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FEDERAL REGISTER

Vol. 78 Tuesday,

No. 151 August 6, 2013

Pages 47527–48024

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, Washington, DC 20408, 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 Printing Office, Washington, DC 20402 is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

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WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, September 17, 2013
9 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

Printed on recycled paper.

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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.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0669; Directorate Identifier 2013–NM–117–AD; Amendment 39–17540; AD 2013–16–02]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

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

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Dassault Aviation Model FALCON 7X airplanes. This AD requires incorporation of a new procedure into the airplane flight manual (AFM). This AD was prompted by a report of a runway excursion caused by failure of the nose landing gear position feed-back assembly. We are issuing this AD to detect and correct an incorrect angle signal causing an un-commanded nose wheel deflection, which could result in reduced controllability of the airplane.

DATES: This AD becomes effective August 21, 2013.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of August 21, 2013.

We must receive comments on this AD by September 20, 2013.

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

- Federal eRulemaking Portal: Go to *http://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: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1137; fax 425–227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2013–0128, dated June 17, 2013 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> A Falcon 7X aeroplane recently experienced a runway excursion. The results of the subsequent technical investigations accomplished by Dassault Aviation identified a failure of the Nose Landing Gear position feed-back assembly, due to an incorrect angle signal resulting in un-commanded nose wheel deflection which could not be countered by the pilot.
>
> This condition, if not detected and corrected, could lead to further similar events, which could result in [reduced controllability of the airplane and] damage to the aeroplane.
>
> To address this potential unsafe condition, pending the development of an assembly with improved design, Dassault Aviation published an operational procedure, for checking the condition of the nose wheel steering position feed-back. This procedure has been incorporated into the applicable electronic checklist.
>
> For the reasons described above, this [EASA] AD requires incorporation of the new procedure into the Airplane Flight Manual (AFM) and an update of the Electronic Check List (ECL).
>
> This [EASA] AD is considered to be an interim action and further AD action may follow.

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Dassault has issued (Change Proposal) CP076, approved by EASA on June 17, 2013, to the Dassault Falcon 7X Airplane Flight Manual DGT105608. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are issuing this AD because we evaluated all pertinent information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and MCAI

This action will not require the update of the electronic checklist (ECL), as required by the MCAI. The ECL is not part of the approved type design of the airplane and all pertinent requirements are mandated through the AFM change.

FAA's Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because an incorrect angle signal causing an un-commanded nose wheel deflection could result in reduced controllability of the airplane. Therefore, we determined that notice and opportunity for public comment before issuing this AD are impracticable

and that good cause exists for making this amendment effective in fewer than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2013–0669; Directorate Identifier 2013–NM–117–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this AD.

Costs of Compliance

We estimate that this AD affects 39 airplanes of U.S. registry. We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Revise the AFM	1 work-hour × $85 per hour = $85	$0	$85	$3,315

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.

We are 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

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);

3. Will not affect intrastate aviation in Alaska; and

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

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2013–16–02 Dassault Aviation: Amendment 39–17540. Docket No. FAA–2013–0669; Directorate Identifier 2013–NM–117–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective August 21, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Dassault Aviation Model FALCON 7X airplanes, certificated in any category, all manufacturer serial numbers.

(d) Subject

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

(e) Reason

This AD was prompted by a report of a runway excursion caused by failure of the nose landing gear position feed-back assembly. We are issuing this AD to detect and correct an incorrect angle signal causing an un-commanded nose wheel deflection, which could result in reduced controllability of the airplane.

(f) Compliance

You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

(g) Airplane Flight Manual (AFM) Revision

Within 30 days after the effective date of this AD, revise the Limitations and Normal Procedures sections to incorporate the procedures in Dassault Change Proposal (CP)076, approved by European Aviation Safety Agency (EASA) on June 17, 2013, to the Dassault Falcon 7X Airplane Flight Manual (AFM) DGT105608. Dassault CP076, approved by EASA on June 17, 2013, introduces procedures for checking the condition of the nose wheel steering position feedback. Thereafter, operate the airplane according to the limitations and procedures in Dassault CP076, approved by EASA on June 17, 2013. The revision may be done by inserting a copy of Dassault CP076, approved by EASA on June 17, 2013, in the AFM. When this change proposal has been included in general revisions of the AFM, the general revisions may be inserted in the AFM, provided the relevant information in the general revision is identical to that in Dassault CP076, approved by EASA on June 17, 2013, and the change proposal may be removed from the AFM. These amendments take precedence over the same procedures displayed through the electronic checklist (ECL).

(h) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, 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 International Branch, send it to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1137; fax 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov*. 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. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(i) Related Information

Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2013–0128, dated June 17, 2013, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov*.

(j) 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) Dassault (Change Proposal) CP076, approved by EASA on June 17, 2013, to the Dassault Falcon 7X Airplane Flight Manual DGT105608.

(ii) Reserved.

(3) For service information identified in this AD, contact Dassault Falcon Jet, P.O. Box 2000, South Hackensack, NJ 07606; telephone 201–440–6700; Internet *http://www.dassaultfalcon.com*.

(4) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html*.

Issued in Renton, Washington, on July 26, 2013.

Stephen P. Boyd,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–18640 Filed 8–5–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0216; Directorate Identifier 2012–NM–206–AD; Amendment 39–17521; AD 2013–15–05]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

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

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes. This AD was prompted by a determination that certain flap actuators require restoration by installing a redesigned flap actuator inboard pinion seal. This AD requires revising the maintenance program by incorporating new airworthiness limitation tasks. We are issuing this AD to prevent flap system failure, and consequent reduced control of the airplane.

DATES: This AD becomes effective September 10, 2013.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of September 10, 2013.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Luke Walker, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office (ACO), 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7363; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. The NPRM was published in the **Federal Register** on April 8, 2013 (78 FR 20844). The NPRM proposed to correct an unsafe condition for the specified products. Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2012–26, dated October 30, 2012 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> The CL–600–2B19 aeroplane flap actuator inboard pinion seal is prone to leak which can cause internal contamination of the actuator braking mechanism and subsequent actuator failure. This condition, if not corrected, can cause flap system failure. In certain weather and runway conditions, frequent flap system failures pose a safety concern.
>
> To improve the internal actuator sealing, the flap actuator manufacturer has redesigned the inboard pinion seal.
>
> Transport Canada Civil Aviation (TCCA) has been monitoring, through an actuator sampling program, the performance of the flap system since the introduction of actuators equipped with this new inboard pinion seal. Based on this sampling program and recent flap reliability data, TCCA is mandating a restoration task to install the redesigned flap actuator inboard pinion seal on all applicable actuators.
>
> The required action is revising the maintenance program by incorporating two new airworthiness limitation tasks. The unsafe condition is flap system failure, and consequent reduced control of the airplane. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We have considered the comment received.

Statement of Support for the NPRM (78 FR 20844, April 8, 2013) and Request To Shorten Compliance Time

The Airline Pilots Association International stated it supports the NPRM (78 FR 20844, April 8, 2013), and requested that we shorten the compliance time to ensure that the identified safety issue is corrected within the airplane fleet as soon as possible.

We do not agree with the request to shorten the compliance time. After considering all the available information, we have determined that the compliance time, as proposed, represents an appropriate interval of time in which the required actions can

be performed in a timely manner within the affected fleet, while still maintaining an adequate level of safety. In developing an appropriate compliance time, we considered the safety implications, parts availability, and normal maintenance schedules for timely accomplishment of installing the inboard pinion seal in the flap actuator. Further, we arrived at the proposed initial task compliance time with operator and manufacturer concurrence.

To reduce the compliance time of the NPRM (78 FR 20844, April 8, 2013) would necessitate (under the provisions of the Administrative Procedure Act) reissuing the notice, reopening the period for public comment, considering additional comments subsequently received, and eventually issuing a final rule. We have determined that further delay of this final rule is not appropriate. However, if additional data are presented that would justify a shorter compliance time, we might consider further rulemaking on this issue. We have not changed this AD in this regard.

Conclusion

We reviewed the available data, including the comment received, and determined that air safety and the public interest require adopting this AD as proposed—except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM (78 FR 20844, April 8, 2013) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (78 FR 20844, April 8, 2013).

Costs of Compliance

We estimate that this AD affects 573 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Revise the maintenance program	1 work-hour × $85 per hour = $85	$0	$85	$48,705

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.

We are 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

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);

3. Will not affect intrastate aviation in Alaska; and

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

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the MCAI, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2013–15–05 Bombardier, Inc.: Amendment 39–17521. Docket No. FAA–2013–0216; Directorate Identifier 2012–NM–206–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective September 10, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, certificated in any category, equipped with Eaton flap actuators having any part number (P/N) specified in paragraphs (c)(1), (c)(2), and (c)(3) of this AD.

(1) P/N 601R93101–23/–25 (vendor P/N 852D100–23, –25).

(2) P/N 601R93103–23/–24 (vendor P/N 853D100–23, –24).

(3) P/N 601R93104–23/–24 (vendor P/N 854D100–23, –24).

(d) Subject

Air Transport Association (ATA) of America Code 27, Flight controls.

(e) Reason

This AD was prompted by a determination that certain flap actuators require restoration by installing a redesigned flap actuator inboard pinion seal. We are issuing this AD to prevent flap system failure, and consequent reduced control of the airplane.

