become aware of U.S. persons who are seeking to circumvent the section 6039F information reporting rules by claiming that the amounts they receive from foreign persons are not foreign gifts because they do not treat them as gifts but that they are otherwise not taxable (claiming instead that the transfers are loans). These amounts, however, objectively have all the indicia of being a gift. Under the existing principles of Federal tax law, the IRS therefore will recharacterize these amounts as foreign gifts that should have been reported under section 6039F.

C. Exceptions

Proposed § 1.6039F–1(c) provides a number of exceptions to the general rule in proposed § 1.6039F–1(a). Proposed § 1.6039F–1(c)(1) provides that the general rule does not apply if the recipient of the foreign gift is described in section 501(c) and is exempt from tax under section 501(a). Proposed § 1.6039F–1(c)(2)(i) through (iii) provides exceptions from information reporting under proposed § 1.6039F–

1(a) for amounts below the reporting thresholds.

Under proposed § 1.6039F–1(c)(2)(i)(A), a U.S. person is not required to report foreign gifts from foreign individuals or foreign estates if, during the U.S. person’s taxable year, the aggregate amount of foreign gifts received, directly or indirectly, from any one individual or estate (the *transferor*) does not exceed \$100,000, as modified by cost of living adjustments under proposed § 1.6039F–1(c)(2)(v). For purposes of determining whether the \$100,000 reporting threshold is met, all foreign gifts (including covered gifts and bequests) from the transferor and from any foreign persons related to the transferor are aggregated. See proposed § 1.6039F–1(c)(2)(i)(B).

If the aggregate amount of foreign gifts from a transferor exceeds the \$100,000 reporting threshold, the proposed regulations require the U.S. person to separately identify each foreign gift in excess of \$5,000 received from the transferor and from each foreign person related to the transferor, and to provide identifying information about the transferor and related foreign persons, including foreign individuals or foreign estates (for example, name and address). Specific identifying information about the transferor is not currently required to be provided on Form 3520. The Treasury Department and the IRS are of the view that the additional identifying information would assist the IRS in its determination of whether these amounts are properly treated as foreign gifts, and the burden imposed on the U.S. person should be minimal because the U.S. person would need to know the transferor’s identity in order to know whether the transferor is foreign and in order to apply the aggregation rule.

Under proposed § 1.6039F–1(c)(2)(ii), notwithstanding the reporting threshold described above, beginning on the date on which final regulations under section 2801 (tax on gifts and bequests from expatriates) apply, a U.S. person who receives foreign gifts that are covered gifts or bequests will be required to report the covered gifts or bequests under proposed § 1.6039F–1(a) if the aggregate amount of all covered gifts and bequests received by the U.S. person during the calendar year exceeds the exclusion amount under section 2801(c). See proposed § 1.6039F–1(h)(2). This exclusion amount is the dollar amount of the per-donee gift tax exclusion in effect under section 2503(b) for the calendar year (\$18,000 for 2024).

Under proposed § 1.6039F–1(c)(2)(iii), a U.S. person is not required to report foreign gifts from a foreign corporation

or partnership if, during the U.S. person’s taxable year, the aggregate amount of transfers received from any particular corporation or partnership does not exceed \$10,000, as modified by cost-of-living adjustments under proposed § 1.6039F–1(c)(2)(v). The proposed regulations provide rules for aggregating and reporting foreign gifts from persons related to the transferor.

Proposed § 1.6039F–1(c)(2)(iv) provides that, with respect to spouses who file joint income tax returns under section 6013, the reporting threshold amounts apply separately to each spouse.

D. Valuation Principles

Proposed § 1.6039F–1(d) provides that the amount of a foreign gift is the value of the property at the time of the transfer. The value of the property is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell, and both having reasonable knowledge of relevant facts. The value is to be determined in accordance with the Federal gift tax valuation principles of section 2512 and sections 2701 through 2704 (chapter 14 of the Code) and the related regulations.

E. Penalty for Failure To File Information

Proposed § 1.6039F–1(e)(1) describes penalties for failure to furnish the information required by proposed § 1.6039F–1(a) by the due date (including extensions) of Form 3520. The tax consequences of the receipt of the foreign gift will be determined by the IRS based on all the facts and circumstances. A U.S. person who fails to furnish the required information is subject to a penalty equal to five percent of the amount of the foreign gift for each month (or portion thereof) for which the failure continues, but not to exceed 25 percent of the amount of the foreign gift.

For purposes of determining the tax consequences of the receipt of the foreign gift, the IRS may take into account the purported gift rules in § 1.672(f)–4 (which address the treatment of a purported gift, as defined in § 1.672(f)–4(d), from a partnership or foreign corporation). Unless an exception described in § 1.672(f)–4(b), (e) or (f) applies, § 1.672(f)–4 generally requires a U.S. person who receives a purported gift or bequest, directly or indirectly, from a partnership or foreign corporation to include the purported gift or bequest in gross income as ordinary income.

Proposed § 1.6039F–1(e)(2)(i) explains that no penalty is imposed if the U.S.

person shows that the failure to comply is due to reasonable cause and not due to willful neglect. The determination of whether a failure is due to reasonable cause and not due to willful neglect will be made under the principles set out in § 1.6664-4 and § 301.6651-1(c) and will be made on a case-by-case basis, taking into account all pertinent facts and circumstances.

F. Special Rules for Dual Resident and Dual Status Taxpayers

Proposed § 1.6039F-1(f)(1) provides a special rule for dual resident taxpayers (within the meaning of § 301.7701(b)-7(a)(1)). A dual resident taxpayer who, pursuant to a provision of an income tax treaty that provides for resolution of conflicting claims of residence by the United States and the treaty partner, claims to be treated as a resident of the treaty partner as provided in § 301.7701(b)-7 is taxed as a nonresident for U.S. tax purposes for the portion of the taxable year that the individual is treated as a nonresident. The Treasury Department and the IRS are of the view that, because the dual resident taxpayer's filing of relevant forms pursuant to § 301.7701(b)-7 provides adequate information for the IRS to identify residents in this category in order to ensure their tax compliance, reporting on Form 3520 by such a taxpayer is not essential to effective IRS tax enforcement efforts relating to this category of residents.

Similarly, proposed § 1.6039F-1(f)(2) provides a special rule for dual status taxpayers. As provided in § 1.6012-1(b)(2)(ii), a dual status taxpayer who, during the taxable year, abandons U.S. citizenship or U.S. residence or acquires U.S. citizenship or U.S. residence is not treated as a U.S. person for the part of the year that the taxpayer is treated as a nonresident alien for purposes of computing the taxpayer's income tax liability as reflected on the Form 1040NR or other similar schedule attached to such Form 1040NR.

These rules are relevant both for purposes of determining whether a dual resident taxpayer or dual status taxpayer who receives a foreign gift is a U.S. person required to report the foreign gift on Form 3520 and for purposes of determining whether a gift or bequest from a dual resident taxpayer or dual status taxpayer is a gift from a foreign person.

IV. Section 6048—Information With Respect to Certain Foreign Trusts

The proposed regulations provide information reporting rules with respect to a U.S. person's transfers to, creation of, ownership of, and receipt of

distributions from foreign trusts. These proposed regulations generally implement the rules set forth in Notice 97-34, Revenue Procedure 2014-55, and Revenue Procedure 2020-17 (discussed in section III.D of the Background) but also provide additional exceptions to section 6048 reporting and include certain other modifications.

A. Section 6048(a)—Notice of Certain Events

The proposed regulations under section 6048(a) require a responsible party to provide notice of reportable events that occur during the taxable year on Part I of Form 3520. See proposed § 1.6048-2(a)(1).

Proposed § 1.6048-2(c) defines *responsible party* as the grantor in the case of the creation of an inter vivos foreign trust, the transferor in the case of a transfer of property to a foreign trust by a U.S. person other than a transfer by reason of death, or the executor of the estate of a deceased grantor or transferor in any other case, even if the executor is not a U.S. person.

Proposed § 1.6048-2(b) defines a *reportable event* as: (i) the creation of a foreign trust by a U.S. person, (ii) any direct, indirect, or constructive transfer, within the meaning of § 1.679-3 or § 1.684-2, of property (including cash) to a foreign trust by a U.S. person, including a transfer by reason of death, and (iii) the death of a citizen or resident of the United States if the decedent was treated as the owner of any portion of a foreign trust under the grantor trust rules or if any portion of a foreign trust was included in the gross estate of the decedent. A reportable event also includes a U.S. person's transfer of property to a domestic trust that becomes a foreign trust, as described in § 1.684-4 (outbound migrations of domestic trusts), and a U.S. person's transfer of property in exchange for any obligation of the foreign trust or of a related person, as described in § 1.679-4, without regard to whether the obligation is a qualified obligation. A reportable event does not include transfers to certain foreign charitable trusts, foreign compensatory trusts, and tax-favored foreign retirement and non-retirement savings trusts, as discussed in section IV.D.2.i of this Explanation of Provisions. See proposed § 1.6048-5.

Form 3520 generally must be filed by the fifteenth day of the fourth month after the close of the responsible party's taxable year, but no later than the fifteenth day of the tenth month if the responsible party receives an extension of time to file the responsible party's income tax return under section 6081.

See proposed § 1.6048-2(a)(2)(i). However, if the responsible party who is a grantor or transferor qualifies for an automatic extension of time to file an income tax return under section 6081 and § 1.6081-5(a)(5) because the responsible party resides outside of the United States and Puerto Rico, and the responsible party's main place of business or post of duty is outside of the United States or Puerto Rico, Form 3520 must be filed by the fifteenth day of the sixth month after the close of the responsible party's taxable year. See proposed § 1.6048-2(a)(2)(ii). If the responsible party who is a grantor or transferor dies, the executor of the responsible party's estate must file Form 3520 by the fifteenth day of the fourth month after the close of the 12-month period which began on the first day of the responsible party's final taxable year. See proposed § 1.6048-2(a)(2)(iii).

B. Section 6048(b)—U.S. Owners of Foreign Trusts

The proposed regulations under section 6048(b) generally require any U.S. person who is treated as the owner (*U.S. owner*) of any portion of a foreign trust under the grantor trust rules to ensure that the foreign trust: (i) files Form 3520-A with the IRS by the fifteenth day of the third month after the end of the trust's taxable year (March 15 if the trust's taxable year is a calendar year) with a maximum extension of a 6-month period beginning on such day, (ii) furnishes a Foreign Grantor Trust Owner Statement (described in proposed § 1.6048-4(c)(1)(i)) to each U.S. owner of the foreign trust, and (iii) furnishes a Foreign Grantor Trust Beneficiary Statement (described in proposed § 1.6048-4(c)(1)(ii)) to each U.S. person to whom the trust made distributions during the trust's taxable year. The foreign trust must attach copies of each Foreign Grantor Trust Owner Statement and each Foreign Grantor Trust Beneficiary Statement to the Form 3520-A. See proposed § 1.6048-3(a)(1). If the foreign trust does not comply with all these requirements, the U.S. owner is required to: (i) complete and file Part II of Form 3520 by the U.S. owner's Form 3520 due date, and (ii) complete the foreign trust's Form 3520-A and related statements and file them with Part II of the U.S. owner's Form 3520. Further, the U.S. owner must furnish the Foreign Grantor Trust Beneficiary Statement to each U.S. beneficiary by the due date of the U.S. owner's Form 3520. See proposed § 1.6048-3(a)(2). If neither the foreign trust nor the U.S. owner complies with these requirements, the penalty for failure to comply is imposed on the U.S.

owner. See proposed § 1.6677-1(b). As discussed in section IV.D.2.i of this Explanation of Provisions, the proposed regulations under section 6048(b) do not apply to tax-favored foreign retirement and non-retirement savings trusts. See proposed § 1.6048-5.

The proposed regulations require a U.S. person who receives a Foreign Grantor Trust Owner Statement or Foreign Grantor Trust Beneficiary Statement from a foreign trust to treat any item reported by the trust consistently with the trust's treatment of such item unless the U.S. person notifies the IRS about any inconsistency on Form 8082. See proposed § 1.6048-3(b). If the U.S. person fails to notify the IRS about the inconsistency, or if the U.S. person receives information believed to be incorrect from the foreign trust, then, similar to the rules of section 6034A(c) (addressing reporting in respect of income tax returns), any adjustment relating to an unreported item is treated as a mathematical or clerical error under section 6213(b), with the result that the adjustment would not be subject to the usual restrictions on assessment and the U.S. grantor or U.S. beneficiary would have no right to file a Tax Court petition based on the adjustment.

Proposed § 1.6048-3(c) provides that, unless a foreign trust with a U.S. owner appoints a limited U.S. agent, the determination of amounts required to be taken into account with respect to the trust by the U.S. owner under the grantor trust rules will be determined by the IRS based on all the facts and circumstances. Proposed § 1.6048-3(d) provides rules relating to the appointment and duties of the limited U.S. agent. Proposed § 1.6048-3(d) also provides rules concerning the issuance of a summons to a U.S. person (either directly or as the limited agent of the foreign trust) or to the foreign trust to produce records or testimony to determine the amounts required to be taken into account under the grantor trust rules.

C. Section 6048(c)—Reporting by U.S. Persons Receiving Distributions From Foreign Trusts

1. In General

Unless an exception described in proposed § 1.6048-5 applies, proposed regulations under section 6048(c) generally require a U.S. person to complete and file Part III of Form 3520 for each taxable year in which the U.S. person receives (directly or indirectly) any distribution from a foreign trust (including a foreign trust that the U.S. person is treated as owning under the

grantor trust rules). Part III of Form 3520 must be filed by the due date of the U.S. person's Form 3520 for that taxable year. See proposed § 1.6048-4(a). The Treasury Department and the IRS interpret section 6048(c) as requiring any U.S. person, including a U.S. owner, to report the receipt of foreign trust distributions. This interpretation is consistent with both the plain language of section 6048(c) and its purpose—to address Congress's concerns that U.S. taxpayers were avoiding their U.S. tax obligations through the use of foreign trusts that are less visible to the IRS—and empowers the IRS to obtain information that would allow it to enforce U.S. tax laws.

2. Distributions

Proposed § 1.6048-4(b)(1) provides that, as a general rule, the term *distribution* for purposes of proposed § 1.6048-4 means any transfer of property from a foreign trust received directly or indirectly by a U.S. person to the extent such property exceeds the fair market value of any property or services received by the foreign trust in exchange, without regard to whether any portion of the trust is treated as owned by the grantor or another person under the grantor trust rules, whether the recipient is designated as a beneficiary under the terms of the trust, or whether the distribution has any income tax consequences. A distribution includes any amount actually or constructively received and includes the receipt of a gift or bequest described in section 663(a). For purposes of proposed § 1.6048-4(b)(1), a transfer of property from a foreign trust to a grantor trust or to a disregarded entity is treated as a transfer to the U.S. owner of the grantor trust or of the disregarded entity.

Proposed § 1.6048-4(b)(2)(i) provides that the term *distribution* also includes any transfer of property from a foreign trust received by a U.S. person through an intermediary, nominee, or agent. In such a case, the intermediary, nominee, or agent generally is treated as an agent of the foreign trust, and the property is treated as distributed to the U.S. person in the year the property is transferred or made available to the U.S. person. However, proposed § 1.6048-4(b)(2)(ii) provides that, if the IRS determines that the intermediary, nominee, or agent is an agent of the U.S. person, then the property is treated as being transferred from the foreign trust to the U.S. person on the date of the transfer from the foreign trust to the intermediary, nominee, or agent. Regardless of the income tax consequences of such a transfer, pursuant to proposed § 1.6048-

4(b)(2)(iii), the U.S. person receiving an indirect transfer of property from a foreign trust must report it on Part III of Form 3520.

Proposed § 1.6048-4(b)(3) provides that a *distribution* includes any transfer of property from an entity owned by a foreign trust to a U.S. person who is related (within the meaning of § 1.679-1(c)(5)) to the foreign trust. It also explains that the transfer is treated as a distribution from the entity to the foreign trust followed by a distribution from the foreign trust to the U.S. person, unless the U.S. person demonstrates to the satisfaction of the IRS that the distribution from the entity is attributable to the U.S. person's ownership interest in the entity. This rule is the converse of the rule of § 1.679-3(f)(1), which provides that a transfer by a U.S. person to an entity owned by a foreign trust is treated as a transfer to the foreign trust followed by a transfer from the foreign trust to the entity, unless the U.S. person demonstrates to the satisfaction of the IRS that the transfer to the entity is attributable to the U.S. person's ownership interest in the entity.

Proposed § 1.6048-4(b)(4) provides that a *distribution* includes the migration of a foreign trust to a domestic trust. In such a case, the income and corpus of the foreign trust is treated as distributed to the domestic trust on the date the foreign trust becomes a domestic trust. See § 301.7701-7 for the rules that apply to determine whether a trust is a foreign trust or domestic trust.

Proposed § 1.6048-4(b)(5)(i) provides that a *distribution* includes any loan of cash or marketable securities made from a foreign trust (whether from corpus or income) directly or indirectly to a U.S. person. It also clarifies that a loan to a grantor trust or to an entity disregarded as an entity separate from its owner will be treated as a loan to the owner of the grantor trust or of the disregarded entity. Loans from a foreign trust also include a loan made by any foreign or U.S. person if the foreign trust guarantees the loan, as well as a loan made to a U.S. person through any intermediary, nominee or agent.

Proposed § 1.6048-4(b)(5)(ii) further provides that a *distribution* includes any loan of cash or marketable securities made directly or indirectly to a U.S. grantor or beneficiary (as defined in proposed § 1.643(i)-1(d)(1)) of a foreign nongrantor trust or to a U.S. person related (as defined in proposed § 1.643(i)-1(d)(9)) to a U.S. grantor or beneficiary of such foreign nongrantor trust without regard to whether the foreign trust receives an obligation (within the meaning of proposed

§ 1.643(i)–2(b)(2)(i)) in exchange for the loan.

Proposed § 1.6048–4(b)(5)(iii) provides that a loan of cash or marketable securities from a foreign trust must be reported by the U.S. person who receives the loan without regard to whether the loan would have any U.S. income tax consequences to a U.S. grantor or beneficiary of the foreign trust. If the U.S. person who receives the loan is related to a U.S. grantor or beneficiary of a foreign nongrantor trust, then the U.S. grantor or beneficiary also must report the distribution.

Proposed § 1.6048–4(b)(6)(i) provides that a *distribution* includes the fair market value of the direct or indirect use of trust property by a U.S. person without regard to whether the use of trust property would be treated as having any U.S. income tax consequences to a U.S. grantor or beneficiary of the foreign trust. For these purposes, the use of trust property by a grantor trust or a disregarded entity is treated as used by the owner of the grantor trust or of the disregarded entity, respectively. Proposed § 1.6048–4(b)(6)(ii) further provides that a *distribution* includes the fair market value of the direct or indirect use of trust property by a U.S. grantor or beneficiary of a foreign nongrantor trust or by a U.S. person related to such U.S. grantor or beneficiary whether or not the foreign trust is paid the fair market value for such use. Proposed § 1.6048–4(b)(6)(iii) provides that the use of trust property must be reported on Part III of Form 3520 by the U.S. person that uses the trust property without regard to whether the use of trust property would have any U.S. income tax consequences to a U.S. grantor or beneficiary of the foreign trust. If the U.S. person who uses the trust property is related to a U.S. grantor or beneficiary of a foreign nongrantor trust, then the U.S. grantor or beneficiary also must report the distribution.

The Treasury Department and the IRS are of the view that because, under section 643(i), a distribution to a U.S. person related to a U.S. grantor or beneficiary affects the U.S. grantor's or beneficiary's income tax liability, it is appropriate to require reporting by both the U.S. person receiving a distribution from a foreign trust and the U.S. grantor or beneficiary of the foreign trust who is related to that U.S. person. Requiring both parties to report the distribution ensures that the IRS has the information it needs for tax compliance efforts.

Proposed § 1.6048–4(b)(7) confirms that the term *distribution* also includes any covered gift or bequest (within the

meaning of section 2801(e)) that is received from a foreign trust.

3. Information Statements

Proposed § 1.6048–4(c) lists four types of information statements that may be provided by a foreign trust if a U.S. person receives a distribution (including a loan of cash or marketable securities or the use of other trust property) from the foreign trust—Foreign Grantor Trust Owner Statement, Foreign Grantor Trust Beneficiary Statement, Foreign Nongrantor Trust Beneficiary Statement, and Foreign-Owned Grantor Trust Beneficiary Statement. The instructions for Form 3520 will be modified after these regulations are finalized to include a list of items that must be included on a Foreign-Owned Grantor Trust Beneficiary Statement. The list will be similar to the lists of items that must be included on the Foreign Grantor Trust Beneficiary Statement and the Foreign Nongrantor Trust Beneficiary Statement. A U.S. person who receives one of these statements may use the statement to determine the tax consequences of the distribution.

4. Tax Consequences of Distributions

Proposed § 1.6048–4(d) describes the rules that a U.S. person (other than a U.S. owner of the distributing trust) must use to determine the tax consequences of a distribution from a foreign trust other than a distribution that is a loan of cash or marketable securities or the use of other trust property that is not treated as a section 643(i) distribution under proposed § 1.643(i)–1. Two methods to determine the tax consequences are provided: (i) the actual calculation method and (ii) the default calculation method. If the U.S. person who receives the distribution does not receive a copy of the relevant statement (see proposed § 1.6048–4(c)), the U.S. person must determine the tax consequences of the distribution under the default calculation method. A U.S. person who receives the relevant statement generally may compute the tax consequences of the distribution under either the actual calculation method or the default calculation method. However, a U.S. person may not use the actual calculation method if the U.S. person knows or has reason to know that the information in the relevant statement is incorrect. Additionally, if the U.S. person has previously used the default calculation method with respect to distributions from the foreign trust, the U.S. person must consistently use the default calculation method to determine the tax consequences of any subsequent distributions from the trust for all future

years, except for the year in which the trust terminates.

Under the actual calculation method provided in proposed § 1.6048–4(d)(2), a U.S. person who receives a Foreign Grantor Trust Beneficiary Statement or a Foreign-Owned Grantor Trust Beneficiary Statement from the foreign trust determines the income tax consequences of the distribution as a distribution being made from a grantor trust. Thus, if the distribution is a gift under section 102, the U.S. person does not include the distribution in gross income, but the distribution remains subject to the proposed § 1.6048–4 reporting requirements. A U.S. person who receives a Foreign Nongrantor Trust Beneficiary Statement determines the tax consequences of the distribution by applying the rules of subparts C and D of Part 1 of subchapter J of chapter 1 of the Code.

Under the default calculation method provided in proposed § 1.6048–4(d)(3)(i)(A), the U.S. person treats a portion of the distribution as a distribution of current income based on the average amount of the distributions that the U.S. person received from the foreign trust during the prior three taxable years, with only the excess amount of the distribution (that is, the amount that exceeds 125 percent of that average) treated as an accumulation distribution within the meaning of section 665(b) consisting of undistributed net income (*UNI*) of the foreign trust. In applying the default calculation method, in the absence of actual information provided on a statement described in proposed § 1.6048–4(c), the U.S. person must presume that the applicable number of years the foreign trust has been in existence is ten years and that no taxes described in section 665(d) have been imposed on the trust in any applicable previous year (even if a distribution has been made and tax under section 665(d) has previously been imposed). These rules are consistent with the default calculation method that is currently prescribed in the instructions for Part III of Form 3520. The U.S. person's use of the default calculation method does not affect any calculations made by the foreign trust for purposes of trust accounting. See proposed § 1.6048–4(d)(3)(ii).

5. Accumulation Distributions and U.S. Agents

Proposed § 1.6048–4(e) provides that, if a U.S. person fails to provide adequate records to the IRS for purposes of determining the income tax consequences of a distribution from a foreign trust (within the meaning of

proposed § 1.6048-4(b)) other than a loan or use of trust property that is not treated as a section 643(i) distribution under proposed § 1.643(i)-1, then the entire distribution is treated as an accumulation distribution includible in the U.S. person's income. However, if the trustee of the foreign trust authorizes a U.S. person to act as the trust's limited agent under the rules prescribed in proposed § 1.6048-3(e), then the IRS can summons and examine trust records through the U.S. agent and thus may determine the tax consequences of the distribution under the general rules provided in proposed § 1.6048-4(d)(1) rather than treating the entire distribution as an accumulation distribution.

6. Coordination With the Rule for Reporting Large Foreign Gifts

Proposed § 1.6048-4(f) addresses the interaction of proposed § 1.6048-4 and proposed § 1.6039F-1. If a U.S. person receives a distribution from a foreign trust, the U.S. person must report the distribution under proposed § 1.6048-4(a) and not under proposed § 1.6039F-1, regardless of whether the distribution is taxable to the U.S. person.

D. Exceptions

1. Exceptions To Reporting Transfers of Property to Foreign Trusts

Proposed § 1.6048-5(a) provides an exception from section 6048(a) reporting based on section 6048(a)(3)(B). The proposed regulations provide that, for purposes of proposed § 1.6048-2, a reportable event does not include any of the following: (1) a transfer of property to a foreign trust that is a transfer for fair market value within the meaning of § 1.679-4(b) (other than a transfer described in the following sentence); (2) any transfer of property to certain compensatory foreign trusts, as described in section 402(b), 404(a)(4), or 404A; and (3) any transfer of property to a foreign trust provided that the trust has received a determination letter from the IRS that has not been revoked that recognizes the trust as an organization described in section 501(c)(3) that is exempt from Federal income tax under section 501(a). However, a reportable event does include a transfer for fair market value if the transfer is made by a U.S. transferor that is a related person (as defined in § 1.679-1(c)(5)) with respect to the foreign trust in exchange for any obligation of the trust or of a related person, without regard to whether such obligation is a qualified obligation described in proposed § 1.679-4(d).

2. Additional Exceptions To Reporting Transactions With Foreign Trusts

Proposed § 1.6048-5(b) through (e) provides additional exceptions from section 6048 reporting based on the authority granted to the IRS by section 6048(d)(4) to suspend or modify the requirements of section 6048.

i. Tax-Favored Foreign Retirement Trusts, Non-Retirement Savings Trusts, and de Minimis Savings Trusts

Proposed § 1.6048-5(b) provides an exception from section 6048(a) through (c) and proposed §§ 1.6048-2 through 1.6048-4 for certain eligible U.S. individuals' transactions with, or ownership of, certain tax-favored foreign retirement trusts, non-retirement savings trusts, and de minimis savings trusts. These exceptions to section 6048 reporting generally follow the exceptions provided under Rev. Proc. 2020-17, but are modified to address comments received, including comments requesting that future guidance include an increase to the applicable contribution limitation thresholds, rules for tax-favored foreign retirement trusts that may allow limited contributions of unearned income, and relief with respect to certain trusts that do not fall within the listed categories but that have values below a certain threshold.

A *tax-favored foreign retirement trust* means a foreign trust that is established under the laws of a foreign jurisdiction to operate exclusively or almost exclusively to provide, or to earn income for the provision of, pension or retirement benefits and ancillary or incidental benefits, and that meets certain additional requirements, such as contribution limitations or value thresholds, conditions for withdrawal, and information reporting. See proposed § 1.6048-5(b)(2). A *tax-favored foreign non-retirement savings trust* means a foreign trust that is established under the laws of a foreign jurisdiction to operate exclusively or almost exclusively to provide, or to earn income for the provision of, medical, disability, or educational benefits, and that also meets certain additional requirements, such as contribution limitations, conditions for withdrawal, and information reporting. See proposed § 1.6048-5(b)(3). A *tax-favored foreign de minimis savings trust* means a foreign trust that is established under the laws of a foreign jurisdiction to operate as a savings vehicle, that is not treated as a tax-favored foreign retirement trust or a tax-favored foreign non-retirement savings trust, and that meets certain additional requirements,

such as information reporting, and whose value is under a de minimis threshold. See proposed § 1.6048-5(b)(4).

The Treasury Department and the IRS are of the view that it would be appropriate to exempt U.S. individuals from the requirement to provide information about these foreign trusts for several reasons. First, these foreign trusts generally are subject to written restrictions, such as contribution limitations, conditions for withdrawal, and information reporting, under the laws of the country in which they are established that are broadly consistent with the eligibility requirements under the Code for U.S. trusts serving similar policy goals. Second, U.S. individuals with an interest in these trusts may be required under section 6038D to separately report information about their interests in accounts held by, or through, these trusts. Additionally, with respect to tax-favored foreign de minimis savings trusts and tax-favored foreign retirement trusts, the Treasury Department and the IRS are of the view that exempting U.S. individuals from the section 6048 requirements based on the value of the trust is appropriate and consistent with the reporting thresholds under section 6038D.

ii. Distributions From Certain Foreign Compensatory Trusts

The proposed regulations implement the exception from section 6048(c) reporting provided in section V of Notice 97-34 for distributions from certain foreign compensatory trusts described in § 1.672(f)-3(c)(1) (section 402(b) employee trusts and foreign rabbi trusts). Proposed § 1.6048-5(c). The exception applies only if the U.S. individual who receives the distribution reports the distribution as compensation income on a Federal income tax return.

iii. Distributions Received by Certain Domestic Charitable Organizations

Proposed § 1.6048-5(d) implements the exception from section 6048(c) reporting provided in section V of Notice 97-34 for distributions received by a domestic organization described in section 501(c)(3). The exception applies only if the domestic organization has received a determination letter from the IRS that has not been revoked recognizing the domestic organization's exemption from Federal income tax under section 501(a) as an organization described in section 501(c)(3).

iv. Certain Trusts Located in a Mirror Code Possession

Proposed § 1.6048-5(e) provides an exemption from sections 6048(a)

through (c) for a trust located in a mirror code possession to the extent the responsible party (within the meaning of section 6048(a)(4)), U.S. owner, or U.S. recipient is a bona fide resident (within the meaning of § 1.937-1(b)) of the mirror code possession. For this purpose, a mirror code possession is a possession of the United States where, under the income tax system of the possession, the income tax liability of the residents of the possession is determined by reference to the income tax laws of the United States as if the possession were the United States. A trust is located in a mirror code possession if a court within such mirror code possession is able to exercise primary supervision over the administration of the trust and one or more bona fide residents of the mirror code possession have the authority to control all substantial decisions of the trust.

E. Special Rules

1. Dual Resident and Dual Status Taxpayers

Proposed § 1.6048-6(a)(1) provides that a dual resident taxpayer (within the meaning of § 301.7701(b)-7(a)(1)) who computes U.S. income tax liability as a nonresident alien and complies with the filing requirements of § 301.7701(b)-7(b) and (c) is not treated as a U.S. person for purposes of the proposed regulations for the portion of the year that the dual resident taxpayer is treated as a nonresident alien. Similarly, under proposed § 1.6048-6(a)(2), a dual status taxpayer who abandons U.S. citizenship or residence during the tax year or acquires U.S. citizenship or residence during the taxable year, as provided in § 1.6012-1(b)(2)(ii), is not treated as a U.S. person for purposes of the proposed regulations for the portion of the year that the dual status taxpayer is treated as a nonresident alien. As a result, these taxpayers are not subject to section 6048 reporting for the portion of the year during which they are treated as nonresident aliens for purposes of computing their U.S. income tax liability.

2. Reporting by all U.S. Transferors and Recipients

Section 6048(d)(1) provides that, “For purposes of [section 6048], in determining whether a United States person makes a transfer to, or receives a distribution from, a foreign trust, the fact that a portion of such trust is treated as owned by another person under the rules of subpart E of Part I of subchapter J of chapter 1 shall be disregarded.” The Treasury Department and the IRS are of

the view that it is necessary to receive information about transfers to, and distributions from, foreign grantor trusts with regard to all U.S. transferors and U.S. recipients, including the U.S. owner, in order to administer the foreign trust provisions and to determine a taxpayer’s U.S. tax liability with respect to foreign trusts. For example, the IRS uses this information to determine whether the transferor should be treated as the owner of the foreign trust, the value of the foreign trust’s corpus at the end of the year for purposes of assessing penalties under section 6677, and the tax consequences of distributions in later years, such as distributions of corpus or UNI, if the foreign trust becomes a nongrantor trust (because, for example, the grantor dies). Therefore, proposed § 1.6048-6(b) clarifies that, pursuant to section 6048(d)(1), a transfer to, or a distribution from, a foreign trust is reportable under section 6048(a) and (c) and the proposed regulations without regard to whether the trust is a grantor trust or a nongrantor trust, and whether or not there are any U.S. income tax consequences associated with the transfer or distribution.

3. Domestic Trust With Substantial Foreign Activities or Assets

Proposed § 1.6048-6(c) is reserved for rules under section 6048(d)(2). Section 6048(d)(2) provides that, to the extent provided in regulations, a domestic trust is treated as a foreign trust for purposes of sections 6048 and 6677 if the trust has substantial activities, or holds substantial property, outside the United States. See section III.D.4 of the Background.

4. Joint Filers

Proposed § 1.6048-6(d) provides that married U.S. persons, each of whom is subject to the information reporting requirements under proposed § 1.6048-2(a) (as a grantor or transferor required to file Part I of Form 3520), proposed § 1.6048-3(a)(2) (as a U.S. owner of a foreign trust required to file a substitute Form 3520-A), or proposed § 1.6048-4(a) (as a U.S. recipient of a distribution from a foreign trust required to file Part III of Form 3520) for the same foreign trust, may file one Form 3520 for purposes of proposed §§ 1.6048-2 through 1.6048-4, but only if they file a joint income tax return under section 6013 for the tax year for which reporting is required.

V. Section 6677—Civil Penalties for Failure To File Information With Respect to Certain Foreign Trusts

Proposed § 1.6677-1 provides rules for civil penalties that may be assessed if any notice or return required to be filed under proposed §§ 1.6048-2 through 1.6048-4 is not timely filed or contains incomplete or incorrect information. The proposed regulations provide for three separate civil penalties that correspond to each separate reporting requirement under proposed § 1.6048-2, § 1.6048-3, and § 1.6048-4. The Treasury Department and the IRS interpret section 6677 as assessing a penalty based on a percentage of a gross reportable amount, a term that is defined separately under section 6677(c) and in the proposed regulations with respect to each corresponding section 6048 reporting requirement. This interpretation is consistent with the plain text of sections 6048 and 6677 and the purpose of the 1996 Act’s modifications to these sections, which is to discourage U.S. persons from using foreign trusts to avoid their U.S. tax obligations.

A. General Rules

Proposed § 1.6677-1(a)(1) provides that, as a general rule, a person who fails to timely file a required notice or return, or fails to provide complete and correct information, is subject to a penalty equal to the greater of \$10,000 or 35 percent of the applicable gross reportable amount (defined in proposed § 1.6677-1(c)) for each such failure (or for each year, in the case of a failure under proposed § 1.6048-3 relating to information reporting about U.S. owners of foreign trusts). If a person reports an amount that is less than the gross reportable amount, the penalty is based on the amount that is unreported.

Proposed § 1.6677-1(a)(2) provides that, if the failure to comply with the applicable reporting requirement continues for more than 90 days after the day on which the IRS mails notice of the failure to the U.S. person required to pay the penalty, the person is required to pay an additional penalty of \$10,000 for each 30-day period (or fraction thereof) during which the failure continues.

Proposed § 1.6677-1(a)(3)(i) addresses maximum penalties. Proposed § 1.6677-1(a)(3)(i) provides that the aggregate amount of the penalties imposed by proposed § 1.6677-1(a)(1) and (2) (as modified by proposed § 1.6677-1(b), if applicable) with respect to any single failure may not exceed the gross reportable amount with respect to that failure (provided that the IRS receives

enough information to accurately determine the gross reportable amount). In some cases, the IRS can begin to assess penalties before it has received enough information to determine the gross reportable amount. If the aggregate amount of the penalty collected exceeds the applicable gross reportable amount (because the penalty was assessed and collected before the IRS was able to determine the gross reportable amount), the IRS will refund the excess amount pursuant to section 6402.

Proposed § 1.6677–1(a)(3)(ii) provides that the limitations period for claims for refund under section 6511(a) and (b) applies to the refund of any excess amount.

B. Failures To Comply With Proposed § 1.6048–3

Proposed § 1.6677–1(b) makes two modifications to the rules of proposed § 1.6677–1(a) in the case of a notice or return required to be filed under proposed § 1.6048–3 (relating to information reporting about U.S. owners of foreign trusts). First, in the case of a notice or return required to be filed by a foreign trust under proposed § 1.6048–3(a), the U.S. owner, rather than the foreign trust, must pay the penalty. Second, the amount of any penalty that initially is imposed under proposed § 1.6677–1(a)(1) is the greater of \$10,000 or five percent (rather than 35 percent) of the gross reportable amount.

C. Gross Reportable Amount

Proposed § 1.6677–1(c)(1) provides that the term *gross reportable amount* means (i) the gross value of the property involved in the reportable event (determined as of the date of the event) in the case of a failure relating to proposed § 1.6048–2, (ii) the gross value of the portion of the foreign trust's assets (at the close of the trust's taxable year) treated as owned by the U.S. person in the case of a failure relating to proposed § 1.6048–3, and (iii) the gross amount of the distribution or deemed distribution in the case of a failure relating to proposed § 1.6048–4. Proposed § 1.6677–1(c)(2) provides guidance on how to determine the gross value or gross amount of property for purposes of proposed § 1.6677–1(c)(1).

D. Reasonable Cause

Proposed § 1.6677–1(d) provides that the penalty does not apply if the person required to file the notice or return (including a U.S. person who is treated as an owner of a foreign trust that fails to comply with proposed § 1.6048–3(b)) shows that the failure to file is due to reasonable cause and not due to willful neglect. The determination of whether a

failure is due to reasonable cause and not due to willful neglect will be made under the principles set out in § 1.6664–4 and § 301.6651–1(c) and will be made on a case-by-case basis, taking into account all pertinent facts and circumstances. The fact that a foreign jurisdiction would impose a civil or criminal penalty on any person for disclosing the required information will not satisfy the reasonable cause exception. In addition, refusal on the part of a foreign trustee to provide information for any reason, including difficulty in producing the required information or the existence of provisions in the trust instrument that prevent the disclosure of required information, does not constitute reasonable cause.

E. Inapplicability of Deficiency Procedures

Proposed § 1.6677–1(e) provides that deficiency procedures do not apply in the case of the assessment or collection of a penalty imposed under section 6677.

F. Joint Filers

Proposed § 1.6677–1(f)(1) provides that married U.S. persons who jointly file Form 3520 for purposes of proposed §§ 1.6048–2 through 1.6048–4 and jointly file an income tax return under section 6013 (as described section IV.E of this Explanation of Provisions) are treated as a single U.S. person for purposes of assessing section 6677 penalties.

In addition, proposed § 1.6677–1(f)(2) provides that the IRS may treat married U.S. persons who file a joint income tax return under section 6013, but who did not file an information return as required under §§ 1.6048–2 through 1.6048–4, as a single U.S. person for purposes of assessing section 6677 penalties, unless the IRS determines that, based on all the facts and circumstances, only one of the spouses was subject to the information reporting requirement (for example, because only one spouse had an interest in the property constituting the transfer to, or receipt from, a foreign trust). In these cases, it can be difficult for the IRS to determine who, between spouses, should be treated as the transferor, grantor, or owner of, or the recipient of a distribution from, a foreign trust (because, for example, a transfer of property to, or the receipt of property from, a foreign trust was made from (or to) a joint bank account). By enabling the IRS to assess section 6677 penalties on a joint and several basis against married U.S. persons who do not file information returns required under

section 6048, proposed § 1.6677–1(f)(2) allows the IRS to properly enforce section 6048, while still allowing each spouse to demonstrate that they should not be jointly and severally liable for the section 6677 penalties assessed (for example, because one spouse did not have an interest in the underlying property giving rise to a reporting requirement under proposed §§ 1.6048–2 through 1.6048–4).

The liability of married U.S. persons treated as a single person is joint and several pursuant to proposed § 1.6677–1(f)(3).

VI. Proposed Applicability Dates

These regulations are proposed to apply to transactions with foreign trusts and the receipt of foreign gifts in taxable years beginning after the date on which the final regulations are published in the **Federal Register**. However, a taxpayer may rely on these proposed regulations for any taxable year ending after May 8, 2024 and beginning on or before the date that final regulations are published in the **Federal Register**, provided that the taxpayer and all related persons (within the meaning of sections 267(b) and 707(b)(1)) apply the proposed regulations in their entirety and in a consistent manner for all taxable years beginning with the first taxable year of reliance until the applicability date of the final regulations.

Special Analyses

I. Regulatory Planning and Review—Economic Analysis

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

II. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (*PRA*) generally requires that a Federal agency obtain the approval of the Office of Management and Budget (*OMB*) before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit.

The estimated number of taxpayers impacted by these proposed regulations is 58,000. This is the number of taxpayers who currently file Form 3520 and Form 3520–A to report information required by sections 643(i), 679, 6039F, and 6048 as reflected under OMB

control numbers 1545–0074 (for individual filers), 1545–0123 (for business filers), and 1545–0159 (for trust and estate filers). However, the Treasury Department and the IRS estimate that 58,000 is the upper bound because the proposed regulations exempt certain taxpayers from information reporting under sections 6039F and 6048. See, e.g., proposed §§ 1.6039F–1(c) and 1.6048–5.

The collections of information in the proposed regulations are in proposed §§ 1.643(i)–1(b)(2)(ii), 1.643(i)–1(c)(2)(ii), 1.679–2(d)(1), 1.679–4(d)(1)(ii), 1.6039F–1(a), 1.6039F–1(e), 1.6048–2(a), 1.6048–3(a), 1.6048–4(c), and 1.6677–1(d). In general, the collections of information contained in these proposed regulations are currently reflected in the collection of information for Form 3520 and Form 3520–A, which have been reviewed and approved by the OMB in accordance with the PRA under control numbers 1545–0074 (for individual filers), 1545–0123 (for business filers), and 1545–0159 (for trust and estate filers). Thus, the burden estimates for OMB control numbers 1545–0074, 1545–0123, and 1545–0159 will be updated to reflect the collections of information associated with the proposed regulations.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a valid OMB control number.

III. Regulatory Flexibility Act

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (5 U.S.C. chapter 6) (RFA) requires the agency “to prepare and make available for public comment an initial regulatory flexibility analysis” that will “describe the impact of the proposed rule on small entities.” See 5 U.S.C. 603(a). Section 605 of the RFA provides an exception to this requirement if the agency certifies that the proposed rulemaking will not have a significant economic impact on a substantial number of small entities. A small entity is defined as a small business, small nonprofit organization, or small governmental jurisdiction. See 5 U.S.C. 601(3) through (6).

The Treasury Department and the IRS do not expect the proposed regulations to have a significant economic impact on a substantial number of small entities within the meaning of sections 601(3) through 601(6) of the RFA. The proposed regulations generally reflect the existing collection of information requirements for Form 3520 and Form 3520–A. However, because the proposed regulations generally apply to any U.S. person, including small entities, that

engage in certain transactions with foreign trusts or receive large foreign gifts, an initial regulatory flexibility analysis has been prepared for this notice of proposed rulemaking under 5 U.S.C. chapter 6 and is provided below. The Treasury Department and the IRS request comments on the number of small entities that may be impacted and whether that impact will be economically significant.

A. Statement of the Need for, and Objectives of, the Proposed Regulations

As discussed in the Background and Explanation of Provisions, the proposed regulations implement sections 643(i), 679, 6039F, 6048 and 6677 (the *foreign trust and gift provisions*), which were added to the Code or significantly modified to address the use of foreign trusts and similar offshore arrangements by United States persons to avoid U.S. tax. These provisions also enhance the IRS’s ability to obtain information regarding these offshore arrangements, including the receipt of large foreign gifts by United States persons. The proposed regulations address potential uncertainty under current law, including the necessary requirements for complying with the foreign trust and gift provisions, and the relevant tax consequences and potential penalties for compliance failures.

B. Small Entities To Which the Proposed Regulations Will Apply

The proposed regulations generally define a United States person using the definition in section 7701(a)(30), which includes domestic partnerships and domestic corporations, subject to exceptions for certain entities that are exempt from taxation under chapter 1 of the Code. See, e.g., proposed §§ 1.643(i)–1(d)(12), 1.679–1(c)(2), 1.6039F–1(a), and 1.6048–1(b)(7). Because the number of small businesses that file Form 3520 and Form 3520–A is reflected in the taxpayer compliance burden provided for U.S. business income tax returns under OMB 1545–0123, an estimate of the number of small businesses affected by the proposed regulations is not currently feasible, and, therefore, this initial regulatory flexibility analysis assumes that a substantial number of small businesses will be affected. The Treasury Department and the IRS do not expect that the proposed regulations will affect a substantial number of small nonprofit organizations or small governmental jurisdictions.

C. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The proposed regulations generally do not impose additional reporting, recordkeeping, or other compliance obligations. The proposed regulations are substantially similar to the existing guidance in Notice 97–34, Revenue Procedure 2014–55, and Revenue Procedure 2020–17 and the existing instructions to Form 3520 and Form 3520–A. The proposed regulations include certain limited clarifications to the existing guidance and also provide additional taxpayer relief, including with respect to small entities. Moreover, even without the proposed regulations, small entities would continue to be required to file Form 3520 or Form 3520–A to comply with the statutory requirements. Therefore, these regulations generally are not expected to impose new compliance burdens, other than the time necessary for small entities to read the proposed regulations.

D. Duplicate, Overlapping, or Relevant Federal Rules

The Treasury Department and the IRS are not aware of any Federal rules that duplicate, overlap, or conflict with the proposed regulations.

E. Alternatives Considered

The foreign trust and gift provisions apply to any United States person, and the statutes do not establish different rules for small entities. Because the foreign trust and gift provisions are intended to address the use of foreign trusts and similar arrangements to avoid U.S. tax, which can be structured using large and small business entities, the Treasury Department and the IRS are of the view that the proposed regulations should apply uniformly to all business entities. The Treasury Department and the IRS did not consider any significant alternatives. The proposed regulations address potential uncertainty under current law without imposing additional economic burdens on these entities. Therefore, the proposed regulations adopt the approach with the least economic impact.

IV. Section 7805(f)

Pursuant to section 7805(f) of the Internal Revenue Code, this regulation will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

V. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs

and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Tribal government, in the aggregate, or by the private sector, of \$100 million in 1995 dollars, updated annually for inflation. The proposed regulations do not include any Federal mandate that may result in expenditures by State, local, or Tribal governments, or by the private sector in excess of that threshold.

VI. Executive Order 13132: Federalism

Executive Order 13132 (entitled *Federalism*) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. The proposed regulations do not have federalism implications, do not impose substantial direct compliance costs on State and local governments, and do not preempt State law within the meaning of the Executive order.

Comments and Requests for a Public Hearing

Before these proposed amendments to the regulations are adopted as final regulations, consideration will be given to any comments regarding the notice of proposed rulemaking that are submitted timely to the IRS, as prescribed in this preamble under the “Addresses” heading. The Treasury Department and the IRS request comments on all aspects of the proposed rules. Comments are specifically requested in Section I.B. of the Explanation of Provisions, regarding whether qualified obligation rules are needed for loans of marketable securities and regarding the scope and application of the exception from section 643(i) distribution treatment for certain loans made by a foreign corporation. All comments will be made available at www.regulations.gov. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn.

A public hearing has been scheduled for August 21, 2024, at 10 a.m. ET, in the Auditorium at the Internal Revenue Building, 1111 Constitution Avenue NW, Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30

minutes before the hearing starts. Participants may alternatively attend the public hearing by telephone.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit an outline of the topics to be discussed and the time to be devoted to each topic by July 8, 2024. Outlines must be submitted electronically via the Federal eRulemaking Portal at www.regulations.gov (indicate IRS and REG-124850-08). A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing. If no outline of the topics to be discussed at the hearing is received by July 8, 2024, the public hearing will be cancelled. If the public hearing is cancelled, a notice of cancellation of the public hearing will be published in the **Federal Register**.

Individuals who want to testify in person at the public hearing must send an email to publichearings@irs.gov to have your name added to the building access list. The subject line of the email must contain the regulation number REG-124850-08 and the language TESTIFY in Person. For example, the subject line may say: Request to TESTIFY in Person at Hearing for REG-124850-08.

Individuals who want to testify by telephone at the public hearing must send an email to publichearings@irs.gov to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG-124850-08 and the language TESTIFY Telephonically. For example, the subject line may say: Request to TESTIFY Telephonically at Hearing for REG-124850-08.

Individuals who want to attend the public hearing in person without testifying must also send an email to publichearings@irs.gov to have your name added to the building access list. The subject line of the email must contain the regulation number REG-124850-08 and the language ATTEND In Person. For example, the subject line may say: Request to ATTEND Hearing in Person for REG-124850-08. Requests to attend the public hearing must be received by 5:00 p.m. ET on August 19, 2024.

Hearings will be made accessible to people with disabilities. To request special assistance during a hearing please contact the Publications and Regulations Branch of the Office of Associate Chief Counsel (Procedure and Administration) by sending an email to

publichearings@irs.gov (preferred) or by telephone at (202) 317-6901 (not a toll-free number) by at least August 16, 2024.

Statement of Availability of IRS Documents

IRS Revenue Procedures, Revenue Rulings, Notices and other guidance cited in this document are published in the Internal Revenue Bulletin or Cumulative Bulletin and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at <https://www.irs.gov>.

Drafting Information

The principal authors of these proposed regulations are Lara A. Banjanin, Tracy M. Villecco, and S. Eva Wolf of the Office of Associate Chief Counsel (International), and M. Grace Fleeman, formerly of the Office of Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, the Treasury Department and IRS propose to amend 26 CFR part 1 as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding entries in numerical order and revising entries for §§ 1.679-1, 1.679-2, and 1.679-4 to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.643(i)-1 also issued under 26 U.S.C. 643.

Sections 1.643(i)-2 through 1.643(i)-4 also issued under 26 U.S.C. 643 and 6048.

Section 1.643(i)-5 also issued under 26 U.S.C. 643.

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Section 1.679-1 also issued under 26 U.S.C. 643 and 679.

Section 1.679-2 also issued under 26 U.S.C. 643 and 679.

Section 1.679-4 also issued under 26 U.S.C. 643 and 679.

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Section 1.6039F-1 also issued under 26 U.S.C. 6039F.

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Sections 1.6048-1 through 1.6048-6 also issued under 26 U.S.C. 643 and 6048.

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Section 1.6677–1 also issued under 26 U.S.C. 643 and 6048.

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■ **Par. 2.** Sections 1.643(i)–1, 1.643(i)–2, 1.643(i)–3, 1.643(i)–4, and 1.643(i)–5 are added to read as follows:

§ 1.643(i)–1 Loans from and use of trust property of foreign nongrantor trusts.

(a) *Loans and use of trust property—*
(1) *In general.* For purposes of subparts B, C, and D of part I of subchapter J of chapter 1 of the Internal Revenue Code, a loan or use of trust property described in paragraph (b) or (c) of this section is treated as a section 643(i) distribution from a foreign trust to a U.S. grantor or beneficiary of the foreign trust under subchapter J of chapter 1 of the Internal Revenue Code, as provided in such paragraphs. Paragraph (d) of this section provides definitions for this section and §§ 1.643(i)–2 through 1.643(i)–5. Section 1.643(i)–2 provides exceptions to the general rules of this section. Section 1.643(i)–3 provides rules relating to the determination of the amount treated as a section 643(i) distribution and the tax consequences of a section 643(i) distribution. Section 1.643(i)–4 provides examples, and § 1.643(i)–5 provides the applicability date for the rules in this section and §§ 1.643(i)–2 through 1.643(i)–4.

(2) *Interaction with section 6048(c).* For rules relating to information reporting of loans from foreign trusts and the use of property of a foreign trust, see § 1.6048–4. That provision applies without regard to whether the loan or use of property is treated as a section 643(i) distribution or has any other tax consequences, and without regard to whether the foreign trust is a nongrantor or grantor trust.

(b) *Loan of cash or marketable securities from foreign nongrantor trust generally treated as a distribution—*(1) *In general.* Except as provided in § 1.643(i)–2, any direct or indirect loan of cash or marketable securities from a foreign nongrantor trust (whether from trust corpus or income) to any U.S. grantor or beneficiary of that trust or any U.S. person related to such a U.S. grantor or beneficiary is treated as a section 643(i) distribution to the U.S. grantor or beneficiary on the date such loan is made. For these purposes, a loan from a nongrantor trust to a grantor trust or to a disregarded entity is treated as a loan to the owner of the grantor trust or of the disregarded entity, respectively. For example, a loan to a single member LLC treated as a disregarded entity is treated as a loan to the owner of the LLC.

(2) *Indirect loans—*(i) *In general.* Except as provided in paragraph

(b)(2)(ii) of this section, an indirect loan of cash or marketable securities from a foreign nongrantor trust includes a loan of cash or marketable securities made by an intermediary, agent, or nominee of the trust, as well as a loan made to an intermediary, agent, or nominee of a U.S. grantor or beneficiary or of a U.S. person related to a U.S. grantor or beneficiary. For example, such indirect loans include:

(A) Loans made by any person other than the trust to either a U.S. grantor or beneficiary of a foreign trust or any U.S. person related to a U.S. grantor or beneficiary if the foreign trust provides a guarantee (within the meaning of § 1.679–3(e)(4)) for the loan;

(B) Loans made by any person related to a foreign trust, to either a U.S. grantor or beneficiary of the trust, or a U.S. person related to a U.S. grantor or beneficiary; and

(C) Loans made by a foreign trust to a foreign person, other than to a nonresident alien individual grantor or beneficiary of the trust, if the foreign person is related to a U.S. grantor or beneficiary of the trust.

(ii) *Limitation.* The loans described in paragraphs (b)(2)(i)(B) and (b)(2)(i)(C) of this section will not be treated as a section 643(i) distribution if the U.S. grantor or beneficiary:

(A) Satisfies the information reporting requirements of § 1.6048–4 with respect to the loan, and

(B) Includes an explanatory statement attached to the U.S. grantor or beneficiary's Federal income tax return that demonstrates to the satisfaction of the Commissioner that the loan would have been made without regard to the fact that the U.S. grantor or beneficiary is a grantor or beneficiary of the foreign trust.

(iii) *Effect of indirect loans—*(A) *In general.* In the case of a loan described in paragraph (b)(2)(i)(A) or (B) of this section, the person making the loan is treated as an agent of the foreign trust.

(B) *Loans to a foreign person related to a U.S. grantor or beneficiary.* In the case of a loan described in paragraph (b)(2)(i)(C) of this section, the foreign person related to the U.S. grantor or beneficiary is treated as an agent of the U.S. grantor or beneficiary, and the date the loan is made to the foreign person is treated as the date the loan is made to the U.S. grantor or beneficiary.

(3) *Rule for nonresident alien individual grantors or beneficiaries of a foreign trust who become U.S. persons.* If a nonresident alien individual who is a grantor or beneficiary of a foreign trust receives a loan from the trust and, while the loan is outstanding, becomes a U.S. resident (within the meaning of section

7701(b)) or a U.S. citizen within two years after the date the loan was made, the loan will be treated as a section 643(i) distribution with respect to the outstanding amount of the loan as of the date the individual acquires U.S. residence or citizenship unless an exception described in § 1.643(i)–2 applies.

(c) *Use of trust property generally treated as a distribution—*(1) *In general.* Except as provided in § 1.643(i)–2, any direct or indirect use of property of a foreign trust, other than a loan of cash or marketable securities, by any U.S. grantor or beneficiary of the trust or any U.S. person related to a U.S. grantor or beneficiary is treated as a section 643(i) distribution to the U.S. grantor or beneficiary in the taxable year in which the use occurs. For these purposes, use of property of a nongrantor trust by a grantor trust or by a disregarded entity is treated as use by the owner of the grantor trust or of the disregarded entity, respectively. For example, use of trust property by a single member LLC treated as a disregarded entity would be treated as use by the owner of the LLC.

(2) *Indirect use of trust property—*(i) *In general.* Indirect use of property of a foreign trust includes use by an agent or nominee of a U.S. grantor or beneficiary of the trust or an agent or nominee of a U.S. person related to a U.S. grantor or beneficiary. Indirect use of trust property also includes use by a foreign person, other than a nonresident alien individual beneficiary of the trust, if the foreign person is related to a U.S. grantor or beneficiary of the trust, unless paragraph (c)(2)(ii) of this section applies.

(ii) *Limitation.* The use of trust property described in the second sentence of paragraph (c)(2)(i) of this section is not treated as a section 643(i) distribution to the U.S. grantor or beneficiary if the U.S. grantor or beneficiary:

(A) Satisfies the information reporting requirements of § 1.6048–4 with respect to the use; and

(B) Includes an explanatory statement attached to the U.S. grantor's or beneficiary's Federal income tax return that demonstrates to the satisfaction of the Commissioner that the use of trust property would have been allowed without regard to the fact that the U.S. grantor or beneficiary is a grantor or beneficiary of the foreign trust.