(f) Compliance

You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

(g) Maintenance Program Revision

Within 30 days after the effective date of this AD, revise the maintenance program to incorporate Tasks C27–50–111–15 and C27–50–111–17 of Bombardier CL–600–2B19 Temporary Revision (TR) 2A–48, dated July 6, 2012, to Appendix A—Certification Maintenance Requirements, of Part 2, Airworthiness Requirements, of the Bombardier CL–600–2B19 Maintenance Requirements Manual (MRM), except as specified in paragraph (j) of this AD. The initial compliance times for the tasks are specified in paragraph (h) of this AD.

Note 1 to paragraph (g) of this AD: The maintenance program revision required by paragraph (g) of this AD may be done by inserting a copy of Bombardier CL–600–2B19 TR 2A–48, dated July 6, 2012, into Appendix A—Certification Maintenance Requirements, of Part 2, Airworthiness Requirements, of the Bombardier CL–600–2B19 MRM. When this TR has been included in general revisions of the MRM, the general revisions may be inserted in the MRM, provided the relevant information in the general revision is identical to that in Bombardier CL–600–2B19 TR 2A–48, dated July 6, 2012.

(h) Initial Task Compliance Times

For the inboard and outboard flap actuators identified in Bombardier CL–600–2B19 TR 2A–48, dated July 6, 2012, to Appendix A—Certification Maintenance Requirements, of Part 2, Airworthiness Requirements, of the Bombardier CL–600–2B19 MRM, the initial compliance times for the tasks specified in Bombardier CL–600–2B19 TR 2A–48, dated July 6, 2012, are the applicable times specified in paragraphs (h)(1) through (h)(4) of this AD.

(1) For flap actuators that have accumulated less than 6,000 flight cycles as of the effective date of this AD, before the accumulation of 10,000 flight cycles on the flap actuator.

(2) For flap actuators that have accumulated 6,000 or more flight cycles but less than 10,000 flight cycles as of the effective date of this AD, within 4,000 flight cycles after the effective date of this AD, but no later than 12,000 flight cycles on the flap actuator.

(3) For flap actuators that have accumulated 10,000 or more flight cycles but less than or equal to 12,000 flight cycles as of the effective date of this AD, within 2,000 flight cycles after the effective date of this AD, but no later than 13,000 flight cycles on the flap actuator.

(4) For flap actuators that have accumulated more than 12,000 flight cycles as of the effective date of this AD, within 1,000 flight cycles after the effective date of this AD.

(i) Repetitive Compliance Time

Where Bombardier CL–600–2B19 TR 2A–48, dated July 6, 2012, to Appendix A—Certification Maintenance Requirements, of Part 2, Airworthiness Requirements, of the Bombardier CL–600–2B19 MRM, specifies a task interval of 10,000 flight cycles or 144 months, the task interval is 10,000 flight cycles.

(j) No Alternative Actions and Intervals

After accomplishing the revision required by paragraph (g) of this AD, no alternative actions (e.g., inspections) or intervals may be used unless the actions or intervals are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (k) of this AD.

(k) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, 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 ACO, send it to Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone (516) 228–7300; fax (516) 794–5531. 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. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(l) Related Information

Refer to Mandatory Continuing Airworthiness Information Canadian Airworthiness Directive CF–2012–26, dated October 30, 2012, for related information, which can be found in the AD docket on the internet at *http://www.regulations.gov.*

(m) 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) Bombardier CL–600–2B19 Temporary Revision 2A–48, dated July 6, 2012, to Appendix A—Certification Maintenance Requirements, of Part 2, Airworthiness Requirements, of the Bombardier CL–600–2B19 Maintenance Requirements Manual.

(ii) Reserved.

(3) For service information identified in this AD, Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.*

(4) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on July 12, 2013.

Jeffrey E. Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–18488 Filed 8–5–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0564; Directorate Identifier 2010–SW–013–AD; Amendment 39–17494; AD 2013–13–06]

RIN 2120–AA64

Airworthiness Directives; Various Restricted Category Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for Arrow Falcon Exporters, Inc. (previously Utah State University); Firefly Aviation Helicopter Services (previously Erickson Air-Crane Co.); California Department of Forestry; Garlick Helicopters, Inc.; Global Helicopter Technology, Inc.; Hagglund Helicopters, LLC (previously Western International Aviation, Inc.); International Helicopters, Inc.; Precision Helicopters, LLC; Robinson Air Crane, Inc.; San Joaquin Helicopters (previously Hawkins and Powers Aviation, Inc.); S.M.&T. Aircraft (previously US Helicopters, Inc., UNC Helicopter, Inc., Southern Aero Corporation, and Wilco Aviation); Smith Helicopters; Southern Helicopter, Inc.; Southwest Florida Aviation International, Inc. (previously Jamie R. Hill and Southwest Florida Aviation); Tamarack Helicopters, Inc. (previously Ranger Helicopter Services, Inc.); US Helicopter, Inc. (previously UNC Helicopter, Inc.); West Coast Fabrication; and Williams Helicopter Corporation (previously Scott Paper Co.) Model HH–1K, TH–1F, TH–1L, UH–1A, UH–1B, UH–1E, UH–1F, UH–1H, UH–1L, and UH–1P Helicopters; and Southwest Florida Aviation Model UH–

1B (SW204 and SW204HP) and UH–1H (SW205) Helicopters. This AD requires creating a component history card or equivalent record for each main rotor grip (grip); determining and recording the total hours time-in-service (TIS) for each grip; visually inspecting the upper and lower tangs of the grip for a crack; inspecting the grip buffer pads for delamination and if delamination is present, inspecting the grip surface for corrosion or other damage; inspecting the grip for a crack using ultrasonic (UT) and fluorescent penetrant inspection methods; and establishing a retirement life for certain grips. This AD was prompted by three in-flight failures of grips installed on Bell Helicopter Textron (Bell) Model 212 helicopters, which resulted from cracks originating in the lower main rotor blade bolt lug. The actions are intended to prevent failure of the grip, separation of a main rotor blade, and subsequent loss of control of the helicopter.

DATES: This AD is effective September 10, 2013.

The Director of the Federal Register approved the incorporation by reference of certain documents listed in this AD as of September 10, 2013.

ADDRESSES: For service information identified in this AD, contact Bell Helicopter Textron, Inc., P.O. Box 482, Fort Worth, TX 76101; telephone (817) 280–3391; fax (817) 280–6466; or at *http://www.bellcustomer.com/files/*. You may review a copy of the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the Docket Operations Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, any incorporated-by-reference service information, the economic evaluation, any comments received, and other information. The street address for the Docket Operations Office (phone: 800–647–5527) is U.S. Department of Transportation, Docket Operations Office, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Michael Kohner, Aviation Safety Engineer, Rotorcraft Certification Office, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5170; email *7-avs-asw-170@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

On July 8, 2010, at 75 FR 39192, the **Federal Register** published our notice of proposed rulemaking (NPRM), which proposed to amend 14 CFR part 39 to include an AD that would apply to Arrow Falcon Exporters, Inc. (previously Utah State University); Firefly Aviation Helicopter Services (previously Erickson Air-Crane Co.); California Department of Forestry; Garlick Helicopters, Inc.; Global Helicopter Technology, Inc.; Hagglund Helicopters, LLC (previously Western International Aviation, Inc.); International Helicopters, Inc.; Precision Helicopters, LLC; Robinson Air Crane, Inc.; San Joaquin Helicopters (previously Hawkins and Powers Aviation, Inc.); S.M.&T. Aircraft (previously US Helicopters, Inc., UNC Helicopter, Inc., Southern Aero Corporation, and Wilco Aviation); Smith Helicopters; Southern Helicopter, Inc.; Southwest Florida Aviation International, Inc. (previously Jamie R. Hill and Southwest Florida Aviation); Tamarack Helicopters, Inc. (previously Ranger Helicopter Services, Inc.); US Helicopter, Inc. (previously UNC Helicopter, Inc.); West Coast Fabrication; and Williams Helicopter Corporation (previously Scott Paper Co.) Model HH–1K, TH–1F, TH–1L, UH–1A, UH–1B, UH–1E, UH–1F, UH–1H, UH–1L, and UH–1P Helicopters; and Southwest Florida Aviation Model UH–1B (SW204 and SW204HP) and UH–1H (SW205) Helicopters with certain grips installed. The NPRM proposed to require creating a component history card or equivalent record for each grip; determining and recording the total hours TIS for each grip; visually inspecting the upper and lower tangs of the grip for a crack; inspecting the grip buffer pads for delamination and if delamination is present, inspecting the grip surface for corrosion or other damage; inspecting the grip for a crack using UT and fluorescent penetrant inspection methods; and establishing a retirement life for certain grips. The NPRM was prompted by reports of three in-flight failures of grips, P/N 204–011–121–009 and 204–011–121–121, installed on Bell Model 212 helicopters. The failures resulted from cracks originating in the lower blade bolt lug. The cracking was attributed to subsurface fatigue, corrosion and mechanical damage. Grips with these same P/Ns are eligible for installation on certain restricted category helicopters. Grips, P/N 204–044–121–005 and 204–044–121–113, are also affected if they were ever installed on a Model 205B or UH–1N helicopter. The proposed requirements were intended to prevent failure of the grip, separation of a main rotor blade, and subsequent loss of control of the helicopter.

Comments

We gave the public the opportunity to participate in developing this AD, but we did not receive any comments on the NPRM (75 FR 39192, July 8, 2010).

FAA's Determination

We have reviewed the relevant information and determined that an unsafe condition exists and is likely to exist or develop on other products of these same type designs and that air safety and the public interest require adopting the AD requirements as proposed except for we are incorporating the figure by reference instead of including it in our AD and other minor changes to meet current publication requirements. These changes are consistent with the intent of the proposals in the NPRM (75 FR 39192, July 8, 2010) and will not increase the economic burden on any operator nor increase the scope of the AD.

Costs of Compliance

We estimate that this AD will affect 20 helicopters of U.S. registry and that labor costs will average $85 per work-hour. Based on these estimates, we expect the following costs:

- Creating new component history cards or the equivalent will require two work-hours for a labor cost of $170 per helicopter, $3,400 for the U.S. fleet.
- Maintaining records will require five work-hours per year for a labor cost of $425.
- Conducting 24 visual inspections using a magnifying glass will require 12 work-hours per year for a labor cost of $1,020.
- ½ of a buffer pad inspection: 1.5 hours per year for a labor cost of $128.
- ¼ of a fluorescent penetrant inspection: .5 work hour per year for a labor cost of $43.
- 4 UT inspections: 4 work hours per year for a labor cost of $340.
- Removing and replacing a grip set will require 20 work hours per year. A set of grips will cost $37,590, for total cost of $39,290 per helicopter.

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.

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

Regulatory Findings

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

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

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

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);

(3) Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction; and

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

We prepared an economic evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2013–13–06 Various Restricted Category Helicopters: Amendment 39–17494; Docket No. FAA–2010–0564; Directorate Identifier 2010–SW–013–AD.

(a) Applicability

This AD applies to Arrow Falcon Exporters, Inc. (previously Utah State University); Firefly Aviation Helicopter Services (previously Erickson Air-Crane Co.); California Department of Forestry; Garlick Helicopters, Inc.; Global Helicopter Technology, Inc.; Hagglund Helicopters, LLC (previously Western International Aviation, Inc.); International Helicopters, Inc.; Precision Helicopters, LLC; Robinson Air Crane, Inc.; San Joaquin Helicopters (previously Hawkins and Powers Aviation, Inc.); S.M.&T. Aircraft (previously US Helicopters, Inc., UNC Helicopter, Inc., Southern Aero Corporation, and Wilco Aviation); Smith Helicopters; Southern Helicopter, Inc.; Southwest Florida Aviation International, Inc. (previously Jamie R. Hill and Southwest Florida Aviation); Tamarack Helicopters, Inc. (previously Ranger Helicopter Services, Inc.); US Helicopter, Inc. (previously UNC Helicopter, Inc.); West Coast Fabrication; and Williams Helicopter Corporation (previously Scott Paper Co.) Model HH–1K, TH–1F, TH–1L, UH–1A, UH–1B, UH–1E, UH–1F, UH–1H, UH–1L, and UH–1P Helicopters; and Southwest Florida Aviation Model UH–1B (SW204 and SW204HP) and UH–1H (SW205) Helicopters with main rotor grip (grip) part number (P/N) 204–011–121–009, 204–011–121–121, or ASI–4011–121–9, installed, or with grip P/N 204–011–121–005 or 204–011–121–113, if the grip was ever installed on a Model 205B or a Model UH–1N helicopter, or P/N 204–011–121–117, installed, if the grip was ever installed on a Model 205B helicopter, certificated in any category.

(b) Unsafe Condition

This AD defines the unsafe condition as a crack in the lower main rotor blade bolt lug. This condition could result in failure of a grip, separation of a main rotor blade, and subsequent loss of control of the helicopter.

(c) Effective Date

This AD becomes effective September 10, 2013.

(d) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(e) Required Actions

(1) Within 10 hours time-in-service (TIS), create a component history card or equivalent record and determine and record the total hours TIS for each grip. If the total hours TIS cannot be determined from the helicopter records, assume and record 50 hours TIS for each month for which the hours cannot be determined with the grip installed on any helicopter. Continue to count and record the hours TIS and begin to count and record the number of times the helicopter engine(s) are started (engine start/stop cycles).

(2) Within 10 hours TIS, and then at intervals not to exceed 25 hours TIS, without removing the main rotor blades:

(i) Clean the exposed surfaces of the upper and lower tangs of each grip with denatured alcohol and wipe dry.

(ii) Using a 10X or higher magnifying glass, visually inspect the exposed surfaces of the upper and lower tangs of each grip for a crack. Pay particular attention to the lower surface of each lower grip tang from the main rotor blade bolt-bushing flange to the leading and trailing edge of each grip tang as depicted in Figure 5–7, Inspection of Main Rotor Hub Grip (1200 Hours), Revision 9, dated August 8, 2008, of Chapter 5, Inspections and Component Overhaul Schedule, Revision 11, dated April 30, 2010, of Bell Helicopter Textron, Inc. (BHTI), BHT–212–MM–1, Revision 13, dated September 16, 2010.

(iii) At the intervals shown in Table 1 to Paragraph (e) of this AD, ultrasonic (UT) inspect each grip for a crack in accordance with the BHTI Nondestructive Inspection Procedure, Log No. 00–340, Revision E, dated April 9, 2002. The UT inspection of the grip must be performed by a Nondestructive Testing (NDT) UT Level I Special, Level II, or Level III inspector who is qualified under the guidelines established by MIL–STD–410E, ATA Specification 105, AIA–NAS–410, or an FAA-accepted equivalent for qualification standards of NDT Inspection/Evaluation Personnel.

TABLE 1 TO PARAGRAPH (e)

UT inspect grip, P/N	Within 30 days, for a grip with the following or more hours TIS:	Thereafter, at intervals not to exceed the following number of hours TIS or the engine start/stop cycles, whichever occurs first:	
		Hours TIS	Engine start/stop cycles
204–011–121–009 or ASI–4011–121–9	4,000	400	1,600
204–011–121–121	500	150	600

TABLE 1 TO PARAGRAPH (e)—Continued

UT inspect grip, P/N	Within 30 days, for a grip with the following or more hours TIS:	Thereafter, at intervals not to exceed the following number of hours TIS or the engine start/stop cycles, whichever occurs first:	
		Hours TIS	Engine start/stop cycles
204–011–121–005 or –113, if the grip was EVER installed on a Model 205B or Model UH–1N helicopter	4,000	400	1,600
204–011–121–117, if the grip was EVER installed on a Model 205B helicopter	500	150	600

(3) At intervals not to exceed 1,200 hours TIS or 24 months, whichever occurs first:

(i) Remove each main rotor blade, and

(ii) Inspect each grip buffer pad on the inner surfaces of each grip tang for delamination as depicted in Figure 5–7, Inspection of Main Rotor Hub Grip (1200 Hours), Revision 9, dated August 8, 2008, of Chapter 5, Inspections and Component Overhaul Schedule, Revision 11, dated April 30, 2010, of Bell Helicopter Textron, Inc., BHT–212–MM–1, Revision 13, dated September 16, 2010. If there is any delamination, remove the buffer pad and inspect the grip surface for corrosion or other damage.

(4) Within 2,400 hours TIS or at the next overhaul of the main rotor hub, whichever occurs first, and then at intervals not to exceed 2,400 hours TIS:

(i) Remove each main rotor blade.

(ii) Remove each grip buffer pad (if installed) from the inner surfaces of each grip tang.

(iii) Visually inspect the grip surfaces for corrosion or other damage.

(iv) Fluorescent-penetrant inspect (FPI) the grip for a crack, paying particular attention to the upper and lower grip tangs. When inspecting a grip, P/N 204–011–121–005, 204–011–121–009, or 204–011–121–113, or ASI–4011–121–9, pay particular attention to the leading and trailing edges of the grip barrel.

(5) Before further flight:

(i) Replace any cracked grip with an airworthy grip.

(ii) Replace any grip with any corrosion or other damage with an airworthy grip, or repair the grip if the corrosion or other damage is within the maximum repair limitations.

(iii) Remove any grip, P/N 204–011–121–009 or ASI–4011–121–9, that has been in service for 15,000 or more hours TIS.

(iv) Remove any grip, P/N 204–011–121–121, that has been in service for 25,000 or more hours TIS.

(6) Revise the Airworthiness Limitations section of the applicable maintenance manual or the Instructions for Continued Airworthiness (ICA) by establishing a new retirement life of 15,000 hours TIS for grip, P/N 204–011–121–009 or ASI–4011–121–9, and 25,000 hours TIS for grip, P/N 204–011–121–121, by marking pen and ink changes or inserting a copy of this AD into the maintenance manual or ICA.

(7) Record a 15,000 hour TIS life limit for each grip, P/N 204–011–121–009 or ASI–4011–121–9, and a 25,000 hour life limit for each grip, P/N 204–011–121–121, on the applicable component history card or equivalent record.

(f) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Rotorcraft Certification Office, FAA, may approve AMOCs for this AD. Send your proposal to: Michael Kohner, Aviation Safety Engineer, Rotorcraft Certification Office, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5170; email *7-avs-asw-170@faa.gov.*

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, we suggest that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office before operating any aircraft complying with this AD through an AMOC.