(iii) *Effect of indirect use of trust property.* In the case of the use of trust property by a foreign person related to the U.S. grantor or beneficiary described in paragraph (c)(2)(i) of this section, such foreign person is treated as an agent of the U.S. grantor or beneficiary.

(d) *Definitions.* The following definitions apply for purposes of this section and §§ 1.643(i)–2 through 1.643(i)–5:

(1) *Beneficiary.* The term *beneficiary* means a person to whom or for whose benefit, under the terms of the trust instrument or applicable local law, at any time during the term of the trust or upon termination, trust income or corpus may be paid (including pursuant to a power of appointment that has been exercised in favor of that person) or accumulated, directly or indirectly. All references to a U.S. beneficiary mean a beneficiary who is a U.S. person.

(2) *Cash.* The term *cash* includes foreign currencies and cash equivalents.

(3) *Disregarded entity.* The term *disregarded entity* means an entity that, under §§ 301.7701–1 through 301.7701–3 of this chapter, is disregarded as an entity separate from its owner.

(4) *Foreign person.* The term *foreign person* means any person who is not a U.S. person within the meaning of section 7701(a)(30).

(5) *Grantor trust.* The term *grantor trust* means a trust or any portion of a trust that is treated as owned by any person under subpart E of part I of subchapter J of chapter 1 of the Internal Revenue Code.

(6) *Loan of cash.* Except as provided in § 1.643(i)–2(a)(1), the term *loan of cash* includes an extension of credit.

(7) *Marketable securities.* The term *marketable securities* means marketable securities within the meaning of section 731(c)(2)(A), but not including foreign currencies.

(8) *Nongrantor trust.* The term *nongrantor trust* means a trust or any portion of a trust that is not treated as owned by any person under subpart E of part I of subchapter J of chapter 1 of the Internal Revenue Code.

(9) *Related.* A person will be considered to be related to another person if the relationship between such persons would result in a disallowance of losses under section 267 or 707(b). In applying section 267 for purposes of the previous sentence, section 267(c)(4) is applied as if the family of an individual includes the spouses of the members of the individual's family.

(10) *Section 643(i) distribution.* The term *section 643(i) distribution* means a transaction described in paragraph (b) or (c) of this section.

(11) *U.S. grantor.* The term *U.S. grantor* means a U.S. person described in § 1.671–2(e).

(12) *U.S. person.*—(i) *In general.* Subject to paragraph (d)(12)(ii) of this section, the term *U.S. person* means a United States person as defined in section 7701(a)(30) but does not include

an entity that is exempt from tax under chapter 1 of the Internal Revenue Code.

(ii) *Special rules.*—(A) *Dual resident taxpayers.* If a dual resident taxpayer (within the meaning of § 301.7701(b)–7(a)(1) of this chapter) computes U.S. income tax liability as a nonresident alien on the last day of the taxable year and complies with the filing requirements of § 301.7701(b)–7(b) and (c) of this chapter, the dual resident taxpayer is not treated as a U.S. person for purposes of section 643(i) with respect to the portion of the taxable year the dual resident taxpayer was treated as a nonresident alien for purposes of computing U.S. income tax liability.

(B) *Dual status taxpayers.* Except as provided in paragraph (b)(3) of this section, if a taxpayer abandons U.S. citizenship or residence during the tax year or acquires U.S. citizenship or residence during the taxable year as provided in § 1.6012–1(b)(2)(iii), the taxpayer is not treated as a U.S. person with respect to the portion of the taxable year the taxpayer was treated as a nonresident alien for purposes of computing U.S. income tax liability.

§ 1.643(i)–2 Exceptions

(a) *In general.* A loan of cash or use of trust property will not be treated as a section 643(i) distribution if the loan of cash or use of trust property is one of the following:

(1) *Loan of cash in exchange for a qualified obligation.* A loan of cash that is in exchange for a qualified obligation (within the meaning of paragraph (b)(2)(iii) of this section).

(2) *Compensated use of trust property.*—(i) *In general.* Use of trust property, other than a loan of cash or marketable securities, to the extent that the trust is paid the fair market value of such use within a reasonable period from the start of the use of the property. A determination as to the fair market value of the use of such property and as to whether a fair market value payment is made within a reasonable period must be based on all the facts and circumstances, including the type of property used and the period of use. In appropriate cases, such as rental of real property, payments may be made on a periodic basis consistent with arm's length dealings between unrelated parties.

(ii) *Safe harbor.* For purposes of paragraph (a)(2)(i) of this section, a payment is made within a reasonable period if the payment is made or periodic payments commence within 60 days of the start of the use of trust property.

(3) *De minimis use of trust property.* Use of trust property, other than a loan

of cash or marketable securities, if such use is de minimis. Use of trust property will be considered de minimis if aggregate use by members of the group consisting of the U.S. grantors, U.S. beneficiaries, and the U.S. persons related to any U.S. grantor or beneficiary does not exceed 14 days during the calendar year.

(4) *Certain loans made by a foreign corporation.* A loan of cash that is made by a foreign corporation to a U.S. beneficiary of the foreign trust to the extent the aggregate amount of all such loans to the beneficiary does not exceed undistributed earnings and profits of the foreign corporation attributable to amounts that are, or have been, included in the beneficiary's gross income under section 951, 951A, or 1293.

(b) *Qualified obligations.*—(1) *In general.* The rules in this paragraph (b) apply to determine whether a loan of cash is in exchange for a qualified obligation.

(2) *Definitions.* The following definitions apply for purposes of this section and §§ 1.643(i)–1 and 1.643(i)–3 through 1.643(i)–5:

(i) *Obligation.* The term *obligation* means any instrument or contractual arrangement that constitutes indebtedness under general principles of Federal income tax law (for example, a bond, note, debenture, certificate, bill receivable, account receivable, note receivable, open account, or other evidence of indebtedness), and any annuity contract that would not otherwise be classified as indebtedness under general principles of Federal income tax law.

(ii) *Obligor.* The term *obligor* means the person who issues an obligation to a foreign trust in exchange for a loan of cash.

(iii) *Qualified obligation.*—(A) *General requirements.* The term *qualified obligation* means an obligation that at all times satisfies all of the following requirements:

(1) The obligation is reduced to writing in an express written agreement.

(2) The term of the obligation does not exceed five years. For purposes of determining the term of an obligation, the obligation's maturity date is the last possible date that the obligation can be outstanding under the terms of the obligation.

(3) All payments on the obligation must be made in cash in U.S. dollars.

(4) The obligation is issued at par and provides for stated interest at a fixed rate or a qualified floating rate within the meaning of § 1.1275–5(b).

(5) The yield to maturity of the obligation is not less than 100 percent

of the applicable Federal rate and not greater than 130 percent of the applicable Federal rate. The applicable Federal rate for an obligation is the applicable Federal rate in effect under section 1274(d) for the day on which the obligation is issued, as published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter). The yield to maturity and the applicable Federal rate must be based on the same compounding period. If an obligation is a variable rate debt instrument that provides for stated interest at a qualified floating rate, the equivalent fixed rate debt instrument rules in § 1.1274–2(f)(1) or § 1.1275–5(e), whichever is applicable, apply to determine the obligation's yield to maturity.

(6) All stated interest on the obligation is qualified stated interest within the meaning of § 1.1273–1(c).

(B) *Additional requirements to remain a qualified obligation.* An obligation will remain a qualified obligation only if, for the first year and each succeeding year that the obligation remains outstanding, the following requirements are satisfied:

(1) The U.S. grantor or beneficiary timely extends the period for assessment of any income tax attributable to the obligation and any consequent income tax changes for each year that the obligation is outstanding to a date not earlier than three years after the maturity date of the obligation. This extension of the period for assessment is not necessary with respect to the taxable year of the U.S. grantor or beneficiary in which the maturity date of the obligation falls, provided that the obligation is paid in cash in U.S. dollars within that year. The period of assessment is extended by completing and filing Part III of Form 3520, *Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts*, for every year that the obligation is outstanding. The waiver in Part III of Form 3520 shall also contain such other terms with respect to assessment as may be considered necessary by the Commissioner to ensure the assessment and collection of the correct tax liability for each year for which the waiver is required. When Part III of Form 3520 is properly executed and filed, the consent to extend the period for assessment of tax will be deemed to be agreed upon and executed by the Commissioner for purposes of § 301.6501(c)–1(d).

(2) The U.S. grantor or beneficiary timely reports the status of the obligation, including principal and interest payments, on Part III of Form 3520 for each year that the obligation is outstanding.

(3) The obligor timely makes all payments of principal and interest on the obligation according to the terms of the obligation (which may include a reasonable grace period of no more than thirty days for a late payment).

(3) *Modification of a qualified obligation.* If the terms of a qualified obligation are modified and the modification is treated as an exchange under § 1.1001–3, the new obligation that is deemed issued in the exchange under § 1.1001–3 must satisfy all the requirements in paragraph (b)(2)(iii) of this section to be a qualified obligation using the original obligation's issue date. If the modification is not treated as an exchange under § 1.1001–3, then the obligation must be retested as of the date of the modification to determine whether the obligation, as modified, continues to satisfy the requirements in paragraph (b)(2)(iii) of this section to be a qualified obligation.

(4) *Additional loans.* If a qualified obligation is outstanding and the obligor directly or indirectly issues an additional obligation to the foreign trust in exchange for cash, the outstanding obligation is deemed to have the maturity date of the additional obligation in determining whether the outstanding obligation exceeds the specified five-year term. The outstanding obligation must be retested as of the issue date of the additional obligation to determine whether it would have satisfied, as of the outstanding obligation's issue date, all the requirements in paragraph (b)(2)(iii) of this section to be a qualified obligation. If there is more than one qualified obligation outstanding, the determination is made based on the outstanding obligation with the earliest issue date. The additional obligation also must be separately tested to see if it satisfies the requirements in paragraph (b)(2)(iii) of this section to be a qualified obligation.

(5) *Anti-abuse rule.* Notwithstanding paragraphs (b)(3) and (4) of this section, if the Commissioner determines, based on all of the facts and circumstances, that two or more obligations issued by a U.S. obligor are structured with a principal purpose to avoid the application of section 643(i), the Commissioner may treat the obligations as a single obligation that is not a qualified obligation.

(6) *Obligations that cease to be qualified—(i) In general.* If an obligation ceases to be a qualified obligation (for example, because an obligation is modified so that the term of the obligation exceeds 5 years), the U.S. grantor or beneficiary is treated as

receiving a section 643(i) distribution from the trust.

(ii) *Amount of section 643(i) distribution.* Except as otherwise provided in this paragraph (b)(6)(ii), the amount of the section 643(i) distribution treated as received pursuant to paragraph (b)(6)(i) of this section is equal to the obligation's outstanding stated principal amount plus any accrued but unpaid qualified stated interest (within the meaning of § 1.1273–1(c)) as of the date of the event that causes the obligation to no longer be a qualified obligation. In the case of an obligation that ceases to be a qualified obligation because the Commissioner treats two or more obligations as a single obligation pursuant to paragraph (b)(5) of this section, the amount of the section 643(i) distribution will not exceed the sum of the outstanding stated principal amount plus any accrued but unpaid qualified stated interest on each of the obligations as of the date determined by the Commissioner under paragraph (b)(6)(iii) of this section.

(iii) *Date of section 643(i) distribution.* In general, the U.S. grantor or beneficiary is treated as receiving a section 643(i) distribution on the date of the event that causes an obligation to no longer be a qualified obligation. However, based on all of the facts and circumstances, if an obligation (or obligations) is structured with a principal purpose to avoid the application of section 643(i), the Commissioner may deem a section 643(i) distribution to have occurred on any date on or after the issue date of the obligation(s).

(c) *Trust property attributable to nongrantor trust portion—(1) In general.* A loan or use of trust property from a partial nongrantor trust must be apportioned between the nongrantor and grantor portions of the trust in a manner that is reasonable in light of all the facts and circumstances, including the terms of the governing instrument, local law, and the practice of the trustee if it is reasonable and consistent.

(2) *Specific property.* If a loan of cash or marketable securities, or a use of trust property, can be made from only one portion of the foreign trust because the type of property loaned or used is held only by that portion, then the loan or use of property is deemed to be attributable to that portion.

(d) *Reporting.* A loan of cash or marketable securities from, or the use of any property of, a foreign grantor or nongrantor trust to or by a U.S. person is a distribution for purposes of § 1.6048–4(b)(3) or (4), as applicable, and must be reported by the U.S.

person, and if the trust is a foreign nongrantor trust, by the U.S. grantor or beneficiary, under § 1.6048–4(a), irrespective of whether the loan or use of trust property is a section 643(i) distribution.

(e) *Examples.* The following examples illustrate the rules of paragraphs (b) through (d) of this section:

(1) *Example 1: Loan of cash not in exchange for qualified obligation.* Y, a nonresident alien, created and funded a foreign nongrantor trust, FT, for the benefit of X, a U.S. person. X is the sole beneficiary of FT. In Year 1, FT makes a loan of cash to X in exchange for a demand note that permits FT to require repayment by X at any time. The demand note issued by X is not a qualified obligation within the meaning of paragraph (b)(2)(iii) of this section because X's obligation to FT could remain outstanding for more than five years. Accordingly, the qualified obligation exception in paragraph (a)(1) of this section does not apply. Under § 1.643(i)–1(b) and § 1.643(i)–3(a), X is treated as receiving a section 643(i) distribution from FT. X must determine the tax consequences of the distribution under § 1.643(i)–3(c). Under § 1.6048–4(a), X is required to report the section 643(i) distribution on Part III of Form 3520 for Year 1, as a distribution from a foreign trust.

(2) *Example 2: Beneficiary fails to extend period of assessment and fails to report loan on Form 3520.* Y, a nonresident alien, created and funded a foreign nongrantor trust for the benefit of X, a U.S. person. On June 30, Year 1, FT makes a loan of cash to X in exchange for an obligation that satisfies the requirements of paragraph (b)(2)(iii)(A) of this section. However, X fails to timely file Form 3520 and did not request an extension to file. As a result, X has failed to extend the period for assessment of any income tax attributable to the loan through the filing of Form 3520 by its due date as required under paragraph (b)(2)(iii)(B)(1) of this section. X also has failed to report the status of the loan on Form 3520 as required under paragraph (b)(2)(iii)(B)(2) of this section. Either one of X's failures is sufficient to cause the loan to be treated as a section 643(i) distribution under § 1.643(i)–1(b). Because the loan fails to continue to be treated as a qualified obligation, the loan is treated as a section 643(i) distribution from FT as of April 15, Year 2, the date that X's Form 3520 was due.

(3) *Example 3: Effect of subsequent obligation on original obligation.* Y, a nonresident alien, created and funded a foreign nongrantor trust for the benefit of X, a U.S. person. On January 1, Year

1, FT makes a loan of cash to X in exchange for Note 1, an obligation with a maturity date of January 1, Year 6, that satisfies the requirements of paragraph (b)(2)(iii) of this section. On June 30, Year 1, FT makes an additional loan of cash to X in exchange for Note 2, an obligation with a maturity date of June 30, Year 6. Under paragraph (b)(4) of this section, Note 1 will be deemed to have a maturity date of June 30, Year 6 (i.e., a greater than five-year term) and will cease to be a qualified obligation. Under paragraph (b)(6)(ii) of this section, X will be treated as receiving a section 643(i) distribution equal to Note 1's outstanding stated principal amount plus any accrued but unpaid qualified stated interest (within the meaning of § 1.1273–1(c)) as of June 30, Year 1. Note 2 will be separately tested to determine whether it satisfies the requirements of paragraph (b)(2)(iii) of this section.

(4) *Example 4: Anti-abuse rule.* Y, a nonresident alien, created and funded a foreign nongrantor trust for the benefit of X, a U.S. person. On January 1, Year 1, FT makes a loan of cash to X in exchange for Note 1, an obligation with a maturity date of January 1, Year 4 that satisfies the requirements of paragraph (b)(2)(iii) of this section. On January 1, Year 4, FT makes another loan of cash to X in exchange for Note 2, an obligation with a maturity date of January 1, Year 7, but otherwise has the same terms as Note 1. Based on all of the facts and circumstances, the Commissioner determines under paragraph (b)(5) of this section that Notes 1 and 2 are structured with a principal purpose to avoid the application of section 643(i). Therefore, under paragraph (b)(5) and paragraph (b)(6)(ii) and (iii) of this section, the Commissioner may treat Notes 1 and 2 as a single obligation (with a six-year term) that is not a qualified obligation and may treat X as receiving a section 643(i) distribution equal to the combined outstanding stated principal amounts of Note 1 and Note 2 plus any accrued but unpaid qualified stated interest as of any date determined by the Commissioner.

(5) *Example 5: Allocation of trust property attributable to partial grantor trust.* In Year 1, Y, a nonresident alien, creates and settles a foreign trust, FT, for the benefit of X, a U.S. beneficiary. Y funds the trust with a vacation home valued at \$500,000 and \$500,000 cash. Under the trust document, Y has the power to revoke the trust as to the vacation home and any income earned by the vacation home at any time without the consent of any person. This power to revoke results in Y being

treated as the owner of the portion of the trust comprising the vacation home (the grantor trust portion) under section 676 (after application of § 1.672(f)–3(a)). Y has no powers that would cause Y to be treated as the owner of the portion of the trust comprising the cash Y contributed or any income earned by that cash. X uses the vacation home for 2 months in Year 2 and does not compensate the trust for the use of the vacation home. Under paragraph (c)(2) of this section, the use of the vacation home will be deemed to be attributable to the grantor trust portion and thus will not be treated as a section 643(i) distribution to X. Under paragraph (d) of this section, X must comply with the reporting requirements of § 1.6048–4 with respect to the use of the vacation home. Under § 1.6048–4(b)(4), X is required to report the use of the vacation home on Part III of Form 3520 for Year 2 as a distribution from FT.

§ 1.643(i)–3 Consequences of section 643(i) distribution.

(a) *Amount treated as section 643(i) distribution—(1) Loan of cash.* Except as provided otherwise, in the case of a loan of cash treated as a section 643(i) distribution, the amount of the section 643(i) distribution is the issue price of the loan, as determined under § 1.446–2(d)(1), § 1.1273–2 or § 1.1274–2 (whichever is applicable), as of the date (described in § 1.643(i)–2(b)(6)) the loan is treated as a section 643(i) distribution.

(2) *Loan of marketable securities.* In the case of a loan of marketable securities treated as a section 643(i) distribution, the amount of the section 643(i) distribution is the fair market value of the securities as of the date the loan is treated as a section 643(i) distribution.

(3) *Uncompensated use of trust property.* In the case of the use of trust property treated as a section 643(i) distribution, the amount of the section 643(i) distribution is the fair market value of the use of the property less the amount of any payments made within a reasonable period (described in § 1.643(i)–2(a)(2)) for the use of such property. The fair market value of the use of the property is based on all the facts and circumstances, including the type of property used and the period of use.

(b) *Allocation of section 643(i) distribution among multiple U.S. grantors and beneficiaries.* If a U.S. person who is not a U.S. grantor or beneficiary of a foreign trust but who is related to more than one U.S. grantor or beneficiary of the trust receives a loan of cash or marketable securities, or uses

trust property, that is treated as a section 643(i) distribution, then each U.S. grantor and beneficiary who is related to the U.S. person receiving the loan or using trust property is treated as receiving an equal share of the section 643(i) distribution. For purposes of this allocation, the term U.S. beneficiary includes only those beneficiaries who must or may receive a current distribution from the foreign trust.

(c) *Tax consequences of a section 643(i) distribution*—(1) *In general.* A U.S. grantor or beneficiary who is treated as receiving a section 643(i) distribution must determine the tax consequences of the distribution under either the actual calculation method (as defined in § 1.6048-4(d)(2)) or the default calculation method (as defined in § 1.6048-4(d)(3)). A U.S. grantor or beneficiary may not use the actual calculation method to determine the tax consequences of a section 643(i) distribution in a tax year in which the U.S. grantor or beneficiary has not received a Foreign Nongrantor Trust Beneficiary Statement (see § 1.6048-4(d)(2)) from the foreign trust before completing the U.S. grantor's or beneficiary's return, knows or has reason to know that the information in the Foreign Nongrantor Trust Beneficiary Statement is incorrect, or previously has used the default calculation method for the same trust. A U.S. grantor or beneficiary who previously has used the default calculation method must consistently use the default calculation method to determine the tax consequences of any subsequent distribution (within the meaning of § 1.6048-4(b)) from the same trust in all future years, except in the year in which the trust terminates. See § 1.6048-4(d)(3)(iii).

(2) *Consequences to foreign trust*—(i) *Treatment of amount under section 661(a)(2).* In the case of a section 643(i) distribution, regardless of whether a U.S. grantor or beneficiary uses the default calculation method or the actual calculation method of computing the tax consequences of a distribution, the foreign trust must treat the section 643(i) distribution as an amount properly paid, credited, or required to be distributed by the trust as described in section 661(a)(2).

(ii) *Distribution of marketable securities.* If the section 643(i) distribution is of marketable securities, the trust will be deemed to have made an election to have section 643(e)(3) apply with respect to all section 643(i) distributions of marketable securities made by the trust during the taxable year, and any resulting capital gain is

included in the trust's distributable net income pursuant to section 643(a)(6)(C).

(iii) *Foreign Nongrantor Trust Beneficiary Statement.* The foreign trust may issue a Foreign Nongrantor Trust Beneficiary Statement (as described in § 1.6048-4(c)(2)) to each U.S. person who receives a loan of cash or marketable securities, or uses trust property other than a loan of cash or marketable securities, during the taxable year of the trust, without regard to whether a U.S. person would be required to take the amount of the loan or use of trust property into account as a section 643(i) distribution. If a U.S. person to whom a statement is issued is not a U.S. grantor or beneficiary but is related to a U.S. grantor or beneficiary, the foreign trust may issue a duplicate statement to the U.S. grantor or beneficiary.

(3) *Consequences to U.S. grantor or beneficiary*—(i) *Actual calculation method.* If a U.S. grantor or beneficiary is eligible to use, and uses, the actual calculation method, the U.S. grantor or beneficiary must treat a section 643(i) distribution as an amount properly paid, credited, or required to be distributed by the trust as described in section 662(a)(2) using information about the foreign trust as provided in the Foreign Nongrantor Trust Beneficiary Statement and applying the rules of subparts C and D of part I of subchapter J of chapter 1 of the Internal Revenue Code.

(ii) *Default calculation method.* Under the default calculation method, a U.S. grantor or beneficiary must apply the rules provided in § 1.6048-4(d)(3).

(d) *Subsequent transactions for loans or use of trust property*—(1) *In general.* Any subsequent transaction regarding the principal of any loan of cash or marketable securities treated as a section 643(i) distribution (including complete or partial repayment, satisfaction, cancellation, discharge, or otherwise, but not including the payment of interest) or the return of trust property the use of which was treated as a section 643(i) distribution has the consequences described in paragraphs (d)(2) and (3) of this section.

(2) *Consequences to foreign trust.* Any subsequent transaction regarding the principal of any loan of cash or marketable securities or the return of trust property treated as a section 643(i) distribution has no tax consequences to the trust. However, any payment to the trust other than the repayment of principal of any loan treated as a section 643(i) distribution, including the payment of interest, is treated as income to the trust.

(3) *Consequences to obligor*—(i) *In general.* Any subsequent transaction

regarding the principal of any loan of cash or marketable securities or the return of trust property treated as a section 643(i) distribution is treated as a transfer that is not a gratuitous transfer by a U.S. person for purposes of § 1.671-2(e)(2)(i) and chapter 1 of the Internal Revenue Code.

(ii) *Satisfaction of loan with property.* Any transfer of property to a foreign trust in satisfaction of any amount due under a loan of cash or marketable securities treated as a section 643(i) distribution causes the obligor to recognize as gain or loss the difference between the fair market value of the property transferred and the adjusted basis of such property in the hands of the obligor in accordance with the rules of section 1001 and the regulations under section 1001 in this part.

§ 1.643(i)-4 Examples.

(a) *Scope.* The examples in this section illustrate the rules of §§ 1.643(i)-1 through 1.643(i)-3.

(b) *Example 1: Loan to contingent remainder beneficiary treated as loan to U.S. beneficiary.* Y, a nonresident alien, created and funded a foreign nongrantor trust, FT, for the benefit of Y's two children from Y's first marriage, A and B, who are both nonresident aliens. FT's governing trust instrument provides that, upon the death of the second to die of A and B, the trust may make a distribution to any of Y's surviving children, in the discretion of the trustee. In Year 1, X, a U.S. person who is Y's daughter from Y's second marriage, receives a loan of \$100,000 from FT in exchange for an obligation that is not a qualified obligation within the meaning of § 1.643(i)-2(b)(2)(iii). Under § 1.643(i)-1(d)(1), X is a U.S. beneficiary of FT because X is a U.S. person to whom, at some point before the termination of the trust, the trust income or corpus may be paid at the discretion of the trustee. Under §§ 1.643(i)-1(b)(1) and 1.643(i)-3(a)(1), X is treated as receiving a section 643(i) distribution from FT in the amount of \$100,000. X must determine the tax consequences of the distribution under § 1.643(i)-3(c). Under § 1.6048-4(a), X is required to report the section 643(i) distribution on Part III of Form 3520 for Year 1 as a distribution from a foreign trust.

(c) *Example 2: Loan from foreign nongrantor trust to a foreign grantor trust treated as section 643(i) distribution to U.S. owner.* The facts are the same as in paragraph (b) of this section (*Example 1*), except that instead of a loan to X, in Year 1, FT makes a loan of \$100,000 to GT, a foreign grantor trust treated as wholly owned by X, in

exchange for an obligation that is not a qualified obligation within the meaning of § 1.643(i)–2(b)(2)(iii). Under § 1.643(i)–1(d)(1), X is a U.S. beneficiary of FT as explained in paragraph (b) of this section (*Example 1*). Under §§ 1.643(i)–1(b)(1) and 1.643(i)–3(a)(1), X, who is treated as the owner of GT, is treated as receiving a section 643(i) distribution from FT in the amount of \$100,000. X must determine the tax consequences of the distribution under § 1.643(i)–3(c). Under § 1.6048–4(a), X is required to report the section 643(i) distribution on Part III of Form 3520 for Year 1 as a distribution from a foreign trust.

(d) *Example 3: Loan by a person related to a foreign nongrantor trust treated as a section 643(i) distribution.* X, a U.S. person, is a beneficiary of FT, a foreign nongrantor trust. FT owns 55% of the stock of FC, a foreign corporation that is not a controlled foreign corporation within the meaning of section 957 or a passive foreign investment company within the meaning of section 1297. FC is related to FT within the meaning of § 1.643(i)–1(d)(9). On January 2, Year 1, FC lends cash to X in exchange for an obligation that is not a qualified obligation within the meaning of § 1.643(i)–2(b)(2)(iii). Under § 1.643(i)–1(b)(2)(iii), FC is treated as the agent of FT with respect to the loan, and under § 1.643(i)–1(b)(1) and (2)(i), X is treated as receiving the loan from FT on January 2, Year 1. Nevertheless, under § 1.643(i)–1(b)(2)(ii), the loan is not treated as a section 643(i) distribution if X satisfies the reporting requirements of § 1.6048–4 and attaches a statement to X's income tax return that demonstrates to the satisfaction of the Commissioner that the loan would have been made without regard to X's relationship with FT. Otherwise, X is treated as receiving a section 643(i) distribution and must determine the tax consequences of the distribution under § 1.643(i)–3(c). Regardless of whether X claims the exception described in § 1.643(i)–1(b)(2)(ii), under § 1.6048–4(a), X is required to report the loan on Part III of Form 3520 for Year 1 as a distribution from a foreign trust.

(e) *Example 4: Guaranteed loan by an unrelated person treated as a section 643(i) distribution.* X is a U.S. beneficiary of FT, a foreign nongrantor trust. On January 2, Year 1, X borrows \$100,000 from Bank in exchange for an obligation that is not a qualified obligation within the meaning of § 1.643(i)–2(b)(2)(iii), and FT provides a guarantee (within the meaning of § 1.679–3(e)(4)) for the loan. Under § 1.643(i)–1(b)(1) and (2)(i), X is treated

as receiving a loan from FT on January 2, Year 1, in the amount of \$100,000 because FT guaranteed the loan from Bank to X. On January 2, Year 1, X is treated as receiving a section 643(i) distribution. X must determine the tax consequences of the distribution under § 1.643(i)–3(c). Under § 1.6048–4(a), X is required to report the section 643(i) distribution on Part III of Form 3520 as a distribution from a foreign trust.

(f) *Example 5: Loan to a foreign person related to a U.S. beneficiary.* X is a U.S. beneficiary of FT, a foreign nongrantor trust. X is also the sole shareholder of CFC, a foreign corporation, treated as a controlled foreign corporation under section 957. On January 2, Year 1, FT lends \$100,000 to CFC in exchange for an obligation that is not a qualified obligation within the meaning of § 1.643(i)–2(b)(2)(iii). CFC is related to X within the meaning of § 1.643(i)–1(d)(9). Under § 1.643(i)–1(b)(1) and (2)(i), X is treated as receiving a loan from FT on January 2, Year 1, in the amount of \$100,000 because FT made the loan to CFC, a foreign person related to X. Under § 1.643(i)–1(b)(2)(ii), the loan is not treated as a section 643(i) distribution if X reports the loan consistent with the requirements of § 1.6048–4 and attaches a statement to X's income tax return that demonstrates to the satisfaction of the Commissioner that the loan from FT to CFC would have been made without regard to X's relationship with FT. Otherwise, X is treated as receiving a section 643(i) distribution and must determine the tax consequences of the distribution under § 1.643(i)–3(c). Regardless of whether X claims the limitation described in § 1.643(i)–1(b)(2)(ii), under § 1.6048–4(a), X is required to report the loan on Part III of Form 3520 for Year 1 as a distribution from a foreign trust.

(g) *Example 6: Loan to wholly owned corporation of U.S. beneficiary.* Y, a nonresident alien, created and funded a foreign nongrantor trust, FT, for the benefit of Y's child, X, a U.S. person. X is a U.S. beneficiary within the meaning of § 1.643(i)–1(d)(1). X wholly owns XYZ Corp, a domestic corporation. On July 1, Year 1, FT lends \$100,000 to XYZ Corp in exchange for an obligation that is not a qualified obligation within the meaning of § 1.643(i)–2(b)(2)(iii). Under § 1.643(i)–1(d)(9) and (12), XYZ Corp is a U.S. person related to X. Under § 1.643(i)–1(b)(1) and (2)(i) and § 1.643(i)–3(a)(1), X is treated as receiving a section 643(i) distribution from FT in the amount of \$100,000. X must determine the tax consequences of the distribution under § 1.643(i)–3(c). Under §§ 1.6048–4(a), X and XYZ Corp

are required to report the loan on Part III of Form 3520 for Year 1 as a distribution from a foreign trust.

(h) *Example 7: Subsequent transactions with respect to loan treated as a section 643(i) distribution.* The facts are the same as in paragraph (g) of this section (*Example 6*). In Year 1, XYZ Corp makes a payment to FT that it characterizes in part as a partial repayment of principal and in part as interest on its obligation to FT. Under § 1.643(i)–3(d)(3)(i), the portion of the payment that is characterized as a repayment of principal will be treated as a transfer that is not a gratuitous transfer by a U.S. person for purposes of § 1.671–2(e)(2)(i) and chapter 1 of the Internal Revenue Code. Under § 1.643(i)–3(d)(2), the transfer of principal will have no tax consequences to FT. Furthermore, under § 1.643(i)–3(d)(2), the portion of the payment that is characterized as interest by XYZ Corp will be treated as income to FT.

(i) *Example 8: Uncompensated use of trust property.* Y, a nonresident alien, created and funded a foreign nongrantor trust, FT, for the benefit of Y's daughter, A, a U.S. person. A is a U.S. beneficiary of FT within the meaning of § 1.643(i)–1(d)(1). FT owns real property that could be rented to an unrelated person at fair market value for \$10,000 a month. During all of Year 1, A lives in the property rent-free. Under §§ 1.643(i)–1(c) and 1.643(i)–3(a)(3), A is treated as receiving a section 643(i) distribution from FT in Year 1 in the amount of \$120,000 ($12 \times \$10,000$). A must determine the tax consequences of the distribution under § 1.643(i)–3(c). Under § 1.6048–4(a), A must report the section 643(i) distribution on Part III of Form 3520 for Year 1 as a distribution from FT.

(j) *Example 9: Partially compensated use of trust property.* The facts are the same as in paragraph (i) of this section (*Example 8*) except that A pays FT \$2,000 on the first of each month for the use of the property even though the fair market value is \$10,000. Under §§ 1.643(i)–1(c), 1.643(i)–2(a)(2), and 1.643(i)–3(a)(3), A is treated as receiving a section 643(i) distribution in Year 1 from FT in the amount of \$96,000 ($12 \times (\$10,000 - \$2,000)$). A must determine the tax consequences of the distribution under § 1.643(i)–3(c). Under §§ 1.6048–4(a), A must report the entire fair market value of \$120,000 on Part III of Form 3520 for Year 1 as a distribution from FT even though only a portion of the fair market value is treated as a section 643(i) distribution due to partial compensation.

(k) *Example 10: Uncompensated use of trust property treated as distribution*

from accumulated income. On January 1, Year 1, Y, a nonresident alien, creates and funds a foreign nongrantor trust, FT, for the benefit of Y's son, X, a U.S. person. X is a U.S. beneficiary of FT within the meaning of § 1.643(i)–1(d)(1). FT has \$60,000 of distributable net income (DNI), as defined under section 643(a), in Year 1, \$80,000 of DNI in Year 2, and \$90,000 of DNI in Year 3. FT has never made any distributions. FT owns real property that could be rented to an unrelated person for \$10,000 a month. During all of Year 3, X occupies the property rent free. Under § 1.643(i)–1(c) and § 1.643(i)–3(a)(3), X is treated as receiving a section 643(i) distribution from FT in Year 3 in the amount of \$120,000, the fair market value use of the trust property (12 × \$10,000). Under § 1.6048–4(a), X must report the section 643(i) distribution on Part III of Form 3520 for Year 3 as a distribution from FT. X receives a Foreign Nongrantor Trust Beneficiary Statement from FT and uses the actual calculation method under § 1.643(i)–3(c)(3)(i) to determine the tax consequences of the section 643(i) distribution. The \$120,000 is treated as an amount properly paid, credited, or required to be distributed by the trust as described in section 662(a)(2). As a result of X's uncompensated use of FT's property, X's section 643(i) distribution consists of a distribution of DNI of \$90,000 (FT's DNI in Year 3) and an accumulation distribution of \$30,000 under subpart D of subchapter J of chapter 1 of the Internal Revenue Code.

(l) *Example 11: Use of property of partial grantor trust not treated as section 643(i) distribution.* X and Y are married. X is a U.S. person and Y is a nonresident alien. X and Y have three children, A, B, and C. A and B are both nonresident aliens. C is a U.S. person. In Year 1, X and Y created a foreign trust, FT, for the benefit of A and B to which X contributed a vacation home and Y contributed cash and securities. Neither X nor Y retained any powers described in sections 673 through 677. In Year 2, C lived in the vacation home rent free. Although C is not a beneficiary of FT under the terms of the trust, under § 1.679–2(a)(5), C's uncompensated use of the vacation home causes FT to be treated as having a U.S. beneficiary. Thus, under § 1.679–1(a), X will be treated as the owner of the portion of FT attributable to the vacation home. Under § 1.643(i)–2(c)(2), C's use of the vacation home will be treated as the use of property from the grantor trust portion of FT. C will not be treated as receiving a section 643(i) distribution. Under §§ 1.6048–4(a), C must report the use of

the vacation home on Part III of Form 3520 for Year 2 as a distribution from FT.

(m) *Example 12: Use of trust property by exempt entity not treated as section 643(i) distribution.* In Year 1, X, a nonresident alien, creates a foreign nongrantor trust, FT, and funds the trust with cash and a valuable painting. In Year 1, pursuant to the terms of the trust instrument, FT lends the painting to E, a U.S. organization described in section 501(c)(3) with a valid determination letter from the Commissioner. E exhibits the painting and does not reimburse FT for the use of the painting. E is not a U.S. person within the meaning of § 1.643(i)–1(d)(12) because E is an entity that is exempt from tax under chapter 1 of the Internal Revenue Code. Accordingly, E's use of the painting is not a section 643(i) distribution under § 1.643(i)–1(c). E's use of the painting, however, is a distribution within the meaning of § 1.6048–4(b). Nevertheless, under § 1.6048–5(d), E is not required to report the use of the painting on Part III of Form 3520 because E is a section 501(c)(3) entity that has received a determination letter from the Commissioner that recognizes that E is exempt from Federal income tax under section 501(a) as an organization described in section 501(c)(3), and the determination letter has not been revoked.

§ 1.643(i)–5 Applicability date.

The rules of §§ 1.643(i)–1 through 1.643(i)–4 apply to loans of cash or marketable securities made from, and to the use of any other property of, a foreign trust after the [date of publication of the final regulations in the **Federal Register**].

■ **Par. 3.** Section 1.679–0 is amended by:

■ a. Revising entry for § 1.679–1(c)(2).

■ b. Adding new entry for § 1.679–2(a)(5).

■ c. Redesignating the entry for § 1.679–2(b)(3) as the entry for § 1.679–2(b)(4).

■ d. Adding new entry for § 1.679–2(b)(3).

■ e. Adding new entries for § 1.679–2(b)(4)(i) through (vi).

■ f. Adding new entry for § 1.679–2(d).

■ g. Revising the entries for § 1.679–4(d)(1) through (6).

■ h. Removing the entry for § 1.679–4(d)(7).

■ i. Revising the entry for § 1.679–7.

The revisions and additions read as follows:

§ 1.679–0 Outline of major topics.

* * * * *

§ 1.679–1 U.S. transferor treated as owner of foreign trust.

(c) * * *

(2) U.S. person.

(i) In general.

(ii) Special rules.

(A) Dual resident taxpayers.

(B) Dual status taxpayers.

* * * * *

(6) Obligation.

§ 1.679–2 Trusts treated as having a U.S. beneficiary.

(a) * * *

(5) Loan or uncompensated use of trust property treated as paid or accumulated for the benefit of a U.S. person.

(i) In general.

(ii) Indirect loans.

(iii) Exceptions.

(iv) Safe harbors.

(A) Reasonable period.

(B) De minimis use.

(v) Interaction with section 643(i).

(vi) Examples.

(A) Example 1: Loan of cash to U.S. person.

(B) Example 2: Use of trust property by U.S. person.

(C) Example 3: Use of trust property by church.

(D) Example 4: Indirect loan of cash to a U.S. person.

(E) Example 5: Interaction with section 643(i) and with section 6048(c) information reporting.

* * * * *

(b) * * *

(3) Loans to, or uncompensated use of trust property by, indirect beneficiaries.

(4) * * *

(i) Example 1. Trust benefiting foreign corporation.

(ii) Example 2. Trust benefiting another trust.

(iii) Example 3. Trust benefiting another trust after transferor's death.

(iv) Example 4. Indirect benefit through use of debit card.

(v) Example 5. Other indirect benefit.

(vi) Example 6. Indirect benefit through an indirect loan.

* * * * *

(d) Presumption that foreign trust has U.S. beneficiary.

(1) In general.

(2) Authority of Commissioner to request information.

§ 1.679–4 Exceptions to general rule.

* * * * *

(d) * * *

(1) In general.

(i) Requirements of the obligation.

(ii) Additional requirements to remain a qualified obligation.

(2) Modification of a qualified obligation.

(3) Additional loans.

(4) Anti-abuse rule.

(5) Obligations that cease to be qualified.

(i) In general.

(ii) Amount transferred to the trust.

(iii) Timing of transfers resulting from failed qualified obligations.

(6) Examples.

(i) Example 1: Demand loan.

(ii) Example 2: Private annuity.

(iii) Example 3: Transfer to unrelated foreign trust in exchange for an obligation.

(iv) Example 4: Transfer for an obligation with term in excess of 5 years.

(v) Example 5: Transfer for a qualified obligation.

(vi) Example 6: Effect of modification treated as an exchange.

(vii) Example 7: Effect of subsequent obligation on original obligation.

* * * * *

§ 1.679–7 Applicability dates.

* * * * *

■ **Par. 4.** Section 1.679–1 is amended by revising paragraphs (c)(2) and (c)(6) to read as follows:

§ 1.679–1 U.S. transferor treated as owner of foreign trust.

* * * * *

(c) * * *

(2) *U.S. person*—(i) *In general.* Subject to paragraph (c)(2)(ii) of this section, the term *U.S. person* means a United States person as defined in section 7701(a)(30).

(ii) *Special rules*—(A) *Dual resident taxpayers.* If a dual resident taxpayer (within the meaning of § 301.7701(b)–7(a)(1) of this chapter) computes U.S. income tax liability as a nonresident alien on the last day of the taxable year and complies with the filing requirements of § 301.7701(b)–7(b) and (c) of this chapter, the dual resident taxpayer will not be treated as a U.S. person for purposes of section 679 with respect to the portion of the taxable year the dual resident taxpayer was treated as a nonresident alien for purposes of computing U.S. income tax liability.

(B) *Dual status taxpayers.* If a taxpayer abandons U.S. citizenship or residence during the tax year or acquires U.S. citizenship or residence during the taxable year as provided in § 1.6012–1(b)(2)(ii), the taxpayer will not be treated as a U.S. person with respect to the portion of the taxable year the taxpayer was treated as a nonresident alien for purposes of computing U.S. income tax liability.

* * * * *

(6) *Obligation.* The term *obligation* means any instrument or contractual arrangement that constitutes indebtedness under general principles of Federal income tax law (for example, a bond, note, debenture, certificate, bill receivable, account receivable, note receivable, open account, or other evidence of indebtedness), and an annuity contract that would not otherwise be classified as indebtedness under general principles of Federal income tax law.

* * * * *

■ **Par. 5.** Section 1.679–2 is amended by:

■ a. Adding paragraph (a)(5).

■ b. Redesignating paragraph (b)(3) as paragraph (b)(4).

■ c. Adding new paragraph (b)(3).

■ c. In newly redesignated paragraph (b)(4), designating Examples 1 through 5 as paragraphs (b)(4)(i) through (v).

■ d. Adding paragraph (b)(4)(vi).

■ e. Adding paragraph (d).

The revisions and additions read as follows:

§ 1.679–2 Trusts treated as having a U.S. beneficiary.

(a) * * *

(5) *Loan or uncompensated use of trust property treated as paid or accumulated for the benefit of a U.S. person*—(i) *In general.* Except as provided in paragraph (a)(5)(iii) of this section, any direct or indirect loan of cash or marketable securities from a foreign trust or portion of a foreign trust (whether from trust corpus or income) as described in paragraph (a)(5)(ii) to, or the direct or indirect use of any other property of a foreign trust or portion of a foreign trust by, any U.S. person (whether or not a beneficiary under the terms of the trust) is treated as causing trust income or corpus to be paid or accumulated for the benefit of a U.S. person for purposes of paragraph (a)(1) of this section. For these purposes, a loan from a foreign trust to, or the use of property of a foreign trust by, a grantor trust (as defined in § 1.643(i)–1(d)(5)) or a disregarded entity (as defined in § 1.643(i)–1(d)(3)) is treated as a loan to or use by the owner of the grantor trust or of the disregarded entity, respectively. For example, a loan to a single member LLC treated as a disregarded entity is treated as a loan to the owner of the LLC.

(ii) *Indirect loans.* For purposes of paragraph (a)(5)(i) of this section, an indirect loan of cash or marketable securities from a foreign trust or portion of a foreign trust includes:

(A) Loans of cash or marketable securities made by any person to a U.S. person, if the foreign trust provides a guarantee (within the meaning of § 1.679–3(e)(4)) for the loan; and

(B) Loans of cash or marketable securities made from a foreign trust to a U.S. person through an intermediary, such as an agent or nominee of the foreign trust, or from a person related (within the meaning of § 1.643(i)–1(d)(9)) to the foreign trust.

(iii) *Exceptions.* Paragraph (a)(5)(i) of this section does not apply if—

(A) The U.S. person who receives the loan of cash or marketable securities, or who uses trust property, is an entity described in section 501(c)(3),

(B) The loan of cash received by the U.S. person is in exchange for a qualified obligation within the meaning of § 1.643(i)–2(b)(2)(iii) (but without

regard to § 1.643(i)–2(b)(2)(iii)(B)(1) and (2)), or

(C) The U.S. person who uses trust property, other than a loan of cash or marketable securities, pays the trust the fair market value of the use of such property within a reasonable period from the date of the start of the use of the property. A determination as to the fair market value of the use of such property and as to whether a fair market value payment is made within a reasonable period will be based on all the facts and circumstances, including the type of property used and the period of use. In appropriate cases, such as rental of real property, payments may be made on a periodic basis, if doing so would be consistent with arm's-length dealings between unrelated parties.

(iv) *Safe harbors.* The following safe harbors apply for purposes of paragraph (a)(5)(iii)(C) of this section.

(A) *Reasonable period.* A payment is made within a reasonable period if the payment is made or periodic payments commence within 60 days of the start of the use of trust property.

(B) *De minimis use.* Use of trust property will be disregarded if the aggregate use by all U.S. persons (within the meaning of § 1.679–1(c)(2)) does not exceed 14 days during the calendar year.

(v) *Interaction with section 643(i).* If a foreign trust or a portion of a foreign trust is treated as having a U.S. beneficiary pursuant to the rules of this paragraph (a)(5) and a U.S. transferor is thus treated as the owner of the foreign trust or a portion of the foreign trust under section 679, section 643(i) does not apply to the trust or portion of the trust of which the U.S. transferor is treated as the owner.

(vi) *Examples.* The following examples illustrate the rules of paragraph (a)(5) of this section. In these examples, X, Y, and E are U.S. persons (within the meaning of § 1.679–1(c)(2)), and FT is a foreign trust. In addition, FT's trust instrument provides that no U.S. person can benefit either as to income or corpus of FT.

(A) *Example 1: Loan of cash to U.S. person.* In Year 1, X transfers cash and real property to FT. X is not treated as the owner of any portion of FT under sections 673 through 679. In Year 2, Y receives a loan of cash from FT that is not in exchange for a qualified obligation within the meaning of § 1.643(i)–2(b)(2)(iii) and thus does not qualify for the exception under paragraph (a)(5)(iii)(B) of this section. Y is not an entity described in section 501(c)(3) and thus does not qualify for the exception under paragraph (a)(5)(iii)(A) of this section. Under

paragraph (a)(5) of this section, the loan is treated as paid or accumulated for the benefit of a U.S. person for purposes of paragraph (a)(1) of this section, and under § 1.679–1(a), X is treated as the owner of FT. Under paragraph (c)(1) of this section, FT is treated as acquiring a U.S. beneficiary in Year 2.

(B) *Example 2: Use of trust property by U.S. person.* The facts are the same as in paragraph (a)(5)(vi)(A) of this section (*Example 1*) except that, instead of receiving a loan of cash in Year 2, Y occupies real property owned by FT in exchange for monthly payments of \$2,000. FT could rent the property to an unrelated party at fair market value for \$10,000 a month. Under paragraph (a)(5) of this section, Y's use of FT's property is treated as paid or accumulated for the benefit of a U.S. person for purposes of paragraph (a)(1) of this section because Y has not paid fair market value for the use of the real property. Under § 1.679–1(a), X is treated as the owner of FT. Under paragraph (c)(1) of this section, FT is treated as acquiring a U.S. beneficiary in Year 2.

(C) *Example 3: Use of trust property by church.* In Year 1, X transfers cash and a valuable painting to FT. X is not treated as the owner of any portion of FT under sections 673 through 679. In Year 2, FT lends the painting to E, a U.S. church described in section 501(c)(3). E's use of the painting is not treated as paid or accumulated for the benefit of a U.S. person for purposes of paragraph (a)(1) of this section because the exception in paragraph (a)(5)(iii)(A) of this section applies, and thus FT is not treated as having a U.S. beneficiary in Year 2.

(D) *Example 4: Indirect loan of cash to a U.S. person.* In Year 1, X transfers property to FT. In Year 2, Y borrows \$100,000 from Bank in exchange for an obligation that is not a qualified obligation within the meaning of § 1.643(i)–2(b)(2)(iii) and thus does not qualify for the exception under paragraph (a)(5)(iii)(B) of this section. FT provides a guarantee (within the meaning of § 1.679–3(e)(4)) for the loan. Under paragraph (a)(5)(ii)(A) of this section, Y is treated as receiving a loan from FT because FT guaranteed the loan from Bank to Y. Under paragraph (a)(5) of this section, the loan is treated as paid or accumulated for the benefit of a U.S. person for purposes of paragraph (a)(1) of this section. Under § 1.679–1(a), X is treated as the owner of FT. Under paragraph (c)(1) of this section, FT is treated as acquiring a U.S. beneficiary in Year 2.

(E) *Example 5: Interaction of grantor trust rules with section 643(i) and with section 6048(c) information reporting.* In

Year 1, X created and funded a foreign nongrantor trust, FT. During Year 1 and Year 2, FT accumulates income in the amount of \$110,000. Before Year 3, neither X nor any other person is treated as owning FT under the rules of sections 673 through 679. In Year 3, Y receives a loan of \$100,000 cash from FT that is not in exchange for a qualified obligation within the meaning of § 1.643(i)–2(b)(2)(iii) and thus does not qualify for the exception under paragraph (a)(5)(iii)(B) of this section. Under paragraph (a)(5) of this section, the loan to Y is treated as paid for the benefit of a U.S. person for purposes of paragraph (a)(1) of this section. Under § 1.679–1(a), X is now treated as the owner of FT. Under paragraph (a)(5)(v) of this section, section 643(i) does not apply to the loan from FT to Y. Under paragraph (c)(1) of this section, FT is treated as acquiring a U.S. beneficiary in Year 3. Pursuant to § 1.6048–4(b)(3), Y is treated as receiving a distribution from FT and must comply with the reporting requirements in § 1.6048–4 with respect to the loan.

(b) * * *

(3) *Loans to, or uncompensated use of trust property by, indirect beneficiaries.* For purposes of paragraphs (a)(1) and (a)(5) of this section, a loan of cash or marketable securities or the use of trust property shall be treated as paid or accumulated for the benefit of a U.S. person if—

(i) The loan is made to, or the trust property is used by, a foreign entity described in paragraph (b)(1) of this section; or

(ii) The loan is made through, or the use of trust property is made available to, an intermediary described in paragraph (b)(2) of this section, or such loan or use of trust property is made by any other means where a U.S. person may obtain an actual or constructive benefit.

(4) * * *

(vi) *Example 6. Indirect benefit through an indirect loan.* A, a U.S. person, transfers property to FT. The trust instrument provides that no U.S. person can benefit either as to income or corpus. However, FT maintains an account with FB, a foreign bank, and FB issues a loan to B, a U.S. person, against the account maintained by FT. Under paragraphs (a)(1), (a)(5), and (b)(3) of this section, FT is treated as having a U.S. beneficiary.

* * * * *

(d) *Presumption that foreign trust has U.S. beneficiary—(1) In general.* If a U.S. person directly or indirectly transfers property to a foreign trust other than a trust described in § 1.679–4(a)(2) or (3),

the Commissioner may treat the trust as having a U.S. beneficiary for purposes of § 1.679–1(a), unless the U.S. person—

(i) Satisfies the reporting requirements of § 1.6048–2 with respect to the transfer; and

(ii) Includes an explanatory statement attached to the U.S. person's Federal income tax return that demonstrates to the satisfaction of the Commissioner that the trust satisfies the requirements of paragraph (a)(1) of this section immediately after the transfer.

(2) *Authority of Commissioner to request information.* The Commissioner may request information related to the trust described in paragraph (d)(1) of this section and its potential beneficiaries to determine whether the trust satisfies the requirements of paragraph (a)(1) of this section. Unless such additional information is provided upon the Commissioner's written notice and request to the U.S. person, the trust will be deemed to have a U.S. beneficiary. The U.S. person will have 60 days (90 days if the notice is addressed to a person outside the United States) to respond to the notice and request.

■ **Par. 6.** Section 1.679–4 is amended by revising paragraph (d) to read as follows:

§ 1.679–4 Exceptions to general rule.

* * * * *

(d) *Qualified obligations—(1) In general—(i) Requirements of the obligation.* For purposes of this section, an obligation is treated as a qualified obligation only if the obligation at all times satisfies all of the following requirements—

(A) The obligation is reduced to writing in an express written agreement;

(B) The term of the obligation does not exceed five years. For purposes of determining the term of an obligation, the obligation's maturity date is the last possible date that the obligation can be outstanding under the terms of the obligation;

(C) All payments on the obligation must be made in cash in U.S. dollars;

(D) The obligation is issued at par and provides for stated interest at a fixed rate or a qualified floating rate within the meaning of § 1.1275–5(b);

(E) The yield to maturity of the obligation is not less than 100 percent of the applicable Federal rate and not greater than 130 percent of the applicable Federal rate. The applicable Federal rate for an obligation is the applicable Federal rate in effect under section 1274(d) for the day on which the obligation is issued, as published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter). The

yield to maturity and the applicable Federal rate must be based on the same compounding period. If an obligation is a variable rate debt instrument that provides for stated interest at a qualified floating rate, the equivalent fixed rate debt instrument rules in § 1.1274–2(f)(1) or § 1.1275–5(e), whichever is applicable, apply to determine the obligation's yield to maturity; and

(F) All stated interest on the obligation is qualified stated interest within the meaning of § 1.1273–1(c).

(ii) *Additional requirements to remain a qualified obligation.* An obligation will remain a qualified obligation only if, for the first year and each succeeding year that the obligation remains outstanding, the trust timely makes all payments of principal and interest on the obligation according to the terms of the obligation (which may include a reasonable grace period of no more than thirty days for a late payment) and the U.S. transferor fulfills the requirements of this paragraph (d)(1)(ii):

(A) The U.S. transferor timely extends the period for assessment of any income tax attributable to the obligation and any consequent income tax changes for each year that the obligation is outstanding to a date not earlier than three years after the maturity date of the obligation. This extension of the period for assessment is not necessary with respect to the taxable year of the U.S. transferor in which the maturity date of the obligation falls, provided that the obligation is paid in cash in U.S. dollars within that year. The period of assessment is extended by completing and filing Part I of Form 3520, Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts, for every year that the obligation is outstanding. Part I of Form 3520 also may contain such other terms with respect to assessment as may be considered necessary by the Commissioner to ensure the assessment and collection of the correct tax liability for each year for which the extension of the period of assessment is required. When Part I of Form 3520 is properly executed and filed, the consent to extend the period for assessment of tax will be deemed to be agreed upon and executed by the Commissioner for purposes of § 301.6501(c)–1(d); and

(B) The U.S. transferor timely reports the status of the obligation, including principal and interest payments, on Part I of Form 3520 for each year that the obligation is outstanding.

(2) *Modification of a qualified obligation.* If the terms of a qualified obligation are modified and the modification is treated as an exchange under § 1.1001–3, the new obligation

that is deemed issued in the exchange under § 1.1001–3 must satisfy all the requirements in paragraph (d)(1) of this section to be a qualified obligation using the original obligation's issue date. If the modification is not treated as an exchange under § 1.1001–3, then the obligation must be retested as of the date of the modification to determine whether the obligation, as modified, continues to satisfy the requirements in paragraph (d)(1) of this section to be a qualified obligation.

(3) *Additional loans.* If a qualified obligation is outstanding and the U.S. transferor directly or indirectly obtains an additional obligation issued by the foreign trust in exchange for cash, or if the U.S. transferor directly or indirectly obtains an additional obligation issued by a person related to the trust, the outstanding obligation is deemed to have the maturity date of the additional obligation in determining whether the outstanding obligation exceeds the specified five-year term. The outstanding obligation must be retested as of the issue date of the additional obligation to determine whether it would have satisfied, as of the outstanding obligation's issue date, all the requirements in paragraph (d)(1) of this section to be a qualified obligation. If there is more than one qualified obligation outstanding, the determination is made based on the outstanding obligation with the earliest issue date. The additional obligation also must be separately tested to see if it satisfies the requirements of (d)(1) of this section to be a qualified obligation.

(4) *Anti-abuse rule.* Notwithstanding paragraphs (2) and (3) of this section, if the Commissioner determines, based on all the facts and circumstances, that two or more obligations issued by a foreign trust or a person related to the trust are structured with a principal purpose to avoid the application of section 679, the Commissioner may treat the obligations as a single obligation that is not a qualified obligation.

(5) *Obligations that cease to be qualified—(i) In general.* If an obligation ceases to be a qualified obligation (for example, because an obligation is modified so that the term exceeds 5 years), the U.S. transferor is treated as making a transfer to the foreign trust.

(ii) *Amount transferred to the trust.* The amount that the U.S. transferor is treated as having transferred to the trust will be equal to the obligation's outstanding stated principal amount plus any accrued but unpaid qualified stated interest (within the meaning of § 1.1273–1(c)) as of the date of the event that causes the obligation to no longer be a qualified obligation. In the case of

an obligation that ceases to be a qualified obligation because the Commissioner treats two or more obligations as a single obligation pursuant to paragraph (d)(4) of this section, the U.S. transferor is treated as making a transfer to the trust in an amount not to exceed the sum of the outstanding stated principal amount of the obligations plus any accrued but unpaid qualified stated interest for each of the obligations as of the date determined by the Commissioner under paragraph (d)(5)(iii) of this section.

(iii) *Timing of transfers resulting from failed qualified obligations.* In general, a U.S. transferor is treated as making a transfer to the foreign trust on the date of the event that causes an obligation to no longer be a qualified obligation. However, based on all of the facts and circumstances, if an obligation (or obligations) is structured with a principal purpose to avoid the application of section 679, the Commissioner may deem a transfer to have occurred on any date on or after the issue date of the obligation(s).

(6) *Examples.* The following example illustrates the rules of this paragraph (d). In these examples, A and B are U.S. residents and FT is a foreign trust.

(i) *Example 1: Demand loan.* A is a related person (as defined in § 1.679–1(c)(5)) with respect to FT. A transfers \$50,000 to FT in exchange for a demand note that permits A to require repayment by FT at any time. Because FT's obligation to A could remain outstanding for more than five years, the obligation is not a qualified obligation within the meaning of paragraph (d)(1) of this section and, pursuant to paragraph (c) of this section, it is not taken into account for purposes of determining whether A's transfer is eligible for the fair market value exception of paragraph (a)(4) of this section. Accordingly, § 1.679–1 applies to treat A as the owner of the portion of FT attributable to the full \$50,000 transfer to FT.

(ii) *Example 2: Private annuity.* A is a related person (as defined in § 1.679–1(c)(5)) with respect to FT. A transfers \$40,000 to FT in exchange for an annuity from FT that will pay A \$100x per year for the rest of A's life. Because FT's obligation to A could remain outstanding for more than five years, the obligation is not a qualified obligation within the meaning of paragraph (d)(1) of this section and, pursuant to paragraph (c) of this section, it is not taken into account for purposes of determining whether A's transfer is eligible for the fair market value exception of paragraph (a)(4) of this section. Accordingly, § 1.679–1 applies

to treat A as the owner of the portion of FT attributable to the full \$40,000 transfer to FT.

(iii) *Example 3: Transfer to unrelated foreign trust in exchange for an obligation.* B is not a related person (as defined in § 1.679–1(c)(5)) with respect to FT. B transfers \$10,000 to FT in exchange for an obligation of the trust. The term of the obligation is fifteen years. Because B is not a related person with respect to FT, paragraph (c) of this section does not apply. The fair market value of the obligation received by B is taken into account for purposes of the fair market value exception of paragraph (a)(4) of this section even though the obligation is not a qualified obligation within the meaning of paragraph (d)(1) of this section.

(iv) *Example 4: Transfer for an obligation with term in excess of 5 years.* A is a related person (as defined in § 1.679–1(c)(5)) with respect to FT. A transfers property that has a fair market value of \$50,000 to FT in exchange for an obligation of FT. The term of the obligation is ten years. Because the term of the obligation exceeds five years, the obligation is not a qualified obligation within the meaning of paragraph (d)(1) of this section, and pursuant to paragraph (c) of this section, it is not taken into account for purposes of determining whether A's transfer is eligible for the fair market value exception of paragraph (a)(4) of this section. Accordingly, § 1.679–1 applies to treat A as the owner of the portion of FT attributable to the full \$50,000 transfer to FT.

(v) *Example 5: Transfer for a qualified obligation.* The facts are the same as in paragraph (d)(6)(iv) of this section (*Example 4*), except that the term of the obligation is three years. Assuming the other requirements of paragraph (d)(1) of this section are satisfied, the obligation is a qualified obligation, and its stated principal amount is taken into account for purposes of determining whether A's transfer is eligible for the fair market value exception of paragraph (a)(4) of this section.

(vi) *Example 6: Effect of modification treated as an exchange.* A is a related person (as defined in § 1.679–1(c)(5)) with respect to FT. A transfers property that has a fair market value of \$10,000 to FT in exchange for an obligation with a term of four years that satisfies the requirements of paragraph (d)(1) of this section. Two years later, a significant modification of the obligation within the meaning of § 1.1001–3, including an extension of the obligation by an additional term of three years, occurs, and the modification is treated as an exchange under § 1.1001–3. The new

obligation that is deemed issued in the exchange under § 1.1001–3 must satisfy the requirements of paragraph (d)(1) of this section to be a qualified obligation as of the original obligation's issue date. Because the new obligation would not satisfy the five-year requirement of paragraph (d)(1), the obligation ceases to be treated as a qualified obligation.

(vii) *Example 7: Effect of subsequent obligation on original obligation.* A is a related person (as defined in § 1.679–1(c)(5)) with respect to FT. On January 1, Year 1, A transfers \$100,000 to FT in exchange for Obligation 1 from FT, an obligation with a maturity date of January 1, Year 6, that satisfies the requirements of paragraph (d)(1) of this section. On June 30, Year 1, A transfers an additional \$50,000 to FT in exchange for Obligation 2, an obligation with a maturity date of June 30, Year 6, that independently satisfies the requirements of paragraph (d)(1) of this section. Under paragraph (d)(3) of this section, Obligation 1 will be deemed to have a maturity date of June 30, Year 6 (*i.e.*, a greater than five-year term) and will cease to be a qualified obligation under paragraph (d)(1) of this section. Pursuant to paragraph (c) of this section, because Obligation 1 is not a qualified obligation, it is not taken into account for purposes of determining whether A's transfer of \$100,000 is eligible for the fair market value exception of paragraph (a)(4) of this section. Accordingly, § 1.679–1 applies to treat A as the owner of the portion of FT attributable to the \$100,000 transferred to FT. Obligation 2 is separately tested to determine whether it satisfies the qualified obligation rules of paragraph (d)(1) of this section and to the extent it does, A is treated as eligible for the fair market value exception of paragraph (a)(4) of this section and is not treated as the owner of the portion of FT attributable to the \$50,000 transferred to FT.

■ **Par. 7.** Section 1.679–7 is amended by:

- a. Revising the section heading.
- b. Adding paragraphs (b)(4) through (b)(7).

The revision and additions read as follows:

§ 1.679–7 Applicability dates.

* * * * *

(b) * * *

(4) The amendments to §§ 1.679–1(c)(2) and 1.679–1(c)(6) apply for taxable years beginning after the [date of publication of the final regulations in the **Federal Register**].

(5) The rules of § 1.679–2(a)(5) apply to loans and the use of trust property after the [date of publication of the final regulations in the **Federal Register**].

(6) The rules of § 1.679–2(d) apply to transfers of property after the [date of publication of the final regulations in the **Federal Register**].

(7) Section 1.679–4(d) applies to obligations issued or modified after the [date of publication of the final regulations in the **Federal Register**]. If an obligation issued on or before the [date of publication of the final regulations in the **Federal Register**] is modified after that date, and the modification is a significant modification under § 1.1001–3, the new obligation that is deemed issued in the exchange is treated as issued after the [date of publication of the final regulations in the **Federal Register**]. If the modification is not a significant modification under § 1.1001–3, then the original obligation must be retested as of the date of the modification to determine whether the obligation, as modified, satisfies the requirements in paragraph (d)(1), as amended, to be a qualified obligation.

■ **Par. 8.** Section 1.6039F–1 is added to read as follows:

§ 1.6039F–1 U.S. recipients of foreign gifts.

(a) *Reporting of foreign gifts—(1) In general.* Except as provided in paragraph (c) of this section, and subject to paragraph (a)(2) and (3) of this section, each U.S. person (within the meaning of section 7701(a)(30)) who receives a foreign gift (within the meaning of paragraph (b) of this section) during a taxable year must report such gift (including the additional information required under paragraph (c) of this section if, after applying the aggregation rules, the foreign gift exceeds certain reporting thresholds) on Part IV of Form 3520, Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts, by the fifteenth day of the fourth month after the close of the U.S. person's taxable year. In the case of a U.S. person who has been granted an extension of time to file the U.S. person's income tax return pursuant to section 6081, an extension of time for filing Form 3520 is granted to the fifteenth day of the tenth month following the close of the U.S. person's taxable year. No further extension of time to file Form 3520 is allowed. For special rules concerning the treatment of dual resident taxpayers (within the meaning of § 301.7701(b)–7(a)(1) of this chapter) and dual status taxpayers (described in § 1.6012–1(b)(2)(ii)) as U.S. persons for purposes of this section, see paragraph (f) of this section.

(2) *Reporting by U.S. citizens and residents residing abroad.* In the case of a U.S. person who is an individual and

who qualifies for an automatic extension to file their income tax return under section 6081 and § 1.6081-5(a)(5) because the U.S. person resides outside of the United States and Puerto Rico and the U.S. person's main place of business or post of duty is outside of the United States and Puerto Rico, the U.S. person must report the foreign gifts received by the U.S. person during the taxable year on Part IV of Form 3520 by the fifteenth day of the sixth month after the close of the U.S. person's taxable year. If the U.S. person has been granted an extension of time to file the U.S. person's income tax return pursuant to section 6081, an extension of time for filing Form 3520 is granted to the fifteenth day of the tenth month following the close of the U.S. person's taxable year. No additional extension of time to file Form 3520 is allowed.

(3) *Reporting for deceased U.S. persons.* In the case of a deceased U.S. person, the executor (within the meaning of section 2203) of the U.S. person's estate must report the foreign gifts received by the U.S. person during the U.S. person's final taxable year on Part IV of Form 3520 by the fifteenth day of the fourth month following the close of the 12-month period which began with the first day of the U.S. person's final taxable year. If the executor of the U.S. person's estate has been granted an extension of time to file the U.S. person's final income tax return pursuant to section 6081, an extension of time for filing Form 3520 is granted to the fifteenth day of the tenth month following the close of the 12-month period which began with the first day of the U.S. person's final taxable year. No additional extension of time to file Form 3520 is allowed.

(b) *Definition of foreign gift—(1) In general.* The term *foreign gift* means any amount received from a non-U.S. person that the recipient (including a spouse) treats as a gift, bequest, devise, or inheritance for income tax purposes, but does not include any qualified transfer within the meaning of section 2503(e)(2) (relating to certain transfers for educational or medical expenses) or any transfer that is treated as a distribution (within the meaning of § 1.6048-4(b)) from a foreign trust and that is reported on a return under § 1.6048-4. A U.S. person who receives a transfer from a foreign trust must treat that transfer as a distribution from the trust that is reportable under § 1.6048-4, rather than as a foreign gift that is reportable under paragraph (a) of this section, even if the U.S. person treats the transfer as a gift for another purpose (such as computing the person's Federal income tax liability). For example, although a

covered gift or bequest described in section 2801(e) is a foreign gift, a U.S. person who receives a covered gift or bequest from a foreign trust must report the covered gift or bequest as a distribution (within the meaning of § 1.6048-4(b)) under § 1.6048-4.

(2) *Anti-avoidance rule.* The term foreign gift includes any amount received by a U.S. person from a non-U.S. person that meets all of the following requirements—

(i) Based on all the facts and circumstances, the Commissioner determines that the amount received is in substance a gift;

(ii) The recipient does not treat the amount received as a gift, bequest, devise, or inheritance; and

(iii) The recipient does not treat the amount received as taxable income (such as a purported loan).

(c) *Exceptions—(1) Section 501(c) recipient.* Paragraph (a) of this section does not apply if the recipient of the foreign gift is an organization described in section 501(c) and exempt from tax under section 501(a).

(2) *Reporting threshold rules—(i) Foreign gifts from foreign individuals or foreign estates—(A) Reporting threshold.* Except as provided in paragraph (c)(2)(ii) of this section, paragraph (a) of this section does not apply to a foreign gift received by a U.S. person from a non-U.S. person who is an individual (a *foreign individual*) or a foreign estate (within the meaning of section 7701(a)(31)(A)) if, during the U.S. person's taxable year, the aggregate amount of foreign gifts received, directly or indirectly, from that foreign individual or foreign estate (the *transferor*) does not exceed \$100,000, as modified by cost-of-living adjustments pursuant to paragraph (c)(2)(v) of this section.

(B) *Aggregation rule.* To determine whether paragraph (c)(2)(i)(A) of this section applies to foreign gifts received from a transferor, each U.S. person must aggregate foreign gifts, including covered gifts and bequests described in section 2801(e), received from all foreign individuals, foreign estates, and any other foreign person (such as corporations or partnerships) that the U.S. person knows or has reason to know are related to the transferor within the meaning of § 1.643(i)-1(d)(9). If the aggregate amount of all these foreign gifts exceeds the \$100,000 reporting threshold, the U.S. person must separately identify each foreign gift in excess of \$5,000 received from the transferor and from each foreign person related to the transferor and must provide identifying information (for example, name and address) about the

transferor and each such foreign person, including a foreign individual or a foreign estate.

(ii) *Covered gifts and bequests.* Subject to paragraph (h)(2) of this section, paragraph (a) of this section does not apply to a foreign gift that is a covered gift or bequest described in section 2801(e) if the aggregate amount of covered gifts and bequests received by the U.S. person during the calendar year does not exceed the section 2801(c) amount, which is the dollar amount of the per-donee exclusion in effect under section 2503(b). For purposes of this paragraph (c)(2)(ii), the aggregate amount of covered gifts and bequests received by the U.S. person during the calendar year does not include transfers from a foreign trust (as described in paragraph (b)(1) of this section), as such transfers are reportable as distributions (within the meaning of § 1.6048-4(b)) under § 1.6048-4.

(iii) *Other foreign gifts—(A) Reporting threshold.* Paragraph (a) of this section does not apply to a foreign gift received by a U.S. person from a foreign corporation or a foreign partnership if, during the U.S. person's taxable year, the aggregate amount of foreign gifts from that corporation or partnership (the *transferor*), when aggregated with foreign gifts received from other foreign persons that the U.S. person knows or has reason to know are related to the transferor as described in paragraph (c)(2)(iii)(B) of this section, does not exceed \$10,000, as modified by cost-of-living adjustments pursuant to paragraph (c)(2)(v) of this section.

(B) *Aggregation rule.* To determine whether paragraph (c)(2)(iii)(A) of this section applies to foreign gifts from a transferor, the U.S. person must aggregate foreign gifts received from all foreign corporations, foreign partnerships, and any other foreign person that the U.S. person knows or has reason to know are related to the transferor within the meaning of § 1.643(i)-1(d)(9). If the aggregate amount of these foreign gifts exceeds the reporting threshold, the U.S. person must separately identify each foreign gift from the transferor and from each foreign person related to the transferor and provide identifying information (for example, name and address) about the transferor and each such foreign person, including a foreign individual or foreign estate.

(iv) *Joint returns.* In the case of married U.S. persons who file joint income tax returns under section 6013 for a tax year, the reporting threshold under paragraph (c)(2)(i)(A) of this section applies separately to each spouse. Thus, married U.S. persons who

file a joint income tax return will not be subject to paragraph (a) of this section if the aggregate amount of foreign gifts received by each spouse, directly or indirectly from any one foreign individual or foreign estate, taking into account the aggregation rule of paragraph (c)(2)(i)(B) of this section, does not exceed \$100,000 during the taxable year.

(v) *Cost-of-living adjustments.* The reporting thresholds under paragraph (c)(2)(i)(A) and under paragraph (c)(2)(iii)(A) of this section are increased by an amount equal to the product of the amounts specified in such paragraphs and the cost-of-living adjustment for the taxable year of the gift under section 1(f)(3), except that paragraph (A)(ii) thereof is applied by substituting “1995” for “2016.”

(d) *Valuation principles.* The amount of a foreign gift is the value of the property at the time of its transfer. The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell, and both having reasonable knowledge of relevant facts. Accordingly, the value of the property is determined in accordance with the Federal gift tax valuation principles of section 2512 and sections 2701 through 2704 (chapter 14 of the Internal Revenue Code) and the regulations under section 2512 and sections 2701 through 2704 in this part.

(e) *Penalty for failure to file information—(1) In general.* If a U.S. person fails to furnish information required under paragraph (a) of this section with respect to any foreign gift by the due date provided under paragraph (a)—

(i) The tax consequences of the receipt of such foreign gift may be determined by the Commissioner based on all the facts and circumstances, and

(ii) Notwithstanding the tax consequences under paragraph (e)(1)(i) of this section, such U.S. person must pay (upon notice and demand by the Commissioner and in the same manner as tax) an amount equal to 5 percent of the amount of such foreign gift for each month (or portion thereof) for which the failure to report the foreign gift as a gift on Form 3520 continues (not to exceed 25 percent of such amount in the aggregate).

(2) *Reasonable cause exception.* Paragraph (e)(1) of this section will not apply to any failure to report a foreign gift if the U.S. person submits a reasonable cause statement to the Commissioner under penalties of perjury and demonstrates to the satisfaction of the Commissioner that

the failure is due to reasonable cause and not due to willful neglect. The determination of whether a taxpayer acted with reasonable cause and not with willful neglect is made under the principles set out in § 1.6664–4 and § 301.6651–1(c). This determination is made on a case-by-case basis, taking into account all pertinent facts and circumstances.

(f) *Special rules—(1) Dual resident taxpayers.* If a dual resident taxpayer (within the meaning of § 301.7701(b)–7(a)(1) of this chapter) computes U.S. income tax liability as a nonresident alien on the last day of the taxable year and complies with the filing requirements of § 301.7701(b)–7(b) and (c) of this chapter, the dual resident taxpayer will not be treated as a U.S. person for purposes of section 6039F with respect to the portion of the taxable year the dual resident taxpayer was treated as a nonresident alien for purposes of computing U.S. income tax liability.

(2) *Dual status taxpayers.* If a taxpayer abandons U.S. citizenship or residence during the taxable year or acquires U.S. citizenship or residence during the taxable year as provided in § 1.6012–1(b)(2)(ii), the taxpayer will not be treated as a U.S. person with respect to the portion of the taxable year the taxpayer is treated as a nonresident alien for purposes of computing U.S. income tax liability.

(g) *Examples.* The following examples illustrate the rules of this section. In these examples and unless otherwise stated, assume that the reporting threshold under paragraph (c)(2)(i)(A) of this section is \$100,000:

(1) *Example 1: Qualified transfer exception.* X, a U.S. person, attends Private University, an accredited college in the United States. X's grandparents, who are not U.S. persons, pay X's tuition directly to Private University. The tuition payment is a qualified transfer within the meaning of section 2503(e)(2). Under paragraph (b)(1) of this section, X is not treated as receiving a foreign gift from X's grandparents. Accordingly, X is not required to report the tuition payment under paragraph (a) of this section.

(2) *Example 2: Charitable donee.* XYZ, a U.S. person, is an organization described in section 501(c) and is exempt from tax under section 501(a). XYZ receives a bequest of \$200,000 from a foreign estate. Because XYZ meets the exception under paragraph (c)(1) of this section for organizations described in section 501(c) and exempt from tax under section 501(a), XYZ is not required to report the bequest under paragraph (a) of this section.

(3) *Example 3: Gift from dual resident taxpayer.* X is a lawful permanent resident of the United States within the meaning of § 301.7701(b)–1(b) of this chapter and is a resident of Country F under the domestic law of Country F. X is a resident of Country F under the residence article of the U.S.-Country F income tax treaty and notifies the United States by taking such a position on Form 1040NR and Form 8833 for Year 1. Pursuant to § 301.7701(b)–7 of this chapter, X is treated as a nonresident alien for purposes of computing X's U.S. income tax liability for Year 1. During Year 1, X makes a gift of \$150,000 to Y, a U.S. citizen. Under paragraph (f)(1) of this section, X is not treated as a U.S. person for purposes of this section. Because X is not treated as a U.S. person for Year 1, the gift is a foreign gift within the meaning of paragraph (b) of this section. Y must report the foreign gift on Part IV of Form 3520 under paragraph (a) of this section.

(4) *Example 4: Gifts from related foreign individuals.* X, a U.S. citizen, is married to Y, a nonresident alien. Y has three brothers, A, B, and C, who also are nonresident aliens. In Year 1, Y makes a gift of \$90,000 to X, A makes a gift of \$40,000 to X, B makes two gifts to X (one of \$4,000 and one of \$3,000), and C makes a gift of \$4,000 to X. X knows or has reason to know that A, B, and C are related to Y within the meaning of § 1.643(i)–1(d)(9). X treats all five transfers as gifts. Under paragraphs (c)(2)(i)(A) and (B) of this section, to calculate the \$100,000 reporting threshold, X must aggregate foreign gifts from Y, A, B, and C. For Year 1, X must report the receipt of \$141,000 in foreign gifts. In addition, under paragraphs (a) and (c)(2)(i)(B) of this section, X must separately identify and report information regarding the \$90,000 foreign gift from Y, the \$40,000 foreign gift from A, and the aggregated \$7,000 foreign gifts from B because each person's foreign gift for Year 1 exceeds \$5,000. X is not required to identify the \$4,000 gift from C separately because it does not exceed \$5,000.

(5) *Example 5: Covered gift within meaning of section 2801(e).* Z is a resident of Country F and relinquishes U.S. citizenship on July 1, Year 1, becoming a covered expatriate within the meaning of section 877A(g)(1). On December 31, Year 10, a date after the date final regulations under section 2801 are published in the **Federal Register**, Z gives \$50,000 to Z's son, X, who is a U.S. person. The transfer is a covered gift within the meaning of section 2801(e) and a foreign gift within the meaning of paragraph (b) of this section. Because the value of the foreign

gift exceeds the threshold specified in paragraph (c)(2)(ii) of this section (assuming that for Year 10 this amount is under \$50,000), X must report receipt of the foreign gift on Part IV of Form 3520 under paragraph (a) of this section. X also is subject to tax and separate reporting requirements under section 2801.

(6) *Example 6: Gifts from foreign individual and related corporation.* X, a U.S. citizen, is married to Y, a nonresident alien. Y is the sole shareholder of FC, a foreign corporation. During Year 1, Y makes a gift of \$11,000 to X, and FC makes a gift of \$9,000 to X. Because X knows or has reason to know that Y and FC are related, X must aggregate the gifts from Y and FC (\$20,000). Although the \$20,000 aggregate amount deemed received from Y does not exceed the \$100,000 reporting threshold with respect to foreign gifts from foreign individuals, the \$20,000 aggregate amount received from FC exceeds the applicable reporting threshold for foreign gifts from foreign corporations under paragraph (c)(2)(iii) of this section for Year 1 (assume that for Year 1 this amount is \$18,000). Accordingly, X must report receipt of the foreign gift on Part IV of Form 3520 under paragraph (a) of this section. In addition, X must separately identify each foreign gift from Y and FC and must provide identifying information about Y and FC.

(7) *Example 7: Penalties for failure to report information.* The facts are the same as in paragraph (g)(6) of this section (*Example 6*). X fails to report the amounts received from Y and FC on Form 3520 and does not demonstrate to the satisfaction of the Commissioner that such failure is due to reasonable cause and not due to willful neglect. Under paragraph (e)(1)(i) of this section and § 1.672(f)-4(a)(2), the Commissioner may determine that, based on all the facts and circumstances, the gift of \$9,000 from FC to X should be treated as a dividend from FC to X and included in X's gross income. Under paragraph (e)(1)(i) of this section, the Commissioner also may determine that there are no tax consequences to X upon receiving the gift of \$11,000 from Y. Without regard to the tax consequences determined under paragraph (e)(1)(i) of this section, under paragraph (e)(1)(ii) of this section, X must pay (upon notice and demand by the Commissioner and in the same manner as tax) \$1,000, an amount equal to 5 percent of the aggregate amount of \$20,000 for each month for which the failure to disclose the foreign gifts on Form 3520 continues (not to exceed \$5,000, an amount equal

to 25 percent of the aggregate amount of \$20,000).

(h) *Applicability date*—(1) *In general.* Except as provided in paragraph (h)(2) of this section, the rules of this section apply to amounts received after the [date of publication of the final regulations in the **Federal Register**].

(2) *Covered gifts and bequests.* Paragraph (c)(2)(ii) of this section is effective on the date final regulations under section 2801 are published in the **Federal Register** and applies to covered gifts or bequests received on or after that date.

■ **Par. 9.** Sections 1.6048-1 through 1.6048-7 are added to read as follows:

§ 1.6048-1 Scope.

(a) *In general.* Sections 1.6048-1 through 1.6048-7 provide rules concerning information that must be reported under section 6048 with respect to foreign trusts. This section provides general definitions for purposes of §§ 1.6048-1 through 1.6048-7. Section 1.6048-2 provides rules requiring a responsible party to provide notice of a reportable event that occurs during the taxable year with respect to a foreign trust. Section 1.6048-3 provides rules applicable to a U.S. owner of a foreign trust to ensure that the trust provides certain information about the trust's activities and operations for the year to the Commissioner and to any U.S. person (within the meaning of section 7701(a)(30)) who is treated as an owner of the trust or who receives a distribution from the trust. Section 1.6048-4 provides rules requiring a U.S. person to report the receipt of a distribution from a foreign trust during the U.S. person's taxable year. Section 1.6048-5 provides exceptions to the rules of §§ 1.6048-2 through 1.6048-4. Section 1.6048-6 provides certain special rules, including rules concerning dual resident taxpayers (within the meaning of § 301.7701(b)-7(a)(1) of this chapter) and dual status taxpayers (described in § 1.6012-1(b)(2)(ii)) who compute their U.S. income tax liability as nonresident aliens for part or all of the taxable year. Section 1.6048-7 provides applicability dates. For civil penalties that apply for failure to comply with the requirements of §§ 1.6048-2 through 1.6048-4, *see* § 1.6677-1. For penalties that apply to understatements of tax that are attributable to transactions involving undisclosed foreign financial assets, including assets with respect to which information was required to be provided under section 6048 but was not provided, *see* section 6662(b)(7) and (j). For suspension of the statute of

limitations when required information has not been provided under section 6048, *see* section 6501(c)(8).

(b) *Definitions.* The following definitions apply for purposes of this section and §§ 1.6048-2 through 1.6048-7:

(1) *Executor.* The term *executor* means an executor within the meaning of section 2203.

(2) *Foreign person.* The term *foreign person* means any person who is not a U.S. person within the meaning of paragraph (b)(4) of this section.

(3) *Foreign trust.* The term *foreign trust* means a foreign trust within the meaning of § 301.7701-7.

(4) *Grantor trust.* The term *grantor trust* means a trust or any portion of a trust that is treated as owned by any person under subpart E of part I of subchapter J of chapter 1 of the Internal Revenue Code.

(5) *Grantor trust rules.* The term *grantor trust rules* means the rules under subpart E of part I of subchapter J of chapter 1 of the Internal Revenue Code.

(6) *Nongrantor trust.* The term *nongrantor trust* means a trust or any portion of a trust that is not treated as owned by any person under subpart E of part I of subchapter J of chapter 1 of the Internal Revenue Code.

(7) *U.S. person.* The term *U.S. person* means any person who is a U.S. person within the meaning of section 7701(a)(30) but not including certain dual resident taxpayers and dual status taxpayers as described in § 1.6048-6(a).

§ 1.6048-2 Notice of reportable events.

(a) *In general*—(1) *Filing requirement.* Unless an exception in § 1.6048-5 applies, a responsible party (as defined in paragraph (c) of this section) must provide written notice of any reportable event (as defined in paragraph (b) of this section) that occurs during the taxable year of the U.S. person described in paragraph (b) of this section on Part I of Form 3520, Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts. If a responsible party must report a reportable event with regard to more than one foreign trust during the taxable year, the responsible party must file a separate Form 3520 for each such foreign trust. *See* §§ 1.679-1 and 1.684-1 for additional rules regarding transfers to foreign trusts by U.S. persons. *See* § 1.6048-6(d) for information reporting by married U.S. persons who file a joint income tax return.

(2) *Due dates*—(i) *General rule.* Subject to paragraph (a)(2)(ii) and (iii) of this section, the responsible party must file Form 3520 by the fifteenth day of

the fourth month after the close of the responsible party's taxable year. If the responsible party has been granted an extension of time to file the responsible party's income tax return pursuant to section 6081, an extension of time for filing Form 3520 is granted to the fifteenth day of the tenth month following the close of the responsible party's taxable year. No additional extension of time to file Form 3520 is allowed beyond the fifteenth day of the tenth month following the close of the responsible party's taxable year.

(ii) *Filing by U.S. persons residing outside the United States.* In the case of a grantor or transferor (described in paragraph (c)(1) or (c)(2) of this section, respectively) who qualifies for an automatic extension to file the grantor's or transferor's income tax return under section 6081 and § 1.6081-5(a)(5) because the grantor or transferor resides outside of the United States and Puerto Rico and the grantor's or transferor's main place of business or post of duty is outside of the United States and Puerto Rico, the grantor or transferor must file Form 3520 by the fifteenth day of the sixth month after the close of the grantor's or transferor's taxable year. If the grantor or transferor has been granted an extension of time to file the grantor's or transferor's income tax return pursuant to section 6081, an extension of time for filing Form 3520 is granted to the fifteenth day of the tenth month following the close of the grantor's or transferor's taxable year. No additional extension of time to file Form 3520 is allowed.

(iii) *Filing by executor of grantor's or transferor's estate.* In the case of a deceased grantor or transferor, the executor of the grantor's or transferor's estate (within the meaning of paragraph (c)(3) of this section) must file Form 3520 by the fifteenth day of the fourth month following the close of the 12-month period which began with the first day of the grantor's or transferor's final taxable year. If the executor of the grantor's or transferor's estate has been granted an extension of time to file the grantor's or transferor's final income tax return pursuant to section 6081, an extension of time for filing Form 3520 is granted to the fifteenth day of the tenth month following the close of the 12-month period which began with the first day of the grantor's or transferor's final taxable year. No additional extension of time to file Form 3520 is allowed.

(b) *Reportable event.* Subject to § 1.6048-5, for purposes of this section, the term *reportable event* means any of the events described in paragraphs (b)(1) through (3):

(1) The creation of any foreign trust by any U.S. person.

(2) Any direct, indirect, or constructive transfer, within the meaning of § 1.679-3 or § 1.684-2, of property (including cash) to a foreign trust by a U.S. person, including a transfer by reason of death. In addition, a reportable event includes an outbound migration of a domestic trust, as described in § 1.684-4, without regard to whether any gain is taxable under § 1.684-1, and a U.S. person's transfer of property in exchange for any obligation of the foreign trust or of a person related to the trust, as described in § 1.679-4, without regard to whether the obligation is a qualified obligation.

(3) The death of a citizen or resident of the United States if—

(i) The decedent was treated as the owner of any portion of a foreign trust under subpart E of part I of subchapter J of chapter 1 of the Internal Revenue Code, or

(ii) Any portion of a foreign trust was included in the gross estate of the decedent for Federal estate tax purposes.

(c) *Responsible party.* For purposes of this section, the term *responsible party* means each of the following:

(1) The grantor (within the meaning of § 1.671-2(e)) in the case of the creation of an inter vivos trust.

(2) The transferor in the case of a reportable event described in paragraph (b)(2) of this section other than a transfer by reason of death.

(3) The executor of the deceased grantor's or transferor's estate in any other case (whether or not the executor is a U.S. person).

(d) *Examples.* The following examples illustrate the rules of this section.

(1) *Example 1: Creation and funding of foreign trust.* A, an attorney, creates a foreign trust, FT, on behalf of B, A's client. A and B are both U.S. persons. Shortly thereafter, B transfers \$100x to FT. A and B are both grantors of FT under § 1.671-2(e), even though only B transferred property to FT. Under paragraph (b)(1) of this section, the creation of FT is a reportable event, and under paragraph (c)(1) of this section, A and B are responsible parties. Under paragraph (b)(2) of this section, the funding of FT is a reportable event, and under paragraph (c)(2) of this section, B is the responsible party. Accordingly, under paragraph (a) of this section, A must report the creation of FT and B must report the creation and the transfer to FT, respectively, on Part I of Form 3520.

(2) *Example 2: Transfers to two foreign trusts.* The facts are the same as in paragraph (d)(1) of this section

(*Example 1*). B also transfers \$100x to a second foreign trust, FT2, during the same taxable year. Under paragraph (a)(1) of this section, B must file two Forms 3520, one for the creation and funding of FT and one for the funding of FT2.

(3) *Example 3: Transfer by domestic trust to foreign trust.* Under the grantor trust rules, B is treated as the owner of a domestic trust, DT. B is a U.S. person and funds DT with \$1,000x.

Subsequently, B causes DT to transfer \$600x to FT, an existing foreign trust. Under § 1.679-3(b), B is treated as transferring \$600x to FT. Under paragraph (b)(2) of this section, the transfer is a reportable event. Under paragraph (c)(2) of this section, B is a responsible party. Accordingly, under paragraph (a) of this section, B is required to report the transfer to FT on Part I of Form 3520.

(4) *Example 4: Transfer by reason of death.* C, a U.S. person who files on a calendar year basis, is treated as the owner of a domestic trust, DT, under the grantor trust rules. The trust instrument provides that, upon C's death, DT will terminate and the trustee must distribute the trust corpus to a foreign trust, FT, for the benefit of C's children. C dies in Year 1. The trustee of DT distributes the trust corpus to FT in Year 1. The transfer to FT is a reportable event under paragraph (b)(2) of this section as a transfer by reason of C's death. Under paragraph (c)(3) of this section, the executor of C's estate is the responsible party. Accordingly, under paragraph (a) of this section, the executor of C's estate is required to report the transfer on Part I of Form 3520 by April 15, Year 2, the fifteenth day of the fourth month after the close of the 12-month period which began with the first day of C's final taxable year, as described in paragraph (a)(2)(ii) of this section. If C's executor is granted an extension of time to file C's final income tax return, then C's Form 3520 will have a 6-month extension and be due by October 15, Year 2.

(5) *Example 5: Death of U.S. citizen who was the owner of a foreign trust.* The facts are the same as in paragraph (d)(4) of this section (*Example 4*), except that C dies in Year 1 while C is treated as the owner of FT. Under paragraph (b)(3)(i) of this section, C's death is a reportable event. Under paragraph (c)(3) of this section, the executor of C's estate is a responsible party. Accordingly, under paragraph (a) of this section, the executor of C's estate is required to report C's death on Form 3520 by April 15, Year 2, the fifteenth day of the fourth month after the close of the 12-month period which began with the first

day of C's final taxable year, as described in paragraph (a)(2)(ii) of this section. If C's executor is granted an extension of time to file C's final income tax return for the year of decedent's death, then C's Form 3520 will also have an extension and be due by October 15, Year 2.

(6) *Example 6: Transfer in exchange for less than fair market value.* X, a U.S. person, sells property worth \$1,000x to a foreign trust, FT, in exchange for \$100x in cash. Under § 1.671–2(e)(2)(ii), the \$900x excess amount is a gratuitous transfer by X to FT. Under § 1.679–3(a), X is treated as making a transfer of \$900x to FT. Under paragraph (b)(2) of this section, the transfer is a reportable event. Under paragraph (c)(2) of this section, X is a responsible party. Accordingly, under paragraph (a) of this section, X is required to report the \$900x transfer to FT on Part I of Form 3520.

(7) *Example 7: Creation and funding of trust in Puerto Rico by U.S. citizen.* X is a U.S. citizen and a bona fide resident of Puerto Rico. X creates and funds a trust, T, in Puerto Rico. T is subject to the primary jurisdiction of the Puerto Rican courts. Because T fails the court test of § 301.7701–7(a)(i), it is classified as a foreign trust under § 301.7701–7. Under paragraph (b)(1) and (2) of this section, the creation and funding of T are reportable events. Under paragraph (c)(1) and (2) of this section, X is a responsible party. Accordingly, under paragraph (a) of this section, X is required to report the creation and funding of T on Part I of Form 3520.

(8) *Example 8: Indirect transfer.* X, a U.S. person, creates FT, a foreign trust, for the benefit of X's children, who are U.S. citizens. On July 1, Year 1, X transfers ABC stock to X's brother, Y, a nonresident alien, for no consideration. Y immediately sells the ABC stock and uses the proceeds to purchase DEF stock. On January 5, Year 2, Y transfers the DEF stock to FT. X is related to Y within the meaning of § 1.679–3(c)(4). X cannot demonstrate to the satisfaction of the Commissioner that Y, as the intermediary, has a relationship with the beneficiaries of the trust that establishes a reasonable basis for concluding that the intermediary would make a transfer to FT, that Y acted independently of X, or that Y is not an agent of X. Thus, the transfer is deemed to be for the principal purpose of tax avoidance under § 1.679–3(c)(2). Under § 1.679–3(c)(1), X is treated as having made an indirect transfer of the DEF stock to FT on January 5, Year 2. Under § 1.679–3(c)(3), Y is treated as an agent of X, and the DEF stock is treated as

transferred to FT by X. Under paragraph (b)(2) of this section, the transfer is a reportable event. Under paragraph (c)(2) of this section, X is a responsible party. Accordingly, under paragraph (a) of this section, X is required to report the transfer on Part I of Form 3520.

(9) *Example 9: Constructive transfer.* FT, a foreign trust, owes \$100x to F Corp, an unrelated foreign corporation, for the performance of services by F Corp for the benefit of FT. In satisfaction of FT's liability to F Corp, X, a U.S. person, transfers to F Corp property with a fair market value of \$100x. By satisfying FT's obligation, under § 1.679–3(d)(1), X is treated as having made a constructive transfer of property to FT. Under paragraph (b)(2) of this section, the transfer is a reportable event. Under paragraph (c)(2) of this section, X is a responsible party. Accordingly, under paragraph (a) of this section, X is required to report the transfer on Part I of Form 3520.

(10) *Example 10: Partial guarantee of foreign trust obligations.* F Corp, a foreign corporation, lends \$100x to FT, a foreign trust, in exchange for FT's obligation to repay the loan. Knowing that F Corp would not have made the loan without a guarantee, X, a U.S. person related to FT under § 1.679–1(c)(5), gratuitously guarantees the repayment of \$60x of FT's obligation. Under § 1.679–3(e), X is treated as having transferred \$60x to FT. Under paragraph (b)(2) of this section, the transfer is a reportable event. Under paragraph (c)(2) of this section, X is a responsible party. Accordingly, under paragraph (a) of this section, X is required to report the transfer on Part I of Form 3520.

(11) *Example 11: Dual resident taxpayer.* The facts are the same as in paragraph (d)(10) of this section (*Example 10*) except that X is a dual resident taxpayer (within the meaning of § 301.7701(b)–7(a)(1)) who computes his U.S. tax liability as a nonresident alien for the taxable year during which he is treated as making the transfer. Pursuant to § 1.6048–6(a)(1), X is not treated as a U.S. person for that taxable year and is not required to report the transfer on Part I of Form 3520.

(12) *Example 12: Outbound migration of domestic nongrantor trust.* X, a U.S. person, transfers property to an irrevocable domestic trust, DT, for the sole benefit of X's daughter. DT is not treated as owned by X or any other person under the grantor trust rules. DB, a domestic bank, resigns as trustee when X dies, and FB, a foreign bank, becomes the replacement trustee under the terms of the trust. Pursuant to § 301.7701–7(d), DT becomes a foreign trust, FT. Under

§ 1.684–4(a), DT is treated as having transferred all of its assets to FT and is required to recognize gain on the transfer under § 1.684–1(a). Under paragraph (b)(2) of this section, the transfer is a reportable event. Under paragraph (c)(2) of this section, DT is the responsible party. Accordingly, under paragraph (a) of this section, DT is required to report the transfer on Part I of a Form 3520.

(13) *Example 13: Outbound migration of domestic grantor trust.* On January 2, Year 1, X, a U.S. person, transfers property with a fair market value of \$100x and an adjusted basis of \$40x to a revocable domestic trust, DT, for the benefit of A, a U.S. person. X is treated as the owner of DT under section 676. On January 15, Year 2, when the fair market value of all property transferred to DT by X is \$150x, DT acquires a foreign trustee who has the power to determine whether and when distributions will be made to A. Under sections 7701(a)(30)(E) and 7701(a)(31)(B) and § 301.7701–7(d)(1)(ii)(A) and (d)(2)(i), DT becomes a foreign trust, FT, on January 15, Year 2. Under § 1.684–2(d), X is treated as transferring property with a fair market value of \$150x to FT on January 15, Year 2, without regard to whether FT is a foreign grantor trust. Under paragraph (b)(2) of this section, the transfer is a reportable event. Under paragraph (c)(2) of this section, X is the responsible party. Under paragraph (a) of this section, X is required to report the transfer on Part I of Form 3520.

§ 1.6048–3 U.S. owners of foreign trusts.

(a) *U.S. owner requirement to ensure foreign trust information is provided—*
(1) *In general.* Unless an exception in § 1.6048–5 applies, any U.S. person who is treated as an owner (*U.S. owner*) of a foreign trust or of any portion of a foreign trust under subpart E of part I of subchapter J of chapter 1 of the Internal Revenue Code during any taxable year is responsible for ensuring that, by the fifteenth day of the third month after the end of the foreign trust's taxable year, with a maximum extension of a 6-month period pursuant to section 6081, the foreign trust—

(i) Files Form 3520–A, Annual Information Return of Foreign Trust With a U.S. Owner (under section 6048(b)), under an identification number assigned to the trust (or portion of the trust) with the Commissioner in accordance with the instructions for Form 3520–A, and attaches copies of the statements required by paragraphs (a)(1)(ii) and (iii) of this section,

(ii) Furnishes a Foreign Grantor Trust Owner Statement in accordance with

the instructions for Form 3520–A for the taxable year to each U.S. owner; and

(iii) Furnishes a Foreign Grantor Trust Beneficiary Statement in accordance with the instructions for Form 3520–A for the taxable year to each U.S. person, other than the U.S. owner, to whom the trust has made a distribution (within the meaning of § 1.6048–4(b)), either directly or indirectly, during the trust's taxable year (each a *U.S. beneficiary*).

(2) *Substitute Form 3520–A filed by the U.S. owner.* If the foreign trust does not comply with the requirements of paragraph (a)(1) of this section, the U.S. owner must—

(i) Complete and file Part II of Form 3520, Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts, in accordance with the instructions for Form 3520 by the due date of the U.S. owner's Form 3520, as described in § 1.6048–2(a)(2) but as if “U.S. owner” replaces “responsible party” in § 1.6048–2(a)(2)(i) and as if “U.S. owner” replaces “grantor or transferor” in § 1.6048–2(a)(2)(ii) and (iii), as applicable; and

(ii) Complete Form 3520–A and related statements for each U.S. owner and U.S. beneficiary on behalf of the foreign trust and file them with the U.S. owner's Part II of Form 3520 by the due date of the U.S. owner's Form 3520 as provided in paragraph (a)(2)(i) of this section. Further, unless paragraph (a)(3) of this section applies, the U.S. owner must furnish the Foreign Grantor Trust Beneficiary Statement in accordance with the instructions for Form 3520–A to each U.S. beneficiary by the due date of the U.S. owner's Form 3520.

(3) *Certain fixed investment trusts.* A U.S. owner who is subject to the rules of this section is not required to provide information about the other persons who are treated as owners of the foreign trust if the foreign trust meets all requirements to qualify as a widely held fixed investment trust within the meaning of § 1.671–5(b)(22) other than the requirement that it be a U.S. person under section 7701(a)(30)(E).

(b) *Consistency rule—(1) In general.* Subject to paragraph (b)(2) of this section, U.S. owners or U.S. beneficiaries who receive a Foreign Grantor Trust Owner Statement or Foreign Grantor Trust Beneficiary Statement from a foreign trust must treat any item reported by the trust to such U.S. person in a manner that is consistent with the trust's treatment of such item on the Foreign Grantor Trust Owner Statement or Foreign Grantor Trust Beneficiary Statement.

(2) *Notification of inconsistent treatment.* If a U.S. owner's or U.S.

beneficiary's treatment on such U.S. owner's or U.S. beneficiary's return is (or may be) inconsistent with the treatment of the item reported on a Foreign Grantor Trust Owner Statement or Foreign Grantor Trust Beneficiary Statement, then the U.S. owner or U.S. beneficiary must notify the Commissioner about the inconsistent treatment. The notification of inconsistent treatment must be made on a Form 8082, Notice of Inconsistent Treatment or Administrative Adjustment Request (AAR). Rules similar to the rules of section 6034A(c) (generally requiring beneficiaries of estates or trusts to file their returns in a manner that is consistent with information received from the estate or trust) will apply, including the rules for any adjustments required to make the treatment of reported items consistent in the case of a U.S. owner's or U.S. beneficiary's failure to notify the Commissioner about the inconsistent treatment.

(c) *Income tax determinations for foreign grantor trusts without U.S. agents.* If a foreign trust with a U.S. owner does not have a U.S. agent as described in paragraph (d) of this section, or if otherwise provided pursuant to paragraph (d)(5) of this section, then the amounts required to be taken into account with respect to the trust by the U.S. owner under the grantor trust rules are determined by the Commissioner based on all the facts and circumstances.

(d) *Authorization of a U.S. agent—(1) In general.* Paragraph (c) does not apply if a U.S. owner of a foreign trust ensures that the foreign trust authorizes a U.S. person to act as the trust's limited agent as described in paragraph (d)(2) of this section solely for purposes of applying sections 7602, 7603, and 7604 with respect to—

(i) Any request by the Commissioner to examine records or produce testimony related to the proper treatment of amounts required to be taken into account under the grantor trust rules; or

(ii) Any summons by the Commissioner for such records or testimony.

(2) *Requirements.* In order to authorize a U.S. person to act as an agent under paragraph (d)(1) of this section, a U.S. owner of a foreign trust must ensure that the trust and the agent enter into a binding authorization agreement that is executed by the foreign trust and the U.S. agent before the due date of Form 3520–A or substitute Form 3520–A (as described in § 1.6048–3(a)(1) and (2), respectively) for the taxable year that the U.S. owner

is considered the owner of the trust. The authorization must remain in effect for as long as the statute of limitations remains open for the U.S. owner's relevant taxable year. If the agent resigns or liquidates or if the agent's responsibility is terminated, the U.S. owner of the foreign trust must ensure that the foreign trust notifies the Commissioner within 90 days, by filing an amended Form 3520–A. This notification must contain the name, address and Taxpayer Identification Number of the new U.S. agent.

(3) *Limitations.* The appearance of persons or production of records by reason of a U.S. person being an agent described in paragraph (d)(1) of this section will not subject such persons or records to legal process for any purpose other than determining the correct treatment of the amounts to be taken into account by the U.S. owner under paragraph (c) of this section.

(4) *No office, permanent establishment, or trade or business.* A foreign trust that appoints a U.S. agent described in paragraph (d)(1) of this section will not be considered to have an office or a permanent establishment in the United States, or to be engaged in a trade or business in the United States, solely because of the agent's activities as an agent pursuant to this section.

(5) *Summons issued to a U.S. agent—*

(i) *In general.* Paragraph (c) of this section applies if a summons is issued to a U.S. person (either directly or as a limited agent of a foreign trust who is appointed pursuant to paragraph (d)(1) of this section) or to a foreign trust (where service of the summons can be effectuated) to produce any records or testimony in order to determine the amounts required to be taken into account under the grantor trust rules, and if—

(A) The summons is not quashed in a proceeding, if any, begun not later than the 90th day after the summons was issued and is not determined to be invalid in a proceeding, if any, begun under section 7604 to enforce the summons; and

(B) The Commissioner has sent by certified or registered mail a notice to the U.S. person or foreign trust of its determination that the U.S. person or foreign trust has not substantially and timely complied with the summons, and a proceeding to review the determination is not begun any later than 90 days after the notice is mailed. If such a proceeding is not begun on or before such 90th day, the determination by the Commissioner will be binding.

(ii) *Enforcement proceeding not required.* The Commissioner is not required to begin an enforcement

proceeding to enforce the summons in order to apply the rules of paragraph (d)(5) of this section.

(iii) *Suspension of statute of limitations.* If the U.S. person or foreign trust to which a summons is issued brings a proceeding to quash the summons not later than the 90th day after the summons was issued, or begins a proceeding to review a determination under paragraph (d)(5)(i)(B) of this section not later than the 90th day after the day on which the notice referred to in paragraph (d)(5)(i)(B) of this section was mailed, the running of any period of limitation under section 6501 (relating to assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) for the taxable year or years to which the summons that is the subject of such proceeding relates will be suspended for the period during which the proceeding, and appeals therein, are pending. In no event will any such period expire before the 90th day after the day on which there is a final determination in the proceeding.

(e) *Examples.* The following examples illustrate the rules of this section.

(1) *Example 1: Fixed investment trust.* X, a U.S. person, is treated as an owner of a foreign trust, FT, that would be a widely held fixed investment trust within the meaning of § 1.671–5(b)(22) if it were a domestic trust. FT does not file a Form 3520–A for Year 1. Under paragraph (a)(2) of this section, X is required to complete and file Part II of Form 3520 by the due date for X's Year 1 Form 3520. In addition, under paragraph (a)(2) of this section, X is required to complete a substitute Form 3520–A and related statements and file them with X's Year 1 Form 3520. Under paragraph (a)(4) of this section, X is not required to provide information about the other owners of FT.

(2) *Example 2: Substitute Form 3520–A.* X, a U.S. person, is treated as the owner of a foreign trust, FT. FT's taxable year ends on December 31. On November 1, Year 1, FT makes a distribution to Y, a U.S. beneficiary of the trust. FT fails to comply with the requirements of paragraph (a)(1) of this section for its taxable year ending December 31, Year 1. Under paragraph (a)(2) of this section, X is required to complete and file Part II of Form 3520 by the due date for X's Year 1 Form 3520. In addition, under paragraph (a)(2) of this section, X is required to complete a substitute Form 3520–A and related statements and file them with X's Year 1 Form 3520. X must furnish a Foreign Grantor Trust Beneficiary Statement to Y by the due date for X's Year 1 Form 3520.

(3) *Example 3: Failures to appoint U.S. agent and to respond to summons.* X, a U.S. person, is treated as the owner of a foreign trust, FT. FT does not appoint a U.S. agent described in paragraph (d)(1) of this section. The Commissioner issues a summons to X for the production of records of FT related to the proper treatment of amounts required to be taken into account by X under the grantor trust rules. Neither X nor FT responds to the summons. Under paragraph (c) of this section, the Commissioner may determine the amount that X must take into account under the grantor trust rules based on all the facts and circumstances.

(4) *Example 4: Multiple trusts and multiple transactions.* X, a U.S. person, is treated as the owner of two foreign trusts, FT1 and FT2. During Year 1, X transfers cash to FT1 and receives a distribution from FT2. FT1 and FT2 fail to comply with the requirements of paragraph (a)(1) of this section for their taxable years ending in Year 1. Under § 1.6048–2 and paragraph (a)(2) of this section, X must report X's transfer to, and ownership of, FT1 on one Form 3520, and under § 1.6048–4 and paragraph (a)(2) of this section, X must report X's ownership of, and distribution from, FT2 on a second Form 3520. In addition, under paragraph (a)(2)(ii) of this section, X must complete a substitute Form 3520–A for each trust, FT1 and FT2, and file them with X's Year 1 Form 3520 for each trust.

(5) *Example 5: Dual resident taxpayer.* (i) X is a lawful permanent resident of the United States within the meaning of § 301.7701(b)–1(b) of this chapter and a tax resident of Country F under the domestic tax law of Country F. X is treated as a resident of Country F under the residence article of the U.S.–Country F income tax treaty (the treaty). Pursuant to § 301.7701(b)–7 of this chapter, X is treated as a nonresident alien for purposes of computing X's U.S. income tax liability for Year 1. During Year 1, X transfers \$100x to a foreign trust, FT, for the benefit of X's children, who are U.S. citizens. Under § 1.6048–6(a), X is not treated as a U.S. person and is not required to report the transfer under § 1.6048–2 on a Form 3520 for Year 1.

(ii) In Year 2, X waives any benefits to which X would have been entitled under the treaty and computes X's U.S. income tax liability as a resident alien. Under § 1.679–5(a), X is treated as having made a transfer to FT on January 1, Year 2, in the amount of the fair market value of FT as of that date. Under § 1.679–1(a), X is treated as the

owner of FT as of January 1, Year 2. Under § 1.6048–2(a), X is required to file a Form 3520 for Year 2 on which X reports the transfer to FT. If FT fails to comply with the requirements of paragraph (a)(1) of this section for FT's taxable year ending in Year 2, under paragraph (a)(2) of this section, X also must complete and file Part II of Form 3520, and complete and file a substitute Form 3520–A with the related statements attached to X's Year 2 Form 3520.

§ 1.6048–4 Reporting by U.S. persons receiving distributions from foreign trusts.

(a) *Reporting of trust distributions.* Unless an exception in § 1.6048–5 applies, any U.S. person who receives directly or indirectly any distribution from a foreign trust (without regard to whether any person is treated as the owner of the foreign trust under the rules of subpart E of part I of subchapter J of chapter 1) must file Part III of Form 3520, Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts, by the due date of the U.S. person's Form 3520, as described in § 1.6048–2(a)(2) by replacing “responsible party” with “U.S. person” in § 1.6048–2(a)(2)(i) and by replacing “grantor or transferor” with “U.S. person” in § 1.6048–2(a)(2)(ii) and (iii), as applicable. See § 1.6048–6(d) for information reporting by married U.S. persons who file a joint income tax return.

(b) *Distribution—(1) In general.* Except as provided in paragraphs (b)(5)(ii) and (b)(6)(ii) of this section, a *distribution* means any transfer of property (including cash) from a foreign trust received directly or indirectly by a U.S. person to the extent such property exceeds the fair market value of any property or services received by the foreign trust in exchange for the property transferred, without regard to whether any portion of the foreign trust is treated as owned by the grantor or another person under the rules of subpart E of part I of subchapter J of chapter 1, whether the recipient is designated as a beneficiary by the terms of the foreign trust, or whether the distribution has any income tax consequences. A distribution includes any amount, including without limitation a gift or bequest described in section 663(a), actually or constructively received by a U.S. person. For these purposes, a transfer of property from a foreign trust to a grantor trust or to a disregarded entity (as defined in § 1.643(i)–1(d)(3) of this chapter) is treated as a distribution to the owner of the grantor trust or of the disregarded entity, respectively. For example, a

transfer of property from a foreign trust to a single member LLC treated as a disregarded entity is treated as a distribution to the owner of the LLC. For distributions through intermediaries, see paragraph (b)(2) of this section; for distributions from entities owned by a foreign trust, see paragraph (b)(3) of this section; for inbound migrations of foreign trusts, see paragraph (b)(4) of this section; for loans of cash or marketable securities, see paragraph (b)(5) of this section; for use of trust property, see paragraph (b)(6) of this section; and for the receipt of covered gifts or bequests from a foreign trust, see paragraph (b)(7) of this section.

(2) *Distributions from foreign trusts through intermediaries*—(i) *In general.* A distribution includes any transfer of property from a foreign trust received by a U.S. person through an intermediary, nominee, or agent. In such a case, except as otherwise provided in paragraph (b)(2)(ii) of this section, the intermediary, nominee, or agent is treated as an agent of the foreign trust and the property is treated as distributed from the foreign trust to the U.S. person in the year the property is received by or made available by the intermediary, nominee, or agent to the U.S. person.

(ii) *Special rule.* If the Commissioner determines that the intermediary, nominee, or agent is an agent of the U.S. person, the property is treated as distributed from the foreign trust to the U.S. person in the year the property is received by the intermediary, nominee, or agent. In such case, the intermediary, nominee, or agent is not treated as distributing the property to the U.S. person when the property is subsequently received by or made available by the intermediary, nominee, or agent to the U.S. person.

(iii) *Reporting indirect transfers of property.* An indirect transfer of property from a foreign trust must be reported on Part III of Form 3520 without regard to whether the receipt of such property would be treated as having any income tax consequences to the U.S. person receiving such property, to a U.S. grantor or beneficiary of the foreign trust, or to a U.S. owner of the foreign trust.