(g) Additional Information

BHTI Alert Service Bulletin (ASB) 212–94–92, Revision A, dated March 13, 1995; BHTI Operations Safety Notice (OSN) 204–85–6, OSN 205–85–9, and OSN 212–85–13, all dated November 14, 1985 and co-published as one document; BHTI ASB 205B–02–39, Revision B, dated November 22, 2002; and BHTI ASB 212–02–116, Revision A, dated October 30, 2002, which are not incorporated by reference, contain additional information about the subject of this AD.

(h) Subject

Joint Aircraft Service Component (JASC) Code: 6220, Main rotor head.

(i) 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 Helicopter Textron, Inc. Nondestructive Inspection Procedure, Log No. 00–340, Revision E, dated April 9, 2002.

(ii) Figure 5–7, Inspection of Main Rotor Hub Grip (1200 Hours), Revision 9, dated August 8, 2008, of Chapter 5, Inspections and Component Overhaul Schedule, Revision 11, dated April 30, 2010, of Bell Helicopter Textron, Inc., BHT–212–MM–1, Revision 13, dated September 16, 2010.

(3) For BHTI service information identified in this AD, contact Bell Helicopter Textron, Inc., P.O. Box 482, Fort Worth, TX 76101; telephone (817) 280–3391; fax (817) 280–6466; or at *http://www.bellcustomer.com/files/.*

(4) You may review a copy of this service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

(5) You may also review a copy of this service information at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Fort Worth, Texas, on June 18, 2013.

Kim Smith,

Directorate Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2013–18570 Filed 8–5–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0447; Directorate Identifier 2013–NE–17–AD; Amendment 39–17536; AD 2013–15–20]

RIN 2120–AA64

Airworthiness Directives; General Electric Company Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are superseding emergency airworthiness directive (AD) 2013–14–51 for General Electric Company (GE) GE90–110B1 and GE90–115B turbofan engines with affected transfer gearbox assembly (TGB) radial gearshafts installed. AD 2013–14–51 was sent previously to all known U.S. owners and operators of GE90–110B1 and GE90–115B turbofan engines. AD 2013–14–51 prohibited operation of an airplane if more than one installed engine has an affected TGB radial

gearshaft. This AD contains the same prohibition as AD 2013–14–51 and also prohibits operation of any airplane 60 days after the effective date of this new AD if any installed engine has an affected TGB radial gearshaft. This new AD also revises the applicability by adding GE90–76B, GE90–77B, GE90–85B, GE90–90B, GE90–94B, and GE90–113B turbofan engine models and adds a mandatory terminating action. This new AD was prompted by reports of three failures of TGB radial gearshafts which resulted in in-flight shutdowns (IFSDs). We are issuing this new AD to prevent failure of the TGB radial gearshaft, which could result in IFSD of one or more engines, loss of thrust control, and damage to the airplane.

DATES: This AD is effective August 21, 2013.

We must receive any comments on this AD by September 20, 2013.

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

- *Federal eRulemaking Portal:* Go to *http://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:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact General Electric Company, One Neumann Way, Room 285, Cincinnati, OH; phone: 513–552–3272; email: *geae.aoc@ge.com.* You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Carlos Fernandes, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7189; fax: 781–238–7199; email: *carlos.fernandes@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

On May 16, 2013, we issued emergency AD 2013–10–52 (issued on June 16, 2013, as a Final Rule, Request for Comments (78 FR 38195, June 26, 2013)), which was immediately effective to owners and operators of GE GE90–110B1 and GE90–115B turbofan engines. That AD resulted from reports of two failures of TGB radial gearshafts that resulted in IFSDs. That AD prohibited operation of an airplane with affected TGBs installed on both engines.

On July 12, 2013, we issued emergency AD 2013–14–51, superseding AD 2013–10–52 (78 FR 38195, June 26, 2013). AD 2013–14–51 also prohibits operation of an airplane with affected TGB radial gearshafts installed on both engines. AD 2013–14–51 resulted from a report of an additional failure of a TGB radial gearshaft, outside the population identified in AD 2013–10–52. We issued ADs 2013–10–52 and 2013–14–51 to prevent failure and separation of the TGB radial gearshaft, which could result in IFSD of one or more engines, loss of thrust control, and damage to the airplane.

Actions Since AD 2013–14–51 Was Issued

Since we issued emergency AD 2013–14–51, dated July 12, 2013, we determined that airplanes with an installed engine with an affected TGB radial gearshaft should not be allowed to operate more than 60 days after the effective date of this new AD. We also revised the Applicability of this new AD since we determined that the affected TGB radial gearshafts are installed on additional GE90 engine models besides the GE90–110B1 and GE90–115B. We also determined the need to add a mandatory terminating action.

Relevant Service Information

We reviewed GE GE90–100 Series Alert Service Bulletin (ASB) No. GE90–100 S/B 72–A0568, dated July 10, 2013; GE GE90–100 Series Service Bulletin (SB) No. GE90–100 S/B 72–0569, Revision 0, dated July 19, 2013; and GE GE90 SB No. GE90 S/B 72–1091, Revision 0, dated June 11, 2013, which provide additional information regarding the affected TGB radial gearshafts. We also reviewed GE GE90–100 Series SB No. GE90–100 S/B 72–0563, Revision 0, dated June 21, 2013, and Revision 1, dated July 10, 2013; and GE GE90 SB No. GE90 S/B 72–1066, Revision 0, dated June 21, 2013; which provide information regarding the mandatory terminating action.

FAA's Determination

We are issuing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

AD Requirements

This AD prohibits operation of an airplane with affected TGB radial gearshafts installed on both engines after the effective date of this AD. This AD also prohibits operation of an airplane with affected TGB radial gearshafts installed on any engine 60 days after the effective date of this AD. This AD also adds a mandatory terminating action, namely, to install a TGB radial gearshaft that is eligible for installation.

FAA's Justification and Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because of the before further flight compliance time. Therefore, we find that notice and opportunity for prior public comment are impracticable and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not provide you with notice and an opportunity to provide your comments before it becomes effective. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number FAA–2013–0447 and directorate identifier 2013–NE–17–AD at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each

substantive verbal contact we receive about this AD.

Costs of Compliance

We estimate that this AD will affect about 16 GE90 engines installed on airplanes of U.S. registry. We also estimate that it will take about eight hours per engine to replace the TGB radial gearshaft. The average labor rate is $85 per hour. The cost of this part is about $16,700. Based on these figures, we estimate the total cost of this AD to U.S. operators to be $278,080.

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.

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

Regulatory Findings

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

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

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

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction, and

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing AD 2013–10–52 (78 FR 38195, June 26, 2013); and

■ b. Adding the following new AD: 2013–15–20: Amendment 39–17536; Docket No. FAA–2013–0447; Directorate Identifier 2013–NE–17–AD.

(a) Effective Date

This AD is effective August 21, 2013.

(b) Affected ADs

This AD supersedes Emergency AD 2013–14–51, Directorate ID 2013–NE–17–AD, dated July 12, 2013. This AD also removes AD 2013–10–52 (78 FR 38195, June 26, 2013) from the Code of Federal Regulations.

(c) Applicability

General Electric Company (GE) GE90–76B, GE90–77B, GE90–85B, GE90–90B, GE90–94B, GE90–110B1, GE90–113B and GE90–115B turbofan engines with a transfer gearbox assembly (TGB) radial gearshaft, part number (P/N) 1995M24P02, serial number (S/N) listed in Figure 1 to paragraph (c) of this AD, installed.

FIGURE 1 TO PARAGRAPH (c)—TGB RADIAL GEARSHAFT P/N 1995M24P02 S/N'S

FIA0KCYG	FIA0JETA	FIA0H0VJ	FIA0HL0C
FIA0K63F	FIA0J7V2	FIA0K62R	FIA0HLY9
FIA0K3A3	FIA0KCYM	FIA0K63C	FIA0HL0E
FIA0JVRE	FIA0JJ6E	FIA0K89H	FIA0HL0F
FIA0H0VM	FIA0JNJH	FIA0KCYK	FIA0HL0G
FIA0K3A4	FIA0K62W	FIA0K3A5	FIA0HLY7
FIA0K62T	FIA0K89P	FIA0HWKA	FIA0HJTE
FIA0JJ53	FIA0JJ57	FIA0KCYR	FIA0HJTJ
FIA0K89W	FIA0JJ56	FIA0HWKE	FIA0HJTG
FIA0KCW8	FIA0KH9Y	FIA0J7WH	FIA0HJTC
FIA0K3A6	FIA0KCYP	FIA0JER9	FIA0HJTF
FIA0HY8C	FIA0JJ55	FIA0JNJJ	FIA0HJTH
FIA0K3AP	FIA0KH9G	FIA0JVRR	FIA0HJTA
FIA0J7WG	FIA0KH9H	FIA0JNJM	FIA0HJR9
FIA0JVRL	FIA0KH9K	FIA0KH9R	FIA0HWJ7
FIA0J7V1	FIA0KH9C	FIA0KH9P	FIA0HY76
FIA0JVRM	FIA0K63H	FIA0K89C	FIA0HY8F
FIA0K3AV	FIA0K63M	FIA0JVRH	FIA0H0VK
FIA0J7V8	FIA0K62Y	FIA0K89L	FIA0J7VR
FIA0J7WE	FIA0JVP9	FIA0JER6	FIA0JJ58
FIA0K3A2	FIA0K63E	FIA0JETH	FIA0JJ6C
FIA0K3A1	FIA0K3AY	FIA0H0VC	FIA0JNJF
FIA0K3AN	FIA0JVRT	FIA0K3AL	FIA0JNJK
FIA0JVRP	FIA0HY8E	FIA0J7VV	FIA0JVRC
FIA0JJ6F	FIA0HY8N	FIA0J7VP	FIA0J7V4
FIA0JJ6J	FIA0J7V0	FIA0J7V9	FIA0JETF
FIA0JVRV	FIA0J7V3	FIA0HWJ8	FIA0HEG4
FIA0H0VL	FIA0J7V5	FIA0H0VA	FIA0HWJ9
FIA0K89T	FIA0HY8H	FIA0KCYL	FIA0HWJ5
FIA0K89Y	FIA0HEG2	FIA0HY79	FIA0HWJ6