(3) *Distributions from entities owned by a foreign trust.* A distribution includes any transfer of property from an entity in which a foreign trust directly or indirectly holds an ownership interest that is received by a U.S. person who is a related person (as defined in § 1.679-1(c)(5)) with respect to the foreign trust. In such case, the transfer of the property by the entity owned by the foreign trust to the U.S.

person is treated as a distribution of such property by the entity to the foreign trust followed by a distribution of the property from the foreign trust to the U.S. person, unless the U.S. person demonstrates to the satisfaction of the Commissioner that the distribution from the entity is properly attributable to the U.S. person's ownership interest in the entity.

(4) *Inbound migrations of foreign trusts.* A distribution includes an inbound migration of a foreign trust. An inbound migration of a foreign trust occurs when a foreign trust becomes a domestic trust. In such case, the foreign trust is treated as distributing the trust corpus and income to the domestic trust on the date the foreign trust becomes a domestic trust.

(5) *Loans of cash or marketable securities*—(i) *In general.* A distribution includes any loan of cash or marketable securities made from a foreign trust (whether from trust corpus or income) directly or indirectly to a U.S. person. For these purposes, a loan to a grantor trust or to a disregarded entity (as defined in § 1.643(i)-1(d)(3) of this chapter) will be treated as a loan to the owner of the grantor trust or of the disregarded entity, respectively. For example, a loan to a single member LLC treated as a disregarded entity will be treated as a loan to the owner of the LLC. Loans from a foreign trust include:

(A) A loan of cash or marketable securities made by any person to a U.S. person, if the foreign trust provides a guarantee (within the meaning of § 1.679-3(e)(4)) for the loan, and

(B) A loan of cash or marketable securities made by any intermediary, nominee or agent of a foreign trust to a U.S. person.

(ii) *Section 643(i) loans of cash or marketable securities.* A distribution includes a direct or indirect loan of cash or marketable securities from a foreign nongrantor trust to any U.S. grantor or beneficiary (within the meaning of § 1.643(i)-1(d)(11) or (1), respectively) or a U.S. person related (within the meaning of § 1.643(i)-1(d)(9)) to a U.S. grantor or beneficiary regardless of whether the loan was made in exchange for a qualified obligation within the meaning of § 1.643(i)-2(b)(2)(iii). For these purposes, indirect loans include loans described in § 1.643(i)-1(b)(2).

(iii) *Reporting loans of cash or marketable securities.* A loan of cash or marketable securities made from a foreign trust must be reported by the U.S. person described under paragraph (b)(5)(i) of this section and by the U.S. grantor or beneficiary described under paragraph (b)(5)(ii) of this section on Part III of Form 3520, Annual Return to

Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts, without regard to whether the loan would be treated as having any income tax consequences to a U.S. grantor or beneficiary (within the meaning of § 1.643(i)-1(d)(11) or (1), respectively) of the foreign trust.

(6) *Use of trust property*—(i) *In general.* A distribution includes the fair market value of the direct or indirect use of any property of a foreign trust by a U.S. person. For these purposes, use of property of a foreign trust by a grantor trust or by a disregarded entity (as defined in § 1.643(i)-1(d)(3)) will be treated as the use of trust property by the owner of the grantor trust or of the disregarded entity, respectively. For example, use of trust property by a single member LLC treated as a disregarded entity will be treated as use of trust property by the owner of the LLC.

(ii) *Section 643(i) use of trust property.* A distribution includes the fair market value of the direct or indirect use of any property of a foreign nongrantor trust by a U.S. grantor or beneficiary (within the meaning of § 1.643(i)-1(d)(11) or (1), respectively) or a U.S. person related (within the meaning of § 1.643(i)-1(d)(9)) to a U.S. grantor or beneficiary without regard to whether the foreign trust is paid the fair market value for such use. For these purposes, indirect use of trust property includes the use described in § 1.643(i)-1(c)(2).

(iii) *Reporting use of trust property.* The use of trust property must be reported by the U.S. person described under paragraph (b)(6)(i) of this section and by the U.S. grantor or beneficiary described under paragraph (b)(6)(ii) of this section on Part III of Form 3520, Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts, without regard to whether the use of trust property would be treated as having any income tax consequences to a U.S. grantor or beneficiary (within the meaning of § 1.643(i)-1(d)(11) or (1), respectively) of the foreign trust.

(7) *Certain covered gifts or bequests.* A distribution includes any covered gift or bequest (described in section 2801(e)) that is received as a distribution from a foreign trust.

(c) *Statements provided by foreign trust*—(1) *Foreign grantor trust with U.S. owner*—(i) *Owner statement.* Pursuant to § 1.6048-3(a)(1)(ii), a U.S. owner of a foreign trust (or portion of a foreign trust) should receive a Foreign Grantor Trust Owner Statement.

(ii) *Statement for U.S. person receiving a distribution.* Pursuant to

§ 1.6048–3(a)(1)(iii), a U.S. person, other than a U.S. owner, who receives a distribution from a foreign grantor trust (or portion of a foreign grantor trust) should receive a Foreign Grantor Trust Beneficiary Statement.

(2) *Foreign nongrantor trust.* A foreign nongrantor trust may issue, by the fifteenth day of the third month after the end of the trust's taxable year, a Foreign Nongrantor Trust Beneficiary Statement to each U.S. person who receives a distribution from the foreign trust during the trust's taxable year.

(3) *Foreign grantor trust with foreign owner.* A foreign trust that is treated as owned by a foreign person under the grantor trust rules may issue, by the fifteenth day of the third month after the end of the trust's taxable year, a Foreign-Owned Grantor Trust Beneficiary Statement to each U.S. person who receives a distribution.

(d) *Tax consequences of distributions—(1) In general.* Subject to paragraph (e) of this section, a U.S. person (other than a U.S. person described in § 1.6048–4(c)(1)(i)) who receives a distribution (other than a distribution described in § 1.6048–4(b)(5) or (6) that is not treated as a section 643(i) distribution under § 1.643(i)–1) from a foreign trust must determine the tax consequences of the distribution as follows, unless the distribution is received in a year that the foreign trust terminates. For rules determining the tax consequences of a distribution in the year a foreign trust terminates, see paragraphs (d)(3)(i)(B) and (d)(3)(iii) of this section.

(i) A U.S. person who receives a Foreign Grantor Trust Beneficiary Statement or a Foreign-Owned Grantor Trust Beneficiary Statement before the due date of the U.S. person's income tax return (including extensions) must determine the income tax consequences of the distribution from the trust as a distribution being made from a grantor trust.

(ii) A U.S. person who receives a Foreign Nongrantor Trust Beneficiary Statement before the due date of the U.S. person's income tax return (including extensions) may determine the income tax consequences of the distribution under either the actual calculation method described in paragraph (d)(2) of this section or the default calculation method described in paragraph (d)(3) of this section, unless the U.S. person knows or has reason to know that the information in the statement is incorrect or the U.S. person has previously used the default calculation method with respect to distributions from the same foreign trust.

(iii) In all other cases, including when a U.S. person does not receive a statement described in § 1.6048–4(c) before the due date of the U.S. person's income tax return (including extensions), the U.S. person must use the default calculation method described in paragraph (d)(3) of this section.

(2) *Actual calculation method.* Under the actual calculation method, the tax consequences of the distribution are determined by using actual information about the foreign trust as provided in the Foreign Nongrantor Trust Beneficiary Statement described in § 1.6048–4(c)(2) and applying the rules of subparts C and D of Part I of subchapter J of chapter 1 of the Internal Revenue Code.

(3) *Default calculation method—(i) Consequences to U.S. person who receives a distribution from a foreign trust—(A) In general.* Under the default calculation method, the tax consequences of the distribution are determined by allocating the distribution between a distribution of current income and a distribution of accumulated income under the rules of this paragraph (d)(3). The portion of the distribution that is treated as a distribution of current income is 125% of the average distribution that the U.S. person received from the foreign trust during the immediately preceding three taxable years (or the number of years during which the trust has been a foreign trust, if fewer than three years). The remainder of the distribution, if any, is treated as an accumulation distribution within the meaning of section 665(b) that is subject to an interest charge under section 668. For purposes of computing the interest charge (in the absence of actual information provided on a statement described in § 1.6048–4(c)), the U.S. person must assume that the applicable number of years the trust has been in existence is ten years and that no taxes described in section 665(d) have been imposed on the trust in any applicable previous year (even if a distribution had been made and tax under section 665(d) had been imposed).

(B) *Year of trust termination.* Unless paragraph (d)(3)(iii) of this section applies, the tax consequences of a distribution in the year a foreign trust terminates are determined by treating the distribution as an accumulation distribution within the meaning of section 665(b) that is subject to an interest charge under section 668 for any amount in excess of the portion of the distribution that is treated as a distribution of current income described in paragraph (d)(3)(i)(A) of this section.

(ii) *Consequences to trust.* A foreign trust must determine the income tax consequences of distributions to U.S. persons by applying the applicable rules of part I of subchapter J of chapter 1 of the Internal Revenue Code.

(iii) *Actual calculation method in year of foreign trust termination after using the default calculation method.* A U.S. person who has previously used the default calculation method with respect to distributions from a foreign trust may, for the year in which the foreign trust terminates, determine the tax consequences of a distribution from the same trust by using the actual calculation method provided that, before the due date of the U.S. person's income tax return (including extensions), the trust provides to the U.S. person complete and accurate information about all previous distributions from such foreign trust. The U.S. person must use this information to recalculate the tax effect of all previous distributions from such foreign trust under the actual calculation method in order to determine the portion attributable to current income, accumulated income, and principal in the year that the foreign trust terminates. A U.S. person described in this paragraph (d)(3)(iii) may not use the actual calculation method for the year that the foreign trust terminates if the U.S. person knows or has reason to know that the information provided by the foreign trust is incorrect.

(iv) *Example.* The following example illustrates the rules of paragraph (d)(3)(i) of this section. B, a U.S. person, is a beneficiary of a foreign nongrantor trust, FT, that was established in Year 1. In Year 2, Year 3, and Year 4, B received distributions from FT of \$100x, \$200x, and \$300x respectively. In Year 5, B receives a \$400x distribution from FT. To determine the tax consequences of the Year 5 distribution, B applies the default calculation method. Under the default calculation method, the average distribution that B received from FT during the preceding three years is \$200x and 125% of such average distribution is \$250x. Therefore, \$250x of the Year 5 distribution is treated as a distribution of current income and the remaining \$150x is treated as an accumulation distribution. The \$150x that is treated as an accumulation distribution is subject to an interest charge under section 668. B must report the distribution and the default calculation on Part III of Form 3520 for Year 5.

(e) *Distribution treated as accumulation distribution if records are not provided.* If adequate records are not

provided to the Commissioner to determine the proper treatment of any distribution from a foreign trust (within the meaning of paragraph (b) of this section) other than a loan or use of trust property that is not treated as a section 643(i) distribution under § 1.643(i)-1, the entire distribution will be treated as an accumulation distribution includible in the gross income of the U.S. person who received the distribution under chapter 1 of the Internal Revenue Code. However, if the trustee of a foreign trust authorizes a U.S. person to act as the trust's limited agent under rules prescribed in § 1.6048-3(d), then the tax consequences of the distribution may be determined under the rules described in paragraph (d)(1) of this section.

(f) *Interaction with § 1.6039F-1.* If a U.S. person receives a distribution from a foreign trust, the U.S. person must report the distribution under paragraph (a) of this section and not under § 1.6039F-1(a), regardless of whether the distribution is taxable to the U.S. person receiving the distribution. See § 1.6039F-1(b).

(g) *Examples.* The following examples illustrate the rules of this section. In each example, X is a U.S. citizen, FT is a foreign trust, and FC is a foreign corporation.

(1) *Example 1: Payment of liability treated as distribution.* X owes \$1,000x to Y for services that Y performed for X. In satisfaction of X's liability to Y, FT transfers to Y property with a fair market value of \$1,000x. Under paragraph (b)(1) of this section, FT's transfer of property to Y is constructively received by X from FT, and is a distribution in the amount of \$1,000x to X for purposes of this section. Under paragraph (a) of this section, X must report the distribution on Part III of Form 3520.

(2) *Example 2: Assumption of liability treated as distribution.* The facts are the same as in paragraph (g)(1) of this section (*Example 1*) except that FT assumes X's liability to pay Y. The result is the same as in paragraph (g)(1) of this section (*Example 1*).

(3) *Example 3: Trust's partial guarantee of U.S. person's obligation treated as distribution from foreign trust.* Y lends \$1,000x of cash to X in exchange for X's obligation to repay the loan. X is a U.S. person. FT guarantees the repayment of \$600x of X's obligation. Under paragraph (b)(5)(i)(A) of this section, FT's guarantee of X's obligation is a distribution from FT to X in the amount of \$600x. Under paragraph (a) of this section, X must report the distribution on Part III of Form 3520.

(4) *Example 4: Section 643(i) loan not in exchange for qualified obligation.* X's sister, A, and A's husband, B, are both U.S. citizens. X, A, and B are U.S. persons within the meaning of § 1.643(i)-1(d)(12), and X is related to B under § 1.643(i)-1(d)(9). B is a beneficiary of FT, a nongrantor trust. In Year 1, FT lends \$100x to X in exchange for a demand note that permits FT to require repayment by X at any time. The demand note issued by X is not a qualified obligation within the meaning of § 1.643(i)-2(b)(2)(iii) because X's obligation to FT could remain outstanding for more than five years. Accordingly, the loan from FT to X is treated as a section 643(i) distribution of \$100x to B under § 1.643(i)-1(a). The loan is a distribution from FT to X and B under paragraph (b)(5)(ii) of this section. Under paragraphs (a) and (b)(5)(iii) of this section, X and B each must report the distribution on Part III of Form 3520.

(5) *Example 5: Section 643(i) loan in exchange for qualified obligation.* The facts are the same as in paragraph (g)(4) of this section (*Example 4*) except that the loan cannot remain outstanding for more than five years and it is a qualified obligation within the meaning of § 1.643(i)-2(b)(2)(iii). Although the loan is not a section 643(i) distribution within the meaning of § 1.643(i)-1(a), the loan nevertheless is a distribution from FT to X and to B under paragraph (b)(5)(ii) of this section. Under paragraphs (a) and (b)(5)(iii) of this section, X and B each must report the distribution on Part III of Form 3520.

(6) *Example 6: Distribution through intermediary.* Y, a nonresident alien, created FT in 1980 for the benefit of Y's children and their descendants, all of whom are U.S. persons. FT's trustee, T, determines that \$100x of accumulated income should be distributed to X, one of Y's children. Pursuant to a plan with a principal purpose of avoiding the interest charge that would be imposed on an accumulation distribution from a foreign trust by section 668, T makes a gratuitous transfer from FT of \$100x to N, a foreign person. N subsequently makes a gratuitous transfer of \$100x to X. Under § 1.643(h)-1(a)(1), FT is deemed to have made an accumulation distribution of \$100x to X. The distribution through N as the intermediary is treated as a distribution under paragraph (b)(2)(i) of this section. Under paragraphs (a) and (b)(2)(iii) of this section, X must report the distribution on Part III of Form 3520.

(7) *Example 7: Excess payment in exchange for property.* X transfers to FT property with a fair market value of \$200x in exchange for a payment of

\$500x. Under paragraph (b)(1) of this section, the excess amount of \$300x is treated as a distribution from FT to X. Under paragraph (a) of this section, X must report the distribution of \$300x on Part III of Form 3520.

(8) *Example 8: Excess payment in exchange for services.* X receives a payment of \$100x from FT purportedly in exchange for X's performance of services as a trustee of FT. The fair market value of the services performed is \$20x. Under paragraph (b)(1) of this section, X is treated as receiving a distribution of \$80x from FT. Under paragraph (a) of this section, X must report the distribution of \$80x on Part III of Form 3520.

(9) *Example 9: Distribution from entity owned by foreign trust.* FT owns all of the outstanding stock of FC. FC distributes \$100x directly to X, a related person within the meaning of § 1.679-1(c)(5) with respect to FT. Because FT is the sole shareholder of FC, X is unable to demonstrate to the satisfaction of the Commissioner that the distribution is properly attributable to X's ownership interest in FC. Accordingly, under paragraph (b)(3) of this section, X is treated as receiving a distribution of \$100x from FT. Under paragraph (a) of this section, X must report the distribution of \$100x on Part III of Form 3520.

(10) *Example 10: Distribution from entity co-owned by foreign trust.* FC has 100 outstanding shares of stock. FT owns 25 shares of FC stock, X owns 50 shares, and N, a nonresident alien, owns the remaining 25 shares. In Year 1, FC distributes a dividend of \$25x to each of FT and N and \$50x to X. Because the distribution was made to FT, X, and N in proportion to their ownership interests in FC and X reports \$50x as a dividend on X's timely filed income tax return for Year 1, X is able to demonstrate to the satisfaction of the Commissioner that the distribution is properly attributable to X's ownership interest in FC. Accordingly, under paragraph (b)(3) of this section, X is not treated as receiving a reportable distribution of \$50x from FT.

(11) *Example 11: Foreign trust becomes domestic trust.* FB, a foreign bank, resigns as trustee of FT, and DB, a domestic bank, becomes the new trustee of FT. Pursuant to section 7701(a)(30)(E), FT becomes a domestic trust, DT. Under paragraph (b)(4) of this section, DT is treated as receiving a distribution of the trust corpus and income from FT. Under paragraph (a) of this section, DT must report the deemed distribution of the trust corpus and income on Part III of Form 3520 for the

year in which the inbound migration occurs.

(12) *Example 12: Distribution received by domestic trust.* T, as trustee of FT, has the power to decant. Exercising that power, T distributes the trust corpus and income of FT to DT, a domestic trust. Neither FT nor DT is a grantor trust. Under paragraph (b)(1) and (4) of this section, DT receives a distribution of the trust corpus and income from FT. Under paragraph (a) of this section, DT must report the distribution of the trust corpus and income on Part III of Form 3520 for the year in which the decanting occurs.

(13) *Example 13: Distribution received by U.S. owner.* X is treated as the owner of FT under section 679. X receives a distribution from FT. Under paragraph (a) of this section, X must report the distribution on Part III of Form 3520.

(14) *Example 14: Distribution from trust owned by another person.* X receives a distribution from FT. Y, a nonresident alien, is treated as the owner of FT under the grantor trust rules. X receives a completed Foreign-Owned Grantor Trust Beneficiary Statement. Under paragraph (a) of this section and § 1.6048-6(b), X must file Form 3520 for the year of the distribution.

(15) *Example 15: Use of default calculation method if statement not provided.* The facts are the same as in paragraph (g)(14) (*Example 14*) except that X does not receive a Foreign-Owned Grantor Trust Beneficiary Statement from FT. Pursuant to paragraph (d)(3) of this section, X must determine the tax consequences of the distribution using the default calculation method. Under the default calculation method, X must include the distribution in income in accordance with rules prescribed in paragraph (d)(3) of this section and in the Instructions for Form 3520 for the applicable taxable year.

(16) *Example 16: Distribution attributable to covered gift.* Z relinquishes Z's U.S. citizenship on September 15, Year 1. Z is a covered expatriate within the meaning of section 877A(g)(1). On August 1, Year 2, Z creates and transfers \$300x to a foreign trust, FT, for the benefit of Z's son, S, a U.S. citizen. On December 30, Year 3, S receives a \$40x distribution from FT. Whether or not the entire amount of the distribution is a covered gift within the meaning of section 2801(e), under paragraph (b)(7) of this section, the \$40x is a distribution. Under paragraph (a) of this section, S must report the distribution on Part III of Form 3520. S also may have additional reporting

requirements under section 2801 for the covered gift.

§ 1.6048-5 Exceptions.

(a) *Exceptions under section 6048(a)(3)(B).* For purposes of § 1.6048-2, a reportable event does not include any of the following:

(1) Any transfer of property to a foreign trust to the extent the transfer is a transfer for fair market value within the meaning of § 1.679-4(b), provided that the transfer is not one made by a U.S. person that is a related person (as defined in § 1.679-1(c)(5)) with respect to the foreign trust in exchange for an obligation of the trust or of a related person (without regard to whether such obligation is a qualified obligation described in § 1.679-4(d));

(2) Any transfer of property to a foreign trust described in section 402(b), 404(a)(4), or 404A; and

(3) Any transfer of property to a foreign trust, provided that the trust has received a determination letter from the Commissioner that has not been revoked recognizing that the foreign trust is exempt from Federal income tax under section 501(a) as an organization described in section 501(c)(3).

(b) *Exceptions for certain tax-favored foreign trusts—*(1) *In general.* Sections 6048(a) through 6048(c) and §§ 1.6048-2 through 1.6048-4 do not apply to any eligible individual's transactions with, or ownership of, a tax-favored foreign retirement trust as defined under paragraph (b)(2) of this section or a tax-favored foreign non-retirement savings trust as defined under paragraph (b)(3) of this section. For purposes of this paragraph (b)(1), an *eligible individual* means an individual who is, or at any time was, a U.S. person and who, for any period during which an amount of tax may be assessed under section 6501 (without regard to section 6501(c)(8)), is compliant (or comes into compliance) with all requirements for filing a Federal income tax return (or returns) covering the period such individual was a U.S. person, and to the extent required under U.S. tax law, has reported as income any contributions to, earnings of, or distributions from an applicable tax-favored foreign trust on the applicable return (including on an amended return).

(2) *Tax-favored foreign retirement trust.* For purposes of this section, a *tax-favored foreign retirement trust* means a foreign trust that is created, organized, or otherwise established under the laws of a foreign jurisdiction (*the trust's jurisdiction*) as a trust, plan, fund, scheme, or other arrangement (collectively, a *trust*) to operate exclusively or almost exclusively to

provide, or to earn income for the provision of, pension or retirement benefits and ancillary or incidental benefits, and that meets the following requirements established by the laws of the jurisdiction governing the trust:

(i) The trust generally is exempt from income tax or otherwise is tax-favored under the laws of the trust's jurisdiction. For purposes of this section, a trust is tax-favored under the laws of the trust's jurisdiction if it meets any one or more of the following conditions:

(A) Contributions to the trust that otherwise would be subject to tax are deductible or excluded from income, are taxed at a reduced rate, give rise to a tax credit, or otherwise are eligible for another tax benefit (such as a government subsidy or contribution); or

(B) Taxation of investment income earned by the trust is deferred until distribution or the investment income is taxed at a reduced rate (including exempt from tax).

(ii) Annual information reporting with respect to the trust (or of its participants or beneficiaries) is provided, or otherwise is available, to the relevant tax authorities in the trust's jurisdiction.

(iii) Generally, only contributions with respect to income earned from the performance of personal services are permitted (with allowances made for limited contributions made by unemployed individuals).

(iv) The trust meets either the value threshold in paragraph (b)(2)(iv)(1) or any one of the contribution limitations in paragraph (b)(2)(iv)(2) of this section:

(1) *Value threshold.* The aggregate value of the trust(s) in the trust's jurisdiction is limited to no more than \$600,000 at any point during the taxable year (as adjusted under paragraph (b)(2)(iv)(3) of this section) regardless of the number of trusts established.

(2) *Contribution limitations.* The contributions to the trust(s) in the trust's jurisdiction are limited to any one of the following:

(i) A percentage of earned income of the participant,

(ii) An annual limit of \$75,000 (as adjusted under paragraph (b)(2)(iv)(3) of this section) or less, or

(iii) A lifetime limit of \$1,000,000 (as adjusted under paragraph (b)(2)(iv)(3) of this section) or less.

(3) *Dollar limitations subject to adjustments—*(i) The value threshold in paragraph (b)(2)(iv)(1) and contribution limits in paragraph (b)(2)(iv)(2) of this section are determined using the U.S. Treasury Bureau of Fiscal Service foreign currency conversion rate on July 1 of the tax year (available at <https://fiscaldata.treasury.gov/datasets/>

treasury-reporting-rates-exchange/treasury-reporting-rates-of-exchange).

(ii) In the case of calendar years beginning on or after January 1, 2025, the amounts under paragraph (b)(2)(iv)(1) and paragraph (b)(2)(iv)(2) of this section will be adjusted at the same time and in the same manner as the amounts are adjusted under section 415(d), except that the base period will be the calendar quarter beginning July 1, 2024.

(v) Withdrawals, distributions, or payments from the trust are conditioned upon reaching a specified retirement age, disability, or death, or penalties apply to withdrawals, distributions, or payments made before such conditions are met. A trust that otherwise meets the requirements of this paragraph (b)(2)(v), but that allows withdrawals, distributions, or payments for in-service loans or for reasons such as hardship, educational purposes, or the purchase of a primary residence, will be treated as meeting the requirements of this paragraph.

(vi) In the case of an employer-maintained trust:

(A) The trust is nondiscriminatory insofar as a wide range of employees, including rank and file employees, must be eligible to make or receive contributions or accrue benefits under the terms of the trust (alone or in combination with other comparable plans);

(B) The trust (alone or in combination with other comparable plans) actually provides significant benefits for a substantial majority of eligible employees; and

(C) The benefits actually provided under the trust to eligible employees are nondiscriminatory.

(3) *Tax-favored foreign non-retirement savings trust.* For purposes of this section, a *tax-favored foreign non-retirement savings trust* means a foreign trust that is created, organized, or otherwise established under the laws of a foreign jurisdiction (*the trust's jurisdiction*) as a trust, plan, fund, scheme, or other arrangement (collectively, a *trust*) to operate exclusively or almost exclusively to provide, or to earn income for the provision of, medical, disability, or educational benefits, and that meets the following requirements established by the laws of the trust's jurisdiction:

(i) The trust generally is exempt from income tax or otherwise is tax-favored under the laws of the trust's jurisdiction as defined in paragraph (b)(2)(i) of this section.

(ii) Annual information reporting with respect to the trust (or of its participants or beneficiaries) is provided, or

otherwise is available, to the relevant tax authorities in the trust's jurisdiction.

(iii) Contributions to the trust are limited to \$10,000 (multiplied by the cost-of-living adjustment determined under section 1(f)(3) for the calendar year by substituting "calendar year 2020" for "calendar year 2016" in section 1(f)(3)(A)(ii) and rounding to the nearest multiple of \$1,000) or less annually, or \$200,000 (multiplied by the cost-of-living adjustment determined under section 1(f)(3) for the calendar year by substituting "calendar year 2020" for "calendar year 2016" in section 1(f)(3)(A)(ii) and rounding to the nearest multiple of \$1,000) or less on a lifetime basis, determined using the U.S. Treasury Bureau of Fiscal Service foreign currency conversion rate on the last day of the tax year (available at <https://fiscaldata.treasury.gov/datasets/treasury-reporting-rates-exchange/treasury-reporting-rates-of-exchange>).

(iv) Withdrawals, distributions, or payments from the trust are conditioned upon the provision of medical, disability, or educational benefits, or apply penalties to withdrawals, distributions, or payments made before such conditions are met.

(4) *Tax-favored foreign de minimis savings trusts.* For purposes of this section, a *tax-favored foreign de minimis savings trust* means a foreign trust that is created, organized, or otherwise established under the laws of a foreign jurisdiction (*the trust's jurisdiction*) as a trust, plan, fund, scheme, or other arrangement (collectively, a *trust*) to operate as a savings vehicle, that is not treated as a *tax-favored foreign retirement trust*, as described in paragraph (b)(2) or a *tax-favored foreign non-retirement savings trust*, as described in paragraph (b)(3), and that meets each of the following requirements:

(i) The trust generally is exempt from income tax or otherwise is tax-favored under the laws of the trust's jurisdiction as defined in paragraph (b)(2)(i) of this section;

(ii) Annual information reporting with respect to the trust (or of its participants or beneficiaries) is provided, or otherwise is available, to the relevant tax authorities in the trust's jurisdiction pursuant to the laws of the trust's jurisdiction; and

(iii) The aggregate value of the trust(s) in the trust's jurisdiction is limited to no more than \$50,000 at any point during the taxable year (multiplied by the cost-of-living adjustment determined under section 1(f)(3) for the calendar year by substituting "[the year of the date of publication of the final regulations in the **Federal Register**]" for "calendar

year 2016" in section 1(f)(3)(A)(ii) and rounding to the nearest multiple of \$1,000) regardless of the number of trusts established. The \$50,000 is determined using the U.S. Treasury Bureau of Fiscal Service foreign currency conversion rate on the last day of the tax year (available at <https://fiscaldata.treasury.gov/datasets/treasury-reporting-rates-exchange/treasury-reporting-rates-of-exchange>).

(5) *Certain rollovers and transfers.* A trust that otherwise meets the requirements of paragraphs (b)(2) or (b)(3) of this section will not fail to be treated as a tax-favored foreign retirement or non-retirement savings trust within the meaning of this paragraph (b) solely because it may receive a rollover of assets or funds transferred from another tax-favored foreign retirement or non-retirement savings trust established and operated under the laws of the same jurisdiction, provided that the trust transferring assets or funds also meets the requirements of this paragraph (b)(2) or (b)(3), as applicable (but this paragraph does not apply to transfers between tax-favored retirement trusts and non-retirement savings trusts).

(c) *Exception for distributions from certain foreign compensatory trusts.* Section 6048(c) does not apply to a distribution received by a U.S. person from a foreign trust described in § 1.672(f)-3(c)(1) provided that the U.S. person includes in income any amounts accumulated on behalf of, or distributed by the trust, to the U.S. person to the extent such amounts are required to be included in income (other than amounts that are exempt from Federal income tax under a bilateral income tax treaty or any other bilateral agreement to which the United States is a party) of the U.S. person, including pursuant to section 409A(b).

(d) *Exception for certain distributions received by domestic section 501(c)(3) organizations.* Section 6048(c) does not apply to a distribution from a foreign trust received by a domestic organization, provided that the organization has received a determination letter from the Commissioner that has not been revoked recognizing that the domestic organization is exempt from Federal income tax under section 501(a) as an organization described in section 501(c)(3).

(e) *Exception for certain mirror code possession trusts.* Sections 6048(a) through 6048(c) do not apply to a trust located in a mirror code possession to the extent the responsible party (within the meaning of section 6048(a)(4)), U.S. owner, or U.S. recipient is a bona fide

resident (within the meaning of § 1.937–1(b)) of such mirror code possession. For purposes of this paragraph (e), a mirror code possession is a possession of the United States where, under the income tax system of the possession, the income tax liability of the residents of the possession is determined by reference to the income tax laws of the United States as if the possession were the United States, and a trust is located in a mirror code possession if a court within the mirror code possession is able to exercise primary supervision over the administration of the trust and one or more bona fide residents of the mirror code possession have the authority to control all substantial decisions of the trust.

§ 1.6048–6 Special rules.

(a) *Special rules*—(1) *Dual resident taxpayers*. If a dual resident taxpayer (within the meaning of § 301.7701(b)–7(a)(1) of this chapter) computes U.S. income tax liability as a nonresident alien on the last day of the taxable year and complies with the filing requirements of § 301.7701(b)–7(b) and (c) of this chapter, the dual resident taxpayer is not treated as a U.S. person for purposes of section 6048 with respect to the portion of the taxable year the dual resident taxpayer is treated as a nonresident alien for purposes of computing U.S. income tax liability.

(2) *Dual status taxpayers*. If a taxpayer abandons U.S. citizenship or residence during the taxable year or acquires U.S. citizenship or residence during the taxable year as provided in § 1.6012–1(b)(2)(ii), the taxpayer will be not treated as a U.S. person for purposes of §§ 1.6048–1 through 1.6048–7 with respect to the portion of the taxable year the taxpayer was treated as a nonresident alien for purposes of computing U.S. income tax liability.

(b) *Effect of ownership under the grantor trust rules*. The fact that a portion of a foreign trust is treated as owned by the grantor or another person under subpart E of part I of subchapter J of chapter 1 of the Internal Revenue Code is irrelevant for purposes of determining whether a U.S. person makes a transfer to, or receives a distribution from, a foreign trust that must be reported under §§ 1.6048–2 through 1.6048–4. See § 1.6048–4(g)(13) and (14).

(c) [Reserved]

(d) *Married U.S. persons filing a joint income tax return*. Married U.S. persons who file a joint income tax return under section 6013 for a tax year, and each of whom is subject to the information reporting requirements under §§ 1.6048–2(a) (as a grantor or transferor

under §§ 1.6048–2(c)(1) and (2) required to file Part I of Form 3520), 1.6048–3(a)(2) (as a U.S. owner of a foreign trust required to file a substitute Form 3520–A), or 1.6048–4(a) (as a U.S. recipient of a distribution from a foreign trust required to file Part III of Form 3520) for the same foreign trust, may together file a single Form 3520, Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts, for that year at the time and in the manner described in §§ 1.6048–2 through 1.6048–6. For purposes of filing a substitute Form 3520–A under § 1.6048–3(a)(2), a separate Foreign Grantor Trust Owner statement must be completed and attached for each married U.S. person. See § 1.6677–1(f) with respect to liability for penalties.

§ 1.6048–7 Applicability dates.

(a) *In general*. The rules of §§ 1.6048–1 through 1.6048–4 and § 1.6048–6 apply as follows:

(1) Section 1.6048–1 applies after the [date of publication of the final regulations in the **Federal Register**].

(2) To the extent related to § 1.6048–2, including the relevant portions of § 1.6048–6, the rules apply to reportable events occurring after the [date of publication of the final regulations in the **Federal Register**].

(3) To the extent related to § 1.6048–3, including the relevant portions of § 1.6048–6, the rules apply to taxable years of U.S. persons beginning after the [date of publication of the final regulations in the **Federal Register**].

(4) To the extent related to § 1.6048–4, including the relevant portions of § 1.6048–6, the rules apply to distributions received after the [date of publication of the final regulations in the **Federal Register**].

(b) *Special rule for § 1.6048–5*. Section 1.6048–5 applies as follows—

(1) To the extent related to reportable events under section 6048(a) and the regulations under section 6048 in this part, the rules apply to reportable events occurring after the [date that final regulations are published in the **Federal Register**].

(2) To the extent related to ownership of a foreign trust under section 6048(b) and the regulations under section 6048 in this part, the rules apply to taxable years of U.S. owners beginning after the [date that final regulations are published in the **Federal Register**]; and

(3) To the extent related to distributions from a foreign trust under section 6048(c) and the regulations under section 6048 in this part, the rules apply to distributions received after the [date that final regulations are published in the **Federal Register**].

■ **Par. 10.** Section 1.6677–1 is added to read as follows:

§ 1.6677–1 Failure to file information with respect to certain foreign trusts.

(a) *Civil penalty*—(1) *In general*. In addition to any criminal penalty provided by law, and subject to the rules of paragraph (b) of this section (concerning reporting required under § 1.6048–3) and the rules of paragraph (a)(3) of this section (regarding the maximum penalty that may be assessed), if any notice or return required to be filed by §§ 1.6048–2 through 1.6048–4 is not timely filed, or contains incomplete or incorrect information, then with respect to each failure to comply with §§ 1.6048–2 through 1.6048–4, the person required to file such notice or return must pay a penalty equal to the greater of \$10,000 or 35 percent of the gross reportable amount (within the meaning of paragraph (c) of this section).

(2) *Penalty for continuing failure*. Subject to the rules of paragraph (a)(3) of this section (regarding the maximum penalty that may be assessed), if any failure described in paragraph (a)(1) of this section continues for more than 90 days after the day on which the Commissioner mails notice of such failure to the person required to pay the penalty, the person must pay an additional penalty (in addition to the amount determined under paragraph (a)(1) of this section) of \$10,000 for each 30-day period (or fraction thereof) during which the failure continues after the expiration of the 90-day period.

(3) *Maximum penalty*—(i) *Limited to gross reportable amount*. At such time as the gross reportable amount with respect to any failure can be determined by the Commissioner, the aggregate amount of the penalties imposed under paragraphs (a)(1) and (2) of this section will be reduced as necessary to ensure that the amount does not exceed the gross reportable amount with respect to that failure (and to the extent that the aggregate amount already collected exceeds the gross reportable amount, the Commissioner will refund the excess amount pursuant to section 6402).

(ii) *Period of limitations on refund of excess amounts*. The limitations period provided for claims for refund under section 6511(a) and (b) applies to the refund of any excess amount.

(b) *Special rules for returns under § 1.6048–3*. In the case of a Form 3520–A or a substitute Form 3520–A, including attached statements, that are required to be filed and furnished under § 1.6048–3(a)—

(1) The U.S. person who is treated as the owner of the foreign trust (or a

portion of the foreign trust) is liable for the penalty imposed by paragraph (a) of this section for the failure to comply with § 1.6048–3(a), and

(2) Paragraph (a) of this section is applied by substituting “5 percent” for “35 percent.”

(c) *Gross reportable amount*—(1) *In general.* For purposes of paragraph (a) of this section, the term *gross reportable amount* means—

(i) The gross value of the property involved in the reportable event (determined as of the date of the event) in the case of a failure relating to § 1.6048–2,

(ii) The gross value of the portion of the trust’s assets at the close of the trust’s taxable year treated as owned by the U.S. person in the case of each applicable failure relating to § 1.6048–3, and

(iii) The gross amount of the distribution in the case of a failure relating to § 1.6048–4.

(2) *Gross value and gross amount.* The gross value or gross amount of property is determined in accordance with the valuation principles of sections 2512 and 2031 and the regulations under sections 2512 and 2031 in this part, though, in all events, without regard to any taxes, expenses, liabilities, or restrictions on the sale or use of the property.

(d) *Reasonable cause exception*—(1) *In general.* Paragraph (a) of this section does not apply to any failure to file information with respect to a foreign trust if the person required to file such information submits a reasonable cause statement to the Commissioner under penalties of perjury and demonstrates to the satisfaction of the Commissioner that the failure is due to reasonable cause and not due to willful neglect. The determination of whether a taxpayer acted with reasonable cause and not with willful neglect is made under the principles set out in § 1.6664–4 and § 301.6651–1(c) of this chapter. This determination is made on a case-by-case basis, taking into account all pertinent facts and circumstances.

(2) *Examples of situations that do not satisfy the reasonable cause exception.* Examples of facts that do not constitute reasonable cause for purposes of this paragraph (d) include but are not limited to the following:

(i) The fact that a foreign jurisdiction would impose a civil or criminal penalty on such person (or any other person) for disclosing the required information.

(ii) Refusal on the part of a foreign trustee to provide information for any reason, including difficulty in producing the required information or

the existence of provisions in the trust instrument that prevent the disclosure of required information.

(e) *Deficiency procedures do not apply.* Subchapter B of chapter 63 (relating to deficiency procedures for income, estate, gift, and certain excise taxes) does not apply in respect of the assessment or collection of any penalty imposed under this section.

(f) *Married U.S. persons filing a joint income tax return*—(1) *In general.* For purposes of this section, married U.S. persons who file one Form 3520 with respect to the same foreign trust under § 1.6048–6(d) for a tax year are treated as if they are a single U.S. person for that year.

(2) *Anti-abuse rule.* For purposes of this section, the Commissioner may treat married U.S. persons who file a joint income tax return under section 6013 for a tax year as a single U.S. person for that year, unless the Commissioner determines that, based on all the facts and circumstances, only one of the married individuals was subject to the information reporting requirement under §§ 1.6048–2 through 1.6048–4 (for example, because only one spouse had an interest in the property constituting the transfer to, or receipt from, a foreign trust).

(3) *Joint and several liability.* If married U.S. persons are treated as a single U.S. person for a tax year, such married U.S. persons have joint and several liability with respect to any penalties imposed under this section.

(g) *Examples.* The following examples illustrate the rules of this section. In each example, X is a U.S. person and FT is a foreign trust.

(1) *Example 1: Partial reporting.* X transfers property worth \$100,000 to FT but reports only \$40,000 of that amount on Part I of Form 3520 pursuant to § 1.6048–2. X does not demonstrate to the satisfaction of the Commissioner that X’s failure to report the correct amount was due to reasonable cause and not due to willful neglect. Under paragraph (a)(1) of this section, penalties will be imposed only on the unreported \$60,000.

(2) *Example 2: Maximum penalty limited to gross reportable amount.* X receives a distribution of \$100,000 from FT in Year 1 but fails to report the distribution as required by § 1.6048–4(a). The Commissioner learns about the distribution but does not have enough information to determine the gross reportable amount. On January 2, Year 4, the Commissioner mails a notice of the reporting failure to X and assesses a penalty of \$10,000 under paragraph (a)(1) of this section. X does not comply with X’s reporting requirement within

90 days after the day that the Commissioner mails the notice (by April 2, Year 4), so the Commissioner begins to assess additional penalties of \$10,000 under paragraph (a)(2) of this section for each 30-day period (or fraction thereof), beginning on April 2, Year 4, during which the failure continues. By the time X complies with X’s reporting requirement, the aggregate penalties assessed with respect to X’s failure to report the distribution total \$150,000. Under paragraph (a)(3)(i) of this section, the maximum penalty that the Commissioner may assess with respect to this failure is \$100,000 (the applicable gross reportable amount determined under paragraph (c)(1)(iii) of this section), and the Commissioner must abate the excess \$50,000 of assessed penalties.

(3) *Example 3: Maximum penalty limited to gross reportable amount below \$10,000 minimum.* Assume the same facts as in Example 2 above except that instead of a \$100,000 distribution, X receives a distribution of \$4,000 from FT. By the time X complies with X’s reporting requirement, the aggregate penalties assessed with respect to X’s failure to report the distribution total \$20,000. Under paragraph (a)(3)(i) of this section, the maximum penalty that the Commissioner may assess with respect to this failure is \$4,000 (the applicable gross reportable amount determined under paragraph (c)(1)(iii) of this section), and the Commissioner must abate the excess \$16,000 of assessed penalties.

(4) *Example 4: Multiple failures over multiple years.* X created FT in Year 1 and is treated as the owner of FT under the grantor trust rules. The trustee of FT fails to file a Form 3520–A with respect to FT for Year 2 and Year 3 as required by § 1.6048–3(a)(1), and X fails to file a substitute Form 3520–A and a Form 3520 (as required by § 1.6048–3(a)(2)) for the same period. (In Year 4, X replaces the trustee, and the new trustee files a Form 3520–A for Year 4.) Under paragraphs (a)(1) and (b) of this section, X is subject to one penalty for Year 2 and one penalty for Year 3 for the failure to comply with § 1.6048–3(a)(1) and (a)(2) for those years.

(5) *Example 5: Distribution from foreign-owned grantor trust through an intermediary.* Y, a nonresident alien, is treated as the owner of FT under section 676, after the application of section 672(f). X receives a distribution from FT through an intermediary as described in § 1.6048–4(b)(2)(i). X does not include the distribution in gross income and does not report the distribution on Part III of Form 3520 as required by § 1.6048–4(a). Even if the Commissioner

determines that X was not required to include the distribution in gross income, X is liable for penalties imposed by paragraph (a)(1) of this section based on the gross reportable amount determined under paragraph (c)(1)(iii) of this section because X is required to report indirect transfers of property under § 1.6048-4(b)(2)(iv).

(6) *Example 6: Multiple failures in multiple years.* (i) *Facts.* On December 31, Year 1, X creates FT and makes a gratuitous transfer of property with a value of \$100,000 to FT. X is treated as the sole owner of FT under the grantor trust rules. During Year 2, X makes no transfers to FT and receives no distributions from FT. At the end of Year 2, the value of FT's assets is \$110,000. During Year 3, X makes no transfers to FT, but X receives a distribution of \$30,000. At the end of Year 3, the value of FT's assets is \$85,000. X does not file any Forms 3520 or substitute Forms 3520-A for Year 1 through Year 3. The Trustee of FT does not file any Forms 3520-A for Year 1 through Year 3.

(ii) *Analysis—(A) Year 1.* For Year 1, X is subject to two penalties under paragraphs (a)(1) and (b) of this section: a \$35,000 penalty (the greater of \$10,000 or \$35,000 (35% of \$100,000)) for failure to comply with § 1.6048-2(a) and a \$10,000 penalty (the greater of \$10,000 or \$5,000 (5% of \$100,000)) for failure to comply with § 1.6048-3(a). If X does not comply with X's reporting requirements for Year 1 within 90 days after the day on which the Commissioner mails notice of the reporting failures to X, X will be subject to additional penalties under paragraph (a)(2) of this section of \$10,000 per failure per 30-day period (or fraction thereof) (\$20,000 in the aggregate per 30-day period (or fraction thereof)) during which the failure continues. Under paragraph (a)(3)(i) of this section, the aggregate amount of the penalty imposed under paragraphs (a)(1) and (2) of this section with respect to each failure will not exceed the gross reportable amount for that failure.

(B) *Year 2.* For Year 2, X is subject to one penalty under paragraphs (a)(1) and (b) of this section: a \$10,000 penalty (the greater of \$10,000 or \$5,500 (5% of \$110,000)) for failure to comply with § 1.6048-3(a). If X does not comply with X's reporting requirements for Year 2 within 90 days after the day on which the Commissioner mails notice of the reporting failures to X, X will be subject to additional penalties under paragraph (a)(2) of this section of \$10,000 per failure per 30-day period (or fraction thereof) (\$10,000 per 30-day period (or fraction thereof)) during which the

failure continues. Under paragraph (a)(3)(i) of this section, the aggregate amount of the penalty imposed under paragraphs (a)(1) and (2) of this section with respect to each failure will not exceed the gross reportable amount for that failure.

(C) *Year 3.* For Year 3, X is subject to two penalties under paragraphs (a)(1) and (b) of this section: a \$10,000 penalty (the greater of \$10,000 or 4,250 (5% of \$85,000)) for failure to comply with § 1.6048-3(a), and a penalty of \$10,500 (the greater of \$10,000 or \$10,500 (35% of \$30,000)) for failure to comply with § 1.6048-4. If X does not comply with X's reporting requirements for Year 3 within 90 days after the day on which the Commissioner mails notice of the reporting failures to X, X will be subject to additional penalties under paragraph (a)(2) of this section of \$10,000 per failure per 30-day period (or fraction thereof) (\$20,000 in the aggregate per 30-day period (or fraction thereof)) during which the failure continues. Under paragraph (a)(3)(i) of this section, the aggregate amount of the penalty imposed under paragraphs (a)(1) and (2) of this section with respect to each failure will not exceed the gross reportable amount for that failure.

(iii) *Conclusion.* X is subject to aggregate penalties of \$75,500 under paragraphs (a)(1) and (b) of this section: \$45,000 for Year 1, \$10,000 for Year 2, and \$20,500 for Year 3. X may be subject to additional penalties under paragraph (a)(2) of this section if X fails to comply with X's reporting requirements within 90 days after the day on which the Commissioner mails notice of each failure to X. Under paragraph (a)(3)(i) of this section, the aggregate amount of the penalty imposed under paragraphs (a)(1) and (2) of this section with respect to each failure will not exceed the gross reportable amount for that failure.

(7) *Example 7: Interaction with § 1.6039F-1.* In Year 1, X receives \$500,000 from FT that X treats as a gift. Under § 1.6048-4(d) and § 1.6039F-1(b), X is required to report the amount as a distribution under § 1.6048-4 and not as a foreign gift under § 1.6039F-1(a). However, based on the advice of X's tax advisor, X reports the distribution under § 1.6039F-1(a) and not under § 1.6048-4. X's failure to report the distribution under § 1.6048-4 is subject to penalties under § 1.6677-1(a) unless X demonstrates to the satisfaction of the Commissioner that such failure is due to reasonable cause and not due to willful neglect. The fact that X reported the distribution under § 1.6039F-1(a) based on the advice of X's tax advisor is a factor that may be taken into account in

determining whether X's failure to report the distribution under § 1.6048-4 was due to reasonable cause. X's reliance on X's tax advisor's advice can only constitute reasonable cause, however, if, under all the circumstances, the reliance was reasonable within the meaning of § 1.6664-4(c).

(8) *Example 8: Presumption that FT has a U.S. owner.* X created FT in Year 1 and transferred \$100,000 to FT. X reported the transfer to FT on Part I of Form 3520 for Year 1, but did not complete the other parts of Form 3520. X did not file any Forms 3520 with respect to FT in Year 2 or subsequent years. FT has not filed any Forms 3520-A with respect to FT (and X has not filed any substitute Forms 3520-A). Pursuant to § 1.679-2(d)(2), the Commissioner sends a written notice to X requesting additional information related to the trust and its potential beneficiaries. X does not respond. Under § 1.679-2(d)(1), FT is treated as having a U.S. beneficiary. Under § 1.679-1(a), X is treated as the owner of FT. Under paragraphs (a) and (b) of this section, X is subject to penalties for Year 1 and subsequent years for failure to comply with § 1.6048-3(a).

(9) *Example 9: Penalty for failure to report loan that is not treated as a section 643(i) distribution.* FT is not treated as being owned by X or any other person under the grantor trust rules. X receives a loan of cash from FT and in exchange issues an obligation to FT that is a qualified obligation within the meaning of § 1.643(i)-2(b)(2)(iii). Provided the obligation does not cease to be a qualified obligation, the loan will not be a section 643(i) distribution under § 1.643(i)-1(a) and therefore will not be taxable to X. However, the loan is a distribution within the meaning of § 1.6048-4(b)(3) that must be reported on Part III of Form 3520 under § 1.6048-4(a). X fails to report the loan. X is subject to penalties under § 1.6677-1(a) unless X demonstrates to the satisfaction of the Commissioner that such failure is due to reasonable cause and not due to willful neglect.

(10) *Example 10: Joint and several penalties.* X and Y are married U.S. persons who file a joint income tax return under section 6013. In Year 1, X and Y create FT and fund the trust with \$100,000 for the benefit of their U.S. children. X and Y jointly file their income tax return for the Year 1 tax year but fail to file a Form 3520 reporting the transfer of assets to a foreign trust pursuant to § 1.6048-2. In addition, FT has not filed any Forms 3520-A with respect to FT (and X and Y have not filed any substitute Forms 3520-A)

pursuant to § 1.6048–3(a). For the Year 1 tax year, X and Y are jointly and severally liable for penalties under paragraph (a) of this section pursuant to paragraph (f)(2) and (3) of this section.

(h) *Applicability dates*—(1) *Reportable events*. To the extent related to § 1.6048–2, this section applies to reportable events occurring after the

[date of publication of the final regulations in the **Federal Register**].

(2) *U.S. owners of foreign trusts*. To the extent related to § 1.6048–3, this section applies to taxable years of U.S. persons beginning after the [date of publication of the final regulations in the **Federal Register**].

(3) *Reporting by U.S. persons receiving distributions from foreign*

trusts. To the extent related to § 1.6048–4, this section applies to distributions received after the [date of publication of the final regulations in the **Federal Register**].

Douglas W. O'Donnell,
Deputy Commissioner.

[FR Doc. 2024–09434 Filed 5–7–24; 8:45 am]

BILLING CODE 4830–01–P



FEDERAL REGISTER

Vol. 89

Wednesday,

No. 90

May 8, 2024

Part IX

Department of Health and Human Services

Administration for Community Living

45 CFR Part 1324

Adult Protective Services Functions and Grants Programs; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

45 CFR Part 1324

RIN 0985-AA18

Adult Protective Services Functions and Grants Programs

AGENCY: Administration for Community Living (ACL), Department of Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: ACL is issuing this Final Rule to modify the implementing regulations of the Older Americans Act of 1965 (“the Act” or OAA) to add a new subpart (Subpart D) related to Adult Protective Services (APS).

DATES:

Effective date: This final rule is effective on June 7, 2024.

Compliance date: May 8, 2028.

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I. Background

ACL is issuing this final rule modifying 45 CFR part 1324 of the implementing regulations of the Older Americans Act of 1965 (OAA or “the Act”) to add a new subpart (subpart D). The rule exercises ACL’s authority to regulate Adult Protective Services (APS) systems under section 201(e)(3) of the Act, 42 U.S.C. 3011(e)(3) and section 2042(a) and (b) of the Elder Justice Act (EJA), 42 U.S.C. 1397m–1(a) and (b).

Adult maltreatment is associated with significant harm to physical and mental health, as well as financial losses. Older adults and adults with disabilities may also experience deteriorated family relationships, diminished autonomy, and institutionalization, all of which can impact quality of life.¹ Studies have found that at least one in ten community-dwelling older adults experienced some form of abuse or potential neglect in the prior year.² A recent study of intimate partner violence among older adults found past 12-month prevalence of intimate partner psychological aggression, physical violence, and sexual violence by any perpetrator was 2.1%, 0.8%, and 1.7%, respectively.³

¹ Mengting Li & Xinqi Dong, *Association Between Different Forms of Elder Maltreatment and Cognitive Change*, 33 *J. of Aging and Health*, 249 (2020), <https://pubmed.ncbi.nlm.nih.gov/33249977/>; Russ Neuhart, *Elder Abuse: Forensic, Legal and Medical Aspects*, 163 (Amy Carney ed., 2019); Rosemary B. Hughes et al., *The Relation of Abuse to Physical and Psychological Health in Adults with Developmental Disabilities*, 12 *Disability and Health J.*, 227 (2019), <https://doi.org/10.1016/j.dhjo.2018.09.007>; Joy S. Ernst & Tina Maschi, *Trauma-Informed Care and Elder Abuse: A Synergistic Alliance*, 30 *J. of Elder Abuse & Neglect*, 354 (2018), <https://pubmed.ncbi.nlm.nih.gov/30132733/>.

² Ron Acierno et al., *Prevalence and Correlates of Emotional, Physical, Sexual, and Financial Abuse and Potential Neglect in the United States: The National Elder Maltreatment Study*, 100 *Amer. J. of Pub. Health* 292 (2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2804623/>; Andre Rosay & Carrie Mulford, *Prevalence Estimates & Correlates of Elder Abuse in the United States: The National Intimate Partner and Sexual Violence Survey*, 29(1) *J. of Elder Abuse and Neglect*, 1 (2017); E-Shien Chang & Becca R Levy, *High Prevalence of Elder Abuse During the COVID-19 Pandemic: Risk and Resilience Factors*, 29(11) *Amer. J. of Geriatric Psychiatry* (2021), <https://doi.org/10.1016/j.jagp.2021.01.007>; <https://pubmed.ncbi.nlm.nih.gov/27782784/>; #~:text=More%20than%201%20in%2010,both%20intimate%20and%20nonintimate%20partners; Yongjie Yon et al., *Elder Abuse Prevalence in Community Settings: A Systematic Review and Meta-analysis*, 5(2) *Lancet Global Health* 147 (2017); Furthermore, it is estimated that for every incident of abuse reported to authorities, nearly 24 additional cases remain undetected. See Jennifer Storey, *Risk Factors for Abuse and Neglect: A Review of the Literature*, 50 *Aggression and Violent Behavior* 101339 (2020), <https://www.sciencedirect.com/science/article/abs/pii/S1359178918303471>.

³ Zhang Kudon H, Herbst JH, Richardson LC, Smith SG, Demissie Z, Siordia C. Prevalence

APS plays a critical role in the lives of older adults and adults with disabilities that may be subject to adult maltreatment. APS programs receive and respond to reports of adult maltreatment and self-neglect and work closely with adults and a wide variety of allied professionals to maximize safety and independence and provide a range of services to those they serve. APS programs often link adults subject to maltreatment to community social, physical health, behavioral health, and legal services to help them maintain independence and remain in the settings in which they prefer to live. APS programs are also often the avenue through which adult maltreatment is reported to law enforcement or other agencies of the criminal justice system.

APS is a social and human services program. Working collaboratively and with the consent of the client, APS caseworkers develop service plans and connect the client to social, health, and human services. As a social services program, the “findings” in an APS case are not legal determinations, either civil or criminal. If APS suspects that an act of maltreatment falls under a State’s criminal statutes, APS will refer the case to law enforcement. APS systems work in close collaboration with law enforcement and emergency management systems to address the needs of older adults and adults with disabilities who are the victim of criminal acts, including but not limited to assault and sexual assault.

As discussed in greater detail in the *Statutory and Regulatory History*, until 2021, APS systems were funded primarily through a variety of local and State resources. All States now accept Federal funding, including EJA funding, for their APS systems in addition to their State and local funding. This final rule creates the first mandatory Federal standards to govern APS policies, procedures, and practices. State APS systems and programs will be required to comply with the final rule to receive Federal EJA funding. Thus far, the absence of Federal standards has resulted in significant program variation across and within States and, in some cases, sub-standard quality according to APS staff and other community members.

In 2021, ACL fielded a survey (OMB Control No. 0985-0071) of 51 APS systems (the 50 States and the District

estimates and factors associated with violence among older adults: National Intimate Partner and Sexual Violence (NISVS) Survey, 2016/2017. *J Elder Abuse Negl.* 2023 Dec 21:1–17. doi: 10.1080/08946566.2023.2297227. Online ahead of print. PMID: 38129823.

of Columbia).⁴ Results from that survey, which included State policy profiles, along with an analysis of the 2020 National Adult Maltreatment Reporting System (NAMRS)⁵ data, illustrate the wide variability across APS programs.⁶

As discussed in the *Definitions* section, an APS system is made up of both the State entity (e.g., the department of health and human services) or entities that receive State and Federal funding for APS, including EJA funding, and the local APS programs that provide adult protective services.⁷ While the State entities establish APS policy, conduct training, administer funding, and provide information technology infrastructure support to local APS programs in almost all APS systems,⁸ 27 States have indicated the need for greater consistency in practice.⁹ States identified specific obstacles that included: a lack of resources for oversight in general or quality assurance processes specifically, differing policy interpretations across local programs, and not enough supervisors.¹⁰

To elevate uniform, evidence-informed practices across APS

programs, ACL issued Voluntary Consensus Guidelines for State APS Systems (Consensus Guidelines) in 2016, which were subsequently updated in 2020.¹¹ In developing the Consensus Guidelines, ACL applied Office of Management and Budget (OMB) and National Institutes of Standards and Technology (NIST) standards and processes for creating field-developed, consensus-driven guidelines.¹² The Consensus Guidelines represent recommendations from the field based on their experience and expertise serving adults and communities and provide a core set of principles and common expectations to encourage consistency in practice, ensure adults are afforded similar protections and APS services regardless of locale, and support interdisciplinary and interagency coordination.

This final rule is informed by the input of commenters; the extensive research, analysis, community input in the development of our Consensus Guidelines and recommendations borne out of that process; experience and information from our NAMRS data; and the 2021 51 State National Process Evaluation Report.¹³

A. Statutory and Regulatory History and Reasons for the Proposed Rulemaking

APS programs have historically been primarily funded by States and administered by States and localities. They have been recognized in Federal law since 1974, when the Social Security Act was amended by the Social Services Amendments of 1974 (Pub. L. 93–647), 42 U.S.C. 1397a(a)(2)(A), to permit States to use Social Services

Block Grant (SSBG) funding under Title XX for APS programming. However, while most States currently use SSBG funding for their APS programs, the amount of SSBG funding allocated to APS varies, and the allocations are limited.¹⁴

Through a series of legislative actions, Congress designated ACL as the Federal entity with primary responsibility for providing Federal policy leadership and program oversight for APS. This includes authority granted by the OAA to promulgate regulations, to oversee formula grants to State and Tribal APS programs, to enhance APS programs, to collect data to increase APS effectiveness, and to directly link the authorities of the EJA with those contained in the OAA.

Title VII of the OAA (Vulnerable Elder Rights Protection Activities), enacted in 1992, authorizes funding to States to address protections for vulnerable adults. Some activities are specifically identified to be conducted with Title VII funding. Section 201(e) of the OAA, 42 U.S.C. 3011(e), added in 2006, vests responsibility for a coordinated Federal and national response to elder justice issues broadly with the Assistant Secretary for Aging. ACL has rulemaking authority for elder justice activities by virtue of section 201(e)(3), 42 U.S.C. 3011(e)(3), which states, “the Secretary, acting through the Assistant Secretary, may issue such regulations as may be necessary to carry out this subsection . . .” and specifically references the responsibility of the Assistant Secretary for elder abuse prevention and services, detection, treatment, and response in coordination with heads of State APS programs. Section 2042(b) of the EJA, 42 U.S.C. 1397m–1, establishes an APS grant program under which the Secretary annually awards grants to States. The Secretary of HHS has designated ACL as the grant-making agency for APS. Therefore, the EJA and the OAA provide the Assistant Secretary with broad authority to coordinate, regulate, and fund State APS systems.

Through the enactment of the EJA in 2010, Congress again recognized the need for a more coordinated national elder justice and APS system. The EJA creates a national structure to promote research and technical assistance to

⁴ Adult Protective Services Technical Assistance Resource Center (2023). National Process Evaluation of the Adult Protective Services System. Submitted to the Administration for Community Living, U.S. Department of Health and Human Services. The U.S. Territories are not included in the analysis. Extant policy information was not available from the Territories, thus were not included in the APS Policy Review or APS Systems Outcomes Analysis. They were able to participate in the APS Practice Survey, and their data are included in internal survey results reported to ACL.

⁵ NAMRS is a data reporting system established and operated by ACL for the purpose of better understanding of adult maltreatment in the United States. The data collected is submitted by all APS programs in all states, the District of Columbia, and the Territories. NAMRS annually collects data on APS investigations of abuse, neglect and exploitation of older adults and adults with disabilities, as well as information on the administration of APS programs. The data provide an understanding of key program policies, characteristics of those experiencing and perpetrating maltreatment, information on the types of maltreatment investigated, and information on services to address the maltreatment. For more information, visit: The Admin. For Cmty. Living, *National Adult Maltreatment Reporting System*, www.namrs.acl.gov (last visited April 18, 2023).

⁶ We refer to “States” in this rule to encompass all fifty States, the District of Columbia, and the five Territories (American Samoa, Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and U.S. Virgin Islands).

⁷ See *infra* note 24. In addition to ACL formula grants, States may receive Title XX Social Services Block Grant (SSBG) funding. However, States have discretion for whether and how much of their SSBG funding they choose to allocate to APS. Not all States use SSBG funding for their APS systems.

⁸ For example, 76 percent of APS programs indicate that their State exerts “significant” control over local APS operations. See *supra* note 4 at 20.

⁹ See *supra* note 4 at 21.

¹⁰ *Id.*

¹¹ For detailed information on the development process for the 2016 and subsequent 2020 Consensus Guidelines, see The Admin. For Cmty. Living, *Final National Voluntary Guidelines for State Adult Protective Services Systems* (2016), <https://acl.gov/sites/default/files/programs/2017-03/APS-Guidelines-Documents-2017.pdf> (last visited May 16, 2023); The Admin. For Cmty. Living, *Voluntary Consensus Guidelines for State APS Systems* (2020), <https://acl.gov/programs/elder-justice/final-voluntary-consensus-guidelines-state-aps-systems> (last visited Apr. 18, 2023).

¹² Off. of Mgmt. & Budget, Exec. Off. of the President, OMB Circular A–119, *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities*, https://www.nist.gov/system/files/revise/circular_a-119_as_of_01-22-2016.pdf; National Technology Transfer and Advancement Act of 1995, Public Law No. 104–113, including amendment Utilization of consensus technical standards by Federal agencies, Public Law No. 107–107, § 1115 (2001), <https://www.nist.gov/standardsgov/national-technology-transfer-and-advancement-act-1995>; The Admin. For Cmty. Living, *Report on the Updates to the Voluntary Consensus Guidelines for APS Systems* (2020) https://acl.gov/sites/default/files/programs/2020-05/ACL-Appendix_3_fin_508.pdf (last visited May 9, 2023).

¹³ See *supra* note 4.

¹⁴ For example, South Carolina had the highest SSBG expenditure for *Vulnerable and Elderly Adults* in FY 2020 at \$14,311,707 representing 58 percent of their entire block grant. The Dep’t. of Health and Hum. Servs., *Social Services Block Grant: Fiscal Year 2020. Ann. Rep.* (2020). https://www.acf.hhs.gov/sites/default/files/documents/ocs/RPT_SSBG_Annual%20Report_FY2020.pdf (last visited May 11, 2023).

support Federal, State, and local elder justice efforts, as well as authorization for dedicated APS funding. A component of the EJA is specifically designed to address the need for better Federal leadership. The Federal Elder Justice Coordinating Council (EJCC) is established by the EJA¹⁵ to coordinate activities across the Federal government that are related to elder abuse, neglect, and exploitation. The EJA designates the Secretary of HHS to chair the EJCC, and continually since the establishment of the EJCC in 2012, the HHS Secretary has designated that responsibility to the Assistant Secretary for Aging. Under the chairmanship of the Assistant Secretary for Aging, and since its establishment, the EJCC has met regularly, soliciting input from the APS community—ranging from individual citizens to expert practitioners and industry associations—on identifying and proposing solutions to the problems surrounding elder abuse, neglect, and financial exploitation, and for strengthening national support for APS.¹⁶

On numerous occasions, the APS community has stressed the need for more Federal guidance, leadership, stewardship, resources, and support for State and local APS programs and for victims of adult maltreatment. Advocates have requested greater funding and Federal regulatory guidance for APS systems in their testimony before Congress,¹⁷ in their statements to the EJCC,¹⁸ and in peer-reviewed journals.¹⁹

The Government Accountability Office (GAO) conducted three studies between 2010 and 2013 on the topics of abuse, neglect, and exploitation to shed light on the need for Federal leadership. The studies' findings repeatedly recommend a coordinated, Federal response to address the gaps in public awareness, prevention, intervention, coordination, and research of elder

maltreatment, as well as a Federal "home" for APS.²⁰

Since Fiscal Year (FY) 2015, Congress has appropriated funds to ACL in support of APS through section 2042(a) and 2401(c) of the EJA, 42 U.S.C. 1397m–1(a) and 42 U.S.C. 1397m(c). This funding is used to collect data, disseminate best practices, and provide discretionary elder justice demonstration grants.²¹ In FY 2021, Congress provided the first dedicated appropriation to implement the EJA section 2042(b), 42 U.S.C. 1397m–1(b), formula grants to all States, the District of Columbia, and the Territories to enhance APS with one-time funding in response to the COVID–19 pandemic, totaling \$188 million, and another \$188 million in FY 2022.²² The recent Consolidated Appropriations Act of 2023 included the first ongoing annual appropriation of \$15 million to ACL to continue providing formula grants to APS programs under the EJA section 2042(b), 42 U.S.C. 1397m–1(b).²³

This rule represents the first exercise of ACL's regulatory authority over APS under the OAA and the EJA. While we have issued sub-regulatory guidance, including comprehensive Consensus Guidelines in 2016 and 2020 that include APS evidence-informed practices, we believe it is necessary to codify and clarify a set of mandatory minimum national standards to ensure uniformity across APS programs and to promote high quality service delivery that thus far has not been achieved under the current Consensus Guidelines.

This final rule requires the State entity to establish written policies and procedures in areas of significant APS practice and establishes minimum Federal standards above and beyond which States may impose additional requirements on their APS systems, as discussed in greater depth herein.

²⁰ U.S. Gen. Acct. Off., *GAO–11–208, Elder Justice: Stronger Federal Leadership Could Enhance National Response to Elder Abuse* (2011) <https://www.gao.gov/products/gao-11-208>; U.S. Gen. Acct. Off., *GAO–13–110, Elder Justice: National Strategy Needed to Effectively Combat Elder Financial Exploitation* (2012) <https://www.gao.gov/products/gao-13-110>; U.S. Gen. Acct. Off., *GAO–13–498, Elder Justice: More Federal Coordination and Public Awareness Needed* (2013) <https://www.gao.gov/products/gao-13-498>.

²¹ 42 U.S.C. 1397m–1.

²² Coronavirus Response and Relief Supplemental Appropriations Act of 2021, Public Law 116–260, 134 Stat. 1182; American Rescue Plan Act of 2021, Public Law 117–2, 135 Stat. 4.

²³ Consolidated Appropriations Act, 2023, Public Law 117–328. FY 21 and 22 funding was one-time funding to help with start-up costs and infrastructure and the surge of needs during the COVID–19 Public Health Emergency. FY 23 funding was the first ongoing formula grant funding to State grantees.

B. Overview of the Final Rule

This final rule adopts the same structure and framework as the proposed rule. Section II provides a discussion of the Final Rule and response to comments, including general comments received on the NPRM and on individual provisions of the rule. Our Final Rule is a direct response to feedback from interested parties and reflects input about the evolving needs of APS systems.

We have made changes to the proposed rule's provisions based on the comments we received, including making changes to requirements commenters asserted would create significant burden or be difficult to implement. We have also provided clarification on several provisions in the preamble. Among the notable changes and significant clarifications are the following:

We have lengthened the implementation timeline by delaying the compliance date from 3 years after the publication of this rule to 4 years, and we discuss how States can work with ACL to address specific requirements that may need additional time through corrective actions plans.

Section 1324.401 addresses definitions used in the final rule. The definitions are foundational terms used in APS practices. In response to commenter feedback, ACL added definitions for "finding," "report" and "response." We also revised the terms "abuse," "adult maltreatment," "at risk of harm," "emergency protective action," "exploitation," "investigation," "mandated reporter," "self-neglect," and "sexual abuse." We removed the terms "inconclusive," "post-investigative services," "substantiated," "trust relationship," and "unsubstantiated."

To clarify expectations around State adoption of the definitions in § 1324.401, we added new § 1324.402(a)(5) (Program Administration) explaining that State entities are not required to uniformly adopt the regulatory definitions, but State definitions may not narrow the scope of adults eligible for APS or services provided. The final rule requires States to establish definitions for APS systems that collectively incorporate every defined term and all of the elements of the definitions contained in § 1324.401. States must then provide assurances in their State plans that their definitions meet or exceed the minimum standard established by this Final Rule.

We clarified in § 1324.402(b)(2)(i)(A) that the requirement for a 24-hour

¹⁵ 42 U.S.C. 1397k.

¹⁶ The Admin. for Cmty. Living, *Federal Elder Justice Coordinating Council*, <https://ejcc.acl.gov/> (last visited Apr. 18, 2023).

¹⁷ *Public and Outside Witness, Hearing Before the Subcomm. on Lab., Health and Hum. Servs. Educ. & Related Agencies of the House Appropriations Comm.*, 113th Cong. (2014) (statement of Kathleen M. Quinn, Exec. Dir. of the Nat'l. Adult Protective Servs. Ass'n.) <https://www.napsa-now.org/wp-content/uploads/2014/03/Appropriations-Testimony-NAPSA.pdf>.

¹⁸ *Enhancing Response to Elder Abuse, Neglect, and Exploitation: Elder Justice Coordinating Council, Testimony of William Benson* (Oct. 10, 2012), http://www.aoc.acl.gov/AoA_Programs/Elder_Rights/EJCC/Meetings/2012_10_11.aspx.

¹⁹ Kathleen Quinn & William Benson, *The States' Elder Abuse Victim Services: A System in Search of Support*, 36 *Generations* 66 (2012).

immediate need response can be fulfilled through a partnership with Emergency Management Systems, Law Enforcement, or other appropriate community resource with 24-hour response capability.

We clarified in § 1324.402(c) State APS-related client rights *do not* need to be provided in very first moment of first contact and that client rights *do not* need to be provided in writing (APS programs may choose how they wish to provide clients notice of their rights).

We modified proposed § 1324.402(d) to remove the requirement that State APS entities set staff-to-client ratios.

We modified proposed § 1324.403 (Investigation and Post-Investigation Services) by renaming it “APS Response” in response to commenter feedback.

We amended proposed § 1324.403(c)(6) by dividing it into § 132.403(c)(6): “permit APS the emergency use of APS funds to buy goods and services” and § 1324.403(c)(7) “permit APS to seek emergency protective action only as appropriate and necessary as a measure of last resort to protect the life and wellbeing of the client from harm from others or self-harm” in conformity with revised definition of “emergency protective services” and to better reflect APS practice and ACL policy around emergency protective action.

We removed § 1324.403(e)(6), which required APS systems to monitor the status of clients and the impact of services. Similarly, we removed § 1324.403(f)(3)(iii), which required APS programs to assess the outcome and efficacy of intervention and services. We believe this data can be adequately captured by our Program Performance requirements at § 1324.407.

In § 1324.404 (Conflict of Interest), we removed proposed § 1324.404(a) that required APS systems to ensure that APS employees and agents did not simultaneously provide or oversee direct services to clients during the course of an investigation.

We added to new § 1324.404(a) and § 1324.404(b) (formerly proposed § 404(b) and § 404(c) respectively) and amended to include “member of immediate family or household” [emphasis added] to widen scope of who is captured by COI provisions.

We moved proposed § 1324.404(e) to new § 1324.404(c) requiring APS establish monitoring and oversight protocol.

We expanded and finalized at § 1324.404(d)(1)–(2) to prohibit dual relationships unless unavoidable and when APS petitions for or serves as guardian, the dual relationship is

unavoidable only if less restrictive alternatives to guardianship have been considered and either (i) a court has instructed the APS program to petition for or serve as a guardian or; (ii) there is no other qualified individual/entity available to petition for or serve as guardians. For all dual relationships APS must describe and document mitigation strategies in the case record to address conflicts of interest.

We added § 1324.405(a) (Accepting Reports) that 24 hour per day seven calendar day per week requirement for accepting reports does not mean a live APS worker must field reports—rather, it refers to 24 hour per day, seven calendar day per week reporting portal. We likewise clarified that APS programs must maintain at least two methods of reporting and one method of reporting must be an online portal, secured email address, or other online method.

We removed proposed § 1324.405(b)(ii), which required APS to share with a mandated reporter the finding of an allegation in a report made by the mandated reporter. New § 1324.405(b)(1)–(2) adds the requirement that a mandated reporter only be notified upon their request. APS must only inform the reporter if a case has been opened because of their report, with the prior consent of the adult on whose behalf the case was opened. Relatedly, we have modified to definition of “mandated reporter” to apply only to mandated reporters reporting in their professional capacity.

We modified proposed § 1324.406 (Coordination with Other Entities) to add Tribal APS programs to § 1324.406(a)(1). We modified proposed § 1324.406(a)(2) to reference coordination with State Medicaid agencies “for the purposes of coordination with respect to critical incidents.”

We modified § 1324.406(a)(3) to add State securities and financial regulators, and Federal financial and securities enforcement agencies.

We have made clarifying edits and preamble text proposed § 1324.406(b)(3) that APS Systems should facilitate (but are not required) to enter into formal data sharing agreements or MOUs. Informal arrangements may also be appropriate.

We modified proposed § 1324.408 (State Plans) to clarify that the State APS entity receiving the Federal award of funding under 42 U.S.C. 1397m–1 must develop the State plan in collaboration with other State APS entities, as applicable, and other APS programs.

C. Severability

To the extent that any portion of the requirements arising from the final rule is declared invalid by a court, ACL intends for all other parts of the final rule that can operate in the absence of the specific portion that has been invalidated to remain in effect. While our expectation is that all parts of the final rule that are operable in such an environment would remain in effect, ACL will assess at that time whether further rulemaking is necessary to amend any provisions subsequent to any holding that ACL exceeded its discretion, or the provisions are inconsistent with the OAA or EJA or are vacated or enjoined on any other basis.

II. Provisions of the Final Rule and Responses to Public Comments

We received 172 public comments from individuals and organizations, including State APS entities, Tribes and Tribal organizations, APS programs, Area Agencies on Aging (AAAs), Ombudsman programs, State governmental entities, State and national organizations and advocacy groups, and private citizens. We thank commenters for their consideration of the proposed rule and appreciate all comments received. In the subsequent sections, we summarize the rule’s provisions and the public comments received, and we provide our response.

General Comments on the NPRM

General Support

Comment: We received many comments in support of the proposed rule. Commenters expressed general support for the national baseline created by the regulations. A significant number of commenters requested additional funds for APS programs, particularly in light of requirements in the new regulations.

Response: ACL appreciates these comments. We encourage collaboration at the State and local levels to identify solutions that are responsive to the needs and resources in local communities. Requests for additional funding are outside the scope of this rule.

Technical Corrections; Recommendations for Sub-Regulatory Guidance

Comment: Several commenters identified technical corrections, including inconsistency in terminology and grammatical errors. Commenters also provided suggestions and raised questions that could be addressed in future sub-regulatory guidance on a variety of topics.

Response: We appreciate these comments and have made the recommended technical corrections. We look forward to providing technical assistance and guidance subsequent to promulgation of the final rule.

Minimum Federal Standards

As discussed in the proposed rule, our requirements establish minimum Federal standards for all States receiving EJA funding pursuant to 42 U.S.C. 1397m–1. These standards will promote uniformity across APS programs and high-quality service delivery. However, as discussed in the preamble, the regulation allows significant flexibility for State APS systems as they respond to the unique needs of their communities. Accordingly, we allow and encourage State APS systems to include services, practices, and processes that exceed these minimum Federal standards. As State entities develop their State plans, they should, in addition to assurances related provided pursuant to § 1324.408, detail APS functions performed above the minimum Federal standards set out in this regulation. We emphasize that EJA funding is available for all approved APS functions as defined in section 2402 of the EJA, 42 U.S.C. 1397m–1, including those not explicitly detailed in this regulation, provided they are included in an approved State plan.

We will provide technical assistance as States develop their State plans to determine whether their policies and procedures and program functions meet these minimum standards.

Comment: One commenter requested that ACL clarify in regulation text that EJA funds may be expended on activities not specified in the regulation.

Response: We have declined to revise the regulation text as requested. Our regulation establishes a minimum Federal standards for APS functions, and we require that EJA funding must be used consistent with the activities described in the approved State plan; under 42 U.S.C. 1397m–1(b)(3)(A), “funds made available pursuant to this subsection may only be used by States and local units of government to provide adult protective services and may not be used for any other purpose.” EJA funding may be used for all activities in an approved State plan, including those not specifically enumerated in this regulation. However, EJA funding is only allowable for APS activities under the EJA and in an approved State plan. Under 42 U.S.C. 1397m–1(b)(3)(C), EJA funding must be used to supplement, and not supplant, other sources of funding that support the same or similar activities.

Tribal Considerations

Comment: We received comments regarding the applicability of this rule to Tribes, Tribal governments, and Tribal APS programs. Commenters encouraged ACL to finalize regulations that allow Tribes the flexibility to adapt Tribal APS programs to their own cultures. Commenters further stressed that our regulations should consider and reflect Tribal practices and perspectives—requiring State APS systems to coordinate with Tribal governments and APS programs, and to address APS jurisdiction over events that occur on Tribal lands or to members of tribes who may not be on Tribal land. Commenters sought greater explanation and clarification.

Response: Tribal governments do not receive funding through EJA APS formula grants (42 U.S.C. 1397m–1), thus this rule does not apply to Tribal governments. However, we recognize that many State and local APS programs collaborate with Tribes and Tribal APS programs during their work. We have amended § 1324.406(a)(1) “Coordination with Other Entities” to reflect this.

ACL is committed to honoring Tribal sovereignty and works to maintain a strong government-to-government relationship by providing opportunities for meaningful and timely input on areas that have a direct impact to Tribal programs. This rule anticipates that State entities will seek input from interested parties when they develop State APS plans, and we encourage collaboration with all interested parties, including Tribes, Tribal governments, and Tribal members. ACL will provide technical assistance to States regarding the preparation of State APS plans, including engaging with Tribes. Additionally, ACL will solicit input from and conduct Tribal consultation meetings with affected Federally recognized Tribes per Federal requirements as this rule is implemented.

Compliance

Comment: We received comment requesting more information on compliance requirements and penalties for non-compliance.

Response: As with all grant-funded programs, grantees must comply with applicable Federal requirements to receive funding. If a State APS program accepts funding made available under 42 U.S.C. 1397m–1(b), it is required to adhere to all provisions contained in this final rule, in addition to the uniform administrative requirements, cost principles, and audit requirements for HHS awards codified in 45 CFR part

75. Among other requirements, State entity recipients of funding must provide fiscal and performance reporting that documents that they are expending funds in compliance with Federal statutes, regulations, and the terms and conditions of the Federal award. Further, 45 CFR part 75, subpart D requires recipients of Federal awards to have a financial management system in place to account for the Federal award. ACL leaves it to the State entity’s discretion to determine how they will ensure that funds are expended in a manner that meets the requirements of this regulation and consistent with the State’s internal fiscal controls.

Upon learning of compliance concerns, ACL provides technical assistance to enable grantees to come into compliance (as is true of all compliance concerns related to our grantee’s actions). ACL may also work with grantees on a corrective action plan. Consequences for non-compliance may include withholding of funds until the grantee achieves compliance.

Effect on County-Administered Systems

Comment: One commenter in a county-based system commented in support of the proposed rule, suggesting that it will help to standardize services, place the State in a position of greater oversight, and effectively support adults with disabilities. Other commenters stressed that, in county-based systems, it would be difficult to implement the rule because the State does not have sufficient authority over counties to ensure compliance. A few commenters suggested that the proposed rule would detract from the strengths of a county-administered system that promotes autonomy and system responsiveness based on local needs and abilities and would be challenging or impossible to implement based on the structure of their programs.

Commenters raised concerns that our conflict of interest provisions in § 1324.404 would be challenging to implement in counties where many APS workers have dual relationships. A few commenters suggested that our proposal would require additional funding and staff to mitigate conflicts surrounding dual relationships. One commenter wrote that creation of a centralized State intake system in their county-administered system would be challenging and burdensome and may be less effective than the current localized process. They sought clarification as to whether State-centralized systems were required.

A few commenters in a county-administered State requested specific

guidance on the rule's application and implementation to their APS systems.

Response: We appreciate commenters' comments related to implementation of this regulation in States that have county-administered systems, and we acknowledge unique challenges such APS systems may face as they implement this regulation. The regulations set minimum Federal standards with a significant amount of latitude provided for State implementation. We believe the flexibility will allow all States, including those with county-based system, to continue provide APS services tailored to the unique needs of their communities. We discuss dual relationships in more detail in our preamble discussion for § 1324.404. We clarify nothing in this regulation requires a State centralized intake system.

Funding made available under 42 U.S.C. 1397m–1(b) is intended to enable State APS programs to implement an APS program as described in this regulation. As the recipient of Federal funding, the State entity is responsible for compliance with this regulation and 45 CFR part 75, which sets out requirements for all recipients of this type of Federal funding. We leave it to the discretion to the State entity to determine how to best ensure that all Federal funds are expended in a manner that meets the requirements of this regulation and consistent with the State's internal fiscal controls. We will provide ongoing technical assistance as necessary to county-administered systems throughout the initial implementation period, now extended to 4 years, and beyond. State APS entities may also request a corrective action plan to assist in addressing provisions of the rule that prove uniquely challenging for county-administered systems.

Administrative Burden, Implementation Costs, Implementation Timeframe

Comment: A significant number of commenters raised concerns about the burden, cost, and amount of time regulated entities would need to implement the final rule (e.g., costs and time needed to change State statute, to create or update State regulations, to review and update existing policies and procedures, to create new policies and procedures, and to train staff), as well as concerns about the ongoing costs of monitoring compliance with the final rule. Some State agencies commented that they anticipate that consultants and/or additional staff will need to be hired and/or that changes will need to be made to information technology

systems. Some State agencies asserted that ACL had greatly underestimated both the cost, and the amount of time, needed to come into compliance with the rule.

Response: We appreciate that the implementation of this rule may require statutory changes, create administrative burden, and require increased funding and/or increased staff. We have carefully considered commenter feedback and made substantial revisions to our proposals where we believed burden could be reduced while still maintaining the integrity and efficacy of these requirements.²⁴ For example, we have removed requirements for States entities to set staff to client ratios, streamlined monitoring requirements, clarified the ability of APS systems to share responsibility for immediate risk cases with first responders and other community partners, and clarified requirements around 24 hour per day, 7 calendar day per week intake methods. We have also lengthened the implementation timeline by extending the compliance date from 3 to 4 years.

If State APS entities encounter challenges implementing specific provisions of the rule, they should engage with ACL for technical assistance and support. In addition, State APS entities that need additional time to comply with one or more provisions of the rule may submit a request to proceed under a corrective action plan. A request should include the reason the State needs additional time, the steps the State will take to reach full compliance, and how much additional time the State anticipates needing. The corrective action plan process is intended to be highly collaborative and flexible. Under a corrective action plan, States agencies and ACL will jointly identify progress milestones and a feasible timeline for the State agency to come into compliance with the provision(s) of the rule incorporated into the corrective action plan. State agencies must make a good faith effort at compliance to continue operating under a corrective action plan. ACL will provide guidance on this process after this rule takes effect, including a timeline for making requests for corrective action plans.

Our rule will improve APS program efficiency, enhance APS for older adults and adults with disabilities, and further the intent of the OAA and the EJA. We anticipate upon full implementation that any burden incurred will be far

outweighed by the benefit of this rulemaking.

III. Adult Protective Services Systems

A. Section 1324.400 Eligibility for Funding

In proposed § 1324.400, we clarified that annual funding from ACL through section 2042(b) of the EJA, 42 U.S.C. 1397m–1(b) is predicated on compliance with this rule.

Comment: We received comment from States with bifurcated APS systems. These States have two APS entities, one charged with investigating allegations of adult maltreatment and self-neglect for people aged 60 and over, and the other charged with investigating allegations of adult maltreatment and self-neglect for younger adults with disabilities. Commenters requested clarification on the application of the proposed rule to the programs that serve younger adults with disabilities.

Response: The final rule applies to any program that uses EJA funding to provide Adult Protective Services, whether those funds are used for older or younger adults. ACL bases our authority to issue APS regulations on elder abuse prevention and services on section 201(e)(3) of the OAA, 42 U.S.C. 3011(e)(3). With respect to APS for younger adults, section 2042(b) of the EJA authorizes grants to enhance the provision of APS, defined broadly as “services provided to adults as specified by the Secretary.” 42 U.S.C. 1397m–1. Given that Congress has appropriated funding for APS programs under the EJA, ACL intends for this regulation to set forth the conditions of participation for recipients of APS grants to States under the EJA, as well as elder abuse prevention and services under the OAA.

ACL has previously taken the position that funding to APS programs provided through the EJA should serve all adults eligible for APS services.²⁵ For purposes of this regulation, we defer to States' definition of “adult” to determine eligibility for APS. Therefore, this regulation applies to all APS programs that serve adults eligible for APS services, regardless of whether an APS entity serves only adults under age 60.

As detailed in § 1324.408, each State that accepts APS funding must submit a single State plan for ACL approval that describes which populations will be served, which services will be provided, and which entities will oversee the provision of those services.

²⁴ See a further discussion of projected burden and benefit in our Regulatory Impact Analysis on p. 124.

²⁵ See, CORONAVIRUS RESPONSE AND RELIEF SUPPLEMENTAL APPROPRIATIONS ACT OF 2021 (CRRSA): GRANTS TO ENHANCE ADULT PROTECTIVE SERVICES TO RESPOND TO COVID–19, Frequently Asked Questions (Updated March 23, 2023).

States with bifurcated APS systems may designate more than one entity as responsible for different populations within their State plan. In such States, the State plan should also describe the allocation plan for the distribution of funds between State entities, as well as processes for coordination on cases and on the development of policies and procedures.

B. Section 1324.401 Definitions

The final rule updates the definitions of significant terms in § 1324.401 by adding several new definitions and revising several existing definitions. The additions and revisions are intended to reflect terms foundational to APS practice and feedback that we have received from a range of interested parties.

We add definitions of the following terms to the final rule: “finding,” “report,” and “response.”

We retain the following terms from the proposed rule and make revisions: “adult maltreatment,” “Adult Protective Services System,” “at risk of harm,” “client,” “emergency protective action,” “exploitation,” “investigation,” “mandated reporter,” “self-neglect,” “sexual abuse,” and “State entity.”

We removed the following terms used in the proposed rule: “inconclusive,” “post-investigative services,” “substantiated,” “trust relationship,” and “unsubstantiated.”

Comment: We received comment encouraging more systematic use of strengths-based language throughout our definitions.

Response: Throughout the definitions and the rule, we have worked to incorporate more person-directed (also sometimes referred to as “person-centered”) and strengths-based language. According to the National Center on Elder Abuse, “[p]erson-centered, trauma-informed care is a holistic approach to service provision that fosters dignity and resilience among survivors of trauma. This approach recognizes the impact of trauma and incorporates that knowledge into service delivery and provider practices. Person-centered, trauma informed care provides a framework that advances safety, culturally respectful and responsive programming, and empowering environments for survivors.”²⁶ We

agree with commenters that the systematic use of strengths-based language that reflects the principles of person-centeredness and trauma-informed care is critical to effective APS services for adults and thank commenters for their feedback.

Comment: We received comment from many State APS entities and other interested parties that several of our definitions, most notably “adult maltreatment,” conflict with State definitions, were confusing or duplicative, or did not reflect APS practice in their State. Many States commented, providing their own State definitions. Many State entities and APS programs commented that changes to their State statute, regulation, and/or policy would be necessary to come into compliance and that to make these changes would be onerous and time-consuming. Some commenters requested that ACL provide waivers for States where compliance would be overly burdensome.

Response: We thank commenters for sharing their State experience and expertise. We have incorporated many of these suggestions and comments in our revised definitions, and into our incorporation of the definitions into the regulatory requirements in § 1324.402.

We include the definitions in this regulation, some of which are drawn directly from the OAA and EJA, as a baseline, and we encourage States without robust existing definitions to adopt these statutory definitions. However, we clarify in this final rule in § 1324.402 that this regulation does not require States to adopt these definitions verbatim. Under § 1324.402, the final rule requires States to establish definitions for APS systems that collectively incorporate every defined term and all of the elements of the definitions contained in § 1324.401. Under § 1324.408, States must provide assurances that their definitions meet or exceed the minimum standard we have established in § 1324.401.

To assess whether States have met the minimum standard, we will evaluate all State definitions in their totality as opposed to individually. States must ensure that all definitions specified by this rule and their elements are incorporated into a State plan and that their definitions capture the full intent and purpose of the definitions in this regulation. For example, some States may define the “knowing deprivation of goods or services necessary to meet the essential needs of an adult” as “willful negligence,” rather than as an element of “abuse.” So long as the State’s APS definitions address such “knowing deprivation” in *some* definition, the

State will have satisfied this requirement.

We recognize that some States may nevertheless need to change statutes (including criminal statutes), regulations, or policies to satisfy this requirement if their APS program definitions do not yet fully incorporate all required adult maltreatment and self-neglect elements. We are establishing a 4-year implementation timeline to provide States ample opportunity to cross-walk their current definitions and those contained in this rule and make any statutory, program, or policy changes that may be necessary. States may also request to proceed under a corrective action plan if they are unable to meet this requirement within 4 years. “Abuse”

Consistent with the definitions set forth in section 102(1) of the OAA, 42 U.S.C. 3002(1), and section 2011 of the EJA, 42 U.S.C. 1397j(1), we proposed to define abuse as an element of *adult maltreatment* to encompass the knowing psychological, emotional, and/or physical harm or the knowing deprivation of goods or services necessary to meet the essential needs or avoid such harm.

Comment: A significant number of commenters, including many State APS entities and national associations representing the interests of APS programs, requested we remove “knowing” from the definition of abuse. Some commenters offered examples from their State, to include “reckless” in addition to “knowing” in defining the mindset of a perpetrator of abuse.

Commenters suggested that it was too difficult and burdensome to determine whether a person knowingly or unknowingly harmed or deprived an adult of necessary goods or services. For example, a commenter pointed out that an APS program may be put in the position of deciding whether a mental health condition, cultural practice, or other subjective factor affected a perpetrator’s mindset. Relatedly, another commenter asked how “unknowing” psychological, emotional, and/or physical harm of an adult would be treated by APS systems under our definitions.

A significant number of other commenters raised questions about the interaction between the definitions of “abuse” and “neglect.” They suggested that, as proposed, the definition of abuse could be conflated with neglect. Commenters sought clarity as to whether an allegation of abuse and neglect could be substantiated against the same alleged perpetrator for the same act.

²⁶ The National Center on Elder Abuse, *Tips and Tools for Person-Centered, Trauma-Informed Care of Older People at the Intersection of Trauma, Aging, and Abuse*, https://eldermistreatment.usc.edu/wp-content/uploads/2023/07/NCEA_TT_PCTICare_web.pdf. See also, Ernst, J.S., & Maschi, T. (2018). Trauma-informed care and elder abuse: a synergistic alliance. *Journal of Elder Abuse & Neglect*, 30(5), 354–367. <https://doi.org/10.1080/08946566.2018.1510353>.

Response: We appreciate these comments and understand that the statutory definition of “abuse” differs from the definition that many States have adopted. As we have clarified above, State APS entities are not obligated to adopt these statutory definitions verbatim, so long as the elements of each defined term are all incorporated into State definitions.

In response to commenter concerns, we are clarifying the distinction between “abuse” and “neglect” (further discussed below) as defined by the OAA and the EJA. Neglect is defined as “the failure of a caregiver or fiduciary to provide the goods or services that are necessary to maintain the health and/or safety of an adult.” 42 U.S.C. 3002(38), 42 U.S.C. 1397j(16). Abuse is defined as “the knowing infliction of physical or psychological harm or the knowing deprivation of goods or services that are necessary to meet essential needs or to avoid physical or psychological harm” [emphasis added]. 42 U.S.C. 3002(1), 42 U.S.C. 1397j(1). A number of commenters interpreted the “knowing deprivation of goods or services” (abuse) as a “failure . . . to provide the goods or services” (neglect) and argued that the definitions are redundant. Moreover, commenters noted that overlapping definitions could make it difficult for States to effectively report out on case types.

The rules of statutory construction require that we interpret the entire statute as a whole, with the assumption that Congress intended each provision to work together harmoniously.²⁷ Here, the key distinction between abuse and neglect is the mindset—abuse requires the intent (the “knowing deprivation”) to cause harm. For these two definitions to be read as distinct, the “failure” to provide goods or services under the definition of neglect must be interpreted as being unintentional. We understand from commenters that many State APS systems may approach abuse and neglect differently; namely, their definitions assess whether a harm was active (as in physical abuse) or caused by deprivation (as in either willful or unintentional neglect). In this way, State APS systems are set up to look at the functional outcome, regardless of the intentionality associated with it. As stated above, State APS systems are in compliance with this regulation so long as the totality of their definitions incorporate all of the elements of adult maltreatment and self-neglect contained in the regulatory definitions.

Commenter concerns related to the difficulty of assessing mindset are well taken. However, we note that many APS investigative functions rely on contextual clues to understand state of mind or decisional capability. We reiterate that States have the discretion to distinguish between the “knowing deprivation of goods or services that are necessary to meet essential needs or to avoid physical or psychological harm” and other actions that are defined as abuse by statute. Factors such as cultural practices and mental health conditions should be considered during an APS response. We defer to the expertise, sensitivity, and judgement of APS workers when evaluating such elements. In all cases, APS workers should undertake a person-centered, culturally competent approach to investigation and service delivery, and we reiterate our requirements surrounding person-directedness and trauma informed responses at § 1324.402(b)(1) and § 1324.403(c)(1) as well as ongoing education and training requirements for APS workers at § 1324.402 (e)(1).

Comment: One commenter suggested we add that no adult will be found to be abused solely on the grounds of environmental factors that are beyond the control of the older adult or the caretaker, such as inadequate housing, furnishings, income, clothing, or medical care.

Response: We recognize the commenter’s concern related to environmental factors and understand that individuals will experience different outcomes based on the resources available to them. The deprivation of goods or services for reasons beyond the control of the older adult or caretaker (as described by the commenter above) does not constitute abuse if it is not intentional. In all cases, we stress the importance of APS systems’ discretion with respect to when and how to move forward in person-directed investigations and service delivery.

Comment: We received comment from Tribal commenters suggesting we define “abuse” to include “spiritual abuse.”

Response: We thank commenters for their suggestion but decline to revise the definition. States have the discretion to determine whether to include “spiritual abuse” in their definition. We will provide ongoing technical assistance to States as they implement the final rule.

Comment: We received comment requesting we define “psychological harm,” “emotional harm,” and “physical harm.”

Response: We thank commenters for their suggestions and decline to adopt

these definitions. We will leave these definitions to State discretion.

“Adult”

Comment: ACL received comment that some States include a vulnerability qualifier in their definition of adult and asked how this would comport with our definition of “at risk of harm.”

Response: Please see the discussion in our definition of “at risk of harm.”

Comment: We received a few comments supporting a national definition for “adult,” with one commenter suggesting we let States apply for exceptions if the national definition is overly burdensome. We received one comment asking that we specify “eligible adults” for improved clarity. However, we received many comments, including from State APS entities and national associations representing them, supporting our decision to defer to States when defining “adult” for the purposes of “adult maltreatment.”

Response: We concur with commenters that our approach will allow States flexibility to design and operate their APS systems in a manner that best fits the needs of the State’s population and aligns with existing State statutory eligibility requirements. We have decided not to permit exceptions because we believe our definition as written will accommodate all States adequately as written. We are finalizing this definition as proposed.

“Adult Maltreatment”

In this final rule, we define “adult maltreatment” to bring uniformity and specificity to a foundational term used throughout APS systems and this regulation. Our definition establishes a comprehensive and uniform approach to investigations of adult maltreatment while still allowing for State flexibility and discretion. We proposed that “adult maltreatment” encompass five elements: abuse, neglect, exploitation, sexual abuse, and self-neglect. We also proposed to require that the adult must have a relationship of trust with the perpetrator of abuse, neglect, exploitation, or sexual abuse and be at risk of harm from the perpetrator.

Comment: We received several comments in support of a national definition for “adult maltreatment.” We also received comments opposed to a unified national definition of adult maltreatment, with one commenter suggesting that our definition overextends the reach of APS. Other commenters stated that adherence to our definition would conflict with their State definitions and others suggested additional elements to our definition.

²⁷ *United Savings Assn. of Tex. v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365 (1988).

Response: ACL thanks commenters for their support. We believe a standard baseline definition upon which States may build will advance APS practice and is crucial to the success of this rulemaking. We are therefore retaining this definition in the final rule. We note that we have extended the implementation timeline to 4 years to provide State entities more time to revise definitions.

Comment: We received comment that the formulation of our “adult maltreatment” definition was confusing and would be challenging to implement. Under our proposed rule, “adult maltreatment” was defined as “self-neglect or abuse, neglect, exploitation, or sexual abuse of an adult at-risk of harm from a perpetrator with whom they have a trust relationship.” States noted that there was no perpetrator involved in cases of self-neglect, that the presence of the term “adult” when coupled with definitions of the five elements of maltreatment may be duplicative, and the presence of “trust relationship” may be duplicative of “caregiver” and “fiduciary” in “neglect”.

Response: We appreciate commenters’ thoughtful responses and suggestions. We have revised the definition of adult maltreatment as follows: *Adult maltreatment means the abuse, neglect, financial exploitation, or sexual abuse of an adult at-risk of harm.* Please see our definitions of “abuse,” “neglect,” “financial exploitation,” “sexual abuse,” and “self-neglect” as well as our further discussion of “trust relationship” and “risk of harm” contained herein.

“Adult Protective Services (APS)”

Consistent with the definitions set forth in section 102(3) of the OAA, 42 U.S.C. 3002(3), and section 2011 of the EJA, 42 U.S.C. 1397j(2), we proposed to define Adult Protective Services as such services provided to adults as the Assistant Secretary may specify and includes services such as—

- (A) receiving reports of adult abuse, neglect, or exploitation;
- (B) investigating the reports described in subparagraph (A);
- (C) case planning, monitoring, evaluation, and other case work and services; and

- (D) providing, arranging for, or facilitating the provision of medical, social service, economic, legal, housing, law enforcement, or other protective, emergency, or support services.

Comment: Several commenters generally requested that the final rule remove the requirement that APS include providing services. One

commenter noted high costs of hiring enough staff to comply with the definition, as well as training costs. Some commenters noted that some APS programs only provide referrals to other entities or provide limited services to “stabilize the situation” and noted that more lengthy case management or provision of services would be very costly. A commenter believes our definition gives APS the ability to designate a legal, social service, or medical provider as an APS provider and disagrees with this decision.

Response: Service provision is memorialized in Federal statute and is the core of APS’ mission in most States. We emphasize this in our definition. However, our definition does not mandate that APS systems provide any specific service. Rather, it describes the general types of services that APS encompasses. We affirm that APS may provide referrals or otherwise facilitate the provision of legal, medical, or social services. However, APS does not have the authority to designate those referral entities as APS providers.

Comment: Other commenters suggested that APS cannot provide emergency services, and that the proposed definition as written is vague and could potentially open the State to legal liability.

Response: We believe our definition, which defines APS services as “providing for, or facilitating the provision of [. . .] emergency, and supportive services” [emphasis added], does not require that APS provide emergency services. Rather, APS may refer to other entities for emergency protective services, as needed. For example, APS could facilitate the provision of community-based services by referring an adult to another program to receive urgently needed home repairs, for nutrition assistance, or transportation.

Comment: Several commenters voiced support for APS offering a wide array of services.

Response: We agree and likewise believe that APS does, and should, provide a wide array of services. We believe the statutory definition appropriately describes the array of services provided by APS and decline to further expand upon it.

Comment: A commenter asked that the investigative role of APS be de-emphasized, and the social service role should be emphasized.

Response: We agree and thank the commenter for their suggestion. We have made changes throughout the final rule to more accurately emphasize the critical role of service delivery in APS practice.

Comment: One commenter requested clarity on the expectations related to APS monitoring responsibilities.

Response: ACL will provide ongoing technical assistance to APS State entities and programs related to monitoring. We refer commenters to our discussion at proposed § 1324.403(e)(6) (removed) and proposed § 1324.403(f)(3)(iii) (removed) as well as finalized § 1324.407. We finalize our definition as proposed.

“Adult Protective Services Program”

Comment: We received one comment in support of our proposed definition and one that suggested the definition include reference to administrative and technical staff.

Response: We thank commenters for their input. We believe our definition which refers to “providers” may be interpreted to include administrative and technical staff. We have finalized the definition as proposed.

“Adult Protective Services System”

Comment: We proposed to define “Adult Protective Services (APS) System” as the totality of both the State entity and the local APS programs.” A commenter suggested modifying the language to “the totality of the State entity or entities and the local APS programs” to account for States with multiple APS entities.

Response: We thank the commenter and are revising our definition accordingly.

“At Risk of Harm”

We proposed to define “at risk of harm” in accordance with Centers for Disease Control and Prevention (CDC) Elder Abuse Surveillance: Uniform Definitions and Recommended Core Data Elements (CDC Uniform Definitions) as “the possibility that an adult will experience an event, illness, condition, disease, disorder, injury or other outcome that is adverse or detrimental and undesirable.”²⁸

Comment: We received comment that our definition of “at risk of harm” was too broad and that some States used a narrower standard. A commenter noted that our proposed definition, which refers to “the possibility that an adult will experience an event, illness, condition, disease, disorder, injury or other outcome that is adverse or detrimental and undesirable,” could encompass any possible scenario,

²⁸ U.S. Dep’t of Health & Hum. Servs., Ctrs. For Disease Control and Prevention, Elder Abuse Surveillance: Uniform Definitions and Recommended Core Data Elements, https://www.cdc.gov/violenceprevention/pdf/ea_book_revised_2016.pdf. (Feb. 29, 2016).

illness, or condition. Commenters suggested that the proposed definition would increase caseloads, with some commenters suggesting instead we use “serious harm,” “at risk of maltreatment,” or “vulnerable” in place of “at risk of harm.”

Response: We appreciate commenters’ feedback and have revised the definition to more narrowly describe the risk of harm potentially faced by an adult. We have revised the definition to “the strong likelihood that an adult will experience an event, condition, injury or other outcome that is adverse or detrimental and will occur imminently.” We believe “strong likelihood” better represents the degree to which an adult may be at risk of harm to qualify for APS.

Comment: We received comment that an “at-risk” qualifier may be appropriate when prioritizing APS cases but not as a determinant for APS eligibility.

Response: We appreciate commenters’ suggestion and concur that triaging a case based on risk is an important part of APS intake and case prioritization. However, given finite resources, we believe that a Federal definition should premise eligibility for APS on a strong likelihood of harm while those for whom risk is less immediate can be referred to other community resources. We remind commenters that our definitions are minimum standards. State entities are required to provide assurances that they are investigating abuse, neglect, financial exploitation, sexual abuse, and self-neglect of adults at risk of harm to create an approvable State plan and receive Federal funding, but States may also choose to accept *all* cases irrespective of risk.

Comment: We received comment that including “at risk of harm” in the definition of adult maltreatment would be redundant for States where “vulnerable” was included in the definition of adult and that some commenters preferred “vulnerable” to “at risk” as defined.

Response: We appreciate that, for some States, a strict reading of “at risk of harm” in the context of our definition of “adult maltreatment” may appear to create redundancy. We remind States they need only provide an assurance in their State plan that their vulnerability qualifier meets or exceeds our minimum standard of “at risk of harm” to fulfill the requirements of the rule.

Comment: We received comment that our definition of “at risk of harm” should include a specific timeframe for the adverse or detrimental event, condition, injury, or outcome.

Response: We thank commenters for their suggestion and have added that the adverse or detrimental event, condition, injury, or outcome will occur “imminently.”

Comment: We received comment that “adverse” and “detrimental” were always undesirable and the clause was thus redundant.

Response: We have edited the definition accordingly by removing “undesirable” and thank the commenter.

“Allegation”

Comment: We received support for our definition as proposed as well as suggestions for improvement. One commenter noted that not every reporter knows or suspects a specific alleged perpetrator and suggests removing the term “accusation” from the definition. Relatedly, another commenter suggested we define “report.”

Response: We appreciate commenters’ input. Used in this context, “accusation” represents a reporter’s suspicion of adult maltreatment and does not require a reporter to accuse a specific perpetrator. We are finalizing this definition as proposed. We have added a definition of “report” which contains reference to “allegation or allegations.”

“Assistant Secretary for Aging”

We proposed to define “Assistant Secretary for Aging” as the position identified in section 201(a) of the Older Americans Act (OAA), 42 U.S.C. 3002(7).

Comment: We received comment in support of our proposal.

Response: We thank the commenter and are finalizing the definition as proposed.

“Case”

Comment: We received comment in support of our proposed definition.

Response: We thank the commenter and are finalizing the definition as proposed.

“Client”

Comment: Several commenters noted that the proposed definition appears to exclude adults who receive services after an investigation is complete and suggested changing the definition to include “current or former” subjects of an investigation.

Response: We decline to include “current or former” in the final rule, as we believe that could require APS systems to provide services to all former clients. However, we have amended our definition of “client” from proposed “the subject of an *investigation by APS*”

to “the subject of an *APS response*” to reflect changes made throughout the final rule, including to § 1324.403, regarding APS response to allegations of adult maltreatment or self-neglect. We believe this better captures the holistic range of services APS provides, both during and after an investigation. Furthermore, our definition of client is a minimum standard. The definition would not prohibit APS from providing services to former clients in their response to adult maltreatment and self-neglect.

“Conflict of Interest”

We proposed “conflict of interest” to mean a situation that interferes with a program or program employee or representative’s ability to provide objective information or act in the best interests of the adult.

Comment: We received several comments on our proposed definition, one in support, another State entity that offered its own definition, and a few that suggested we amend the definition to include or exclude certain situations as conflicts of interest.

Response: We thank commenters for their input. We believe our current definition appropriately captures the universe of potential conflicts of interest. Individual instances of conflicts of interest are addressed in depth at § 1324.404 of this rule and discussed in the preamble. We have made minor amendments to the definition to conform with changes to § 1324.404.

“Dual Relationship”

Comment: Several commenters agreed with our proposed definition, while one commenter suggested we use a definition provided by the National Adult Protective Services Association or the National Association of Social Workers. Another commenter noted that to adopt our definition would require a change in State statute.

Response: We thank commenters for their suggestion. Our definition was based upon the National Association of Social Workers’ Code of Ethics, and the definition used in our 2020 Consensus Guidelines.²⁹ We are finalizing the definition as proposed.

“Emergency Protective Action”

Comment: We received several comments opposed to our definition, stating it reinforces a pipeline from APS to undesired guardianship. Commenters

²⁹ *Code of Ethics*, National Association of Social Workers (NASW), <https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English/Social-Workers-Ethical-Responsibilities-to-Clients> (last visited Jan. 22, 2024).

sought clarification regarding emergency out-of-home placement, APS authority, adherence with client self-determination, and least restrictive alternatives.

Response: ACL agrees that client self-determination is of primary importance, and that guardianship and conservatorship should be a last resort. The principles of self-determination and reliance on least restrictive alternatives are foundational to this rule, *see* § 1324.402(b)(1). APS uses a person-directed, trauma-informed approach, considering the unique needs, strengths, preferences, experiences, and goals of each adult. In relying on least-restrictive alternatives, APS maximizes adults' independence and community integration through holistic case planning and service provision, either directly or in coordination with community partners. This type of service provision, support, and collaboration is at the heart of effective APS practice and is relied upon in lieu of more restrictive options such as out-of-home placements or petitions for guardianship whenever possible.

Accordingly, we have modified our definition of emergency protective action to "immediate access to petition the court for temporary or emergency orders or emergency out-of-home placement." We have amended § 1324.403(c) to permit emergency protective action only as appropriate and necessary as a measure of last resort to protect the life and safety of the client from harm from others or self-harm. Finally, we have amended the definition of emergency protective action to remove the reference to the emergency use of APS funds to purchase goods and service and revised § 1324.403(c) to permit such activity as an appropriate response. Our modification of the definition, coupled with amendments to § 1324.403(c), more clearly and accurately describes the nature of an "emergency protective action" and when APS may appropriately pursue it. Finally, we also clarify there are statutory and regulatory authorities with which APS systems must comply, including Federal and State laws that require administration of programs, including APS, in the most integrated and least restrictive setting appropriate to meet the needs of individuals with disabilities and that prohibit discrimination on the basis of disability. These include Section 504 of the Rehabilitation Act and the Americans with Disabilities Act. Compliance with this rule does not address these obligations. The Department of Health and Human Services' Office for Civil Rights offers technical assistance on

these antidiscrimination requirements for covered entities, and we will likewise provide ongoing technical assistance on these anti-discrimination requirements.

Comment: We received a comment requesting that any requirement regarding access to the courts be accompanied by Federal regulations requiring those courts to grant APS access.

Response: We appreciate commenters' suggestion. It is outside the scope of this rule to require that State courts grant APS access.

Comment: One commenter requests clarity on "placement" (*i.e.*, involuntary), and whether lack of "immediate access" would affect funding eligibility.

Response: Per § 1324.403(c)(7), APS is required to have policies and procedures that permit emergency protective action when appropriate. ACL is not mandating a particular type of placement or strict definition of immediate action. We leave such decisions to State entities as they develop their policies and procedures under § 1324.403 and State plans under § 1324.408.

Comment: One commenter suggests the definition also include referral to conservatorship/guardianship, assessment for involuntary hold, and working with law enforcement and district attorneys to freeze bank accounts.

Response: ACL appreciates commenters' suggestions; however, we decline to incorporate commenters' suggestions in the definition. This Final Rule sets Federal minimum standards. State entities may include greater detail into their own definitions of "emergency protective action."

"Financial Exploitation"

Consistent with definitions in section 102 of the OAA, 42 U.S.C. 3002(18)(A), and section 2011 of the EJA, 42 U.S.C. 1397j(8), we proposed to define "exploitation" as the fraudulent or otherwise illegal, unauthorized, or improper act or process of a person, including a caregiver or fiduciary, that uses the resources of an adult for monetary or personal benefit, profit, or gain, or that results in depriving an adult of rightful access to, or use of, their benefits, resources, belongings, or assets.

Comment: We received comments suggesting we change the definition to "financial exploitation" to clarify the definition encompasses only exploitation that is financial in nature.

Response: "Financial exploitation" and "exploitation" are used

interchangeably in the OAA. We agree that the addition of "financial" to the definition increases clarity, we thank commenters for their input, and have revised the definition accordingly.

Comment: We received comments that our proposed definition of "exploitation" be broadened to include other forms of exploitation, for example, labor exploitation or the exploitation of a person.

Response: We appreciate commenters' suggestions and decline to make such a revision. "Exploitation," as we have defined it, is financial in nature. Financial exploitation is among the most reported forms of adult maltreatment and as such we require in this regulation that State APS systems intervene. However, consistent with the rule's structure as a minimum Federal standard for definitions and practice, nothing in our definition of exploitation would limit a State from broadening its own to be inclusive of, and more expansive than, ACL's promulgated definition. To encompass non-financial exploitation.

Comment: We received comments seeking clarification for whether this definition will also apply outside of a family or caregiver relationship.

Response: Financial exploitation may occur between an adult and a fiduciary or caregiver but is not limited to such relationships. For example, an internet scammer may be the perpetrator of financial exploitation.

Comment: A commenter suggested we change "improper" to "unauthorized."

Response: We decline the commenter's suggestion and instead retain both "improper" and "unauthorized" to ensure both types of financial exploitation are appropriately addressed.

Comment: ACL received a comment requesting that "misrepresentation, coercion, and threat of force" be included in our definition, as well as "deception."

Response: We appreciate these suggestions and reiterate our encouragement for States that wish to adopt definitions that go beyond the minimum Federal standard in the regulatory definition.

Comment: A State entity commented that it does not investigate scams, frauds, and thefts where an alleged perpetrator has no personal relationship with the adult. Rather, these cases are referred to law enforcement, and our proposed regulation, absent the presence of a trust relationship, would expand the universe of cases that they are required to take.

Response: We appreciate the comment and recognize that our rule

may, in some cases, increase the types of reports to which a State APS system may need to respond. We note that in some circumstances, referral to State securities and financial regulators, Federal financial and securities enforcement agencies for investigation or other entities with investigatory jurisdiction may be appropriate. See §§ 1324.403(a) and 1324.406(a)(3). This rule requires that APS systems have policies and procedures to *respond* to reports of financial exploitation, with “response” defined broadly per § 1324.401, and a referral to appropriate entities would constitute a “response” under this definition.