FIGURE 1 TO PARAGRAPH (c)—TGB RADIAL GEARSHAFT P/N 1995M24P02 S/N'S—Continued

FIA0JETL	FIA0K62V	FIA0KH9J	FIA0J7VW
FIA0JER8	FIA0HEGY	FIA0HY8G	FIA0J7VY
FIA0J7WC	FIA0HWKC	FIA0HY8M	FIA0J7VT
FIA0JETE	FIA0K3A0	FIA0HY8A	FIA0J7WF
FIA0K3AT	FIA0JVRJ	FIA0H0VG	FIA0J7V6
FIA0JJ59	FIA0K8AA	FIA0K3AR	FIA0K89G
FIA0K3AW	FIA0KCYT	FIA0JETC	FIA0K89K
FIA0JVRN	FIA0KH9T	FIA0KH9W	FIA0K89R
FIA0JNH8	FIA0HEG1	FIA0JNJC	FIA0KCYJ
FIA0JETN	FIA0HEG3	FIA0K63L	FIA0JJ6G
FIA0HY78	FIA0J7WJ	FIA0KCYN	FIA0JJ6A
FIA0HY75	FIA0JER7	FIA0JVRG	FIA0HY8K
FIA0HEG0	FIA0JVRF	FIA0HY8L	FIA0HLY6
FIA0KH9E	FIA0K63K	FIA0HY8J	FIA0HLY0
FIA0KH9F	FIA0J7WK	FIA0H0VH	FIA0HLY1
FIA0H0T9	FIA0JER5	FIA0H0VF	FIA0HLY4
FIA0HLY3	FIA0JETM		

(d) Unsafe Condition

This AD was prompted by reports of three failures of TGB radial gearshafts which resulted in in-flight shutdowns (IFSDs). We are issuing this AD to prevent failure of the TGB radial gearshaft, which could result in IFSD of one or more engines, loss of thrust control, and damage to the airplane.

(e) Compliance

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

(2) Before further flight after the effective date of this AD, do not operate the airplane if more than one installed engine has a TGB radial gearshaft P/N and S/N listed in Figure 1 to paragraph (c) of this AD.

(f) Mandatory Terminating Action

No later than 60 days after the effective date of this AD, as terminating action to the requirements of paragraph (e) of this AD, replace all TGB radial gearshafts identified in Figure 1 to paragraph (c) of this AD that are installed on an airplane with TGB radial gearshafts that are eligible for installation.

(g) Prohibition on Operation

Sixty days after the effective date of this AD, do not operate any airplane that has an engine installed that has a TGB radial gearshaft P/N and S/N listed in Figure 1 to paragraph (c) of this AD.

(h) Definition

For the purposes of this AD, a TGB radial gearshaft eligible for installation is:

(1) A TGB radial gearshaft P/N and S/N, not listed in this AD or

(2) A TGB radial gearshaft with an S/N listed in paragraph (c) of this AD with part number 1995M24P04, 2205M61P01 or 2205M61P02.

(i) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, FAA, may approve AMOCs for this AD. Use the procedures in 14 CFR 39.19 to make your request.

(j) Related Information

(1) For more information about this AD, contact Carlos Fernandes, Aerospace Engineer, Engine Certification Office, FAA, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7189; fax: 781–238–7199; email: *carlos.fernandes@faa.gov.*

(2) GE GE90–100 Series Alert Service Bulletin No. GE90–100 S/B 72–A0568, Revision 0, dated July 10, 2013; GE GE90–100 Series Service Bulletin (SB) No. GE90–100 S/B 72–0569, Revision 0, dated July 19, 2013; GE GE90–100 Series SB No. GE90–100 S/B 72–0563, Revision 0, dated June 21, 2013, and Revision 1, dated July 10, 2013; GE GE90 SB No. GE90 S/B 72–1066, Revision 0, dated June 21, 2013; and GE GE90 SB No. GE90 S/B 72–1091, Revision 0, dated June 11, 2013, can be obtained from GE using the contact information in paragraph (j)(3) of this AD.

(3) For service information identified in this AD, contact General Electric Company, One Neumann Way, Room 285, Cincinnati, OH; phone: 513–552–3272; email: *geae.aoc@ge.com.*

(4) You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

(k) Material Incorporated by Reference

None.

Issued in Burlington, Massachusetts, on July 25, 2013.

Frank P. Paskiewicz,

Acting Director, Aircraft Certification Service.

[FR Doc. 2013–18840 Filed 8–5–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1033; Directorate Identifier 2010–NM–266–AD; Amendment 39–17504; AD 2013–13–16]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

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

ACTION: Final rule.

SUMMARY: We are superseding airworthiness directive (AD) 2005–07–04 for all Airbus Model A330–200 and –300 series airplanes, and Model A340–200 and –300 series airplanes. AD 2005–07–04 required repetitive inspections to detect discrepancies of the transfer tubes and the collar of the ball nut of the trimmable horizontal stabilizer actuator (THSA), and corrective action if necessary; repetitive inspections for discrepancies of the ball screw assembly, and corrective action if necessary; repetitive greasing of the THSA ball nut, and replacement of the THSA if necessary; and modification or replacement (as applicable) of the ball nut assembly, which ends certain repetitive inspections. This new AD removes certain inspections, revises certain actions, and adds airplanes to the applicability. This AD was prompted by several reports of

disconnection of the transfer tube from the ball nut of the THSA. We are issuing this AD to prevent degraded operation of the THSA, which could result in reduced controllability of the airplane.

DATES: This AD becomes effective September 10, 2013.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of September 10, 2013.

The Director of the Federal Register approved the incorporation by reference of certain other publications listed in this AD as of May 4, 2005 (70 FR 16104, March 30, 2005).

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone (425) 227–1138; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. The NPRM was published in the **Federal Register** on October 2, 2012 (77 FR 60075), and proposed to supersede AD 2005–07–04, Amendment 39–14028 (70 FR 16104, March 30, 2005). (AD 2005–07–04 superseded AD 2001–11–09, Amendment 39–12252 (66 FR 31143, June 11, 2001).) The NPRM proposed to correct an unsafe condition for the specified products. The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2010–0192 (corrected), dated October 11, 2010; and EASA Airworthiness Directive 2010–0193 (corrected), dated October 11, 2010; (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> Several cases of transfer tube disconnection from the ball-nut of the trimmable horizontal stabilizer actuator (THSA) part number (P/N) 47172 and 47147–400 were detected on the ground during greasing and maintenance.
>
> This condition is caused by water ingress into the ball-nut resulting in the jamming of the ball transfer circuit when the water freezes.
>
> If the three (independent) ball circuits fail, then the THSA will operate on a fail-safe nut. This nut (which operates without balls) would then jam after several movements on the screw of the THSA.
>
> This degraded operation is not detectable in the cockpit by the crew as long as the THSA does not jam and could damage the ball screw and the fail-safe nut.
>
> To detect this unsafe condition, [Dirección General de Aviación Civil] DGAC France AD F–2001–356 [and F–2001–357] was issued to require repetitive inspections of the transfer tubes and their collars in order to detect at an early stage any distortion or initiation of disconnection.
>
> Further to a new case of transfer tube disconnection, * * * [revised DGAC ADs] required an additional repetitive greasing task with reinforcement of the ball-nut maintenance greasing instructions.
>
> In addition, the electrical flight control computers monitor the operation of the THSA and the jamming of this actuator could be detected and indicated by messages on the maintenance system and on the ECAM [electronic centralized aircraft monitor]. In this case a mandatory inspection of the THSA is required before the next flight.
>
> DGAC France AD F–2002–038 [and F–2002–037] required application of a final fix (related to inspection and greasing task required by DGAC France AD F–2001–356 [and F–2001–357]) for the THSA P/N 47172 by application of Airbus modification 49590/Service Bulletin (SB) A330–27–3085 [or SB A340–27–4089]. It changes the THSA P/N from 47172 to 47172–300.
>
> Later on, DGAC France AD F–2002–414R3 replaced the DGAC AD France F–2001–356R2 and F–2002–038 [and DGAC France AD F2002–415R2 superseded DGAC France ADs F–2001–357R2 and F–2002–037] requiring:
>
> —the repetitive [detailed] inspection [for discrepancies] of all THSA P/N in service [for integrity of the primary and secondary load path and check the Checkable Shear Pins (CSPs)], and
>
> —the lubrication of some THSA P/N, and
>
> —the replacement of THSA P/N 47172, 47147–400 and 47147–2XX/–3XX
>
> [DGAC France AD F–2002–414R3 and F–2002–415R2 correspond to FAA AD 2005–07–04, Amendment 39–14028 (70 FR 16104, March 30, 2005).]
>
> Airbus has later introduced 4 new THSA P/N (47172–500, 47172–510, 47172–520 and 47172–530).
>
> This [EASA] AD retains the requirements of DGAC France AD F–2002–414R3 [and F–2002–415R2], which is superseded, and requires repetitive inspections and lubrications of the new THSA P/N.
>
> The repetitive inspection and lubrication requirements for THSA P/N 47172–520 and 47172–530 shall [also] be included in the next Airworthiness Limitation Section (ALS) Part 4 revision.
>
> * * * * *
>
> Corrective actions include replacing the THSA with a new THSA if cracks, dents, or corrosion are found, or if the feeler gage has failed at any of the four gaps. Other corrective action includes using a method approved by the FAA or the EASA (or its delegated agent) for a finding of metallic debris, loose nut, damaged or missing lock washers, pins and parts, or incorrect installation of items. AD 2005–07–04, Amendment 39–14028 (70 FR 16104, March 30, 2005), required repetitive inspections for discrepancies. This AD requires, for certain airplanes, repetitive inspections for the integrity of the primary and secondary load path, and the CSPs. The unsafe condition is the degraded operation of the THSA, which could result in reduced controllability of the airplane. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comments received.