We believe the benefit of our rule outweighs any burden incurred and will support States in their ongoing implementation of the rule. Please see our discussion of “trust relationship.”

“Finding”

Comment: We received comments requesting we define “finding” and, relatedly, “disposition” and “determination.” Commenters also requested we use terms consistently.

Response: “Finding,” “disposition,” and “determination” are often used interchangeably, depending on the State. For the purpose of this regulation, “finding” means the decision made by APS after investigation to determine that evidence is or is not sufficient under State law that adult maltreatment and/or self-neglect has occurred.

“Inconclusive”

Comment: A commenter recommended revising the definition of “inconclusive” to align with the definitions of “substantiated” and “unsubstantiated” meeting State law or agency policy, while a couple of commenters suggested striking this definition entirely because their State APS system did not include it. One commenter questioned whether “inconclusive” remains open to acquire additional information, or whether this applies to specific situations (*i.e.*, unable to locate).

Response: In response to commenter feedback and to improve clarity, we have updated the definition of “investigation” and removed the use of “substantiated,” “unsubstantiated,” and “inconclusive.”

“Intake or Pre-Screening”

Comment: We received comment in support of our proposal.

Response: We thank commenters and are finalizing as proposed.

“Investigation”

Comment: We received numerous suggestions for modifying our proposed definition of “investigation.” According to one commenter, the proposed definition was too restrictive, as APS should be able to perform both investigation and service delivery. One commenter indicated State law requires investigators to look beyond the allegation to whether there are additional risks to the victim that require services. This commenter suggested the definition be changed to “gather information about possible maltreatment.”

One commenter explained that its State uses findings of “verified, some indication, or no indication” instead of “substantiated, unsubstantiated, or inconclusive.” Another commenter recommended revising the definition to acknowledge that an investigation may be more expansive than simply investigation of a single allegation. For example, an investigation of one allegation may unearth evidence of other maltreatment or self-neglect. A commenter offered, “[i]nvestigation means the process by which APS examines and gathers information about a report of *possible* maltreatment to determine if the circumstances of the allegation meet the State’s standards of evidence for a finding of a substantiated, unsubstantiated, or inconclusive allegation.”

Response: We appreciate the comments about our definition. We have accepted language proposed by commenters. Our final definition of investigation is “the process by which APS examines and gathers information about a possible allegation of adult maltreatment and/or self-neglect to determine if the circumstances of the allegation meet the State’s standards of evidence for a finding.” We believe these revisions adequately address commenters’ concerns.

“Mandated Reporter”

Comment: We received comments in support of our proposal, as well as several comments suggesting we offer a list of who should be a mandated reporter in each State. These suggestions were often based on State law definitions of a mandated reporter.

We also received comment on § 1324.405(b) that, for the purposes of this rule, mandated reporters should be limited to professionals who are required to report adult maltreatment to APS. A commenter noted that in 16 States all persons are mandated reporters, and in one State, no one is a mandated reporter.

Response: Consistent with changes made to § 1324.405(b), we are amending our definition of mandated reporter to clarify that our rule applies only to a professional encountering an adult in the course of their professional duties who is required by State law to report adult maltreatment or self-neglect to APS.

“Neglect”

We proposed, consistent with the definitions in section 102 of the OAA, 42 U.S.C. 3002(38) and section 2011 of the EJA, 42 U.S.C. 1397j(16), to define “neglect” as the failure of a caregiver or fiduciary to provide the goods or services that are necessary to maintain the health and/or safety of an adult.

Comment: One commenter suggested our definition may be too narrow, and that because health and safety may be jeopardized simultaneously, that we instead write “health and/or safety.”

Response: We thank commenter for their suggestion and have amended our definition accordingly.

Comment: Some commenters pointed out that our definition does not address a caregiver or fiduciary’s state of mind, which is a necessary element of the definition. It was suggested by one commenter that a caregiver not be penalized if they were not aware of the needs of an adult or the threat to safety or health.

Response: We appreciate these comments. As discussed above, the definition of “abuse” incorporates the intent and mindset of a potential perpetrator and appropriately captures cases where a caregiver or fiduciary knowingly deprives an adult goods or services necessary to maintain health and/or safety. We refer readers to our preamble discussion of the definition of “abuse” for a more detailed explanation of the interaction between cases of “abuse” and “neglect.”

Comment: We received comment asking us to define “fiduciary” and “caregiver.”

Response: We thank commenters for their request. We decline to define the terms “caregiver” and “fiduciary” and instead leave definitions to State discretion. We believe allowing States leeway to determine what constitutes a “caregiver” or “fiduciary” as it pertains to this rule provides valuable flexibility to meet State needs.

Comment: A commenter suggested that our proposed definition does not align with States’ efforts to establish person-directed principles. The commenter recommended revising the definition of neglect to clarify that caregivers and fiduciaries fulfill an official role and that neglect exists only

within the bounds of this legal relationship by amending the definition to read “the failure of a caregiver or fiduciary to act under their legal responsibility[.]”

Response: We thank commenters for their suggestions; however, we believe confining neglect to a legal relationship between a caregiver and fiduciary is overly narrow and unnecessarily limiting. Research shows that most caregiving in the United States is performed by informal caregivers.³⁰

Comment: A few commenters noted there should be reference to actual injury or serious harm.

Response: We thank commenters for their response. We believe reports of neglect can and should be responded to before there is actual injury or harm. We note that to be eligible for APS services under this rule, an adult must already be at risk of serious harm occurring imminently.

Comment: A commenter asked that we include “abandonment” in our definition.

Response: We decline to include “abandonment” in our definition. Our regulatory definition mirrors Federal statute. State entities that wish to go above our minimum standard to incorporate abandonment in their definition of neglect may do so.

Comment: ACL received comment suggesting we include a narrow definition of “physical and mental health” in our definition of “neglect.”

Response: We decline to include “physical and mental health” in our definition. Our regulatory definition mirrors Federal statute. We are available to provide ongoing technical assistance to implement the definitions in this rule.

“Perpetrator”

Comment: We received comment in support of our definitions, as well as several comments suggesting we more clearly articulate the difference between an “alleged perpetrator” and a “perpetrator.” Another commenter offered that perpetrator tends to suggest criminal intent and sparks confusion, and one State entity noted that they do not use the term “perpetrator.”

Response: We thank commenters for their input and are finalizing the definition as proposed. We have taken care throughout the rule to precisely denote alleged versus substantiated perpetrator. We intend for these definitions to be guides. We will not

require States to adopt the definitions word for word. Instead, we will evaluate State definitions together to assess whether statutory intent is reflected. Please see our discussion above for more detail regarding our expectations of State APS entities’ evaluation of their current definitions, and the potential amendment of current definitions and/or adoption of new definitions. We will be available to provide technical assistance as necessary.

“Post-Investigation Services”

Comment: A few commenters opposed the inclusion of a definition for post-investigation services in the final rule, and a few commenters recommended changes or requested clarification about the definition. One commenter indicated that their State does not have a definition for post-investigation services in statute, so defining the term in their State would require legislative action.

Some commenters indicated that APS services should not be reliant upon or limited to a timeframe that is implied by the term “post.” A few commenters opposed including this definition in the rule because the lifespan of an APS case continues beyond the initiation of an investigation and may include services that mitigate the risk of future adult maltreatment. Another commenter noted that the State handles cases from beginning to end, and that adding additional services would require more staff.

One commenter proposed that the definition include the “principles of restorative justice.”

Response: We thank commenters for their suggestions. Throughout the regulation in response to commenter feedback we have emphasized holistic APS response and replaced “investigation” with “response” when appropriate. “Response” is inclusive of activities and actions undertaken as the result of a report received by APS. These activities and actions include, but are not limited to, post-investigation services. Given the new definition of “response,” our proposed definition of “post-investigation services” is redundant. We have amended § 1324.403 to reflect this change.

“Quality Assurance”

Comment: One commenter reported that their State does not review all case closures or ongoing cases, so including a quality assurance review process in the APS program would require potentially burdensome changes. One commenter suggested the final rule include more specificity on quality assurance programs.

Response: This rule does not require that State entities establish quality assurance programs, as most already have such processes. We encourage APS systems at § 1324.406(b)(3) to coordinate their quality assurance activities. We have finalized this definition as proposed.

“Report”

Comment: We received comment requesting that we add the definition of “report” as “a formal account or statement regarding an allegation or multiple allegations of adult maltreatment and the relevant circumstances surrounding the allegation or allegations.”

Response: We thank commenters for their suggestion and agree a definition of “report” will improve regulatory clarity and consistency and have accepted this suggested definition. We have also added “self-neglect” to the definition of “report” to reflect our revisions to the definition of “adult maltreatment.”

“Response”

Based on comments we received and changes we have made to other sections of the rule, we are adding a definition for “response.” We define “response” as “the range of actions and activities undertaken as the result of a report received by APS.”

“Screening”

Comment: One commenter noted that denied referrals are not referred for services in their State. The commenter requested clarification on whether all calls would have to be referred for services.

Response: Under §§ 1324.402 and § 1324.403, APS State entities must develop policies and procedures to receive and respond to reports of adult maltreatment and self-neglect, which include a process for screening and referring adults for services. Not all cases will necessarily be accepted or referred for services. We have finalized this definition as proposed.

“Self-Neglect”

Consistent with the definitions in section 102(48) of the OAA, 42 U.S.C. 3002(48), and section 2011 of the EJA 42 U.S.C. 1397j(18), we proposed to define self-neglect as: “an adult’s inability, due to physical or mental impairment or diminished capacity, to perform essential self-care tasks including:

- (1) Obtaining essential food, clothing, shelter, and medical care;
- (2) Obtaining goods and services necessary to maintain physical health, mental health, or general safety, or;

³⁰ U.S. Dep’t of Health & Hum. Servs., Admin. For Cmty. Living, 2022 National Strategy to Support Family Caregivers (Sept. 21, 2022), https://acl.gov/sites/default/files/RAISE_SGRG/NatlStrategyToSupportFamilyCaregivers-2.pdf.

(3) Managing one's own financial affairs.

Comment: We received a significant number of comments on this proposed definition. Specifically, commenters requested that we remove "self-neglect" from the definition of "adult maltreatment." Commenters noted that there is no perpetrator in self-neglect and that APS programs' responses to cases of self-neglect differ significantly from investigation and substantiation in cases of abuse, neglect, exploitation, and sexual abuse.

Response: We thank commenters for this suggestion and agree. We have accepted these comments and separately define "self-neglect" and "adult maltreatment" in this final rule. Please see our discussion in the definition of "adult maltreatment."

Comment: We received comments that our definition of self-neglect did not adequately account for personal, informed, and voluntary lifestyle choices, such as the decision not to access medical care or to live in clean surroundings. Furthermore, commenters pointed out that some people with disabilities may not be able to perform self-care tasks without assistance from services and supports, but that does not mean there is a role for APS in such cases.

Response: We thank commenters for their input. An adult is presumed to have capacity until found to lack capacity by a court of law. Provided they are not determined by a court of law to be lacking capacity, APS programs should start from the presumption that an adult has the capability to choose to live how they desire. Distinctions between an adult making a personal, informed, and voluntary choice about how they wish to live and the inability to care for oneself are critical to a person-directed definition of self-neglect. This distinction is also central to supporting the dignity of risk of older adults and adults with disabilities to make decisions to support their autonomy. As discussed below, the regulatory definition of self-neglect is intended to be person-directed, while recognizing that self-neglect may at times create a serious risk of imminent harm to oneself or others, at which point intervention will likely be warranted. We note commenters' concerns and confirm that an adult's status as a person with a disability who may require services and supports to perform essential self-care tasks is not, in and of itself, a justification for APS intervention.

Comment: We received comment that our definition of self-neglect was overly broad and would increase

investigations. One commenter noted that their State required "significant risk to health or safety" as a component of self-neglect.

Response: We thank commenters for their input. We agree that in assessing self-neglect it is important to focus on the existence or potential for harm to the adult as well as to others, rather than on the abilities or decisions of the adult. We have revised the definition to clarify that states must, at a minimum, define self-neglect to include situations in which there is serious risk of imminent harm to oneself or to others. Again, our standards are a minimum floor, and States may use a broader definition of self-neglect, expanding the types of situations that they investigate. However, in defining self-neglect, we encourage States to look at the level of risk posed by specific situations. Such an approach not only focuses resources on the cases with highest need, but it also advances the goal of APS in promoting self-determination and person-directedness and supporting adults in making their own decisions in line with their values and wishes.

Comment: A few commenters requested we strike "diminished capacity" from our definition, as it places unnecessary burden on APS to make a capacity determination. One commenter suggested we replace "diminished capacity" with "diminished ability" to encompass physical and mental function. Relatedly, another commenter requested we more clearly define and delineate concepts of diminished capacity and diminished capability.

Response: Section 102(48) of the OAA, 42 U.S.C. 3002(48), and section 2011 of the EJA 42 U.S.C. 1397j(18) use the language "diminished capacity" in the definition of self-neglect. We note here and elsewhere, however, that "diminished capacity" is a legal determination that APS Programs do not have the authority to make. Because courts, not APS programs, make all capacity determinations we disagree with commenters that discerning diminished capacity will add burden.

Comment: Several commenters sought guidance surrounding the interaction of self-neglect with neglect from a caregiver or fiduciary with whom there is a trust relationship.

Response: We thank commenters for their question. Nothing in this regulation prohibits an APS program from substantiating multiple findings for multiple allegations in a report. This is common in APS practice, and we leave these decisions to the discretion of APS programs. Whether responding to an allegation of neglect or self-neglect,

APS provides person-directed, trauma-informed assessment, investigation, and service planning, including recommendations or referrals to other entities, such as social services programs.

Comment: ACL received comment suggesting that we explicitly include "financial self-neglect" in our definition.

Response: We believe the inclusion of "(3) managing one's own financial affairs" is sufficient to capture "financial self-neglect," and we decline to include a separate definition of "financial self-neglect."

Comment: A commenter asked whether "general safety" includes hoarding, failure to engage in proper home maintenance, or maintaining utility services, to ensure the safety and livability of the home.

Response: We appreciate the commenter's request for greater specificity; however, we decline to provide further detail in this regulation. APS systems have the discretion to provide this level of detail in their definition of self-neglect, and in their policies and procedures for responding to reports of self-neglect. We remind States that the definition of self-neglect in the final rule sets the minimum Federal standard. In this case, APS must at least accept cases based on self-neglect where there is a serious risk of imminent harm to oneself or others but may choose to adopt a more expansive definition. We will provide ongoing technical assistance to State entities and APS programs as they implement this rule, including related to the definition of self-neglect.

"Sexual Abuse"

The OAA does not define "sexual abuse" but defines "sexual assault" at section 102(50), 42 U.S.C. 3002(50), to have the meaning given in section 2003 of the Omnibus Crime Control and Safe Streets Act of 1968, 34 U.S.C. 12291(a)(35).

Comment: We received several comments suggesting our definition explicitly consider a victim's ability or inability to consent to a sexual interaction. A commenter suggested "unwanted" interaction was too subjective to determine and a determination of consent was more appropriate. Several other commenters maintained that our definition should acknowledge situations involving a power imbalance where a victim may be coerced into agreeing to sexual interaction.

Response: We appreciate commenters' thoughtful suggestions and have amended our definition to replace

“unwanted” with “non-consensual.” This change brings our definition into greater conformity with the statutory definition at 34 U.S.C. 13391.

We acknowledge the potential difficulty of defining and making fact-specific determinations of what constitutes consensual and non-consensual contact. We defer to the expertise of APS workers as they respond to reports of sexual abuse in collaboration with law enforcement (when appropriate) and perform person-centered screening, intake, triage, investigation, and service planning. We will provide ongoing technical assistance to States as they implement this rule.

Comment: One commenter noted that their State APS system does not investigate sexual abuse and instead leaves this matter to law enforcement, while only providing services to victims.

Response: Our rule does not prohibit APS from allowing law enforcement to perform investigative functions for cases of alleged sexual abuse while APS performs service delivery. As discussed in §§ 1324.402 and 1324.403 and elsewhere in this rule, the rule requires that APS systems have policies and procedures to *respond* to reports of sexual abuse, with “response” defined broadly per § 1324.401 to include referrals to appropriate entities. In cases of alleged sexual abuse, the APS response may be to refer the case to a more appropriate entity for investigation, and law enforcement can be an appropriate entity to investigate such cases.

Comment: We received comment suggesting our definition include “sexual harassment” “sexual exploitation,” “shaming acts,” and “sex trafficking.”

Response: We thank commenters for their suggestions, which we believe were adequately captured by our proposed definition, which we have retained in the final rule. We remind State APS systems that they may adopt definitions that go above our minimum Federal standard and encourage them to include greater detail in their policies and procedures.

Commenter: A commenter requested we define “non-touching acts” and “sexual interaction.”

Response: We appreciate this comment and defer to State interpretation. We will provide ongoing technical assistance to States as they develop and implement this rule, including as they develop State-specific definitions as desired.

“State Entity”

Comment: A commenter agrees that there should be APS regulations and standardization but does not believe that the requirements of the proposed rule should apply to Tribal governments. Another commenter reported that its State APS program is bifurcated, so the definition of “State entity” requires clarification.

Response: Tribal governments do not receive funding through EJA APS formula grants (42 U.S.C. 1397m–1), thus this rule does not apply to Tribal governments. We discuss this in greater detail in our background section on Tribal considerations. We encourage APS collaboration with Tribal governments per § 1324.406(a)(2)(iv). As noted in § 1324.400 and its preamble discussion, however, we have determined that the rule applies to bifurcated systems. We are therefore amending the definition of “State entity” to “the unit or *units* of State, District of Columbia, or U.S. Territorial government[.]”

“Trust Relationship”

We proposed that “trust relationship” mean “the rational expectation or belief that a relative, friend, caregiver, or other person with whom a relationship exists can or should be relied upon to protect the interests of an adult (as defined above) and/or provide for an adult’s care. This expectation is based on either the willful assumption of responsibility or expectations of care or protection arising from legal or social conventions.”

Comment: We received a few comments in support of the inclusion of a “trust relationship” in the definition of adult maltreatment. However, a significant majority of commenters, including nearly all State APS entities that commented, opposed to the inclusion of “trust relationship” in the definition of adult maltreatment.

Some commenters asserted that the definition was confusing and contradictory. Many commenters stated that requiring a “trust relationship” between the adult and the other person may preclude APS programs from investigating maltreatment such as online or phone scams committed by a stranger. Some commenters asserted that referral to other entities for situations of adult maltreatment that fell outside a trust relationship may allow adult maltreatment to fall through the cracks where referral sources or services are scarce or unavailable.

A number of commenters noted that the definition of “trust relationship” is unclear and would be difficult to

operationalize. For example, “social convention” may vary across cultural practices. Furthermore, requiring a trust relationship would create an evidentiary burden that would be challenging for APS workers to screen for, particularly during an initial intake.

We received comments suggesting that if we retain “trust relationship,” then we should remove it as a condition of eligibility for APS and instead move it to new § 1324.402(b), requiring States to investigate cases involving a trust relationship, as well as § 1324.402(c) clarifying that APS may also investigate cases where there is *not* a trust relationship between alleged perpetrator and alleged victim.

Response: We are removing the requirement of a trust relationship from the definition of “adult maltreatment” and from the definitions section of this rule in response to feedback from commenters.

In developing our proposal to require APS systems investigate allegations of abuse, neglect, sexual abuse, and financial exploitation in the context of a trust relationship, we sought to ensure we did not inadvertently expand the scope of APS programs’ work. Such expansion could increase intakes and corresponding caseloads, potentially requiring more staffing and funding. We did not intend to limit States’ investigations *only* to abuse, neglect, financial exploitation, and sexual abuse perpetrated in the context of a trust relationship.

For example, under our proposal, we would not prohibit States from investigating fraud and scams perpetrated by a stranger. Rather, we had sought to ensure that *at a minimum* and as a condition of receiving EJA formula grants (42 U.S.C. 1397m–1) under § 1324.400 of our proposed rule, all States investigated abuse, neglect, financial exploitation, and sexual abuse perpetrated by a person with whom an adult had a trust relationship. This is commensurate with CDC recommendations and in recognition of the particularly egregious nature of the power and control dynamic that exists in cases of abuse, neglect, financial exploitation, and sexual abuse committed when a trust relationship exists.³¹

However, we concur with commenters that determining the presence of a trust relationship and implementing and operationalizing this

³¹ U.S. Dep’t of Health & Hum. Servs., Ctrs. For Disease Control and Prevention, Elder Abuse Surveillance: Uniform Definitions and Recommended Core Data Elements, https://www.cdc.gov/violenceprevention/pdf/ea_book_revised_2016.pdf (Feb. 29, 2016).

provision, particularly during initial intake, may be burdensome, and its application may result in unintended consequences. We likewise recognize APS programs are experts in the types and nature of the adult maltreatment occurring in their local communities and have ensured our rule allows State systems the flexibility to prioritize and respond to cases based on their expertise.

We continue to stress to State APS systems the importance of investigations where the adult is in a relationship of trust with the alleged perpetrator, and we encourage States to prioritize APS program responses to such reports.

“Unsubstantiated”

We have updated the definition of “investigation” and removed the use of “substantiated,” “unsubstantiated,” and “inconclusive.”

“Victim”

Comment: Some commenters opposed using the term “victim” and recommend the use of the terms “client” or “adult” in the final APS rule. Another commenter suggested the use of “survivor” which is more strengths-based. One commenter reported that its State program uses the terms “victim” and “client” interchangeably within State statutes, but APS programs generally prefer the term “client.” Another commenter recommended that the definition be changed to “alleged victim” because most reports to APS programs are not substantiated. A commenter stated there would need to be State legislative action to include the definition for “victim” in their State APS statutes.

Response: We thank commenters for their suggestions and note that “victim” is a subset of “client” where there is a finding of adult maltreatment. “Adults,” as defined in this rule, become clients when they are screened in by APS. If APS makes a finding that an allegation of maltreatment has occurred, or is likely to have occurred, as defined by State statute, the client is a victim. “Victim” is currently the terminology used by NAMRS and the majority of APS systems. We are finalizing our definition as proposed but have consistently replaced “victim” with “adult” or “client” where alternate terminology is more appropriate.

C. Section 1324.402 Program Administration

We have revised § 1324.402 to more clearly articulate requirements related to incorporation of the regulatory definitions. Section § 1324.402(a) requires State entities to establish

definitions for APS systems that incorporate every defined term and all of the elements of the definitions in § 1324.401, which establish a minimum standard, as discussed above. State definitions may not narrow the scope of adults eligible for APS or services provided. However, State entities are not required to uniformly adopt the regulatory definitions. Section 1324.402(a)(1)–(4) requires the State entity to establish definitions for: the populations eligible for APS; the specific elements of adult maltreatment and self-neglect that render an adult eligible for APS; the alleged perpetrators who are subject to APS investigations in the State; and the settings and locations in which adults may experience maltreatment or self-neglect and be eligible for APS in the State.

Section 1324.402(b) requires APS systems to respond to reports of adult maltreatment, which include allegations of abuse, neglect, financial exploitation, and sexual abuse, as well as reports of self-neglect, and requires the State entity to create, publish, and implement certain policies and procedures for receiving and responding to reports of adult maltreatment and self-neglect. Section 1324.402(b)(1) requires the policies and procedures to be person-directed and rely on the concept of the least restrictive alternative.

Under § 1324.402(b)(2), State APS entities must define in their policies and procedures processes for receiving, screening, prioritizing, and referring cases based on risk and the nature of the adult maltreatment and self-neglect in a standardized fashion across their State. Per § 1324.402(b)(2)(i), these policies and procedures include a tiered, risk-based assessment system, differentiating response requirements for cases that represent immediate and non-immediate risks. Immediate risk is assessed via the likelihood of death, irreparable harm, or significant loss of income, assets, or resources. Responses must occur no later than 24 hours after receiving the report for cases representing an immediate risk and no later than seven calendar days for cases of non-immediate risk.

We have made revisions throughout § 1324.402, and added “self-neglect” throughout to reflect changes to our definition of “adult maltreatment” in § 1324.401. We retain § 1324.402(b)(2)(i) (formerly § 1324.402(a)(4)(i)) as proposed with the clarification that our requirements may be met by referral to emergency management systems or other entities with the capability of responding within 24 hours.

Under § 1324.402(c), State entities must establish policies and procedures

to inform potential APS clients of their APS-related rights under State law at first contact with the potential client. APS programs are required to inform potential APS clients of their rights in the format and language preferred by the adult, including those with limited English proficiency and adults with disabilities. We have renumbered § 1324.402(b) as § 1324.42(c), but otherwise are finalizing it as proposed.

We proposed in § 1324.402(d) that State entities create policies and procedures for the establishment of minimum staff to client ratios for APS systems. In response to comments by APS State entities, national associations representing APS systems, and others, we are not finalizing proposed § 1324.402(d)(3).

Our proposal at § 1324.402(e) required that State entities establish such other program administration policies and procedures and provide other information to APS clients as established by the Assistant Secretary for Aging. We have decided not to finalize proposed § 1324.402(e).

We received many comments from interested parties with detailed suggestions for improvements to our proposals and many seeking clarity on policies contained in our proposed rule. We discuss comments and responses below.

Comment: We received comments from State APS entities, a disability stakeholder, and a research group addressing public disclosure of State policies and procedures. Most commenters were either neutral or in support of leaving disclosure of policies and procedures to State discretion. One commenter suggested that States not be required to make policies and procedures public, but that they be made available upon request. Another commented that it would be helpful in their advocacy and investigations if States were required to disclose policies and procedures publicly.

Response: Based upon the comments we received, the final rule requires States to publish APS policies and procedures. State entities should make their policies and procedures public through publishing them online, or via similar publication method.

Comment: We received general comments in support of our proposal to standardize policies and procedures for receiving and responding to reports of adult maltreatment and self-neglect.

Response: We appreciate commenters’ support.

Comment: Many commenters wrote in support of our provision requiring APS to respond to adult maltreatment and self-neglect, with a few stressing the

importance of flexibility and State discretion. Many APS systems and national stakeholder associations also commented that it is essential that our rule does not impede APS systems' ability to divide and share investigative responsibilities with law enforcement entities and other entities with jurisdiction over investigative functions. One commenter noted that APS should not duplicate the work of other entities, and other commenters emphasized the importance of referral relationships in APS response to abuse, neglect, financial exploitation, sexual abuse, and self-neglect.

Response: We appreciate commenters' responses. The regulation at § 1324.408 requires APS entities to provide assurances in their State plans that they have developed policies and procedures outlining their response to reports of abuse, neglect, financial exploitation, sexual abuse, and self-neglect. Our rule permits State systems significant latitude in the development and application of these policies and procedures, and the regulation does not prohibit referral or collaboration to meet the investigatory requirements of § 1324.402 and § 1324.403. For example, we specifically include law enforcement and State licensing and certification bodies as key partners in § 1324.406. We acknowledge that, in certain cases, particularly in circumstances such as reports of sexual abuse, referral and investigation by law enforcement with case planning and service delivery by APS is the appropriate response for both the alleged victim and the APS program.

Comment: We received a question as to whether States would be permitted to place income restrictions on qualification for APS services.

Response: APS is a social services program serving older adults and adults with disabilities who need assistance because of abuse, neglect, financial exploitation, sexual abuse (adult maltreatment), and self-neglect. In all States, APS is charged with receiving and responding to reports of adult maltreatment and self-neglect. Adult maltreatment and self-neglect affect people of all income levels: accrued wealth is not protector against maltreatment nor is it a remedy. It is contrary to the intent of the EJA and OAA to impose income restrictions for eligibility or receipt of APS services.

Comment: We received comment in support of our proposal at § 1324.402(a)(1) (now § 1324.402(b)(1)), with several commenters noting that their APS systems already incorporate principles of person-directedness. Some commenters specifically noted that guardianship should be used only as a

last resort, and one commenter noted the importance of decisional supports for those with diminished capacity. Other commenters suggested that sometimes APS programs must seek guardianship and that APS must act against the wishes of the adult per State law.

Response: The principles of person-directed services and planning and reliance on least restrictive alternatives are foundational to the protection of the rights of adults. They are set forth in the OAA,³² Rehabilitation Act of 1973,³³ the Americans with Disabilities Act,³⁴ the EJA,³⁵ the Affordable Care Act,³⁶ among other laws, as well as in the Supreme Court decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999). These laws establish separate and independent legal obligations for covered entities; while this final rule is intended to ensure APS policies and practices are consistent with the principles of person-directedness, self-determination, and integration that are foundational to the statutes listed above, the approval of a State APS plan under this regulation does not mean that the State or APS is in compliance with other statutory obligations, including the obligation to avoid discrimination based on disability.

Under this final rule, therefore, a primary goal of APS in responding to reports of adult maltreatment and self-neglect is to promote self-determination and person-directedness, and to support

³² An objective of the OAA is "Freedom, independence, and the free exercise of individual initiative in planning and managing their own lives, full participation in the planning and operation of community-based services and programs provided for their benefit, and protection against abuse, neglect, and exploitation." OAA section 101(10), 42 U.S.C. 3001(10).

³³ The Rehabilitation Act of 1973, as amended Title VII, chapter 1 states the current purpose of the program is to "promote a philosophy of independent living including a philosophy of consumer control, peer support, self-help, self-determination, equal access, and individual and system advocacy, in order to maximize the leadership, empowerment, independence, and productivity of individuals with disabilities, and the integration and full inclusion of individuals with disabilities into the mainstream of American society." 29 U.S.C. 796.

³⁴ Congress stated in the ADA's statutory findings that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency." 42 U.S.C. 12101(a)(7).

³⁵ The EJA defines elder justice to mean "efforts to [. . .] protect elders with diminished capacity while maximizing their autonomy, and [. . .] the recognition of an elder's rights[.]" EJA section 2011, 42 U.S.C. 1397(5).

³⁶ Section 2402(a) requires removal of barriers to providing home and community-based services through strategies to maximize the independence of individuals, including through support and coordination for an individual to design an self-directed, community-supported life.

adults in making their own decisions in line with their values and wishes. APS programs should start from the presumption that an adult has the capability to make all decisions, where a court has not already rendered a legal decision about the adult's decision-making capacity. Decisional capability can vary from situation to situation, from day to day, and at different times within the same day. Capability to make decisions may be affected by economic resources, fear, health status, medication, or by maltreatment. Adults with memory loss or intellectual and cognitive disabilities may have the capability to make decisions, including with the assistance of a trusted supporter. Refusal to accept APS services or refusal to participate in an APS investigation, as well as insistence upon taking action that APS considers not in the person's best interest, is not necessarily (and should not be presumed to be) an indication of lack of decisional capability or diminished capacity.

In promoting decisional capability and least restrictive alternatives, APS programs should recommend guardianship, whether they themselves are petitioning for guardianship, accepting a court appointment to serve as a guardian, or referring to another entity to petition for or serve as guardian, only as a last resort if lesser-restrictive measures have been exhausted or determined not feasible. APS programs already work with their clients to provide or connect them with the services and supports that enable them to direct their care and life choices. Among these are Medicaid home and community-based services (HCBS); OAA-funded programs such as congregate and home-delivered meals, homemaker and chore services, and transportation; and the Supplemental Nutrition Assistance Program (SNAP), among others. APS programs can assist clients to arrange for less restrictive decisional supports, both formal and informal, such as powers of attorney, and health care advanced directives. Guardianship is rarely needed where services and less restrictive decisional supports are appropriately used.

As we further explain in our discussion of § 1324.404, Conflicts of Interest, we have clarified in this final rule that an APS program petitioning for or serving as guardian constitutes a dual relationship that will only be considered unavoidable if all less restrictive alternatives to guardianship have been considered.

Comment: We received comment on proposed § 1324.402(a)(3) requiring State APS entities to define the settings,

locations, types of maltreatment, and alleged perpetrator(s) that APS will investigate. We also received comment suggesting that APS be required to investigate maltreatment in long-term care settings. Another commenter noted that our proposal may require a change in State statute if the rule requires investigation in long-term care settings. One commenter asked that we clarify the meaning of “types of alleged perpetrator.” Another commenter suggested APS often “splits jurisdictions” with another entity, with relationships memorialized both formally and informally.

Response: We have revised § 1324.402 to incorporate and clarify the requirements proposed at § 1324.402(a)(2)–(3). In this final rule, § 1324.402(a) requires State entities to establish definitions for APS systems that: (1) define the populations eligible for APS; (2) define the specific elements of adult maltreatment and self-neglect that render an adult eligible for APS; (3) define the alleged perpetrators who are subject to APS investigations in the State; and (4) define the settings and locations in which adults may experience adult maltreatment or self-neglect and be eligible for APS in the State. Consistent with our proposal, the final rule does not enumerate the types of settings where APS systems must perform investigations—whether a congregate care setting, community-based setting, or other type of setting. Rather, it requires that States establish a definition to standardize the settings the State chooses, or is required by State law to, investigate.

APS entities must also establish definitions to standardize the types of relationships they choose or that they are required by State law to investigate. “Type of perpetrator” as used in proposed § 1324.402(a)(3) refers to the relationship between the alleged victim and perpetrator. For example, a type of perpetrator may be a family member, nursing facility staff member, or relative caregiver (paid or unpaid). Our rule does not enumerate specific types of alleged perpetrators that a State must investigate; it requires that the State establish definitions to standardize which types of perpetrators they choose to, or are required by State law to, investigate.

Comment: We received comments on our proposal at § 1324.402(a)(4)(i) from several State entities noting that they currently maintain a tiered risk system (indicating their priority response levels) that is three tiers or more. A few commenters sought confirmation that these systems would satisfy the

requirements of proposed § 1324.402(a)(4)(i).

Response: We recognize there is diversity across State systems’ priority response levels. A system with three or more tiers is compliant with our requirements at § 1324.402(b)(2)(i) (proposed § 1324.402(a)(4)(i)) provided it meets, at a minimum, the immediate and non-immediate timeliness requirements of § 1324.402(b)(2)(i)(A) and (B). State APS entities must develop a process for screening, prioritizing, and referring reports based on risk. This system should include *at least two tiers* for initial contact with an alleged victim. These tiers are based on assessment of the immediate risk of death, irreparable harm, or significant loss of income, assets, or resources. However, our regulation is a minimum standard. A State is permitted to employ a three-tiered system (or greater) provided cases are screened, prioritized, and referred based on immediate and non-immediate risk and the initial contact requirements of § 1324.403(b)(2)(i) and (ii) are adhered to. We discuss the two-tiered system requirements in greater detail below.

Comment: We received many comments on our proposal at § 1324.402(a)(4)(i)(A) (now at § 1324.402(b)(2)(i)(A)) opposed to a required response time of 24 hours in the case of immediate risk. Commenters noted that many State systems do not currently have the necessary infrastructure to meet our proposal and that compliance would require significantly increased staffing and attendant expense. Commenters suggested using law enforcement and emergency response systems to satisfy the 24-hour immediate risk response requirement, with many suggesting that they already have such collaborative referral systems in place. One commenter noted that requiring APS to respond to emergency situations may put an APS workers’ safety at risk. Others suggested we amend our proposal to one business day to better account for staffing restrictions. A few commenters sought guidance on how to calculate risk and examples of immediate and non-immediate responses.

Response: We thank commenters for their suggestions and questions. First, it is important to distinguish between the requirement to *accept* a report (further discussed under § 1324.405), and the requirement to respond within 24 hours in cases of immediate risk. As we discuss in further depth below, APS programs must respond within 24 hours of retrieving a report from the system that accepts reports 24 hours per day,

seven days per week (24/7) (for example, retrieving an email from a 24/7 inbox), and then screening-in the case.

To satisfy the “in-person contact within 24 hours” requirement for immediate risk cases, APS programs may refer adults to emergency response systems, law enforcement, or other appropriate community resources (e.g., homeless outreach, veteran’s affairs, services for victims of sexual assault). It is not our expectation that a case or service plan will be complete (or necessarily even have begun, depending on the situation) within 24 hours. Our requirement is that States have policies and procedures to ensure that APS *responds* within 24 hours of retrieving and screening-in an immediate risk report. This response may be an in-person visit by APS or by APS accompanied by another entity. APS may also refer the report to another appropriate entity that is able to make an in-person visit within the designated 24 hours. If a reporter files a report outside business hours, the 24-hour time limit for APS response will not begin until APS retrieves the report, and the case is screened-in. For immediate risk reports, APS programs should establish mechanisms to refer reporters to emergency response systems, police, or other 24-hour response resources, particularly for reports that come in after business hours. This may be accomplished, for example, through an away message on a hotline or email. We discuss expectations around 24/7 methods of accepting reports in § 1324.405.

We defer to States in determining what meets the threshold of immediate need or “risk of death, irreparable harm, or significant loss of income, assets, or resources.” We will provide technical assistance to States as they draft or amend their policies and procedures to implement this final rule. We have renumbered § 1324.402(a)(4)(i)(A) as § 1324.402(b)(2)(i)(A) and are otherwise finalizing it as proposed.

Comment: A few commenters suggested we remove “significant loss of income, assets, or resources” from our proposal at § 1324.402(a)(4)(i), noting that a response to financial exploitation cases is often not an immediate need, and another commenter noted that financial exploitation cases may require a nuanced approach with advance research.

Response: The financial exploitation of an adult can progress swiftly in scope and scale, and while a nuanced approach may be necessary, we likewise believe an expeditious response is critical in some cases of financial exploitation. For example, financial

exploitation may rob victims of a significant portion of their retirement savings, endangering their current and future financial security.³⁷ Furthermore, restitution from such crimes may be difficult or impossible.³⁸ Financial exploitation also adversely impacts its victims' mental health, their sense of security, and their dignity. We have renumbered this section as § 1324.402(b)(2)(i), but otherwise finalize this provision as proposed.

We underscore the importance of referral relationships and collaborative partnerships in responding to reports of potential financial exploitation. Accordingly, we have added "State securities and financial regulators, Federal financial and securities enforcement agencies" to § 1324.406(a)(3) in response to commenter feedback.

Comment: While some commenters supported proposed § 1324.402(a)(4)(i)(B) requiring APS response to non-immediate risk reports within no more than seven calendar days, others suggested that a seven calendar-day timeframe was too lenient and gave examples of their State systems. One commenter noted that seven days permitted adequate preparation, planning, and case assignment. Other commenters suggested a shorter timeframe, for example, 72 hours. Still other commenters suggested that seven calendar days was too restrictive and requested a longer timeframe, such as ten calendar days or seven business days. One commenter noted that ACL did not provide adequate justification for a seven-day timeframe.

Response: Based on commenter feedback, we are finalizing § 1324.402(a)(4)(i)(B) (renumbered as § 1324.402(b)(2)(i)(B)) as proposed. We chose a seven-day timeframe because most State APS systems respond to reports within seven calendar days, and we believe this timeframe will ensure

timely response to reports while minimizing burden for APS systems.³⁹ We remind State entities that they are permitted to set shorter timeframes for response (e.g., 72 hours), but not longer timeframes (e.g., more than seven calendar days).

As discussed earlier, it is not our expectation that investigations or case plans will be complete (or potentially even started) within seven calendar days, although data indicates three quarters of States currently perform case-initiation within seven calendar days.⁴⁰ Rather, APS must provide some response to a non-immediate risk report of maltreatment within seven calendar days. We define response broadly in § 1324.401 to include referral and other collaborative interventions. This policy aligns with standards set out in our Consensus Guidelines which suggest 24-hour response for immediate-risk cases and five business day response for non-immediate risk cases. State entities will have 4 years to come into full compliance with these provisions, and we will offer the option of a corrective action plan for States that require more than 4 years to come into compliance with this provision.

Comment: We received a comment suggesting that we revise proposed § 1324.402(a)(5) to read "define investigation and post-determination (or disposition) procedures."

Response: We thank the commenter for their suggestion. We have removed proposed § 1324.405(a)(5) consistent with our revisions to § 1324.403.

Comment: We received comments in support of our proposal to inform adults of their rights at first contact, as well as comments expressing concern. Some commenters requested clarity or made suggestions for improvement, including what is meant by "first contact" and whether they would be required to give adults pamphlets or brochures. Commenters also requested guidance on how to address situations where adults lack the ability to consent to APS services. Commenters suggested that adults should be informed of their rights in an accessible manner, noting the importance of communication preferences and accessibility needs.

Many commenters wrote in opposition to informing an adult of their rights at first contact, as this may set an adversarial tone. Commenters noted it was important to build trust and rapport early in a relationship with a potential

client. One commenter offered that proposed § 1324.402(b) (renumbered as § 1324.402(c) in the final rule) be edited to read "inform clients of their rights at first contact to the extent possible."

Several commenters were opposed to giving adults pamphlets or brochures with information on their rights, out of the concern that this could prove a safety risk if a perpetrator were to find the information and retaliate or coach a victim. Several commenters requested information and examples of person-directed, culturally competent, accessible methods for informing adults of their rights, as well as best practices.

Response: We thank commenters for their comments and suggestions. For the purposes of our rule, "first contact" is the first touch point with the potential client, whether that be by telephone or in-person. This is sometimes, but not always, the initial intake. We note that nothing in our rule requires APS programs to leave brochures or to inform potential clients of their rights as the very first words of an interaction. Informing a potential client of their rights can be woven into an APS worker's first meeting or discussion with a potential client in whatever manner the APS worker deems most appropriate to the situation to build trust and rapport. APS programs must inform potential clients of their APS-related rights under State law. Under the regulation, APS workers are required to provide information about the rights to confidentiality of personal information, to refuse to speak to APS, and to refuse APS, to the extent such rights exist under State law.

We will be providing ongoing technical assistance to implement this final rule, including best practices for informing potential clients (including those with disabilities and impaired decisional capability) of their rights.

Comment: We received a few comments from APS State entities on proposed § 1324.402(b)(2) (renumbered as § 1324.402(c)(2) in the final rule) noting that informing adults of their rights may disincentivize them from talking to APS and may prevent a case from being opened when there is maltreatment or self-neglect present. For example, commenters offered that in cases of self-harm, an adult should not be informed of their rights and that this could be dangerous if they are dissuaded from speaking to APS and accepting services. One APS program opined that if an adult did not want APS services, they should appeal a finding after the fact.

Response: We thank commenters for their responses. As we said regarding comments about self-determination,

³⁷ Financial Crimes Enforcement Network (FinCEN), Advisory on Elder Financial Exploitation, June 15, 2022, <https://www.fincen.gov/sites/default/files/advisory/2022-06-15/FinCEN%20Advisory%20Elder%20Financial%20Exploitation%20FINAL%20508.pdf>. 3 Stanford Center on Longevity and Finra Investor Education Foundation, The State of Financial Fraud in America: Post Conference Report, 2016, <https://longevity.stanford.edu/financial-fraud-research-center/wp-content/uploads/2017/02/Fraud-Post-ConferenceReport-2-15-17-2.pdf>.

³⁸ Consumer Financial Protection Bureau, Recovering from Elder Financial Exploitation: A framework for policy and research, (Office for Older Americans, 2022), https://files.consumerfinance.gov/f/documents/cfpb_recovering-from-elder-financial-exploitation_report_09-2022.pdf.

³⁹ *Supra* note 4. For non-immediate response, there are ten programs that have a ten day, there are 2 that have a 14 day, there is one that has a 20 day. The rest are 7 days or sooner.

⁴⁰ *Id.*

adults must be presumed to have decisional capability. Most State laws establish the right to refuse services, to decline participation in an investigation, and to make decisions which others may disagree with about their lives. We decline to include in the regulations prescriptive descriptions of what would constitute an extreme circumstance warranting non-consensual intervention. In supporting the dignity of risk of older adults and adults with disabilities to make decisions to support their autonomy, APS programs should balance the risk with ensuring the person's health and welfare. Such circumstances are fact-specific and are best assessed carefully by individual programs. We encourage State entities to include in their policies and procedures and in their State plan standards for such intervention, taking into consideration the requirements of person-directed and least restrictive services. We note, however, that a policy of providing an adult with appeal rights after providing non-consensual services, as suggested by one commenter, does not meet the standard of least restrictive intervention. For example, an adult who loses their living arrangement because they were removed from their home without consent cannot be made whole through an appeals process.

We will provide technical assistance as requested regarding approaches to inform potential clients of their rights.

Comment: We received a comment on proposed § 1324.402(b)(3) (renumbered as § 1324.402(c)(3) in the final rule) that in one State, a potential APS client does not have the right to decline services.

Response: Our proposal requires that potential clients must be informed of their APS-related rights *under State law*. Such rights may include the right to decline to participate in an investigation, to decline services, and/or to refuse entry to their home. Thus, if State law does not offer a potential client the right to decline services, APS must still inform the client of any rights they do have under State law. Furthermore, APS programs are required to abide by all other provisions in this rule, including those related to person-directed case planning and services.

Comment: Commenters fully supported proposed § 1324.402(c) (renumbered as § 1324.402(d) in the final rule), which requires that information be provided in a format and language understandable by the adult, and in alternative formats as needed.

Response: We thank commenters for their support and are finalizing as proposed.

Comment: We received broad support for our proposals at § 1324.402(d)(1) (renumbered as § 1324.402(e)(1) in the final rule) for APS training, with several APS entities indicating that they already provide training on core competencies. Some commenters suggested that trainings may be burdensome, particularly with reference to training on our regulations. A few commenters suggested disability-specific education.

Response: We thank commenters for their input and are finalizing as proposed. We will provide ongoing technical assistance and training resources through our technical assistance resource center.

Comment: We received overwhelming opposition to our proposal at § 1324.402(d)(3) for State entities to establish staff-to-client ratios. Commenters believed it would be extremely difficult to develop ratios due to a lack of research and evidence in the area. Many commenters likewise stated that too many variables are beyond their control when determining appropriate ratios, including the complexity of cases, State appropriations for APS staffing, staff attrition and turnover, difference in geography (rural versus urban areas), regulatory changes, and other variables. A commenter noted that tying ratios to current staffing levels may perpetuate understaffing. Many commenters responded to our request for information with support for workload studies.

Response: We thank commenters for their thoughtful input. In response to these comments, we have decided not to finalize proposed § 1324.402(d)(3). We encourage States to conduct ongoing workload studies and will provide ongoing technical assistance as they conduct them.

Comment: We received comment that proposed § 1324.402(e), which requires the State entity to establish other program administration policies and procedures and provide other information to APS clients as established by the Assistant Secretary for Aging, is overly vague and injects undesirable uncertainty.

Response: We thank commenters for their input. We have decided not to finalize this provision.

D. Section 1324.403 APS Response

Section 1324.403 requires the State entity to adopt standardized and systematic policies and procedures for essential APS functions throughout the lifecycle of a case. The purpose of an APS response, including through investigation and service planning, is to collect information about the allegations of adult maltreatment or self-neglect;

determine if the alleged victim is eligible for APS services; assess the immediate risk of the situation; and refer to, arrange for, and/or provide services to stabilize the situation. APS identifies the service needs of the client and develops a plan, including recommendations or referrals to other entities, such as social services programs. Service planning and referral often occurs concurrently to investigation as well as post-investigation in many, but not all, systems.

Section 1324.403 sets forth requirements for the development of standardized policies and procedures governing APS response. Initiation of an investigation encompasses screening and triaging reports and decision-making processes for determining immediate safety and risk factors affecting the adult. The investigation includes the collection of relevant information and evidence. Policies and procedures must also detail methods to make findings on allegations and record case findings, including consultation with outside experts when appropriate. Professional fields for such experts include medicine, social work, law enforcement, legal services, behavioral health, finance/accounting, and long-term care. We likewise require the APS worker to provide referrals to other agencies and programs, as appropriate under State law, such as referrals to AAAs, State Medicaid programs, or Centers for Independent Living for services. For example, the APS program may make a referral to the State Medicaid agency for HCBS to mitigate harm and assist the victim in recovery from the abuse. During a response, APS may, in limited and warranted circumstances, take emergency protective action, which we define in § 1324.401. Such action should be person-directed and taken as a last resort after exploring all other viable options, and prioritize community integration, autonomy, and individual choice.

Many APS clients require services, which APS provides or arranges for through a variety of mechanisms and funding sources. APS staff may provide services directly (e.g., assistance with housing relocation), pay third parties for services (e.g., pay for medications or utility bills), or make referrals to community-based services (e.g., home-delivered meals). The rule offers a framework for the provision of services that promotes the dignity and autonomy of the client, leverages community resources, and aims to prevent future adult maltreatment and/or self-neglect.

We received comment on our proposals from an array of different commenters, including State APS entities, national associations, researchers, APS programs, AAAs, and others. We received many comments critiquing our proposal for inaccurately characterizing APS investigation and service delivery as running separate from and consecutive to each other and for over-emphasizing the role of APS investigatory functions. We have revised the section's title and proposed § 1324.403(e) in response to feedback and offer clarification on individual subsections. We have likewise removed § 1324.403(e)(3) in response to comments stating that it was beyond APS authority to hold perpetrators accountable. We have removed proposed § 1324.403(e)(6) and proposed § 1324.403(f)(3)(iii); we agree with commenters that it would be extremely challenging for APS to monitor a client and measure efficacy and outcomes and believe that the performance data collection required by § 1324.407 and NAMRS is a less burdensome way to monitor and evaluate efficacy and outcomes and achieve the goals of these proposed provisions. In response to comment, we struck "or decision" from proposed § 1324.403(f)(3)(v) as duplicative. Below is a summary of and response to the public comments we received regarding this section.

Comment: We received comment from State APS entities, national associations, researchers, APS programs, and others stating that proposed § 1324.403 "Investigation and Post-Investigation Services" focused too heavily on APS's investigatory function and underrepresented the critical role of service planning and delivery in person-directed APS practice. Commenters also suggested changes throughout proposed § 1324.403 to definitively establish service delivery and investigation as concurrent responsibilities of APS systems.

Response: We thank commenters for their suggestions and feedback and have revised the title of § 1324.403 from "Investigation and Post-Investigation Services" to "APS Response." We have defined "response" in § 1324.401 as "the range of actions and activities undertaken as the result of a report received by APS." We likewise have amended § 1324.403(e) from "[p]rovision of APS post-investigation services [. . .]" to "[p]rovision of and/or referral to services [. . .]"

Comment: We received comment that proposed § 1324.403 was confusing and that proposed §§ 1324.403(a) and 1324.403(b) would be more

appropriately included in § 1324.405, which addresses accepting reports.

Response: Sections 1324.402(a) and 1324.402(b) detail different aspects of APS program administration than § 1324.403 does. Section 1324.402 sets overarching principles for administering the APS program at all phases of the response. Likewise, § 1324.405 addresses the process by which the APS program accepts reports. Section 1324.403, on the other hand, addresses the process for responding to reports. We believe that the significance of response procedures warrants a separate section of the regulation and decline to combine the referenced regulatory sections.

Comment: One commenter requested that we clarify the term "screening" and whether "screened-out" cases must comply with the regulation.

Response: Section 1324.403(a) requires "[s]creening, triaging, and decision-making criteria or protocols to review and assign adult maltreatment and self-neglect reports[.]" Screened-in reports are those that meet the threshold criteria for APS involvement as defined by State statute, regulation, or policy. Screened-out reports are those that do not meet the threshold criteria for APS involvement as defined by State statute, regulation, or policy.

Comment: One commenter recommends that ACL add measures to protect the safety and confidentiality of reporter identity and institution affiliation to ensure safety for all involved.

Response: We thank the commenter for the suggestion. APS systems must comply with State privacy and confidentiality laws. We do not believe we need to include additional privacy and confidentiality standards in this section, but we reiterate that this final rule establishes minimum standards, and States have the discretion to establish stricter privacy and confidentiality standards for reporters if they choose to do so.

Comment: A commenter suggested that collection of relevant information under proposed § 1324.403(c) may not always be directed by the person and, in this case, we should clarify that in cases where a client does not direct evidence collection, APS should act in a client's best interests.

Response: Our final rule at § 1324.403(c)(4) and § 1324.402(b)(1) states that APS should incorporate principles of person-directedness when responding to reports, including during the collection of evidence. We discuss person-directedness in more detail in the discussion of § 1324.402(b)(1).

Comment: A few commenters agreed with our inclusion of proposed § 1324.403(c)(2) and stressed the importance of APS workers' safety. Two commenters pointed out the role of law enforcement when responding to APS reports in ensuring client and worker safety.

Response: We thank commenters for their support and likewise agree law enforcement is a critical APS partner, as discussed in § 1324.406.

Comment: We received one comment from a State APS entity in strong support of our proposals at § 1324.403(c)(3)–(6). The State entity noted that it was already in compliance with these principles and believes they are a national best practice.

Response: We thank the commenter for their support.

Comment: We received comments on proposed § 1324.403(c)(4) requesting that we define trauma-informed and give specific examples of person-directedness. Specifically, we received comments requesting we give examples of how to triage cases in a trauma-informed way.

Response: We thank commenters for their suggestions and questions. As discussed earlier, trauma-informed approaches to adult maltreatment and self-neglect recognize the impact of trauma and incorporate that knowledge into service delivery and provider practices.⁴¹ Trauma-informed intake, triaging, investigation, and service delivery identify how traumatic events and circumstances may affect an adult's immediate and ongoing physical and emotional safety and wellbeing. APS workers trained in trauma-informed practices can identify trauma responses in potential and current clients and adjust their practice approach as informed by the individual client's experience to ensure adults are not re-traumatized and feel safe and empowered.

Person-directedness, like trauma informed approaches, centers the experiences, values, and preferences of the adult.⁴² Person-directed approaches involve the adult in all aspects of intake, investigation, service planning and

⁴¹ Center for Health Care Strategies, The Trauma Informed Care Resource Center, <https://www.traumainformedcare.chcs.org/about-the-trauma-informed-care-implementation-resource-center/> (last visited Feb. 5, 2024).

⁴² Kumar R, Chattu VK. What is in the name? Understanding terminologies of patient-centered, person-centered, and patient-directed care, J Family Med Prim Care. 2018 May–Jun;7(3):487–488 <https://www.cms.gov/priorities/innovation/key-concepts/person-centered-care/>; The Admin. For Comm. Living, Person-centered Planning, <https://acl.gov/programs/consumer-control/person-centered-planning> (last visited Feb. 5, 2024).

delivery, to the greatest extent possible. A person-directed APS response respects the adult's right to self-determination. The adult takes an active role and determines the goals. Examples of person-directed strategies include empowering and assisting the adult to identify and access the desired interventions and services, and emphasizing to the adult that they have a voice—this is their case.

We will provide ongoing technical assistance to State APS systems as they implement the rule. Technical assistance may be provided in webinars, conference sessions, tip sheets, practice guides, and customized presentations or consultations with State APS systems. Topics may include addressing general concepts and may delve into how these concepts are applied to specific components of APS practice, and how best practices are being advanced by APS professionals. We are finalizing § 1324.403(c)(4) as proposed and will include more examples and best practices of trauma-informed and person-directed services, as defined above, in technical assistance.

Comment: We received comment on proposed § 1324.403(c)(5) requesting that we clarify expected minimum frequency and type of contact with a client.

Response: We leave specifics related to frequency and type of contact to the discretion of the APS State entity to incorporate into their policies and procedures. This rule only requires that the State entity have consistent evidence and information collection practices to inform findings on allegations and service planning that maximize engagement with the APS client.

Comment: We received comments on proposed § 1324.403(d) suggesting we require consultation with organizations and providers that have an ongoing relationship with a client. Another commenter suggested consultation with animal service organizations as a part of multidisciplinary teams.

Response: Commensurate with our requirements at § 1324.406, State APS entities should develop policies and procedures that include consultation and collaboration with a variety of experts. We note our list of community partners is not exhaustive and States may choose to add additional entities. We decline to specify organizations for consultation in § 1324.403(d)(1) and are finalizing the section as proposed.

Comment: We received comment on § 1324.403(c)(6) requesting that “emergency protective action” be revised for consistency with our definition at § 1324.401. We also

received comment that APS often does not have control over State law governing law enforcement involvement and policies related to emergency protective action. Another commenter noted that our proposal sets a higher standard than the law in their State and may hinder cases where guardianship is sought due to a client's lack of capacity and decision-making ability. Finally, a few commenters sought clarity on types of emergency protective actions that are appropriate, and one commenter noted that its APS system did not accept out-of-home placements.

Response: We thank commenters for their suggestions and have amended proposed § 1324.403(c)(6) for clarity and to conform with our revised definition at § 1324.401. Specifically, we have amended § 1324.403(c)(6) to permit the emergency use of APS funds to buy goods and services. We have created a new § 1324.403(c)(7) to permit APS to seek emergency protective action only as appropriate and necessary as a measure of last resort to protect the life and safety of the client from harm from others or self-harm.

We believe that the emergency use of APS funds to buy goods and services should not be subject to the stricter standards for seeking emergency protective actions. We apply the stricter standards for seeking emergency protective actions in keeping with our focus on person-directed services and least restrictive alternatives. As stated previously, we require that APS State entities develop policies and procedures that define and limit the use of emergency protective action, including guardianship and conservatorship, as a last resort after all other alternatives have been exhausted. This practice is supported by research and literature on APS practice.⁴³ We will provide ongoing technical assistance and guidance to States about the implementation of emergency protective action and best practices to promote autonomy and incorporate person-directedness.

Comment: We received comment on proposed § 1324.403(e) suggesting we strike “post-investigation services” and replace “during the course of” to read,

⁴³ *Supra* at 12; Most APS programs routinely encourage alternatives to guardianship. More programs (50) provide substitute decision-making (in which someone assumes responsibility to make decisions for a person who has been deemed unable to make his or her own financial or health care decisions) than supported decision making (a process of supporting and accommodating an adult with a disability to enable the adult to make life decisions without impeding the self-determination of the adult) (37 programs). More programs (49) indicated they encourage power of attorney than advanced directives (36 programs).

“services during the course of and post investigation [. . .]” to more accurately and clearly represent person-directed APS service provision during the course of an investigation, as opposed to only once an investigation has closed.

Response: We appreciate these suggestions. Based on various comments on this proposed section, we have revised proposed § 1324.403(e) to read “[p]rovision of and/or referral to services, as appropriate.” We believe this change is responsive to commenter feedback on proposed § 1324.403(e) and § 1324.403 more broadly and aligns with the retitling of § 1324.403 to “APS Response.”

Comment: We received many comments, including from APS State entities, on our proposal at § 1324.403(e)(3) requiring APS systems hold perpetrators accountable. A number of commenters noted that law enforcement and the legal system, not APS, are tasked with holding perpetrators accountable. A commenter noted that APS instead provides protective services to a victim to enhance safety and in accordance with their wishes and informed choice. According to comment, it is outside APS programs' jurisdiction to “stop abusive behavior” and sometimes impossible to accomplish if a victim chooses to remain with their abuser. One commenter suggested amending proposed § 1324.403(e)(3) to read: “Refer perpetrator to the appropriate law enforcement entity or entities to address accountability for the adult maltreatment.” Another commenter suggested replacing “abusive” with “maltreatment” to better reflect our definitions in § 1324.401.

Response: We appreciate and agree with these comments. We have decided not to finalize § 1324.403(e)(3) in response to feedback.

Comment: We received comment in support of our proposal at § 1324.403(e)(4) noting that clients should be at the center of all service planning and other efforts. Another commenter suggested that consultation with clients is not always possible, and that we should amend our proposal to reflect this.

Response: We appreciate commenters' responses. APS should make every attempt to involve a client in service planning and referrals throughout the lifecycle of the case. We believe this is adequately accounted for in §§ 1324.403(c)(4) and (5), §§ 1324.403(e)(1) and (2) and in § 1324.402(b)(1).

Comment: We received comments from State APS entities and other interested parties suggesting that our

proposal at § 1324.403(e)(6) may be difficult to implement and is administratively burdensome and cost prohibitive. Commenters noted that they do not follow cases after closure and sought clarity around expectations for what constitutes monitoring and impact. A commenter suggested that there are ways to monitor effectiveness of APS services (such as tracking recidivism or reoccurrence) that are less burdensome.

Response: We have reassessed our proposal in light of commenters' feedback and suggestions, and we are not finalizing proposed § 1324.403(e)(6). We believe data on service effectiveness and client outcomes can be measured through existing NAMRS data collection and through the program performance data to be reported under § 1324.407.

Comment: We received one comment on proposed § 1323.403(f)(1) from a State APS entity stating that it did not have established timeframes for ongoing review of cases and that proposed § 1324.403(f)(1) would be burdensome. Conversely, we received comments in support of creating timeframes for review.

Response: Ongoing review of open cases ensures that APS addresses adult maltreatment and self-neglect in a timely manner and that cases do not languish, potentially allowing for preventable adult maltreatment or self-neglect. We are not mandating exact timeframes for case review, only that a State APS system have policies and procedures in place to provide for such review. We are finalizing this provision as proposed.

Comment: A commenter suggested that our proposed § 1324.403(f)(2) be removed because our proposal at § 1324.403(e)(4) to create service plans accounted for this and the provision was thus duplicative. Another State offered that each case was unique, and there should be no timeframe set. A commenter offered that timeframes should not be hard and fast, and that extensions were necessary, especially for cases such as financial exploitation. One commenter suggested including an exceptions and ongoing review process.

Response: We are amending our proposal at § 1324.403(f)(2) to read "[e]stablish a *reasonable* length of time by which investigations should be completed and findings be made[. . .]" [emphasis added]. We note that this rule does not set a specific timeframe for investigation completion. Rather, we require State entities to set such quantifiable and reasonable timeframes in policies and procedures, understanding that what is reasonable for one case type may be different from another.

Comment: We received comments in support of our proposal at § 1324.403(f)(3)(iii) requiring State entities to establish policies and procedures to measure the outcome and efficacy of interventions and services. However, we received many comments suggesting that impact and outcomes are difficult to measure. Some stated that our proposal was vague and would be challenging to operationalize, with commenters suggesting it was unclear how to measure outcomes and efficacy after case closure. One commenter argued that the Federal Government needed to set national outcome standards for practice and intervention. Another suggested we amend § 1324.403(f)(3)(ii) to read "[a]ssessment of the outcome and perceived success of intervention and services."

Response: We agree with commenters and are declining to finalize § 1324.403(f)(3)(iii). Similar to our proposal at § 1324.403(e)(6), we believe outcomes and efficacy of interventions and services can be measured by performance data submitted under § 1324.407 and existing NAMRS data collection, alleviating any potential additional burden on APS systems.

Comment: We received comments suggesting we strike "or decision" in proposed § 1324.403(f)(3)(v), as it could allow for recording whether the case was closed but not necessarily the reason behind the closure. We also received comments questioning whether our rule requires case closure information to be transmitted to the client. One commenter advocated that case closure transmittal to the client be optional and not mandatory, and one commenter suggested that it was not person-centered to transmit self-neglect decisions to a client.

Response: We have renumbered §§ 1324.403(f)(3)(v) to 1324.403(f)(3)(iv) to reflect other changes in this subsection. We are removing "or decision" per commenter feedback. We also clarify that § 1324.403(f) only requires documentation of the information and not transmission of the information to the client. We leave to State discretion whether to transmit the reason for case closure to the client.

E. Section 1324.404 Conflict of Interest

Section 1324.404 requires the State entity to establish policies and procedures to prevent, recognize, and promptly address both actual and perceived conflicts of interest at the organizational and individual level. As discussed in the preamble to the rule, trust in APS by clients receiving services and the broader community is essential to the ability of APS programs

to perform their functions effectively and appropriately. APS programs form partnerships and referral relationships with allied organizations and professionals to provide necessary services and supports to adults before, during, and after intake and investigation. Conflicts of interest may arise when a State employee, APS worker, or APS system's financial or personal interests influence or are at odds with the interests of a client or cohort of clients. Many APS programs that provide services for victims of adult maltreatment and adults experiencing self-neglect have close relationships and shared locations and data systems with AAAs, State Units on Aging, and other health and human services agencies.

Additionally, individual APS workers may face conflicts of interest if they are in a "dual relationship" serving multiple roles for a single client. We proposed dual relationships be permitted only when unavoidable and conflicts of interest should be appropriately mitigated and concluded as soon as feasible. Further, our proposed rule required that APS programs have policies and procedures that ensure conflicts of interests are avoided and, if found, remedied. We proposed that APS have policies and procedures to identify both organizational and individual conflicts of interest. Policies must establish actions and procedures that APS will require employees, contractors, grantees, volunteers, and others in a position of trust or authority to take to remedy or remove such conflicts. Over time, APS has expanded its working relationships, thus necessitating additional guidance on preventing and mitigating conflicts of interest.

Commenters were generally supportive of our proposals, with significant feedback offered on proposed § 1324.404(a) regarding APS serving as direct service providers and § 1324.404(d) regarding dual relationships. We also received a few clarifying comments.

We proposed in § 1324.404(a) to prohibit employees and agents of APS from simultaneously serving as direct service providers, such as case managers, to clients. We received several comments opposed to our proposal. As discussed below, in response to commenter feedback, we have removed § 1324.404(a). We have also made clarifying edits to proposed § 1324.404(b) and proposed § 1324.404(c). In addition, we have added new § 1324.404(d) in response to commenter feedback on guardianship and dual relationships. Below is a summary of the public comments we

received regarding this section and our responses.

Comment: We received a number of comments stressing the need for robust conflict of interest protections and in support of our proposal.

Response: We concur and thank commenters for their support.

Comment: We received comment that our proposal was too broad and would create significant burden and expense for APS programs. For example, a commenter suggested that applying the rule to “all professionals involved in an APS investigation” would be difficult to administer and monitor.

Response: We believe that with appropriate legal and policy guidance, APS systems will be able to identify, monitor, remedy, and remove actual and potential conflicts of interest as necessary. ACL maintains that the benefit to APS clients of ethical practice far outweighs the burden incurred.

Commenter: One commenter raised concerns that our proposals might adversely affect the work of multidisciplinary teams.

Response: We believe that our rule will help multidisciplinary teams fulfill their mission and will not adversely impact the work of multidisciplinary teams. Better awareness of, and a standardized approach to remedying conflicts of interest will enable multidisciplinary teams to efficiently address any conflicts of interest among its participants. For example, if a team member has a direct conflict of interest, they may recuse themselves from working on a specific case or cases. Other recommendations include presenting cases without personally identifiable information, strengthening confidentiality agreements, and strengthening working relationships with other local area teams should a conflict arise.

Comment: One commenter suggested the rule be less specific about areas where a conflict of interest may arise and allow States flexibility in identifying and addressing this in State policy.

Response: How an actual or potential conflict of interest may be identified and remedied is often case specific. This rule requires State APS entities to establish appropriate policies and procedures that will guide them if or when a conflict of interest situation arises. State APS entities may seek technical assistance from ACL if questions occur.

Comment: We received a comment suggesting we base our regulations on NAPSA or NASW ethics guidelines on conflicts of interest.

Response: We agree that excellent, reputable guidance is already available through many sources. We encourage State APS entities to seek technical assistance from ACL.

Comment: We received several comments, including from State APS entities, that our proposed regulations might adversely affect county-based systems, particularly smaller counties in these systems. One commenter noted that county-based systems will incur a higher burden in preventing and addressing dual relationships.

Response: We recognize that in smaller communities the possibility for individual and organizational conflict of interest may be more likely to arise due to the nature of a community’s size and structure and may be more burdensome to address. Strategies to remedy conflicts of interest may differ in smaller and rural communities from those strategies used in larger areas. How actual or potential conflicts of interest may be remedied through appropriate policies and procedures is often case specific. Factors to consider include whether the individual in question is a decision maker, whether firewalls or other safeguards can be erected between organizations and individuals, and what monitoring protocols are in place for a potentially conflicted situation. ACL is available to provide technical assistance when such situations arise. We also note that the extended compliance deadline of 4 years and the availability of corrective action plans to address specific areas should benefit any State that needs additional time to come into compliance. This may be particularly helpful in States with county-based systems.

Comment: We received several comments suggesting that our proposal at § 1324.404(a) prohibiting APS workers from serving as direct service providers simultaneously may be unduly burdensome and harmful. One APS State entity noted it would not be able to comply with the provision, as APS staff may be the only resource available in their State. A State entity noted that in small counties, APS workers wear many hats, including as HCBS case managers. Another State commented that it is currently in the process of having all APS workers certified as options counselors. One State APS entity opined that service provision can and should be fluid during the case, and that completely separating investigation from service provision could harm the client. The commenter requested we remove or revise this requirement to allow States latitude.

Response: Based on commenter feedback, we are removing § 1324.404(a). We thank commenters for their input.

Comment: We received comment asking us to define “agent” as used in proposed § 1324.404(b) and (c).

Response: In response to commenter feedback, we have edited newly redesignated § 1324.404(a) and (b) to remove reference to APS agents. We believe our edits alleviate confusion and better align with the definition of “conflict of interest” in § 1324.401.

Comment: One commenter suggested that we clarify proposed § 1324.404(b) by revising it to read “[e]nsure that employees and agents administering APS programs do not have a personal financial interest in an entity to which an APA program may refer clients for services recommended by the APS program.”

Response: We appreciate and have accepted the commenter’s suggestion. In keeping with the deletion of proposed § 1324.404(a), we are redesignating proposed § 1324.404(c) as § 1324.404(a) in the final rule.

Comment: We received a comment suggesting that we define “immediate family” in proposed § 1324.404(c) to mean “same household.”

Response: We thank the commenter for their suggestion. An immediate family member with a potential or real conflict of interest may not be a member of the same household. Similarly, a member of the household, for example someone who rents a room, may not be a family member but could also have a potential or conflict of interest. We therefore are amending proposed § 1324.404(c), now § 1324.404(a) in the final rule, to clarify. We have also revised § 1324.404(b) to incorporate an individual’s immediate family or household, for consistency with redesignated § 1324.404(a).

Comment: We received a comment requesting that proposed § 1324.404(c) align with the definition of conflict of interest in § 1324.401.

Response: We thank the commenter for their suggestion. We have made edits to proposed § 1324.404(b). We are redesignating proposed § 1324.404(c) as § 1324.404(a) in the final rule.

Comment: We received a significant number of comments from the disability community on our proposals at § 1324.404(d) suggesting that APS and AAAs be prohibited from serving as public guardians in dual relationships. Some also suggested that people at risk of guardianship be appointed an advocate from the local Center for Independent Living. One commenter offered that their State APS system

already prohibited AAAs and APS from serving as guardians or powers of attorney for the same person. We also received comments from APS entities, APS programs, and advocacy organizations noting that these dual relationships, including those involving APS workers serving as public guardians, are a reality of APS practice. This is particularly true in rural areas with limited staffing and county-administered systems. APS systems requested more information and guidance on how to operationalize our proposal.

Response: We appreciate the realities of APS practice, as well as the concerns related to the conflicts of interest associated with APS programs being appointed the guardian for an adult served by the APS program. We are revising this section to balance these concerns. While we recognize and are sensitive to the gravity of such situations, we decline to completely prohibit APS entities and programs from petitioning for or serving as guardians to adults in all circumstances. As noted by some commenters, these appointments often occur because no other alternative is available or qualified.

At the same time, we agree that policies and procedures, including firewalls and other safeguards, are necessary to protect against conflicts of interest for APS programs that serve as guardians. The general requirement in § 1324.404 to establish such policies and procedures includes establishment of policies and procedures that address conflicts and appearances of conflict in guardianship situations. To respond to the serious concerns raised by commenters about APS involvement in guardianship, we further clarify the application of this requirement to guardianship. We have revised § 1324.404(d) to describe the circumstances under which petitioning for or serving as guardian is an unavoidable dual relationship. Specifically, it is unavoidable only if all less restrictive alternatives to guardianship have been considered, and either (i) a Court has instructed the APS program to petition for or serve as guardian, or (ii) there is no other qualified individual or entity available to petition for or serve as guardian. We also clarify that for all dual relationships, the APS program must document the dual relationship in the case record and describe the mitigation strategies it will take to address the conflict of interest.

Finally, there are other statutory and regulatory authorities with which APS systems must comply, including Federal and State laws that require

administration of programs, including APS, in the most integrated and least restrictive setting appropriate to meet the needs of individuals with disabilities and that prohibit discrimination on the basis of disability. These include Section 504 of the Rehabilitation Act⁴⁴ and the Americans with Disabilities Act.⁴⁵ Compliance with this rule does not address these obligations. The Department of Health and Human Services' Office for Civil Rights offers technical assistance on these antidiscrimination requirements for covered entities, and we will likewise provide ongoing technical assistance on these anti-discrimination requirements.

We received comments from Centers for Independent Living noting that they are available to serve as an advocate for a person at risk of guardianship. We encourage Centers for Independent Living interested in serving persons subject to or proposed for guardianship to coordinate with APS programs to aid such adults who may request such help before a guardianship petition is filed. Once a guardianship petition is filed, however, State guardianship law determines how the rights and interests of the person subject to the guardianship petition will be represented, including through the appointment of an attorney to defend against the imposition of guardianship.

Comment: We received comment asking for clarification of what "appropriate safeguards" might entail. Another commenter offered that firewalls and disclosures might serve as appropriate safeguards under proposed § 1324.404(d).

Response: We thank commenters for their suggestions. We agree that firewalls and disclosures are among the appropriate safeguards under proposed § 1324.404(d). ACL will provide technical assistance to State APS entities as they develop their policies and procedures that describe safeguards.

Comment: ACL received a comment that our proposal at § 1324.404(e) regarding monitoring and oversight would be expensive and burdensome to implement. One commenter noted that it may be particularly challenging for county-administered systems to monitor dual relationships, where such relationships may occur with more regularity than in other systems. Other commenters requested clarification about ACL's expectations around monitoring and oversight. Another commenter suggested we remove "robust" to describe our monitoring and

oversight proposal at proposed § 1324.404(e).

Response: We thank commenters and recognize that monitoring and oversight might create an increased burden. However, monitoring and oversight are an essential component of ensuring that APS programs operate appropriately with respect to conflicts of interest. We defer to State APS entities' own conflict of interest policies and procedures about monitoring and will provide technical assistance as requested related to expectations and examples. We agree, however, that "robust" is unnecessary, as by its nature monitoring will be robust. We amend accordingly and redesignate § 1324.404(e) to § 1324.404(c).

Comment: Several State APS entities commented that they have their own conflict of interest policies and procedures in place, including informal guidelines, desk audits, and self-reporting. Another inquired whether its current system of desk audits would meet the requirements of our proposed rule.

Response: As mentioned in the response above, we defer to State APS entities' own conflict of interest policies and procedures and will provide technical assistance as requested.

Comment: We received a comment suggesting our proposal would be expensive and burdensome for APS systems to implement. One commenter suggested that removing a conflict of interest is not always feasible and suggested proposed 1324.404(f) be amended to "remedy, and where practicable, remove."

Response: We have decided not to finalize § 1324.404(f) because it was duplicative of introductory language to the section, requiring the State entity to establish standardized policies and procedures to avoid both actual and perceived conflicts of interest, including mechanisms to identify, remove, and remedy them. The final rule accords State APS entities great flexibility in developing policies and procedures to address conflicts of interest. This includes the flexibility to determine how to remedy conflicts of interest when they occur. There are many third-party resources available to APS systems as they develop protocols to address conflicts of interest. Technical assistance is available from ACL.

F. Section 1324.405 Accepting Reports

Section 1324.405(a) requires the State entity to have policies and procedures for accepting reports of adult maltreatment and self-neglect. Such policies and procedures require prompt receipt of reports of alleged

⁴⁴ 29 U.S.C. 796.

⁴⁵ 42 U.S.C. 12101.

maltreatment and self-neglect, using multiple methods for receiving reports 24/7 in ways that are fully accessible (e.g., using augmentative communication devices or translation services). Receiving reports 24/7 is paramount to the safety of clients and aligns with the recommendations of our Consensus guidelines.

APS receives reports from both the general public and individuals mandated by the State to report suspected adult maltreatment and self-neglect. Mandated reporting is an essential tool in combating adult maltreatment and self-neglect. However, most APS programs are not required to contact mandated reporters with information about the case after a report is made. Mandated reporters have stated that the absence of a reporting feedback loop creates a disincentive for reporting. The most common complaint ACL receives from community providers that work with APS is that while they may be required under State law to report, they do not receive information back on the status of their report. In § 1324.405(b), we proposed to require States to implement a “feedback loop” to provide mandated reporters information on the status of a report in certain circumstances.

We received many comments generally supportive of our proposal at § 1324.405(a) requiring APS programs to receive reports 24/7. Several commenters also had clarifying questions, particularly about whether our proposal required reports to be fielded by a live APS worker. We address comments below and are finalizing § 1324.405(a) as proposed.

We received comment on our proposal at § 1324.405(b) suggesting significant modification, notably to better clarify the role of professional mandated reporters, emphasize client confidentiality and principals of person-directedness, and minimize burden on APS systems. We appreciate commenters’ suggestions and have incorporated many of them into our revisions to § 1324.405(b).

We have amended our definition of “mandated reporter” at § 1324.401 to specify that “mandated reporter” refers only to a person who encounters an adult in the course of their professional duties and is required by State law to report suspected adult maltreatment or self-neglect to APS. This is in direct response to feedback we received from commenters, particularly States where all persons are mandated reporters. We have amended § 1324.405(b) providing that information about a report must only be released to a mandated reporter who made such report upon request of

the reporter and with the consent of the adult. We have removed § 1324.405(b)(1)(ii) in response to commenter feedback, limiting information that must be shared with mandated reporters to procedural information about case opening and not substantive information about case findings. We have added

§ 1324.405(b)(2) requiring APS systems to obtain the consent of the adult prior to releasing any information. Finally, we have amended § 1324.405(c) in direct response to commenter feedback requesting that we specify that the State entity must comply with all applicable State and Federal confidentiality laws.

Comment: We received several comments in support of our proposal to promptly accept reports of adult maltreatment and self-neglect, with a few State entities reporting they are already in compliance with this provision.

Response: We thank commenters for their support.

Comment: We received several comments opposed to our proposal to require two methods of reporting 24/7, with some commenters arguing that it would be unduly burdensome.

Response: ACL believes it is important that at least two methods of reporting be available to reporters to accommodate people who may be unable to access a State’s single method of reporting. For example, if a State only provides a website as its method of 24-hour reporting, a person who lacks internet access may be unable to file a report. It is critical that APS be able to receive reports 24 hours per day. When an adult experiencing maltreatment reaches out for APS assistance, they may only have the courage or ability to do so in that moment.

Comment: We received comment suggesting we replace “multiple methods” with “more than one method” in proposed § 1324.405(a).

Response: The word “multiple” means “more than one.” We believe the regulation is clear as drafted and we are finalizing this term as proposed.

Comment: We received questions from a few State entities seeking clarity that two methods of intake were sufficient to meet the requirements of proposed § 1324.405(a).

Response: Two methods of intake are sufficient to meet the requirements of § 1324.405(a), and an online intake system is acceptable as one of these methods. States have the flexibility to provide more than two methods if desired.

Comment: We received comment asking whether online reporting methods were mandatory or optional

intake methods for APS programs. Some commenters suggested that requiring an online intake method would be unduly burdensome. A few other commenters questioned whether an online intake system would satisfy the requirements to have multiple methods of intake. One commenter noted an online reporting system could be easily added to APS program websites at little cost and that any potential burden would be outweighed by the benefit.

Response: We require that one of the methods of reporting be an online reporting method. Online reporting methods are a best practice and are successfully in use in a number of States. An online reporting method may be a website portal, a secure email address that is regularly monitored, or another comparable method. States may also continue to use other methods, including voicemail inboxes. The requirement of § 1324.405(a) is that there are multiple (more than one) methods of reporting and one of those is an online method. Again, we want to ensure that States have flexibility to implement the requirement of multiple reporting systems with the greatest efficiency and least amount of burden. Other APS systems may wish to use a dedicated phone intake line (with live personnel and/or a recorded message) fax, or office walk-in.

Comment: One commenter suggested we require an accessible reporting method.

Response: We remind State APS systems that as recipients of Federal financial assistance from the Department of Health and Human Services, they are covered by applicable civil rights laws including sections 504 and 508 of the Rehabilitation Act. These laws prohibit discrimination against qualified individuals with disabilities and require accessibility. Thus, reporting methods are already required to be accessible. A variety of technical assistance currently exists from the Department of Health and Human Service’s Office for Civil Rights. ACL will also be providing ongoing technical assistance for State APS systems.

Comment: We received clarifying questions from several commenters, including State entities and associations representing them, asking whether accepting reports 24/7 meant APS programs were required to have live staffing 24/7 to field reports. Specifically, commenters asked whether having intake methods operational but unstaffed 24/7 would be sufficient to fulfill the regulations requirements. They also asked if reports that were received off business hours could be returned the next business day.

Commenters noted that if accepting reports requires live staff at all times, implementation of § 1324.405(a) would be extremely expensive and burdensome and require union negotiations, increased staffing, and funding. One commenter stated that their program investigations commence within 72 hours for immediate risk, with a face-to-face contact within 7 days.

Response: We clarify that “receiving reports” means that a reporter may submit a report with APS at all times, whether with a live person or a message to be retrieved during business hours. It is not required that this message be received and acted on by an APS worker immediately upon receipt.

We also agree that it is outside APS programs’ ability or mission to respond face-to-face to reports 24/7. We clarify that our requirements at § 1324.405(a) and relatedly § 1324.402(b)(2), require State entities to establish policies and procedures for receiving, screening, prioritizing, and referring cases based on risk and type of adult maltreatment or self-neglect. For reports received outside business hours, an APS worker should retrieve the message and contact the reporter on the next business day. We encourage, but do not require, APS programs to retrieve messages and contact reporters within 72 hours after the report is made. For § 1324.402(b)(2)(i), requiring a 24-hour response to immediate risk cases, the required 24-hour response time does not begin until a case is “screened-in” by an APS worker.

Comment: We received a comment suggesting that intake outside business hours was often shared with law enforcement and other emergency responders. The commenter sought to clarify that § 1324.405(a) would not make APS solely responsible for off-business hours response or otherwise disrupt shared response arrangements with law enforcement and emergency responders.

Response: We emphasize the important role law enforcement and other first responders play in receiving and responding to reports of adult maltreatment and self-neglect. They are a vital partner to APS systems, and we encourage ongoing collaboration as discussed at § 1324.406(a)(3). Our proposal does not affect shared arrangements for immediate response outside business hours. We will provide technical assistance to APS systems on best practices for working with law enforcement, including training, while receiving reports 24 hours per day.

Comment: We received a few comments in support of proposed

§ 1324.405(b), with some commenters agreeing that lack of feedback for mandated reporters was an issue in APS practice that should be addressed. A few States noted that they currently had some method of notifying mandated reporters. Many commenters offered qualified support but included recommendations for improvement.

Response: We thank commenters for their support and thoughtful recommendations. We have incorporated many into revised § 1324.405(b) as discussed below.

Comment: We received comments that proposed § 1324.405(b) would be costly and burdensome to implement.

Response: We appreciate that implementation of a new system to inform mandated reporters may create an administrative burden for some State systems. However, we have significantly narrowed our original proposal in response to commenter feedback. Furthermore, research indicates that communication with reporters improves outcomes for adults and APS systems.⁴⁶ We believe the benefit of our proposal outweighs the burden. We have also extended the compliance date of the final rule to give States additional time to put new systems in place.

Comment: We requested comment whether minimum timeframes to respond to mandated reporters should be explicitly included in the rule, and a few commenters variously responded both in support of, and opposed to, minimum timeframes to inform mandatory reporters of report information.

Response: Based on comment responses, we decline to include a minimum timeframe for response to mandated reporters. We allow States to retain flexibility and minimize burden commensurate with commenters’ feedback.

Comment: We received significant comment from a wide array of interested parties in opposition to requiring APS programs to provide information to mandated reporters about an APS report and investigation. Some commenters voiced complete opposition to providing mandated reporters with any information, while others requested clarity, and some offered suggestions to improve our proposal and strengthen confidentiality, safety, and person-directedness.

⁴⁶ Lees Haggerty, K., Ojelabi, O., Campetti, R., & Greenlee, K., Education Development Center, Adult Protective Services and Reporter Communication: Recommendations for Improving Practice, (2023), <https://www.edc.org/adult-protective-services-and-reporter-communication-recommendations-improving-practice>.

For example, many commenters pointed out that their State had universal mandated reporter statutes with no delineation between the public and professionals. A national association noted that 16 States currently have such laws. Commenters noted that implementation of our proposals in these States would be extremely burdensome to operationalize, could potentially confuse reporters, and may put adults’ safety in jeopardy. A few commenters suggested we only require sharing information with mandatory reporters who are professionals reporting in their official capacity.

Some commenters noted that our proposal may have safety implications for adults, pointing out that a reporter—even a professional—may be untrustworthy, abusive, or otherwise be acting outside of an adult’s best interest. Several commenters also pointed out that releasing client information without an adult’s consent was not person-centered and may conflict with other provisions of this regulation prioritizing the adult’s rights. Some suggested that such information only be released if it directly benefits the adult, for example, if it was being released to a medical provider treating a client or to further case coordination. A few commenters suggested that our proposal be amended to allow the release of information only with the consent of the adult.

Many commenters stressed the importance of confidentiality, noting that our proposal may violate their States’ confidentiality laws. Some commenters requested we provide explicit language in regulation text about compliance with State confidentiality laws.

We received a number of suggestions from State entities and other commenters, often based on their own State experience, for improvements to our proposal. One commenter offered that information on reports should be limited to whether a case has been screened in or out. Another commenter suggested we only provide information on whether a report has been received. One APS program noted that it shares the screening decision of a case but only at the request of the reporting party. Another commenter noted that their State APS system does not currently share information on the finding of a case. One commenter suggested that feedback can be separated into two categories: procedural and substantive. The commenter noted that in their State, confidentiality laws protect substantive feedback, but procedural feedback is optional, and many counties provide a standardized response to the

mandated reporter. The commenter suggested that our regulations focus on procedural feedback only.

Response: We thank commenters for their detailed responses and suggestions and have amended 1324.405(b) to address these comments. We have amended § 1324.405(b)(1) to require that information about a report only be released upon request of the mandated reporter (per § 1324.401, a person encountering an adult in the course of their professional duties required by State law to report adult maltreatment or self-neglect) who made such report. We have removed § 1324.405(b)(1)(ii), limiting information that must be shared with mandated reporters to procedural information about case opening and not substantive information about case findings. We have added § 1324.405(b)(2), requiring APS systems to obtain the consent of the adult prior to releasing any information.

G. Section 1324.406 Coordination With Other Entities

We proposed in § 1324.406(a) to require that State entities develop policies and procedures to ensure coordination with other State and local governmental agencies, community-based organizations, and other entities engaged in activities to promote the health and well-being of older people and adults with disabilities for the purposes of addressing the needs of the adult experiencing the maltreatment and/or self-neglect. The policies and procedures are an opportunity for State APS systems to assess their relationships with other entities and to ensure State APS systems are working with the right partners in the right way.

These partners include, but are not limited to, State offices that handle scams and frauds, State and local law enforcement, State Medicaid agencies and other State agencies responsible for HCBS programs, the Long-Term Care Ombudsman Program, Protection and Advocacy Systems, financial services providers, State securities and financial regulators, and Federal financial and securities enforcement agencies. Such coordination maximizes the resources of APS systems, improves investigation capacity, and ensures APS response is effective. The mix of partners working together on a specific case will vary based on the facts, and whether the adult is experiencing maltreatment or self-neglect.

We have specifically included the State Medicaid agency as a partner for APS coordination in § 1324.406(a)(2)(i). As discussed below, we recognize the important role of APS in Medicaid critical incident management systems

and have developed our rule to facilitate alignment and coordination between Medicaid agencies and APS and to better align with the Centers for Medicare & Medicaid Service's proposed rule "Ensuring Access to Medicaid Services" (Access Rule's) critical incident requirements, which CMS anticipates will be finalized in Spring 2024.⁴⁷

We require that States establish policies and procedures to ensure coordination with these specific entities as they represent critical partners in the investigation of abuse, neglect, financial exploitation, and sexual abuse. Various non-APS entities have authority to investigate adult maltreatment and self-neglect based on who the alleged victim and perpetrator of the maltreatment are, and where the maltreatment took place. An effective, evidence-based, and holistic response to adult maltreatment must include all enumerated entities working in coordination with APS.

We proposed in § 1324.406(b) to require the State APS system to develop policies and procedures to address coordination and information sharing with several governmental and private entities both within a State and across State lines for the purpose of carrying out investigations. Coordination can include development of memoranda of understanding (MOU) (e.g., for referrals and information sharing), establishment of multidisciplinary teams across and among governmental and non-governmental entities (with appropriate safeguards for confidentiality to protect client privacy and the integrity of APS investigations), and collaboration on training and best practices. While the development of policies and procedures around coordination and information sharing are required, States have flexibility to determine which methods of coordination are appropriate for their APS system and ACL is not requiring any specific method of coordination.

We recognize that State laws may preclude sharing of certain information related to individual cases, but at a minimum, all APS systems can work with other entities around prevention and best practices to address adult maltreatment and self-neglect. State law may allow or require different agencies to investigate alleged maltreatment. Therefore, it is imperative for the State APS system to have a clear understanding of which entities are responsible for which types of

investigations and other types of responses. There are various factors that determine which entity is responsible for investigating adult maltreatment. For example, the location or setting of the adult maltreatment; the type of adult maltreatment; the relationship between an alleged perpetrator and an alleged victim; and the characteristics of the alleged victim. The policies and procedures required by § 1324.406(b) may, but are not required to, include information and data sharing agreements to ensure coordination of response and that appropriate referrals are made when APS receives a report that is outside their jurisdiction to investigate, including with law enforcement, the State Medicaid office, and State licensing and certification agencies. Coordination between entities reduces the imposition of multiple investigations on adults who have been harmed and strengthens responses by public safety and justice system entities and parties, including law enforcement and judges.

Policies and procedures that outline steps for coordination also help to prevent future maltreatment. For example, if APS has an information sharing agreement with other entities, it will be able to share information about alleged maltreatment against adults being served by the respective organizations. Additionally, such agreements allow information sharing between these entities on the outcome of individual investigations, as permissible under State law. For example, this could include communication of the results to State Medicaid agencies in instances in which a Medicaid provider or direct care worker is determined by APS to be a perpetrator of maltreatment, if such sharing is permitted by State law. We also believe it is critical to address coordination across States given that perpetrators may move themselves or their victim to another jurisdiction where the perpetrator will continue to engage in adult maltreatment.

We received a number of comments from interested parties. We discuss comments and responses below.

Comment: We received broad support for our proposals in § 1324.406, including policies and procedures that allow for the use of MOUs and data sharing agreements, and for the proposed rule's focus on coordination with other entities to detect, prevent, address, and remedy adult maltreatment. Several commenters, including State APS entities, commented that they already coordinate with other entities when permitted by law. In particular, commenters

⁴⁷ 88 FR 27960, (May 3, 2023); Office of Information and Regulatory Affairs, Unified Agenda, RIN: 0938-AU68. <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=0938-AU68>.

highlighted the importance of multidisciplinary teams. Commenters also noted that coordination can be difficult and time-consuming and does not rely solely on APS.

Response: We thank commenters for their support and insights and acknowledge the difficulties around collaboration. We are pleased, however, that many States are already in compliance with the provisions of the rule.

Comment: Several commenters who expressed support for § 1324.406 strongly encouraged alignment of its provisions and language across the Department of Health and Human Services' proposed regulations. In particular, commenters recommended that the final rule align language surrounding critical incidents with language in the Centers for Medicare & Medicaid's proposed Access Rule.⁴⁸

Response: We agree with commenters. Our intent in proposed § 1324.406(a)(2)(i) was to reflect the language in the proposed Medicaid Access rule. We have edited § 1324.406(a)(2)(i) to include explicit reference to "critical incidents" to more explicitly align this regulation with the proposed Access Rule and foster a clearer understanding of the level of coordination and information sharing that will be required to successfully implement the requirements. Additionally, we have extended the deadline for compliance with this rule to 4 years after publication to better align with the implementation deadline of the proposed Access rule critical incident management requirements.

Comment: Commenters recommended that we include in § 1324.406(a)(1) Tribal APS programs among other APS programs in the State with which to coordinate.

Response: We accept the comment and have amended § 1324.406(a)(1) accordingly.

Comment: We received many comments, including from APS systems, national associations, and organizations requesting that our rule include a more robust and explicit discussion of coordination with financial institutions. Some commenters noted that it was often difficult to compel financial institutions to release records or otherwise obtain information from them. One commenter said this was true even after the institution filed a report. Two commenters recommended adding language to encourage APS programs to share general case status information with financial institutions, with one commenter highlighting that this

inclusion would support APS coordination with State securities regulators, law enforcement, and other investigators to fight elder financial exploitation. A commenter suggested we broaden proposed § 1324.405(a)(6) "financial institutions" to the broader "financial services industry" and another commenter suggested clarifying the range of institutions. A commenter suggested including guidance that APS should establish policies and protocols for sharing information with financial institutions who submit reports as part of their professional work.

Response: Based on these comments, we have revised § 1324.406(a)(3) to include "State securities and financial regulators, Federal financial and securities enforcement agencies." We decline, however, to expand our definition to "financial services industry" as "financial institution" encompasses investment advisors, broker-dealers, and other entities.⁴⁹ Whether and how to compel financial institutions to release information is outside the scope of this rule.

Comment: We received many comments about coordination with other entities. Some commenters specifically approved of coordination with programs such as the State Long-Term Care Ombudsman Programs and Protection and Advocacy Systems, and some suggested APS coordination with these entities be mandatory. Others suggested additional entities with which APS should coordinate, including other Federal and State governmental agencies, legal services providers, disability organizations, and medical providers such as behavioral health specialists. One State asked for clarification as to whether "emergency management systems" in § 1324.405(a)(5) meant first responders such as emergency medical services and firefighters, or State and local disaster/emergency preparedness and response systems.

Response: We thank commenters for their responses. Many of the entities identified are already included in the regulation or fall into the broad categories in the regulation, such as organizations that advocate on behalf of adults who experience maltreatment. They, therefore, do not need further identification. As the State commenter suggested, emergency management systems could include both first responders and entities responsible for disaster/emergency preparedness and

response systems. Our intent is to ensure that States APS systems have the broadest flexibility possible to coordinate with organizations whose mission is aligned with theirs. These include organizations and entities from which they receive referrals, organizations with which they coordinate to provide services and otherwise respond to adult maltreatment, and organizations that represent older people and people with disabilities. Other than the additions discussed above, we have decided not to revise the regulatory language.

Comment: We received some comments that developing and maintaining relationships with other entities pursuant to § 1324.406(b) could be burdensome and expensive, including where other organizations have different jurisdictions or timeframes for taking action. In particular, the commenters stated that the cost to manage MOUs may be prohibitive and would require increased staff and funding. Some comments suggested that informal coordination was more feasible and reflected current practice. Many State APS entities noted that they are but one party to MOUs and data sharing agreements and cannot mandate that other entities enter into agreements, either intra-State or inter-State.

Response: We believe that building relationships with other entities who investigate and respond to adult maltreatment and self-neglect is an essential part of APS practice and that the benefit of such relationships far outweighs the potential burden. We understand that formal data sharing agreements and/or MOUs are not always the most appropriate or feasible option, and for this reason do not require their use. ACL also recognizes that other entities may be reluctant to enter into agreements or have their own policies and procedures that make entering into agreements difficult. However, we strongly encourage States, when developing or updating their policies and procedures, to assess when such a formalized relationship may be appropriate and, in those cases, establish such relationships.

We seek to clarify the language of the proposed rule. By requiring in proposed § 1324.406(b) that State entities "[p]olicies and procedures must, at a minimum [. . .] (3) allow for the establishment of memoranda of understanding, where appropriate [. . .]" we may have unintentionally given the impression that States must establish MOUs. The use of the phrase "at a minimum" was intended to convey that policies and procedures

⁴⁹ U.S. Treasury, Financial Crimes Enforcement Network, Financial Institution Definition, <https://www.fincen.gov/financial-institution-definition> (last visited January 22, 2024).

⁴⁸ *Id.*

could incorporate MOUs as well as other options, not that policies and procedures must incorporate MOUs. We are amending § 1324.406(b) to remove the phrase “at a minimum.” We are amending § 1324.406(b)(3) to indicate that the policies and procedures must facilitate information exchanges through MOUs, data sharing agreements, and/or other less formal arrangements.

Comment: Commenters also requested that ACL provide technical assistance regarding MOUs and data sharing agreements.

Response: ACL will provide technical assistance regarding MOUs and data sharing agreements as part of the implementation of the final rule.

Comment: We received comments asking that State entities be required to have policies and procedures that address such issues as coordination across States, including record-sharing and reporting requirements.

Response: State entities should develop policies and procedures for coordination that address the needs of their jurisdiction and the people they serve. For example, they may want a policy regarding adults who spend only part of the year in their State or who receive medical services in a jurisdiction they do not serve. To ensure that State entities understand their obligations and their discretion in developing policies and procedures, we are adding a new subsection (4) to § 1324.406(b) for policies and procedures that address other activities as determined by the State entity.

Comment: Many commenters noted that coordination between APS systems and other entities may raise privacy and confidentiality concerns. For example, one commenter noted an APS program may be a covered entity under Health Insurance Portability and Accountability Act of 1996 (HIPAA) while the other party to a data sharing agreement is not. Commenters offered that any automatic information sharing that did not offer a client the opportunity to opt-out would violate principles of self-determination and rights to confidentiality and that any data sharing should be limited to case information necessary for assisting a client-directed action on a specific issue. A commenter warned that inappropriate data sharing could damage the trust built between a client and APS program. Some commenters suggested that all data sharing require client consent first. A commenter suggested we edit our regulation text to explicitly provide for applicable State privacy laws.

Response: As our rule provides, State policies and procedures should

prioritize person-directed responses to reports of maltreatment (§ 1324.402(b)(1)), including in coordinating with other entities. Section 1324.406(a) requires “State entities [to] establish policies and procedures, consistent with State law[.]” This includes compliance with all applicable State privacy laws. Compliance with HIPAA is beyond the scope of this regulation.

H. Section 1324.407 APS Program Performance

We proposed requirements in § 1324.407 for APS State entities’ annual data collection and reporting specific to program performance. Section 1324.407 requires that State entities develop policies and procedures for the maintenance of individual APS case data. We proposed that State entities maintain data for at least 5 years and are finalizing our requirements as proposed. We sought comment on whether our timeframe was adequate or whether a greater or lesser duration was optimal and received comments both in support of and in opposition to our proposal. Commenters also provided suggestions and requested explanation regarding the interaction of new data reporting requirements with existing voluntary NAMRS data submission. We discuss comments and responses below.

Comment: We received several comments voicing general support for setting minimum standards for program performance data collection. One commenter agreed with setting these standards, but suggested organizations should be able to maintain their current systems to reduce burden on States.

Response: We thank commenters for their support and agree that setting minimum program performance data standards is crucial to standardizing APS systems across the country. We believe many States may be able to maintain, or adapt, their current systems to meet the requirements of our regulation. We are finalizing the provision as proposed.

Comment: We received several comments in support of our proposal to maintain records for 5 years. A few commenters proposed alternative time periods, some longer and some shorter. Several State APS entities described their own record retention systems, with some arguing that the rule would require a change that might require increased funding.

Response: ACL appreciates commenters’ input and will maintain the regulatory text of § 1324.407(b) requiring individual case data retention for a minimum of 5 years. We believe that 5 years is the minimum appropriate

timeframe to allow APS programs to assess clients across time to determine whether repeated abuse or recidivism is occurring.

Comment: Many commenters suggested that our proposal was duplicative of NAMRS, with a few commenters suggesting that we should improve NAMRS rather than create a new system of reporting, particularly with respect to equity issues. Some commenters requested clarification on what data will need to be reported, stating that the burden will be lessened if it is the same data as is entered in NAMRS or if ACL provides technical assistance and additional funding. Several commenters noted that statutory changes will be necessary to comply with reporting requirements and that ACL underestimated the costs of this proposal, particularly for States that would need to change their data reporting system. Other commenters requested ongoing financial and technical assistance to make the new reporting requirements more feasible.

Response: ACL appreciates the comments and concerns regarding the development of proposed data collection and maintenance procedures. NAMRS is a voluntary, public health surveillance system and does not collect data about APS performance. NAMRS collects information about the characteristics of those experiencing and perpetrating maltreatment, information on the types of maltreatment investigated, and information on services to address the maltreatment. In contrast, our rule mandates that, in order to receive Federal funding, State entities have policies and procedures in place for the collection and maintenance of performance data on APS investigations. This newly required data collection will allow ACL and States to measure how APS programs are meeting the goals and objectives proposed for this funding. In addition, any information required to be collected as part of required performance data will be made available for public comment, consistent with requirements under the PRA, which govern how Federal agencies collect information from the public. The public will be able to review and comment on any additional data collection proposals related to grant performance, including about the potential burden associated with the data collection, before any specific data collection or reporting is required. Once data collection requirements are finalized, ACL will provide technical assistance to States, and to the extent possible we will work with States to ensure that existing data collection systems can be used for

reporting. For that reason, we are maintaining the required data collection and maintenance procedures as proposed.

Comment: Several commenters provided suggestions on additional program performance and NAMRS data to be collected. One commenter asked ACL to require collection of client demographic data through NAMRS to improve and ensure equitable services for marginalized groups, including racial and ethnic minorities. We received a comment suggesting that ACL collect client outcomes data.

Another commenter requested that we require collection of the reason for investigation and service delivery. One commenter suggested the submission of existing staff-client ratios. A few commenters suggested that APS annual reports to ACL and disaggregated data should be required to be released publicly. Another commenter recommended more data reporting than may be included in annual reports to the State Unit on Aging.

Response: ACL appreciates commenters' suggestions and agrees that granular data, particularly on underserved populations at high risk of adult maltreatment, is critical. Nevertheless, we decline to specify such data collection in this rulemaking. Regarding NAMRS data collection, we encourage public comment on the PRA notice for NAMRS when it is renewed in 2026 (OMB Control number 0985–0054). Additionally, we will be working with States to implement § 1324.407 and establish data collection parameters, and we will consider commenters suggestions in that process. The public will have a 30- and 60-day period to comment on our proposal under the requirements of the Paperwork Reduction Act. Furthermore, we encourage States to collect data beyond our minimum requirements for their own evaluative purposes.

Comment: ACL received comment that the regulation should include a quality assurance program, research, and discussion about specific information describing data collected.

Response: We agree that quality assurance and ongoing research and evaluation of State APS systems is essential, and we encourage these activities and coordination with other entities per § 1324.406(b)(3) as APS systems pursue them. However, we believe that mandating such activities is beyond the scope of this rule.

I. Section 1324.408 State Plans

Section 1324.408(a) of the rule requires each APS State entity to develop a State plan consistent with 45

CFR 75.206(d) and requirements set forth in the EJA and by the Assistant Secretary for Aging.⁵⁰ Funding provided to State APS entities through the EJA is contingent on compliance with our regulations, and the State plan is the mechanism through which States demonstrate, and ACL evaluates, this compliance. State plans can also be used to demonstrate how States' activities, data, and outcomes can inform best practices, which can be used to leverage additional resources. These plans promote coordination and collaboration to better serve the people of a State by providing a blueprint that describes what actions the State will undertake to meet the needs of the population it serves.

Section 1324.408(b) of the rule requires the State entity receiving the Federal award of funding under the EJA (42 U.S.C. 1395m–1) to develop a State plan in conjunction with other State entities (if applicable) and APS programs. Section 1324.408(c) requires the State entity to update the plan at least every 5 years.

ACL has administrative oversight responsibility with respect to the expenditures of Federal funds pursuant to the EJA. Therefore, under § 1324.408(d), as a condition of approval and receipt of Federal funding, APS systems must include assurances in their State plans that they will develop and adhere to policies and procedures as set forth in this regulation. ACL will provide technical assistance to States regarding the preparation of State plans and is responsible for reviewing those that are submitted for compliance. Annual State program performance data collected and submitted to ACL pursuant to § 1324.407 is used to measure performance and assess the extent to which State systems are meeting State plan objectives.

Finally, § 1324.408(e) sets forth a process for plan review. State plans are reviewed and approved by the Director of the Office for Elder Justice and Adult Protective Services (OEJAPS), the position designated by section 201(e)(1) of the OAA, 42 U.S.C. 3011(e)(1). A State entity dissatisfied with the Director of OEJAPS' final determination may appeal to the Deputy Assistant Secretary for review not later than 30

calendar days after the date of the determination. The State entity will then be afforded an opportunity for a hearing before the Deputy Assistant Secretary. If the State disagrees with the determination of the Deputy Assistant Secretary, it may appeal to the Assistant Secretary not later than 30 calendar days after the date of the Deputy Assistant Secretary's decision.

ACL invited interested parties to submit comments about the requirements for State APS program plans, their requirements, and their development. Many commenters were in favor of this regulation, whereas others commented that these provisions of the rule are too burdensome and will require substantial resources for APS programs to implement. ACL appreciates the comments that we received and discusses them below.

Comment: Several commenters welcomed the proposal that each State APS entity must develop a State plan, stating that this will standardize APS programs nationally. Some commenters anticipate that Federal standards and guidelines will help eliminate problems with State practices. A commenter proposed that the State plans should be published online for transparency.

Response: We thank commenters for their support. We strongly encourage State entities to make their State plan public through publishing the plan online, by identifying a point of contact who can share that information, or through other mechanisms, but are not requiring them to do so. ACL will publish State plans on its website.

Comment: Many commenters requested clarification on the required contents of the State plan and on its creation. Some commenters observed that States will require technical assistance from ACL to develop State plans. A commenter recommended that State plans consist of a checklist format that is compliant with the new regulations and that States should not be required to provide extensive narratives in their plans. Prescriptive requirements should be limited, according to a commenter. A commenter suggested that ACL develop a template for State entities to use to develop their plans and another raised concerns that Tribal plans will be subject to State entity input and review.

A few commenters noted that there are some States with bifurcated APS systems—one for adults 60 and over and the other for younger adults with disabilities. Commenters recommended that, in these circumstances, the States should be permitted to submit multiple State plans and Federal funding should

⁵⁰ 45 CFR 75.206(d) allows the option for State entities to submit State plans instead of applications for funding, thereby reducing burden. The Older Americans Act of 1965 § 201(1)(e)(A)(ii), 201(1)(e)(A)(iv)–(B), 42 U.S.C. 3011(e)(1)(A)(ii), 3011(e)(1)(A)(iv) and 42 U.S.C. 3011(e)(1)(B) directs the Assistant Secretary for Aging to collect data and information, and strategic plans from States. The EJA § 2042(b)(4), 42 U.S.C. 1397m–1(b)(4) authorizes State reports from each entity receiving funding.

be separately directed to the distinct State entities.

Response: ACL appreciates comments regarding the need for clarification about State plan creation, content, format, and development. ACL will provide technical assistance to the States related to plan development. We will review best practices and applicable regulations and policy and communicate further information about plan development and requirements to State entities before new State plans are due for submission and review.

We have amended the rule to provide more clarity for States with bifurcated APS systems in response to their comments. Rather than having those States submit multiple plans, we are revising § 1324.408(b) to require the State entity that receives EJA funds directly from ACL to work with any other applicable State entities, as well as APS programs, to develop the State plan. We expect such States to submit one State plan for both APS programs that is developed collaboratively.

Our funding is distributed to only one State entity—the unit or agency that serves older adults. We expect the State entity to disperse funding to the agency that serves other populations, consistent with the allocation plan in the State plan.

Comment: Many commenters recommended that plan implementation should be delayed beyond 3 years after the effective date of the APS rule, with several recommending that plan implementation occur no sooner than 4 years after the rule becomes effective, including an association representing State entities, and other commenters recommending 5 years.

Response: In response to commenter input ACL has extended the deadline for compliance with this rule to 4 years after publication. Therefore, State plans will be due 4 years after our regulations are final. We believe this allots sufficient time for State systems to develop State plans. States that require additional time may request a corrective action plan.

Comments: We received comments opposing our State plan requirements in the proposed rule. Several commenters anticipated that plan development would be challenging, time intensive, and require additional staff and money. Commenters suggested that we had underestimated the cost of writing and receiving approval for the plan. A few commenters predicted that the creation of a new State plan would be burdensome to the States.

Response: As commenters have noted, the drafting and implementation of new State APS plans is expected to require

staffing, time, and resources. However, ACL believes the State plan requirement is reasonable and the least burdensome option available to comply with Federal regulations for Federal grants awards. Federal regulations (45 CFR 75.202) require that HHS provide public notice of Federal financial assistance programs. To indicate interest in receiving funding, entities must abide by standard application requirements outlined in 45 CFR 75.206. To reduce burden on State applicants, 45 CFR 75.206(d) specifically allows for State plans to be submitted rather than applications for funding on a period of performance basis.

ACL has accounted for the factors raised by commenters in the projected costs of rule implementation. Every State, the District of Columbia, and the Territories have already created a State APS operational plan as a requirement of receiving funding under the American Rescue Plan Act of 2021 (ARPA) (Pub. L. 117–2).⁵¹ ACL's estimate of burden is based on the expectation that the States, the District of Columbia, and the Territories will review and update their existing operational plans and not engage in creating a new State APS plan. In addition to meeting regulatory requirements for grant making, we anticipate that State plans will be used to support data collection, to develop promising practices for State and local APS programs, and to improve coordination between APS programs and their partners. State plans will be a useful tool to State entities for establishing quality assurance parameters and monitoring program performance. Most importantly, State plans will provide a standardized platform to facilitate and measure essential outcomes for APS clients.

Moreover, we note again that we have amended the compliance date to 4 years after publication of the final rule. We believe that 4 years provides sufficient time for States to review their State APS operation plan and develop a State plan pursuant to these requirements. States that require additional time may request a corrective action plan.

Comments: A few commenters contend that the State plan is duplicative of the OAA requirements for a State plan. Conversely, one commenter asserted that the APS plan is not like the OAA plan. However, another commenter suggested States could use the OAA State plan as a

template for the APS plan and another that the APS plans could be absorbed into a State's OAA State plan. Some commenters sought clarity regarding the APS State plans interaction with OAA State plans.

Response: ACL appreciates commenters' input. At this time, APS State plans cannot be combined with OAA State plans because current APS funding is provided through the EJA, not the OAA formula grants. As a separate grant award, it is subject to separate Federal grant requirements. However, we agree with commenters that the structure and format may be similar. For example, both the APS and the OAA State plans require State entities to provide assurances that they will abide by Federal laws and regulations. States may choose to synchronize their OAA State plan and APS plan and submit them concurrently. However, they are distinct, and ACL will evaluate each separately.

Comment: We also received comments indicating that the APS State plans required under this rule duplicated or complemented the operational plans required for receipt of ARPA funding, and that that State plans should build on rather than replace ARPA operational plans. A few commenters requested clarification for how APS State plans differed from the operational plans.

Response: ACL does not believe that State plans are duplicative of those plans required by ARPA. Rather, we believe States' ARPA operational plans can and should be the foundation of a more comprehensive and detailed State plan. In ARPA operational plans, State entities described where they sought to make investments to strengthen their APS programs. APS State plans required by § 1324.408 require States to provide further assurances related to APS practices to receive Federal funding. For this reason and the reasons set forth above describing the value and uses of the APS State plans, we are maintaining the regulatory language at § 1324.408(a) as proposed.

Comment: We received comment that State plans are duplicative of our reporting requirements in § 1324.407.

Response: Our reporting requirements in § 1324.407 complement State plan requirements but do not duplicate them. The State plan sets out how the State entity intends to comply with the requirements of this regulation. Performance data reported by States is used to assess the extent to which State APS systems are meeting State plan objectives.

⁵¹ *Elder Justice Act Mandatory Grants*, Admin. For Cmty. Living, <https://acl.gov/grants/elder-justice-mandatory-grants> (last modified on Oct. 18, 2023).

Comments: Many commenters supported a requirement for ongoing input from interested parties in the development of State plans, including feedback from APS workers, prior clients, and from individuals meeting the definition of “adult.” A commenter recommended that the State plan set minimum standards for collaboration. Another commenter wanted to ensure that State plans solicit input from Tribes before State plan implementation.

Response: As commenters have noted, the development of State plans will require a comprehensive planning process that ensures States collaborate with APS programs. The rule anticipates, but does not require, that State entities will seek input from other interested parties when they develop State plans. Section 1324.408(b) sets minimum requirements for collaboration with APS programs regarding plan development. However, we strongly encourage collaboration with all interested parties, including adults with personal experience interacting with APS programs. We are therefore finalizing this proposal.

Comments: Several commenters addressed the frequency of updating State plans under § 1324.408(c). Some commenters found the language requiring an update at least every 5 years or as frequently as every 3 years confusing. A few commenters wrote in support of a 3 to 5 year State plan renewal cycle. Another suggested a longer timeframe based on resource and workload concerns.