Request To Use Later Document Revision

Delta Airlines (Delta) requested that paragraph (j)(2) of the NPRM (77 FR 60075, October 2, 2012) refer to Airbus A330 Airworthiness Limitations Section (ALS) Part 4—Ageing Systems Maintenance, Revision 03, dated September 9, 2011; instead of Revision 02, dated December 16, 2009. Delta stated that Revision 03 of that ALS specifies the 1,000 flight-hour lubrication threshold and repetitive interval that are specified in paragraph (j)(2) of the NPRM, whereas Revision 02 of this ALS specifies 700 flight hours for the lubrication threshold and repetitive interval.

We agree that Airbus A330 Airworthiness Limitations Section (ALS) Part 4—Ageing Systems Maintenance, Revision 03, dated September 9, 2011, correctly specifies the lubrication threshold and repetitive interval. We have changed paragraph (j)(2) of this AD accordingly. In addition, we have changed paragraph (j)(2) of this AD to reference Airbus A340 ALS Part 4—Ageing Systems Maintenance, Revision 02, dated October 12, 2011; and Revision 03, dated November 15, 2012; for the same reason.

Request To Change Wording

Delta requested that we change the wording in paragraph (l) of the NPRM (77 FR 60075, October 2, 2012), which states ''For airplanes identified in paragraph (k) of this AD.'' The commenter asked that the wording ''identified in'' be replaced with

''affected by.'' The commenter provided no reason for the change.

We disagree to change the wording in paragraph (n) in this AD (identified as paragraph (l) in the NPRM (77 FR 60075, October 2, 2012)) as requested by the commenter. However, we have moved the content of paragraphs (k)(1), (k)(2), and (k)(3) of the NPRM to new paragraph (l) in this AD to clarify the actions and affected airplanes. We have also moved the content of paragraph (k)(6) of the NPRM to new paragraph (m) of this AD, and re-identified succeeding paragraphs accordingly. Finally, in paragraph (n) of this AD, we revised the wording to describe the affected airplanes.

Request To Include Additional Part Number

Delta requested that we include THSA P/N 47172–520 and P/N ''47127–530'' in paragraph (m) of the NPRM (77 FR 60075, October 2, 2012) as applicable part numbers for Model A330 series airplanes.

We disagree to include THSA P/N 47127–530 as there is no such part number. We infer that the commenter meant to specify THSA P/N 47172–530. THSA P/N 47172–520 and P/N 47172–530 are not included in the MCAI. However, all necessary tasks for those THSA part numbers are contained in Airbus A330 Airworthiness Limitations Section (ALS) Part 4—Ageing Systems Maintenance, Revision 03, dated September 9, 2011; and Airbus A340 ALS Part 4—Ageing Systems Maintenance, Revision 02, dated October 12, 2011, and Revision 03, dated November 15, 2012. The FAA NPRMs to mandate these ALS Part 4 documents are pending at this time. Therefore, we have not changed this AD in this regard.

Request To Consider Another EASA AD

Corinne Dayde stated that she ''Cannot see how EASA 2012–0061 is considered.''

We are considering addressing EASA AD 2012–0061R1, dated November 30, 2012, in a separate FAA AD. We have not changed this AD in this regard.

Conclusion

We reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting this AD with the changes described previously—and minor editorial changes. We have determined that these changes:

- Are consistent with the intent that was proposed in the NPRM (77 FR 60075, October 2, 2012) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (77 FR 60075, October 2, 2012).

Costs of Compliance

We estimate that this AD will affect about 33 products of U.S. registry.

The actions that are required by AD 2005–07–04, Amendment 39–14028 (70 FR 16104, March 30, 2005), and retained in this AD take up to 36 work-hours per product, at an average labor rate of $85 per work-hour. Based on these figures, the estimated cost of the retained actions is up to $3,060 per product.

We estimate that it will take about 2 work-hours per product to comply with the new basic requirements of this AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this AD on U.S. operators to be $5,610, or $170 per product.

We have received no definitive data that would enable us to provide cost estimates for the on-condition actions specified in this AD.

Authority for This Rulemaking

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

We are 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

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);

3. Will not affect intrastate aviation in Alaska; and

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

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2005–07–04, Amendment 39–14028 (70 FR 16104, March 30, 2005), and adding the following new AD:

2013–13–16 Airbus: Amendment 39–17504. Docket No. FAA–2012–1033; Directorate Identifier 2010–NM–266–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective September 10, 2013.

(b) Affected ADs

This AD supersedes AD 2005–07–04, Amendment 39–14028 (70 FR 16104, March 30, 2005).

(c) Applicability

This AD applies to all Airbus Model A330–201, –202, –203, –223, –223F, –243, –243F, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes; and Model A340–

211, –212, –213, –311, –312, and –313 airplanes; certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 27: Flight Controls.

(e) Reason

This AD was prompted by several reports of disconnection of the transfer tube from the ball nut of the trimmable horizontal stabilizer actuator (THSA). We are issuing this AD to prevent degraded operation of the THSA, which could result in reduced controllability of the airplane.

(f) Compliance

You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

(g) Retained Modification or Replacement

This paragraph restates the requirements of paragraph (g) of AD 2005–07–04, Amendment 39–14028 (70 FR 16104, March 30, 2005). Except for Model A330–223F and –243F airplanes: Within 24 months after May 4, 2005 (the effective date of AD 2005–07–04), modify the ball nut of each THSA by doing paragraph (g)(1) or (g)(2) of this AD, as applicable.

(1) For THSAs having part number (P/N) 47172: Modify the ball nut of the THSA, or replace the existing THSA with a serviceable part having P/N 47172–300; in accordance with Airbus Service Bulletin A330–27–3085 (for Model A330 series airplanes) or A340–27–4089 (for Model A340–313 series airplanes), both Revision 02, both dated September 5, 2002; as applicable.

Note 1 to paragraph (g)(1) of this AD: Airbus Service Bulletins A330–27–3085 and A340–27–4089, both Revision 02, both dated September 5, 2002, refer to TRW Aeronautical Systems Service Bulletin 47172–27–03, dated October 24, 2001 (which is not incorporated by reference in this AD), as additional guidance for accomplishing the modification of the ball nut of the THSA.

(2) For THSAs having P/N 47147–200, –210, –213, –300, –303, –350, or –400: Modify the ball nut of the THSA, or replace the existing THSA with an improved part having P/N 47147–500; as applicable; in accordance with Airbus Service Bulletin A330–27–3093 (for Model A330 series airplanes) or A340–27–4099 (for Model A340–200 and –300 series airplanes), both Revision 01, both dated September 5, 2002; as applicable.

Note 2 to paragraph (g)(2) of this AD: Airbus Service Bulletins A330–27–3093 and A340–27–4099, both Revision 01, both dated September 5, 2002, refer to TRW Aeronautical Systems Service Bulletin 47147–27–10, dated June 27, 2002 (which is not incorporated by reference in this AD), as additional guidance for accomplishing the modification of the ball nut of the THSA.

(h) Retained Previous/Concurrent Requirements

This paragraph restates the requirements of paragraph (h) of AD 2005–07–04, Amendment 39–14028 (70 FR 16104, March 30, 2005).

(1) Except for Model A330–223F and –243F airplanes, prior to or concurrently with accomplishing the requirements of paragraph (g)(2) of this AD, do all of the actions specified in the Accomplishment Instructions of the applicable Airbus service bulletins listed in table 1 or 2 to paragraph (h)(1) of this AD, as applicable, in accordance with those service bulletins.

Note 3 to paragraph (h)(1) of this AD: Airbus Service Bulletin A330–27–3093, Revision 01, dated September 5, 2002, specifies that the actions in Airbus Service Bulletin A330–27–3052 be accomplished previously or concurrently. Airbus Service Bulletin A330–27–3052, Revision 03, dated December 5, 2001, specifies that the actions in Airbus Service Bulletins A330–27–3007, A330–27–3015, A330–27–3047, A330–27–3050, and A330–55–3020 be accomplished previously or concurrently.