Response: ACL has considered these comments and concerns about resources and workload. The intent of the State plan is to ensure that the APS programs are consistently maintaining the services they have committed to and are providing services that meet the needs of the adults receiving APS services. Moreover, the plan updates enable States to review current practices and policies that may need to be revised or abandoned and to adopt new practices based on the adult populations they serve. We believe that the requirement to update State plans every 5 years is a reasonable timeframe. We agree, however, that the language of § 1324.408(c), which allows a State entity to update the State plan as frequently as every 3 years, is confusing. We therefore are amending the language to require that a State plan be updated every 5 years or more frequently as a State entity determines. The first State plan will be due 4 years after the implementation of this regulation, with each subsequent plan due at least every 5 years after that.

We thank commenters for their clarifying suggestions and have incorporated them into the text of § 1324.408(c).

Comments: We received comment in support of our proposal to require APS State plans to contain assurances that APS systems will develop and adhere to policies and procedures as set forth in this regulation. A number of commenters requested information on what the consequences would be should an APS system fail to meet State plan assurances. A commenter stated that the submission of annual data is sufficient for demonstrating compliance with APS policies and procedures and a State plan is not necessary.

Response: We appreciate these responses from commenters. We are requiring State entities to assure us that they have created and adhered to certain policies and procedures set forth in the rule. As stated previously, submission of a State plan satisfies HHS grant requirements under 45 CFR part 75. Failure to provide or adhere to such assurances in the State plan jeopardizes a State’s eligibility for funding under § 1324.400. Please see our discussion in the Background section of this rule for more information on compliance, technical assistance, and corrective action plans for States who need additional time to come into compliance. We decline to change the language of the regulation at § 1324.408(d).

Comments: Many commenters support Federal review of the State APS plans before their implementation. One commenter stated that the appeals process appears inflexible. Another commenter recommended that the rule contain a clearly defined timeline and process for correcting plans found to be defective upon review.

Response: ACL believes that it is essential to issue a clearly defined appeals process to maintain the integrity of the plan review system. Therefore, we are maintaining the language of this section. However, we will be providing technical assistance to the States as they develop their plans and anticipate that most concerns will be resolved through technical assistance consultation and other guidance. For example, if a State submits a State plan that is found to be defective, ACL will work with the State on a corrective action plan to address deficiencies in a timely manner through a collaborative and flexible process.

IV. Required Regulatory Analyses

Of the 172 public comments we received, nine State and four county APS programs submitted comments specifically regarding the Required

Regulatory Analyses. These comments were taken into serious consideration when assessing the costs and benefits of the final rule. Other commenters offered broad commentary on our burden estimates. In the subsequent section, we summarize the comments received and provide our response, followed by an update to the original Regulatory Impact Analysis (RIA).

Comment: ACL received several comments indicating concerns with implementation costs and administrative burden in implementing the final rule, as well as concerns regarding ongoing costs to monitor compliance with the final rule. Some commenters stated they anticipate increased costs associated with personnel issues, including the need to hire consultants and/or additional staff which may incur additional new employee onboarding and training costs. We received comments suggesting that changes will need to be made to State information technology systems. Some commenters asserted that ACL has greatly underestimated both the cost and the amount of time needed to come into compliance with the rule.

Response: As noted above, ACL has made changes to the proposed rule’s provisions based on the public comments we received. Among the revisions and clarifications are the following which reduce burden on and costs to the states:

- ACL added and clarified in § 1324.401 that we have sought to minimize State burden by requiring only an assurance that a State’s definitions as a whole meet the minimum standards of the regulatory definitions. States are not required to adopt each of the individual regulatory definitions exactly as written. We will defer to States’ definitions as long as the concepts and elements set forth in the definitions in this regulation are reflected in a State’s definitions as a whole. This will alleviate perceived burden related to changes in State statute and policy as States will often not need to alter their statutory definitions to conform with those in § 1324.401.

- ACL modified proposed § 1324.402(b) to clarify that APS programs may refer to emergency response systems, law enforcement, or another appropriate community resource (e.g., homeless outreach, veteran’s affairs, services for victims of sexual assault) to meet the requirements of an in-person contact within 24 hours of APS screening and safety and risk assessment.

- We clarify in § 1324.402(c) notice of rights does not require leaving a

brochure, but the notice could be provided verbally or through other means. The costs for printing a pamphlet were illustrative.

- We removed the requirement at proposed § 1324.402(d)(3) that State APS entities set staff-to-client ratios.
- We removed proposed § 1324.403(e)(6) requiring APS systems to monitor the status of clients and the impact of services. Similarly, we removed proposed § 1324.403(f)(3)(iii) that required APS programs assess the outcome and efficacy of intervention and services.
- ACL modified proposed § 1324.405 (Accepting Reports) by removing § 1324.405(b)(1)(ii) requiring APS to share with a mandated reporter the finding of an allegation in a report made by the mandated reporter. New § 1324.405 adds a more limited requirement that a mandated reporter reporting in their professional capacity be notified upon their request, consistent with State privacy law, with the consent of client, and only requires the provision of procedural information (such as whether a case has been opened or closed as a result of their report).
- We have clarified § 1324.406(b) requires that APS programs develop policies and procedures that allow for, but do not require, the implementation of information and data sharing agreements. Rather, policies and procedures must facilitate information exchanges, but States have flexibility in the approaches they use. States may enter into memoranda of understanding (MOU), data sharing agreements, or other less formal arrangements. Formal MOUs and data sharing agreements are not a requirement.
- We have clarified in § 1324.408 that ACL's estimate of burden is based on the expectation that States, the District of Columbia, and Territories will review and update the existing operational plans developed as a requirement of receiving funding under the American Rescue Plan Act and not the creation of new State APS plans.
- We have extended the implementation timeframe from 3 years to 4 years to allow States more time and resources to come into full compliance with the regulation. Many of the costs associated with implementation of the regulation are "one-time" costs which can now be spread across an additional year. We have also clarified that if States need additional time to implement specific provisions beyond the 4 year implementation timeframe, they can request additional time through a corrective action plan.

Many of the burden and cost concerns raised by commenters appear rooted in misperceptions of the scope of the proposed regulations. In the final rule, we have clarified the appropriate scope of applicability and made revisions and clarifications that reduce burden, as outlined above. As a result, we retain the burden estimate as proposed with a few adjustments based on commenter feedback. While State APS programs will need to review and possibly update current practices, policies, and procedures to ensure they comply with the final rule, we note again that a majority of this rule conforms to longstanding APS practice. We also note that public comments that provided State-specific cost estimates to implement and administer the final rule did not clearly differentiate between costs attributable to the incremental costs of implementing the final rule and existing practice, which makes it difficult to incorporate this information in the final RIA. In addition, the final rule grants significant discretion to the State in how to implement many provisions.

In consideration of comments related to the time required for implementation of the rule, we have decided to delay the compliance date of until 4 years after the date of publication. This should give all regulated entities sufficient time to come into compliance with these regulations. If State APS entities encounter challenges implementing specific provisions of the rule, they should engage with ACL for technical assistance and support. In addition, State APS entities that need additional time to comply with one or more provisions of the rule may submit a request to proceed under a corrective action plan. A request should include the reason the State needs additional time, the steps the State will take to reach full compliance, and how much additional time the State anticipates it will need to come into compliance. The corrective action plan process is intended to be highly collaborative and flexible. ACL will provide guidance on this process after this rule takes effect.

A. Regulatory Impact Analysis (Executive Orders 12866 and 13563)

1. Introduction

We have examined the impacts of the final rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory

alternatives and, if regulation is necessary, select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, "significant" regulatory actions are subject to review by the Office of Management and Budget (OMB). As amended by Executive Order 14094 entitled "Modernizing Regulatory Review" section 3(f) of the Executive order defines a "significant regulatory action" as any regulatory action that is likely to result in a rule that may:

- (1) have an annual effect on the economy of \$200 million or more (adjusted every 3 years by the Administrator of the Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, Territorial, or Tribal governments or communities;
- (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in this Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

It has been determined that this rule is significant. Therefore, OMB has reviewed this rule.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes an assessment of anticipated costs and benefits, before finalizing "any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year." The current threshold after adjustment for inflation is \$183 million, using the most current (2023) Implicit Price Deflator for the Gross Domestic Product. This final rule would not result in impacts that exceed this threshold. Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the

Congressional Review Act, 5 U.S.C 801 *et seq.*) OIRA has determined that this rule does not meet the criteria set forth in 5 U.S.C. 804(2).

Summary of Costs and Benefits

Compared to the baseline scenario wherein APS systems continue to operate under State law with no Federal regulation, we identify several impacts of this rule. We anticipate that the rule will: require the revision of State policies and procedures, require training on new rules for APS staff, require the submission of new State plans, require APS systems create a feedback loop to provide information to mandated reporters, require data reporting to ACL, inform potential APS clients of their APS-related rights under State law, and require new or updated record retention systems for certain States. We anticipate that the final rule will result in improved consistency in implementation of APS systems within and across States, clarity of obligations associated with Federal funding for administrators of APS systems, and better and more effective service delivery within and across States with better quality investigations in turn leading to more person-directed outcomes.

This analysis describes costs associated with issuing APS regulations and quantifies several categories of costs to grantees (State entities) and sub-grantees (APS programs), collectively referred to as APS systems, and to ACL under the proposed rule. Specifically, we quantify costs associated with APS systems (1) revising policies and procedures, (2) conducting trainings on updates to policies and procedures, (3) implementing policies and procedures (3) reporting data to ACL (4) maintaining records retention system (5) developing State plans. The proposed effective date of this rule is for 4 years from the date of final publication. This is to allow for variation in the timing of State legislative sessions, in recognition of limited Federal funding, to allow States with more substantial changes increased time to come into compliance, and to better align with the Medicaid Access Rule's critical incident requirements. We anticipate that all States will have fully implemented the rule by its effective date and impacts will be measurable by that time. We conclude the final rule will result in a total State and Federal cost of \$5,223,664.65 to fully implement.

A detailed discussion of costs and benefits associated with the rule follows. The cost of this rule will be offset by improved APS investigation and services and better outcomes for the

victims of adult maltreatment. This represents significant value, particularly given the widespread and egregious nature of adult maltreatment in the United States, which we explain in greater depth in our "Discussion of Benefits."

The analysis also includes a discussion of the potential benefits under the rule that we do not quantify.

a. Costs of the Final Rule

1. Revising and Publishing Policies and Procedures

This analysis anticipates that the rule would result in one-time costs to State entities and APS programs to revise policies and procedures. All APS systems currently maintain policies and procedures, often based on State statute. Findings from our National Process Evaluation Report of Adult Protective Services (OMB Control Number 0985-0054)⁵² and State experiences incorporating concepts from the Consensus Guidelines underscore the importance of the final rule. The final rule establishes a minimum standard broadly reflective of current practice in many States and establishes a benchmark for consistent standards to be implemented uniformly across and within States, where we know variability exists in current practice. For example, while all States currently require a screening process for intake, there is no uniformity or standardization in this process across or within States and detailed documentation in policies and procedures (if present) varies widely. Therefore, in requiring standard policies and procedures for APS systems, ACL anticipates that all APS programs may create new or revise their current policies and procedures under the proposed rule; however, the level of revision will vary by State. There is currently no data on the total number of APS programs. Our estimates reflect our understanding of the structure of State APS systems and the assumption that there is one program per county in local-level systems, totaling 928 APS programs nationwide.⁵³

We estimate that roughly twenty-five percent (25%) of these entities will

require more extensive revisions, with the majority requiring limited revisions to their current policies and procedures. We estimate that programs with more extensive revisions will spend forty (40) total hours on revisions per entity. Of these, thirty-five (35) would be spent by a mid-level manager equivalent to a first-line supervisor (Occupation code 43-1011), at a cost of \$30.70 unadjusted hourly wage, \$61.40 per hour adjusted for non-wage benefits and indirect costs ($35 \times \$61.40$), while an average of five (5) hours would be spent by executive staff equivalent to a general and operations manager (Occupation code 11-1021), at a cost of \$51.54 per hour unadjusted hourly wage, \$103.08 per hour adjusted for non-wage benefits and indirect costs ($5 \times \$103.08$).⁵⁴ For programs with less extensive revisions, we assume twenty-five (25) total hours spent on revisions per entity. Of these, twenty (20) hours would be spent by a mid-level manager equivalent to a first-line supervisor (Occupation code 43-1011), at a cost of \$30.70 per hour unadjusted hourly wage, \$61.40 per hour adjusted for non-wage benefits and indirect costs ($20 \times \$61.40$), while an average of five (5) hours would be spent by executive staff equivalent to a general and operations manager (Occupation code 11-1021), at a cost of \$51.54 unadjusted hourly wage, \$103.08 adjusted for non-wage benefits and indirect costs ($5 \times \$103.08$).

We monetize the time that would be spent by APS programs on revising policies and procedures by estimating a total cost per entity of \$2,664.40 or \$1,743.40, depending on the extent of the revisions. For the approximately 696 programs with more extensive revisions, we estimate a cost of approximately \$1,854,422.40. For the 232 programs with less extensive revisions, we estimate a cost of approximately \$404,468.80. We estimate the total cost associated with revisions with respect to the final rule for APS systems of \$2,258,891.20.

The above estimates of time and number of State entities or APS programs that would revise their policies under the regulation are approximate estimates based on ACL's extensive experience working with APS systems, including providing technical assistance, and feedback and inquiries that we have received from State entities and APS programs.

In addition to the revisions to the State policies and procedures, the final

⁵² *Supra* Note 4.

⁵³ The structure and administration of APS in the United States is variable and we lack data on the number of local APS programs. Some States have a single entity that controls and administers the program, others have a State entity and local programs. There is a staffed APS office in every State government, the District of Columbia and three Territories which receives ACL grant funding. Fifteen States have local level APS programs, the others are State-administered and have a single APS entity for the entire State. We have used counties as a proxy for the 15 with local programs.

⁵⁴ Wages are derived from 2022 Department of Labor, Bureau of Labor and Statistics Data are multiplied by a factor of two for non-wage benefits and indirect costs.

rule requires each State to publish the policies and procedures related to this rule. We base the estimated burden of this requirement on the assumption that a State APS agency has the following administrative structure: a State APS office located within a larger state agency or division (such as a Division on Aging) under the umbrella of a State Department (such as Department of Human Services).

After the policies and procedures have been developed, we estimate that a mid-level manager equivalent to a first-line supervisor (Occupation code 43–1011) will spend four (4) hours, at a cost of \$30.70 unadjusted hourly wage, \$61.40 per hour adjusted for non-wage benefits and indirect costs ($4 \times \$61.40$), to convert the policies and procedures documents into a simplified and plain language version for public release. We estimate that this version will require six (6) hours of review and approval by executive staff within the APS office and State agency, equivalent to a general and operations manager (Occupation code 11–1021), at a cost of \$51.54 per hour unadjusted hourly wage, \$103.08 per hour adjusted for non-wage benefits and indirect costs ($6 \times \$103.08$), and two (2) hours legal review by attorneys equivalent to a State government lawyer (Occupation code 23–1011), at a cost of \$49.71 per hour unadjusted hourly wage, \$99.42 per hour adjusted for non-wage benefits and indirect costs ($2 \times \$99.42$).

We estimate an additional eight (8) hours will be spent by executive staff within the umbrella Department to review and approve the policy document, equivalent to a general and operations manager (Occupation code 11–1021), at a cost of \$51.54 per hour unadjusted hourly wage, \$103.08 per hour adjusted for non-wage benefits and indirect costs ($8 \times \$103.08$), and four (4) hours legal review for compliance with State laws and provisions regarding publicly posting policy documents by attorneys equivalent to a State government lawyer (Occupation code 23–1011), at a cost of \$49.71 per hour unadjusted hourly wage, \$99.42 per hour adjusted for non-wage benefits and indirect costs ($4 \times \$99.42$).

When the document has completed the review and approval process, it will need to be prepared for publication and posting. We estimate ten (10) hours will be spent to format the document for online posting, adding graphics and design, remediating any accessibility issues, equivalent to a state government desktop publisher (Occupation Code 43–9031) at a cost of \$29.42 per hour unadjusted hourly wage, \$58.84 per hour adjusted for non-wage benefits and

indirect costs ($10 \times \$58.84$), and three (3) hours will be spent creating the web page and posting the document, equivalent to a State government web developer (Occupation Code 15–1254) at a cost of \$36.68 per hour unadjusted hourly wage, \$73.36 per hour adjusted for non-wage benefits and indirect costs ($3 \times \$73.36$).

We monetize the time that would be spent by APS programs to make their policies and procedures ready for public dissemination by estimating a total cost per entity of \$3,093.72. As this applies to only the 56 APS systems, we estimate the total cost associated with making their policies and procedures publicly available with respect to the final rule to be \$173,248.32.

We estimate the total cost for revisions of policies and procedures as well as costs associated with making such policies and procedures available for public dissemination to be \$2,432,139.52.

2. Trainings on New Requirements

Cost to conduct trainings (ACL staff and contractors): ACL estimates that the Federal Government will incur a one-time expense with respect to training or re-training State entities under the final rule. Senior ACL staff will train State entities by the ten (10) HHS regions assisted by its technical assistance provider the APS Technical Assistance Resource Center (TARC). We assume for each of the ten (10) regions that trainings will take three (3) hours of staff time for one Federal GS–14 equivalent⁵⁵ at a cost of \$63.43 unadjusted hourly wage, \$126.85 adjusted for non-wage benefits and indirect costs ($3 \times \$126.85$), three (3) hours of staff time for one GS–13 equivalent at a cost of \$53.67 per unadjusted hourly wage, \$107.35 per hour adjusted for non-wage benefits and indirect costs ($3 \times \$107.35$), and (3) and three hours of staff time for five (5) contractors equivalent to training and development managers (U.S. Department of Labor (DOL) Bureau of Labor Statistics (BLS) Occupation code 11–3131) at a cost of \$63.51 per hour unadjusted for non-wage benefits, \$127.02 per hour adjusted for non-wage benefits and indirect costs ($3 \times 5 \times \$127.02$). This is inclusive of time to prepare and conduct the trainings.

We monetize the time spent by Federal employees and contractors to prepare and conduct trainings for State entities by estimating a total cost per

regional training of \$2,607.90. For ten trainings a total of \$26,079.00.

Cost to conduct training (State entity to local APS program): We further anticipate in each of the 15 local-level systems the State entity would incur a one-time expense to conduct a training on the new policies and procedures for the State's local APS programs. For each State entity to prepare and conduct a training (15 trainings total) we anticipate two (2) employees per State entity each equivalent to a first-line supervisor (BLS Occupation code 43–1011), would spend four (4) total hours (two (2) hours per employee) at a cost of \$30.70 per hour unadjusted hourly wage, \$61.40 per hour adjusting for non-wage benefits and indirect costs ($4 \times \$61.40$).

We monetize the time spent by State entities to prepare and conduct trainings for local APS programs at \$245.60 per training. For 15 State entities we anticipate a total of \$3,684.00.

Cost to conduct training (APS programs to APS workers): We anticipate each of the 928 local APS programs will incur a one-time expense to conduct a training for APS workers on new policies and procedures. For each program to prepare and conduct a training we anticipate nine (9) hours to prepare and conduct a training of one mid-level manager equivalent to a first-line supervisor (BLS Occupation code 43–1011), at a cost of \$30.70 per hour unadjusted hourly wage, \$61.40 after adjusting for non-wage benefits and indirect costs ($9 \times \$61.40$). We monetize the time spent by each APS program to prepare and conduct trainings at \$552.60. We monetize the time spent by APS programs to train their workers at \$512,812.80 ($928 \times \$552.60$).

Cost to receive training: There is no data on individual local APS program staffing. However, NAMRS does track an aggregate number of APS staff at the State and local level, from State supervisors to local APS workers: 8,287. We assume 5 percent of these workers are executive staff equivalent to a general and operations manager (BLS Occupation code 11–1021), at a cost of \$51.54 unadjusted hourly wage, \$103.08 per hour adjusted for non-wage benefits and indirect costs ($414 \times \$103.08$), 15 percent are first-line supervisor (Occupation code 43–1011), at a cost of \$30.70 per hour unadjusted hourly wage, \$61.40 per hour adjusting for non-wage benefits and indirect costs ($1,243 \times \$61.40$) and 80 percent are Social and Human Service Assistants (Occupation code 21–1093) at a cost of \$21.33 per hour unadjusted hourly wage, and \$42.66 adjusted for non-wage benefits and indirect costs. ($6,629 \times \$42.66$).

⁵⁵ *Salaries & Wages*, U.S. Office of Personnel Management, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2024/general-schedule> (last visited Jan. 21, 2024); Represents adjusted Federal salary in DC-VA-MD area.

We monetize the time spent by APS staff to receive a two-hour training as follows:

Executive Staff: 414 staff × 2 hours @ \$103.08: \$85,350.24

Supervisory Staff: 1,243 staff × 2 hours @ \$61.40: \$152,640.40

Social and Human Services Assistants: 6,629 staff × 2 hours @ \$42.66: \$565,586.28

We estimate the total cost associated with the receipt of training under the final rule to be \$803,576.92.

We monetize the total amount of time spent to give and receive trainings at \$1,316,389.72. Of this, \$1,290,370.72 is State expense and \$26,019.00 is Federal expense.

3. Implementing New Policies and Procedures

The final rule requires several changes in APS practice which may represent a cost to States.

Cost to implement a two-tiered, immediate vs. non immediate risk, response system: Forty-nine States currently have a two-tiered (or higher) system. Forty-nine States currently respond to immediate need intakes within 24 hours. After consulting former APS administrators, we have determined that we cannot fully quantify how much it would cost a State to develop and implement a new two-tiered system. However, given that most States currently already maintain such a system, and the clarification that APS programs may refer to emergency response systems, law enforcement, or another appropriate community resource (e.g., homeless outreach, veteran's affairs, services for victims of sexual assault) to meet the requirements of an in-person contact within 24 hours, we anticipate it would be a very minor on-going cost in total above current baseline.

Cost to implement a mandatory reporter feedback loop: According to the 2021 ACL Evaluation survey and NAMRS data, of all reports nationally which resulted in an investigation, 255,395 (59 percent) were made by professionals. For example, a home and community-based service provider or other social service provider would be considered a professional but may not be a mandated reporter. For this reason, we assume 75 percent of reports resulting in an investigation made by professionals were made by mandated reporters (191,546) reporting their professional capacity. Of these, we believe roughly one half (50%) would generate a response to the mandated reporter (95,773). For the other fifty percent, the reporter either would not request a response or the client would

not consent to a reporter's request. One such response an APS program could make to a mandated reporter is to send an email. (We note however we are not requiring APS programs to send emails to mandated reporters reporting in their professional capacity who request a response. We leave the method of response to the discretion of APS systems). If for each report leading to an investigation received by a mandatory reporter where the reporter requests a response and the client consents, an APS program sends an email in response, we anticipate a Social and Human Service Assistants (Occupation code 21-1093) at a cost of \$21.33 per hour unadjusted hourly wage, and \$42.66 adjusted for non-wage benefits and indirect costs would spend ten (10) minutes sending the email (\$42.66 ÷ 0.6). We monetize the on-going cost for all 56 systems to send an email for each report of maltreatment from a mandatory reporter to be \$680,946.03 annually (95,773 × \$7.11).

81 percent APS programs do not currently require a feedback loop for mandatory reporters.⁵⁶ To bring all States into compliance (.81 × \$680,946.03) with the final rule will amount to \$551,566.28 annually.

Cost to implement data sharing agreements: Anecdotally we know very few States currently have data sharing agreements with other maltreatment investigatory entities in place. We have estimated 50 APS systems currently have no data use agreements in place while six may have one or more. For illustrative purposes we assume each State without a data sharing agreement will establish three (3) formal MOUs (with, for example, the Medicaid agency, the Long-term care ombudsman, and the Protection and Advocacy System). Each formal MOU will take one mid-level manager equivalent to a first-line supervisor (Occupation code 43-1011), at a cost of \$30.70 per hour unadjusted hourly wage, \$61.40 after adjusting for non-wage benefits and indirect costs four (4) hours to draft (4 × \$61.40). It will take a privacy officer equivalent to a lawyer (Occupation code 23-1011) at a cost of \$49.71 unadjusted hourly wage, \$99.42 per hour adjusted for non-wage benefits and indirect costs three (3) hours to review and approve (3 × \$99.42). It will take an executive staff equivalent to a general and operations manager (Occupation code 11-1021), at a cost of \$51.54 unadjusted hourly wage, \$103.08 per hour adjusted for non-wage benefits and indirect costs three (3) hours (3 × \$103.08) to review and approve. We monetize the cost for

one (1) State APS system to develop one (1) formal MOU to be \$853.10. For a State APS system to establish three (3) formal MOUs, we monetize the cost to be \$2,559.30. For fifty (50) State APS systems to develop one MOU, we monetize the cost to be \$42,655.00 We likewise assume that each of the three (3) entities the APS entity is entering into an MOU with will incur substantially similar costs. We monetize the expense of three (3) entities in fifty (50) states to enter into MOUs with the APS system in their State at \$127,965.00. We monetize the one-time total cost of establishing data sharing agreements to be \$255,930.00.

Cost to inform adults of their APS-related rights under State law: We do not currently have data on the number of States informing adults of their APS-related rights under State law. We know anecdotally some States offer potential clients a paper brochure informing them of their rights. Thus while it is not a requirement that States provide potential clients a pamphlet, we use the example to illustrate a potential cost should States choose to provide a pamphlet (as opposed to verbally informing potential clients of their rights). We anticipate costs of producing and distributing such brochures to be one new pamphlet per State system or 56 pamphlets total. It will require four (4) hours of staff time by a Social and Human Service Assistants (Occupation code 21-1093) at a cost of \$21.33 per hour unadjusted hourly wage, and \$42.66 adjusted for non-wage benefits and indirect costs (4 × \$42.66) and two (2) hours for a first-line supervisor (Occupation code 43-1011), at a cost of \$30.70 per hour unadjusted hourly wage, \$61.40 to review and approve (2 × \$61.40) for a total of \$293.44 per State in staff time to develop each pamphlet. We monetize the one-time staff cost for 56 State systems to develop a pamphlet (56 × \$293.44) at \$16,432.64. According to our NAMRS data, 806,219 client investigations were performed in FFY 2022. Each pamphlet will cost 23 cents to print and produce. Assuming a pamphlet is provided for every new client at the initiation of an investigation (806,219 × \$0.23) it would cost \$185,430.37 annually to produce and distribute pamphlets nationwide. In total, to develop a new pamphlet in all 56 States and distribute them at the beginning of all investigations would cost \$201,863.01 in staff time and materials the first year the policy is in place. Subsequently, States would incur \$185,430.37 in materials annually to implement this provision by distributing a pamphlet.

⁵⁶ See *supra* note 53.

3. Data Reporting to ACL

In our final regulations, we require States to collect and report specific data to ACL. As in our NAMRS data collection system, this data collection uses existing State administrative information systems. Therefore, States will incur very limited new data collection costs as the result of this rule. Most of the data collected are standard data used by the agency. Operating costs of the information systems are part of State agency operations and would not be maintained solely for the purpose of submitting data in compliance with the final rule.

For data reporting from the State to ACL under the final regulation, we anticipate a similar system as NAMRS case component data currently reported voluntarily by States. We performed a burden estimate prior to launching this reporting system. We estimated for 35 States staff cost would be a total annual burden of 675 hours at \$46.00 per hour ($675 \times \$46.00$) for a total of \$31,050.00. IT staff total annual burden was estimated at 3,075 hours at \$69.00 ($3,075 \times \$69.00$) per hour for a total of \$212,175.00. Using this measure as a proxy, we estimate the final rule's data

reporting requirements will cost a total of \$389,160.00 annually for all 56 State entities.

4. Record Retention

The rule imposes a new requirement that APS programs retain case data for 5 years. Many, but not all, programs currently retain case data for a number of years, but comprehensive information does not exist on State retention policies. We can extrapolate from data reporting in the NAMRS that most States retain case data for an average of 2 years.⁵⁷ NAMRS is a comprehensive, voluntary, national reporting system for APS programs. It collects quantitative and qualitative data on APS practices and policies, and the outcomes of investigations into the maltreatment of older adults and adults with disabilities from every State and Territory. All but one State currently maintains an IT infrastructure that supports the retention of electronic APS data and maintains it for 1 year. For this reason, the cost to further store it for 5 years will create a de minimis cost for APS.

5. State Plans and NAMRS

This will be the first time State entities are required to develop and

submit State plans under Section 2042(b) of the EJA, 42 U.S.C. 1397m–1(b). However, States develop operational and spending plans under 45 CFR 75.206(d) every three to 5 years, and we anticipate State plans will build upon existing these operational and spending plans. Based on this existing framework and our extensive experience working with APS systems and OAA grantees on their State plans, we anticipate for each State the equivalent of four (4) hour of executive staff equivalent to a general and operations manager (Occupation code 11–1021), at a cost of \$51.54 per hour unadjusted adjusted hourly wage, \$103.08 adjusted for non-wage benefits and indirect costs ($4 \times \$103.08$), and eight (8) hours of a first-line supervisor (Occupation code 43–1011), at a cost of \$30.70 per hour unadjusted hourly wage, \$61.40 adjusting for non-wage benefits and indirect costs ($8 \times \$61.40$). State plans will be updated every three to 5 years. We monetize the cost of drafting one State plan at \$903.52. We monetize 56 State plans at \$50,597.12.

1. Total Quantified Costs

a. One-Time Costs

Item		
Policies and Procedures Update and Publication	\$2,432,139.52	
	State	Federal
Policies and Procedures Implementation: Training	\$1,316,389.72	\$26,019.00
Policies and Procedures Implementation: Data Sharing Agreements	\$255,930.00	
Policies and Procedures: Informing Adults of Their APS-Related Rights Under State Law	\$16,432.64	
Total	\$4,046,910.88	

b. Ongoing Costs (Annual)

Item of cost	
Policies and Procedures Implementation: Two-Tiered Response System	\$0.
Policies and Procedures Implementation: Mandated Reporter Feedback Loop	\$551,566.28.
Policies and Procedures Implementation: Informing Adults of Their APS-Related Rights Under State Law.	\$185,430.37.
Data reporting to ACL	\$389,160.00.
Record Retention	\$0.
State plan	\$50,597.12 (renewed every 3 to 5 years).
Total	\$1,176,753.77.

d. Discussion of Benefits

Older adults who experience maltreatment are three times more likely to experience adverse consequences to

health, living arrangements, or financial arrangements than their counterparts who do not experience maltreatment.⁵⁸ According to 2022 NAMRS data, four percent or approximately 36,000 APS

clients died during the course of an APS investigation. According to the Consumer Financial Protection Bureau, financial institutions reported \$1.7 billion in losses due to elder financial

⁵⁷ The Admin. for Cmty. Living, *Adult Maltreatment Report 2020* (2021) https://acl.gov/sites/default/files/programs/2021-10/2020_NAMRS_Report_ADA-Final_Update2.pdf.

⁵⁸ M.S. Lachs et al. *The Mortality of Elder Mistreatment*, 280(5) JAMA 428–432 (Aug. 1998) <https://pubmed.ncbi.nlm.nih.gov/9701077/>.

abuse in 2017.⁵⁹ However, in 2016 three States projected the cost could be over \$1 billion in their State alone.⁶⁰

While this final rule does not directly affect the underlying causes of maltreatment, which are complex and multifactorial, it does establish a national baseline of quality in APS practice to intervene in maltreatment as it is occurring, as well as to reduce its long-term effects. We anticipate that improvements in overall quality of practice could significantly reduce the number of losses and deaths that may occur during the course of an APS investigation. Earlier and better intervention by APS stands to reduce unnecessary health care costs, decrease financial losses due to elder financial abuse, maintain living arrangements in the least restrictive alternative possible, and promote the highest quality of life for older adults and adults with disabilities. Improved case interventions impact not only the older adult and adults with disabilities, but also their families who often assume the costs and losses of maltreatment that an older adult or an adult with disabilities experiences.

Generally speaking, the benefits of the rule are difficult to quantify. The minimum standards proposed by the NPRM were in direct response to requests from APS systems for more guidance and uniformity in policy within and among States. We anticipate that when implemented, the rule will elevate evidence-informed practices, bring clarity and consistency to programs, and improve the quality of service delivery for adult maltreatment victims and potential victims. For example, if all States implemented 24/7 reporting acceptance protocols, an adult experiencing maltreatment may be identified earlier, and an investigation could commence and intervene sooner. Earlier intervention could lead to better case outcomes, including earlier access to resources. Training requirements allow caseworkers to better handle and resolve cases. Greater skills and knowledge may also decrease repeat abuse through more appropriate investigation and response services.

Similarly, requirements related to APS coordination with other entities maximize the resources of APS systems, improve investigation capacity, ensure post-investigation services are effective,

reduce the imposition of multiple investigations on adults who have been harmed, and help prevent future maltreatment. Furthermore, coordination with other entities promotes greater flexibility in case investigation, intervention, and response.

Another example of a difficult to quantify benefit is a standardized timeframe for case record retention. Currently, there are no minimum requirements for States to retain their records. The final rule's 5-year minimum retention period facilitates States' ability to track victims and perpetrators across time to deter abuse and identify recidivism while minimizing administrative burden. In the case of both victims and perpetrators, a better understanding of patterns and trends will help APS staff target interventions that are more appropriate to the presenting case, as well as decrease the recurrence of victim maltreatment.

The final rule was informed by expert-developed evidence-informed practices as articulated in our Consensus Guidelines. These evidence-informed practices, when implemented, will result in higher quality investigations, thus allowing APS to identify perpetrators and risk factors of adult maltreatment with greater frequency and accuracy, and, in turn, protecting the health and wellbeing of older adults and adults with disabilities.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) (5 U.S.C. 601 *et seq.*), agencies must consider the impact of regulations on small entities and analyze regulatory options that would minimize a rule's impacts on these entities. The 2023 NPRM noted that ACL "examined the economic implications of the proposed rule and find that if finalized, it will not have a significant economic impact on a substantial number of small entities."⁶¹ Public comments raised issues with the cost estimates, discussed and addressed elsewhere in preamble and regulatory impact analysis; however, public comments did not take issue with ACL's certification of the proposed rule or raise issues that would cause ACL to not certify the final rule.

Alternatively, the agency head may certify that the rule will not have a significant economic impact on a substantial number of small entities. This analysis concludes, and ACL

certifies, that this rule will not have a significant economic impact on a substantial number of small businesses.

APS is a State-based social services program controlled centrally by a State office. Thirty-nine APS systems are State-administered, meaning State staff operate programs out of locally placed State offices.⁶² Fifteen States are county-administered and controlled or a hybrid of State and county-administered and controlled. In county-administered systems, the State entity grants funding to local entities, including counties and non-profits, but does not perform investigatory functions. In hybrid systems, the State maintains a more active oversight and investigatory role, but delegates to local entities. Nationally, State employees perform 70 percent of APS investigations. County and non-profit employees perform the remainder.⁶³

In State-administered systems, no small entities are implicated. State government employees and offices are not small entities as defined by 5 U.S.C. 601. In the 15 county and hybrid administered systems, there are 459 counties of less than 50,000 people.⁶⁴ The administrative structure of APS is complex, and data is incomplete. However, for illustrative purposes we assume that in these 459 counties there is one APS program that is a small entity under 5 U.S.C. 601, either a small government jurisdiction or non-profit. For the purposes of this analysis, we assume these entities would fall under NAICS code 624120, Services for the Elderly and Persons with Disabilities.

Much of the cost of implementation will be borne by State entities in both State-administered and county and hybrid-administered States. In both such systems, the State entity exercises significant control; the State entity receives and distributes Federal funding and is responsible for revising policies and procedures, training local entities, and reporting data to ACL. We monetize the average cost per State APS system to be \$93,279.72. As an example, Colorado has an estimated 48 counties under 50,000 people. Assuming the State entity absorbs the 25 percent of the cost of implementation, each entity will incur \$1,457.49 in implementation expenses per year. Much of this will be a one-time expense. North Carolina has ten counties under 50,000 people. On average, assuming the State entity absorbs 25 percent of the cost burden of

⁵⁹ U.S. Consumer. Fin. Protection. Bur., *Suspicious Activity Reports on Elder Financial Exploitation: Issues and Trends* (2019); <https://www.gao.gov/assets/gao-21-90.pdf>.

⁶⁰ U.S. Gen. Acct. Off., *GAO-21-90, HHS Could Do More to Encourage State Reporting on the Costs of Financial Exploitation* (2020) <https://www.gao.gov/assets/gao-21-90.pdf>.

⁶¹ 88 FR 62517.

⁶² The Northern Mariana Islands and American Samoa currently have no staffed program; they are in the process of developing one.

⁶³ See *supra* note 4, at 20.

⁶⁴ We have made our calculations based on 2022 Census Bureau Data.

the rule, each small entity will incur \$2,798.39 in expense per year, the majority of this representing a one-time expense.

Furthermore, many small entities may already be in compliance with significant portions of these proposed regulations whether as written in policies and procedures or as informal practice.

Consequently, we have examined the economic implications of the final rule and find that it will not have a significant economic impact on a substantial number of small entities.

C. Executive Order 13132 (Federalism)

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement describing the agency's considerations. Policies that have federalism implications include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

The final rule requires State APS systems to implement policies and procedures reflecting evidence-based practices. Receipt of Federal funding for APS systems under the EJA Sec. 2042(b), 42 U.S.C. 1397m-1(b) is contingent upon compliance with this rule. Many States are already in substantial compliance with this rule; however, some may need to revise or update their current APS policies, develop new policies or, in some cases, pass new laws or amend existing State statutes.

Consultations With State and Local Officials

Executive Order 13132 requires meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. As detailed in the preamble, the final regulations closely mirror the *2020 Voluntary Consensus Guidelines for State Adult Protective Services Systems* (Consensus Guidelines). All specific mandates (for example, day and time requirements for case response) contained in the proposed regulation reflect the Consensus Guidelines.

The Consensus Guidelines were developed with extensive input from the APS community, including State and local officials. Interested parties were invited to provide feedback for the proposed updates to the Consensus

Guidelines through a public comment period and five webinars. A Request for Information was posted on ACL's website and the comment period ran from March until May 2019. Five webinars were held during April and May 2019 hosting approximately 190 participants, representing 39 States and the District of Columbia. Participants represented ten fields, with most participants representing the APS network (66 percent). The vast majority of these APS programs are administered and staffed by State and local government entities.

The goals of the outreach and engagement process were to hear from all interested entities, including State and local officials, the public, and professional fields about their experiences with APS. The engagement process ensured affected parties understood why and how ACL was leading the development of the Consensus Guidelines and provided an opportunity to give input into the process and content of the Consensus Guidelines. ACL also reviewed comments on the proposed rule from State and local officials and considered any additional concerns in developing the final rule.

Nature of Concerns and the Need to Issue This Rule

Community members welcomed the Consensus Guidelines and were generally in support of the process by which they were created and updated as well as the substantive content, noting that they "help set the standard and support future planning and State legislative advocacy."⁶⁵

We received comments that the Consensus Guidelines were "aspirational" and would be challenging to implement absent additional funding. We seriously considered these views in developing this rule. We also completed a regulatory impact analysis to fully assess costs and benefits of the new requirements. We recognize that some of the new proposed regulatory provisions will create administrative and monetary burden in updating policies and procedures, as well as potential changes to State law. However, much of this burden will be a one-time expense and States will have significant discretion to implement the provisions in the manner best suited to State needs.

⁶⁵ Report on the Updates to the Voluntary Consensus Guidelines for APS Systems, Appendix 3: 19, https://acl.gov/sites/default/files/programs/2020-05/ACL-Appendix_3.fin_508.pdf.

Extent To Which We Meet Those Concerns

In FY 2021, in response to the COVID-19 pandemic, Congress provided the first dedicated appropriation to implement the EJA section 2042(b), 42 U.S.C. 1397m-1(b), one-time funding for formula grants to all States, the District of Columbia, and the Territories to enhance APS, totaling \$188 million, and another \$188 million in FY 2022. The recent Consolidated Appropriations Act of 2023 included the first ongoing annual appropriation of \$15 million to ACL to continue providing formula grants to APS programs under EJA section 2042(b), 42 U.S.C. 1397m-1(b). This funding is available to States for the implementation of the regulation and meets the concerns commenters raised in 2019 around dedicated funding for APS systems. Additionally, the regulatory changes have already been implemented by many States, and we believe the benefit of the requirements will be significant.

D. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

ACL will fulfill its responsibilities under Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments." Executive Order 13175 requires Federal agencies to establish procedures for meaningful consultation and coordination with Tribal officials in the development of Federal policies that have Tribal implications. ACL solicited input from affected Federally recognized Tribes on October 12, 2023.

E. Plain Language in Government Writing

Pursuant to Executive Order 13563 of January 18, 2011, and Executive Order 12866 of September 30, 1993, Executive Departments and Agencies are directed to use plain language in all proposed and final rules. ACL believes it has used plain language in drafting the proposed and final rule.

F. Paperwork Reduction Act (PRA)

The final rule contains new information collection requirements under 5 CFR part 1320. These new burdens include: new State plans, new program performance data collection and reporting, a requirement that States generate, maintain, and retain written policies and procedures, a requirement that State APS systems disclose information to clients regarding their APS-related rights under State law, and a requirement that States generate, maintain, and retain information and

data sharing agreements (while also disclosing data through such agreements).

As detailed in the regulatory impact analysis, we estimate the following total burden across all States and Territories for such requirements:

(1) State plans: \$50,597.12 (renewed every 3 to 5 years);

(2) Program performance data collection: \$389,160.00 (annually);

(3) Creation and publication of written policies and procedures: \$2,432,139.52 (one-time expense);

(4) Disclosure to potential clients their APS-related rights under State law: \$201,863.01 (\$16,432.64 in one-time expense and \$185,430.37 annually);

(5) Creation and maintenance of data sharing agreements: \$255,930.00 (one-time expense).

ACL will submit information to the OMB for review, as appropriate. The State plans, program performance data, written policies and procedures, disclosure to potential clients of their APS-related rights under State law, and the creation and maintenance of data sharing agreements will be submitted for approval as part of a generic clearance package for information collections related to ACL Administration on Aging programs. ACL intends to update applicable guidance as needed.

List of Subjects in 45 CFR Part 1324

Adult protective services, Elder rights, Grant programs to States, Older adults.

For the reasons discussed in the preamble, ACL amends 45 CFR part 1324 as follows:

PART 1324—ALLOTMENTS FOR VULNERABLE ELDER RIGHTS PROTECTION ACTIVITIES

■ 1. The authority for part 1324 is revised to read as follows:

Authority: 2 U.S.C. 3001 *et seq* and 42 U.S.C. 1394m

■ 2. Add subpart D to part 1324 to read as follows:

Subpart D—Adult Protective Services Programs

Sec.

1324.400 Eligibility for funding.

1324.401 Definitions.

1324.402 Program administration.

1324.403 APS response.

1324.404 Conflict of interest.

1324.405 Accepting reports.

1324.406 Coordination with other entities.

1324.407 APS program performance.

1324.408 State plans.

Authority: 42 U.S.C. 3011(e)(3); 42 U.S.C. 1397m–1.

§ 1324.400 Eligibility for funding.

State entities are required to adhere to all provisions contained herein to be eligible for funding under 42 U.S.C. 1397m–1(b).

§ 1324.401 Definitions.

As used in this part, the term—

Abuse means the knowing infliction of physical or psychological harm or the knowing deprivation of goods or services that are necessary to meet essential needs or to avoid physical or psychological harm.

Adult means older adults and adults with disabilities as defined by State APS laws.

Adult maltreatment means the abuse, neglect, financial exploitation, or sexual abuse of an adult at-risk of harm.

Adult Protective Services (APS) means such activities and services the Assistant Secretary for Aging may specify in guidance and includes:

(1) Receiving reports of adult abuse, neglect, financial exploitation, sexual abuse, and/or self-neglect;

(2) Investigating the reports described in paragraph (1) of this definition;

(3) Case planning, monitoring, evaluation, and other case work and services; and;

(4) Providing, arranging for, or facilitating the provision of medical, social services, economic, legal, housing, law enforcement, or other protective, emergency, or supportive services.

Adult Protective Services Program means local Adult Protective Services providers within an Adult Protective Services system.

Adult Protective Services Systems means the totality of the State entities and the local APS programs.

Allegation means an accusation of adult maltreatment and/or self-neglect about each adult in a report made to APS.

At risk of harm means the strong likelihood that an adult will imminently experience an event, condition, injury, or other outcome that is adverse or detrimental.

Assistant Secretary for Aging means the position identified in section 201(a) of the Older Americans Act (OAA), 42 U.S.C. 3002(7).

Case means all activities related to an APS investigation of, and response to, an allegation of adult maltreatment and/or self-neglect.

Client means an adult who is the subject of an APS response regarding a report of alleged adult maltreatment and/or self-neglect.

Conflict of interest means a situation that interferes with a program or program employee or representative's

ability to provide objective information or act in the best interests of the adult.

Dual relationship means a relationship in which an APS worker assumes one or more professional, personal, or volunteer roles in addition to their role as an APS worker at the same time, or sequentially, with a client.

Emergency Protective Action means immediate access to petition the court for temporary or emergency orders or emergency out-of-home placement.

Financial exploitation means the fraudulent or otherwise illegal, unauthorized, or improper act or process of a person, including a caregiver or fiduciary, that uses the resources of an adult for monetary or personal benefit, profit, or gain, or that results in depriving an adult of rightful access to, or use of, their benefits, resources, belongings, or assets.

Finding means the decision made by APS after investigation that evidence is or is not sufficient under State law to determine adult maltreatment and/or self-neglect has occurred.

Intake or Pre-Screening means the APS process of receiving allegations of adult maltreatment or self-neglect and gathering information on the reports, the alleged victim, and the alleged perpetrator.

Investigation means the process by which APS examines and gathers information about a possible allegation of adult maltreatment and/or self-neglect to determine if the circumstances of the allegation meet the State's standards of evidence for a finding.

Mandated reporter means someone who works with an adult in the course of their professional duties and who is required by State law to report suspected adult maltreatment or self-neglect to APS.

Neglect means the failure of a caregiver or fiduciary to provide the goods or services that are necessary to maintain the health and/or safety of an adult.

Perpetrator means the person determined by APS to be responsible for one or more instances of adult maltreatment.

Quality assurance means the process by which APS programs ensure investigations meet or exceed established standards, and includes:

(1) Thorough documentation of all investigation and case management activities;

(2) Review and approval of case closure; and

(3) Conducting a case review process.

Report means a formal account or statement made to APS regarding an allegation or multiple allegations of

adult maltreatment and/or self-neglect and the relevant circumstances concerning the allegation or allegations.

Response means the range of actions and activities undertaken as the result of a report received by APS.

Screening means a process whereby APS carefully reviews the intake information to determine if the report of adult maltreatment meets the minimum requirements to be opened for investigation by APS, or if the report should be referred to a service or program other than APS.

Self-neglect means a serious risk of imminent harm to oneself or other created by an adult's inability, due to a physical or mental impairment or diminished capacity, to perform essential self-care tasks, including at least one of the following:

- (1) Obtaining essential food, clothing, shelter, and medical care;
- (2) Obtaining goods and services necessary to maintain physical health, mental health, or general safety; or,
- (3) Managing one's own financial affairs.

Sexual abuse means the non-consensual sexual interaction (touching and non-touching acts) of any kind with an adult.

State entity means the unit or units of State, District of Columbia, or U.S. Territorial government designated as responsible for APS programs, including through the establishment and enforcement of policies and procedures, and that receive(s) Federal grant funding under section 2042(b) of the EJA, 42 U.S.C. 1397m–1(b).

Victim means an adult who has experienced adult maltreatment.

§ 1324.402 Program administration.

(a) The State entity shall establish definitions for APS systems that:

(1) Define the populations eligible for APS;

(2) Define the specific elements of adult maltreatment and self-neglect that render an adult eligible for APS;

(3) Define the alleged perpetrators who are subject to APS investigations in the State; and

(4) Define the settings and locations in which adults may experience adult maltreatment and self-neglect and be eligible for APS in the State.

(5) State entities are not required to uniformly adopt the regulatory definitions in § 1324.401, but State definitions may not narrow the scope of adults eligible for APS or services provided.

(b) The State entity shall create, publish, and implement policies and procedures for APS systems to receive and respond to reports of adult

maltreatment and self-neglect in a standardized fashion. Such policies and procedures, at a minimum, shall:

(1) Incorporate principles of person-directed services and planning and reliance upon least restrictive alternatives; and

(2) Define processes for receiving, screening, prioritizing, and referring cases based on risk and type of adult maltreatment and self-neglect consistent with § 1324.403, including:

(i) Creation of at least a two-tiered response system for initial contact with the alleged victim based on immediate risk of death, irreparable harm, or significant loss of income, assets, or resources.

(A) For immediate risk, the response should occur in person and no later than 24-four hours after receiving a report of adult maltreatment and/or self-neglect.

(B) For non-immediate risk, response should occur no more than 7 calendar days after receiving a report of adult maltreatment and/or self-neglect.

(c) Upon first contact, APS systems shall provide to potential APS clients an explanation of their APS-related rights to the extent they exist under State law, including:

(1) The right to confidentiality of personal information;

(2) The right to refuse to speak to APS; and

(3) The right to refuse APS services;

(d) Information shall be provided in a format and language understandable by the adult, and in alternative formats as needed.

(e) The State entity shall establish policies and procedures for the staffing of APS systems that include:

(1) Staff training and on-going education, including training on conflicts of interest; and

(2) Staff supervision.

§ 1324.403 APS response.

The State entity shall adopt standardized and systematic policies and procedures for APS response across and within the State including, at a minimum:

(a) Screening, triaging, and decision-making criteria or protocols to review and assign adult maltreatment and self-neglect reports for APS investigation and/or to report to other authorities;

(b) Tools and/or decision-making processes for APS to review reports of adult maltreatment and self-neglect for any emergency needs of the adult and for immediate safety and risk factors affecting the adult or APS worker when responding to the report and;

(c) Practices during investigations to collect information and evidence to

support findings on allegations, and service planning that will:

(1) Recognize that acceptance of APS services is voluntary, except where mandated by State law;

(2) Ensure the safety of APS client and worker;

(3) Ensure the preservation of a client's rights;

(4) Integrate principles of person-directedness and trauma-informed approaches;

(5) Maximize engagement with the APS client, and;

(6) Permit APS the emergency use of APS funds to buy goods and services;

(7) Permit APS to seek emergency protective action only as appropriate and necessary as a measure of last resort to protect the life and safety of the client.

(d) Methods to make findings on allegations and record case findings, including:

(1) Ability for APS programs to consult with appropriate experts, other team members, and supervisors;

(2) Protocols for the standards of evidence APS should apply when making a finding on allegations.

(e) Provision of and/or referral to services, as appropriate, that:

(1) Respect the autonomy and authority of clients to make their own life choices;

(2) Respect the client's views about safety, quality of life, and success;

(3) Develop any service plan or referrals in consultation with the client;

(4) Engage community partners through referrals for services or purchase of services where services are not directly provided by APS, and;

(f) Case handling criteria that:

(1) Establish timeframes for on-going review of open cases;

(2) Establish a reasonable length of time by which investigations should be completed and findings be made; and

(3) Document, at a minimum:

(i) The APS response;

(ii) Significant changes in client status;

(iii) Assessment of safety and risk at case closure; and

(iv) The reason to close the case.

§ 1324.404 Conflict of interest.

The State entity shall establish standardized policies and procedures to avoid both actual and perceived conflicts of interest for APS. Such policies and procedures must include mechanisms to identify, remove, and remedy any actual or perceived conflicts of interest at organizational and individual levels, including to:

(a) Ensure that employees and individuals administering or

representing APS programs, and members of an employee or individual's immediate family or household, do not have a conflict of interest;

(b) Ensure that employees and individuals administering or representing APS programs, and members of an employee or individual's immediate family or household, do not have a personal financial interest in an entity to which an APS program may refer adults for services;

(c) Establish monitoring and oversight procedures to identify conflicts of interest; and

(d) Prohibit avoidable dual relationships and ensure that appropriate safeguards are established should a dual relationship be unavoidable;

(1) In the case of an APS program petitioning for or serving as guardian, it is an unavoidable dual relationship only if all less restrictive alternatives to guardianship have been considered and either:

(i) A Court has instructed the APS program to petition for or serve as guardian; or

(ii) There is no other qualified individual or entity available to petition for or serve as guardian;

(2) For all dual relationships, the APS program must document the dual relationship in the case record and describe the mitigation strategies it will take to address the conflict of interest.

§ 1324.405 Accepting reports.

(a) The State entity shall establish standardized policies and procedures for receiving reports of adult maltreatment and self-neglect 24 hours per day, 7 calendar days per week, using multiple methods of reporting, including at least one online method, to ensure accessibility.

(b) The State entity shall establish standardized policies and procedures for APS to accept reports of alleged adult maltreatment and self-neglect by mandated reporters as defined in § 1324.401 that:

(1) Share with the mandated reporter who made such report to APS whether a case has been opened as a result of the report at the request of the mandated reporter; and

(2) Obtain the consent of the adult to share such information prior to its release.

(c) The State entity shall comply with all applicable State and Federal confidentiality laws and establish and adhere to standardized policies and procedures to maintain the confidentiality of adults, reporters, and information provided in a report.

§ 1324.406 Coordination with other entities.

(a) State entities shall establish policies and procedures, consistent with State law, to ensure coordination and to detect, prevent, address, and remedy adult maltreatment and self-neglect with other appropriate entities, including but not limited to:

(1) Other APS programs in the State, including Tribal APS programs, when authority over APS is divided between different jurisdictions or agencies;

(2) Other governmental agencies that investigate allegations of adult maltreatment, including, but not limited to:

(i) The State Medicaid agency, for the purposes of coordination with respect to critical incidents and other issues;

(ii) State nursing home licensing and certification;

(iii) State department of health and licensing and certification; and

(iv) Tribal governments;

(3) Law enforcement agencies with jurisdiction to investigate suspected crimes related to adult maltreatment: State or local police agencies, Tribal law enforcement, State Medicaid Fraud Control Units, State securities and financial regulators, Federal financial and securities enforcement agencies, and Federal law enforcement agencies;

(4) Organizations with authority to advocate on behalf of adults who experience alleged adult maltreatment, such as the State Long-Term Care Ombudsman Program, and/or investigate allegations of adult maltreatment, such as the Protection and Advocacy Systems;

(5) Emergency management systems, and;

(6) Banking and financial institutions.

(b) Policies and procedures must:

(1) Address coordination and collaboration to detect, prevent, address, and remedy adult maltreatment and self-neglect during all stages of a response conducted by APS or by other agencies and organizations with authority and jurisdiction to respond to reports of adult maltreatment and/or self-neglect;

(2) Address information sharing on the status and resolution of response between the APS system and other entities responsible in the State or other jurisdiction for response, to the extent permissible under applicable State law;

(3) Facilitate information exchanges, quality assurance activities, cross-training, development of formal multidisciplinary and cross agency teams, co-location of staff within appropriate agencies through memoranda of understanding, data

sharing agreements, or other less formal arrangements; and

(4) Address other activities as determined by the State entity.

§ 1324.407 APS program performance.

The State entity shall develop policies and procedures for the collection and maintenance of data on APS system response. The State entity shall:

(a) Collect and report annually to ACL such APS system-wide data as required by the Assistant Secretary for Aging; and

(b) Develop policies and procedures to ensure that the APS system retains individual case data obtained from APS investigations for a minimum of 5 years.

§ 1324.408 State plans.

(a) State entities must develop and submit to the Director of the Office of Elder Justice and Adult Protective Services, the position designated by 42 U.S.C. 3011(e)(1), a State APS plan that meets the requirements set forth by the Assistant Secretary for Aging.

(b) The State plan shall be developed by the State entity receiving the Federal award under 42 U.S.C 1397m-1 in collaboration with APS programs and other State APS entities, if applicable.(c) The State plan shall be updated at least every 5 years but may be updated more frequently as determined by the State entity.

(d) The State plan shall contain an assurance that all policies and procedures required herein will be developed and adhered to by the State APS system.

(e) State plans will be reviewed and approved by the Director of the Office of Elder Justice and Adult Protective Services. Any State dissatisfied with the final decision of the Director of the Office of Elder Justice and Adult Protective Services may appeal to the Deputy Assistant Secretary for Aging not later than 30 calendar days after the date of the Director of the Office of Elder Justice and Adult Protective Services' final decision and will be afforded the opportunity for a hearing before the Deputy Assistant Secretary. If the State is dissatisfied with the final decision of the Deputy Assistant Secretary for Aging, it may appeal to the Assistant Secretary for Aging not later than 30 calendar days after the date of the Deputy Assistant Secretary for Aging's decision.

Dated: April 8, 2024.

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2024-07654 Filed 5-7-24; 8:45 am]

BILLING CODE 4154-01-P

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