Note 4 to paragraph (h)(1) of this AD: Airbus Service Bulletin A340–27–4099, Revision 01, dated September 5, 2002, specifies that the actions in Airbus Service Bulletin A340–27–4059 be accomplished previously or concurrently. Airbus Service Bulletin A340–27–4059, Revision 03, dated December 5, 2001, specifies that the actions in Airbus Service Bulletins A340–27–4007, A340–27–4025, A340–27–4054, A340–27–4057, and A340–55–4021 be accomplished previously or concurrently.

TABLE 1 TO PARAGRAPH (h)(1) OF THIS AD—RETAINED PREVIOUS/CONCURRENT REQUIREMENTS FOR MODEL A330 SERIES AIRPLANES

Airbus service bulletin—	Revision level—	Date—	Main action—	Additional source of guidance (not incorporated by reference in this AD)—
A330-27-3007	01	September 18, 1996	Replace rudder servo controls with modified parts.	Samm Avionique Service Bulletin SC5300–27–24–01, dated April 15, 1994.
A330-27-3015	.....	June 7, 1995	Modify the control valve detent and the jamming protection device on the THSA.	Lucas Aerospace Service Bulletin 47147–27–02, Revision 1, dated January 31, 1996.
A330-27-3047	01	November 26, 1997	Replace hydraulic motors on the THSA with new parts.	Lucas Aerospace Service Bulletin 47147–27–04, Revision 1, dated June 20, 1997.
A330-27-3050	.....	November 15, 1996	Replace mechanical input shaft for THSA with modified part.	Lucas Aerospace Service Bulletin 47147–27–05, dated November 8, 1996.
A330-27-3052	03	December 5, 2001	Replace THSA with a modified THSA	Lucas Aerospace Service Bulletin 47147–27–07, dated May 4, 1998.
A330-55-3020	01	October 21, 1998	Perform a general visual inspection of the THSA screw jack fitting assembly for correct installation of a washer; and correctly install washer as applicable.	None.

TABLE 2 TO PARAGRAPH (h)(1) OF THIS AD—RETAINED PREVIOUS/CONCURRENT REQUIREMENTS FOR MODEL A340 SERIES AIRPLANES

Airbus service bulletin—	Revision level—	Date—	Main action—	Additional source of guidance (not incorporated by reference in this AD)—
A340-27-4007	.....	April 7, 1994	Replace hydraulic motors on the THSA with new parts.	Lucas Aerospace Service Bulletin 47147–27–01, dated May 4, 1998.
A340-27-4025	.....	June 7, 1995	Modify the control valve detent and the jamming protection device on the THSA.	Lucas Aerospace Service Bulletin 47147–27–02, Revision 1, dated January 31, 1996.

TABLE 2 TO PARAGRAPH (h)(1) OF THIS AD—RETAINED PREVIOUS/CONCURRENT REQUIREMENTS FOR MODEL A340 SERIES AIRPLANES—Continued

Airbus service bulletin—	Revision level—	Date—	Main action—	Additional source of guidance (not incorporated by reference in this AD)—
A340-27-4054	01	November 26, 1997	Replace hydraulic motors on the THSA with new parts.	Lucas Aerospace Service Bulletin 47147–27–04, Revision 1, dated June 20, 1997.
A340-27-4057	.....	November 15, 1996	Replace mechanical input shaft for THSA with modified part.	Lucas Aerospace Service Bulletin 47147–27–05, dated November 8, 1996.
A340-27-4059	03	December 5, 2001	Replace THSA with a modified THSA	Lucas Aerospace Service Bulletin 47147–27–07, dated May 4, 1998.
A340-55-4021	01	October 21, 1998	Perform a general visual inspection of the THSA screw jack fitting assembly for correct installation of a washer; and correctly install washer as applicable.	None.

(2) For the purposes of this AD, a general visual inspection is: A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to ensure visual access to all surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked.

(i) Retained Credit for Previous Actions

(1) This paragraph provides credit for the requirements of paragraph (g)(1) of this AD, if those actions were performed before May 4, 2005 (the effective date of AD 2005–07–04, Amendment 39–14028 (70 FR 16104, March 30, 2005)), using Airbus Service Bulletin A330–27–3085 (for Model A330 series airplanes) or A340–27–4089 (for Model A340–313 series airplanes), both Revision 01, both dated January 23, 2002 (which are not incorporated by reference in this AD), as applicable.

(2) This paragraph provides credit for the requirements of paragraphs (g)(2) of this AD, if those actions were performed before May 4, 2005 (the effective date of AD 2005–07–04, Amendment 39–14028 (70 FR 16104, March 30, 2005)), using Airbus Service Bulletin A330–27–3093 (for Model A330 series airplanes) or A340–27–4099 (for Model A340–200 and –300 series airplanes), both dated June 27, 2002 (which are not incorporated by reference in this AD), as applicable.

(j) New Repetitive Greasing Procedure

(1) Within 700 flight hours after the effective date of this AD, or within 700 flight hours after the date of the last lubrication, whichever occurs later; and thereafter at intervals not to exceed 700 flight hours from the last lubrication of the trimmable horizontal stabilizer (THS) actuator ball screw nut: Perform Task 27.40.00/02, Lubrication of THS Actuator Ball Screw Nut, in accordance with Airbus A330 Maintenance Review Board Report (MRBR), Revision 12, dated July 1, 2010 (for Model A330 series airplanes); or Airbus A340 MRBR, Revision 12, dated July 1, 2010 (for Model A340 series airplanes); on all THSAs.

(2) For airplanes identified in paragraphs (j)(2)(i), (j)(2)(ii), and (j)(2)(iii) of this AD, as applicable, lubrication of the THS actuator ball screw nut performed at a threshold of 1,000 flight hours and a repetitive interval not exceeding 1,000 flight hours, in accordance with Task 274400–00002–1–E, Lubrication of the THSA Ball Nut, of Airbus A330 Airworthiness Limitations Section (ALS) Part 4—Ageing Systems Maintenance, Revision 03, dated September 9, 2011 (for Model A330 series airplanes); or Task 274400–00002–1–E, Lubrication of the THSA Ball Nut, of Airbus A340 ALS Part 4—Ageing Systems Maintenance, Revision 02, dated October 12, 2011, or Revision 03, dated November 15, 2012 (for Model A340–200 and –300 series airplanes); is acceptable for compliance with the requirements of paragraph (j)(1) of this AD.

(i) Airplanes on which Airbus Modifications 52269, 56056, and 55780 have been done in production.

(ii) Model A330 series airplanes on which the actions specified in Airbus Mandatory Service Bulletin A330–27–3137, dated March 20, 2007, or Revision 01, dated December 6, 2007, or Revision 02, dated January 18, 2010; and Airbus Mandatory Service Bulletin A330–92–3046, Revision 04, dated July 16, 2010, or Revision 05, dated November 7, 2011; which are not incorporated by reference in this AD; have been done in service.

(iii) Model A340–200 and –300 series airplanes on which the actions specified in Airbus Mandatory Service Bulletin A340–27–4136, dated March 20, 2007, Revision 01, dated December 6, 2007, or Revision 02, dated February 24, 2010; and Airbus Mandatory Service Bulletin A340–92–4056, Revision 03, dated July 16, 2010; which are not incorporated by reference in this AD; have been done in service.

(k) New Repetitive Inspections of the Ball Screw Assembly and Corrective Actions

For airplanes other than those identified in paragraphs (l)(1), (l)(2), and (l)(3) of this AD: Do the applicable actions specified in paragraphs (k)(1) and (k)(2) of this AD within 700 flight hours after the effective date of this AD, and repeat the inspection thereafter at intervals not to exceed 700 flight hours.

(1) For airplanes on which the actions specified in Airbus Mandatory Service Bulletin A330–27–3137, dated March 20, 2007, Revision 01, dated December 6, 2007, or Revision 02, dated January 18, 2010 (for Model A330 series airplanes); or Airbus Mandatory Service Bulletin A340–27–4136, dated March 20, 2007, Revision 01, dated December 6, 2007, or Revision 02, dated February 24, 2010 (for Model A340–200 and –300 series airplanes); none of which are incorporated by reference in this AD; have been done: Do the applicable detailed inspection of the ball screw assembly for integrity of the primary and secondary load path and check the checkable shear pins (CSP), and do all applicable corrective actions, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A330–27–3102, Revision 08, dated December 6, 2007 (for Model A330 series airplanes); or Airbus Mandatory Service Bulletin A340–27–4107, Revision 08, dated December 6, 2007 (for Model A340–200 and –300 series airplanes); except as required by paragraph (m) of this AD. Do all applicable corrective actions before further flight.

(2) For airplanes on which the actions specified in Airbus Mandatory Service Bulletin A330–27–3137, dated March 20, 2007, Revision 01, dated December 6, 2007, or Revision 02, dated January 18, 2010 (for Model A330 series airplanes); or Airbus Mandatory Service Bulletin A340–27–4136, dated March 20, 2007, Revision 01, dated December 6, 2007, or Revision 02, dated February 24, 2010 (for Model A340–200 and –300 series airplanes); none of which are incorporated by reference in this AD; have not been done: Perform a detailed inspection of the ball screw assembly for integrity of the primary and secondary load path, and do all applicable corrective actions, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A330–27–3102, Revision 08, dated December 6, 2007 (for Model A330 series airplanes); or Airbus Mandatory Service Bulletin A340–27–4107, Revision 08, dated December 6, 2007 (for Model A340 series airplanes); except as required by paragraph (m) of this AD. Do all applicable corrective actions before further flight.

(l) Certain Airplanes Excluded From Paragraphs (k) and (n) of This AD

This paragraph specifies the airplanes excluded from the actions required by paragraphs (k) and (n) of this AD.

(1) Airplanes on which the actions specified in Airbus Modifications 52269, 56056, and 55780 have been done in production.

(2) Model A330 series airplanes on which Airbus Mandatory Service Bulletin A330–27–3137, dated March 20, 2007, Revision 01, dated December 6, 2007, or Revision 02, dated January 18, 2010; and Airbus Mandatory Service Bulletin A330–92–3046, Revision 04, dated July 16, 2010, or Revision 05, dated November 7, 2011; none of which are incorporated by reference in this AD; have been done in service.

(3) Model A340–200 and –300 series airplanes on which the actions specified in Airbus Mandatory Service Bulletin A340–27–4136, dated March 20, 2007, Revision 01, dated December 6, 2007, or Revision 02, dated February 24, 2010; and Airbus Mandatory Service Bulletin A340–92–4056, Revision 03, dated July 16, 2010; have been done in service.

(m) Service Information Exception

Where Airbus Mandatory Service Bulletin A330–27–3102, Revision 08, dated December 6, 2007 (for Model A330 series airplanes); or Airbus Mandatory Service Bulletin A340–27–4107, Revision 08, dated December 6, 2007 (for Model A340 series airplanes); specify contacting Airbus for a damage assessment, this AD requires contacting the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA) (or its delegated agent); for required actions before further flight, and doing the specified actions within the times given.

(n) New Actions for Electronic Centralized Aircraft Monitor (ECAM) Fault Messages

For airplanes other than those identified in paragraphs (l)(1), (l)(2), and (l)(3) of this AD, if one of the ''PRIM X PITCH FAULT'' or ''STAB CTL FAULT'' messages is displayed on the ECAM associated with the ''PITCH TRIM ACTR (1CS)'' maintenance message, do the applicable detailed inspection and all applicable corrective actions specified in paragraph (k)(1) or (k)(2) of this AD, as applicable to airplane configuration, before further flight after the message is displayed on the ECAM.

(o) New Optional Method of Compliance

For airplanes having THSA P/N 47147–500, 47147–700, 47172–300, 47172–500, or 47172–510, accomplishing the repetitive actions specified in paragraph (o)(1) or (o)(2) of this AD, as applicable, is acceptable for compliance with the corresponding actions specified in paragraph (k)(1) or (k)(2) of this AD, as applicable.

(1) For Model A330 series airplanes: The repetitive actions specified in paragraphs (o)(1)(i) through (o)(1)(viii) of this AD.

(i) Task 274400–00001–1–E of Airbus A330 ALS Part 4—Ageing Systems Maintenance, Revision 02, dated December 16, 2009.

(ii) Task 274400–00001–1–E of Airbus A330 ALS Part 4—Ageing Systems Maintenance, Revision 03, dated September 9, 2011.

(iii) Task 274400–00001–2–E of Airbus A330 ALS Part 4—Ageing Systems Maintenance, Revision 02, dated December 16, 2009.

(iv) Task 274400–00001–2–E of Airbus A330 ALS Part 4—Ageing Systems Maintenance, Revision 03, dated September 9, 2011.

(v) Task 274400–00001–3–E of Airbus A330 ALS Part 4—Ageing Systems Maintenance, Revision 02, dated December 16, 2009.

(vi) Task 274400–00001–3–E of Airbus A330 ALS Part 4—Ageing Systems Maintenance, Revision 03, dated September 9, 2011.

(vii) Task 274400–00001–4–E of Airbus A330 ALS Part 4—Ageing Systems Maintenance, Revision 02, dated December 16, 2009.

(viii) Task 274400–00001–4–E of Airbus A330 ALS Part 4—Ageing Systems Maintenance, Revision 03, dated September 9, 2011.

(2) For Model A340–200 and –300 series airplanes: The repetitive actions specified in paragraphs (o)(2)(i) through (o)(2)(viii) of this AD.

(i) Task 274400–00001–1–E of Airbus A340 ALS Part 4—Ageing Systems Maintenance, Revision 01, dated December 15, 2009.

(ii) Task 274400–00001–1–E of Airbus A340 ALS Part 4—Ageing Systems Maintenance, Revision 02, dated October 12, 2011.

(iii) Task 274400–00001–2–E of Airbus A340 ALS Part 4—Ageing Systems Maintenance, Revision 01, dated December 15, 2009.

(iv) Task 274400–00001–2–E of Airbus A340 ALS Part 4—Ageing Systems Maintenance, Revision 02, dated October 12, 2011.

(v) Task 274400–00001–3–E of Airbus A340 ALS Part 4—Ageing Systems Maintenance, Revision 01, dated December 15, 2009.

(vi) Task 274400–00001–3–E of Airbus A340 ALS Part 4—Ageing Systems Maintenance, Revision 02, dated October 12, 2011.

(vii) Task 274400–00001–4–E of Airbus A340 ALS Part 4—Ageing Systems Maintenance, Revision 01, dated December 15, 2009.

(viii) Task 274400–00001–4–E of Airbus A340 ALS Part 4—Ageing Systems Maintenance, Revision 02, dated October 12, 2011.

(p) New Credit for Previous Actions

(1) For Model A300 series airplanes: This paragraph provides credit for the actions specified in paragraph (j) of this AD, if those actions were performed before the effective date of this AD using Task 27.40.00/02, Lubrication of THS Actuator Ball Screw Nut, of Airbus A330 MRBR, Revision 11, dated June 18, 2008 (which is not incorporated by reference in this AD).

(2) For Model A340 series airplanes: This paragraph provides credit for the actions specified in paragraph (j) of this AD, if those actions were performed before the effective date of this AD using Task 27.40.00/02, Lubrication of THS Actuator Ball Screw Nut, of Airbus A340 MRBR, Revision 11, dated June 18, 2008 (which is not incorporated by reference in this AD).

(3) For Model A330 series airplanes: This paragraph provides credit for the inspections and corrective actions required by paragraph (k) of this AD, if those actions were performed before the effective date of this AD using the service information specified in paragraphs (p)(3)(i) through (p)(3)(vi) of this AD (which are not incorporated by reference in this AD).

(i) Airbus Service Bulletin A330–27–3102, Revision 02, dated November 7, 2002.

(ii) Airbus Service Bulletin A330–27–3102, Revision 03, dated June 20, 2003.

(iii) Airbus Service Bulletin A330–27–3102, Revision 04, dated December 8, 2003.

(iv) Airbus Mandatory Service Bulletin A330–27–3102, Revision 05, dated July 7, 2004.

(v) Airbus Mandatory Service Bulletin A330–27–3102, Revision 06, dated December 16, 2005.

(vi) Airbus Mandatory Service Bulletin A330–27–3102, Revision 07, dated March 16, 2007.

(4) For Model A340 series airplanes: This paragraph provides credit for the inspections and corrective actions required by paragraph (k) of this AD, if those actions were performed before the effective date of this AD using the service information specified in paragraphs (p)(4)(i) through (p)(4)(vi) of this AD (which are not incorporated by reference in this AD).

(i) Airbus Mandatory Service Bulletin A340–27–4107, Revision 02, dated September 23, 2002.

(ii) Airbus Service Bulletin A340–27–4107, Revision 03, dated December 4, 2002.

(iii) Airbus Mandatory Service Bulletin A340–27–4107, Revision 04, dated June 20, 2003.

(iv) Airbus Mandatory Service Bulletin A340–27–4107, Revision 05, dated December 8, 2003.

(v) Airbus Mandatory Service Bulletin A340–27–4107, Revision 06, dated December 16, 2005.

(vi) Airbus Mandatory Service Bulletin A340–27–4107, Revision 07, dated March 16, 2007.

(q) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, 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 International Branch, send it to ATTN: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone (425) 227–1138; fax (425) 227–1149. Information may be emailed to: *9-*

ANM-116-AMOC-REQUESTS@faa.gov. 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. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(r) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2010–0192 (corrected), dated October 11, 2010; and EASA Airworthiness Directive 2010–0193 (corrected), dated October 11, 2010; for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov*.

(2) Service information identified in this AD that is not incorporated by reference may be obtained at the addresses specified in paragraphs (s)(5), (s)(6), and (s)(7) of this AD.

(s) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on September 10, 2013.

(i) Airbus Mandatory Service Bulletin A330–27–3102, Revision 08, dated December 6, 2007.

(ii) Airbus Mandatory Service Bulletin A340–27–4107, Revision 08, dated December 6, 2007.

(iii) Task 27.40.00/02, Lubrication of Trimmable Horizontal Stabilizer (THS) Actuator Ball Screw Nut, of Airbus A330 Maintenance Review Board Report (MRBR), Revision 12, dated July 1, 2010.

(iv) Task 27.40.00/02, Lubrication of THS Actuator Ball Screw Nut, of Airbus A340 MRBR, Revision 12, dated July 1, 2010.

(v) A330 Airworthiness Limitations Section (ALS) Part 4—Ageing Systems Maintenance, Revision 02, dated December 16, 2009. Only the title page and Record of Revision of this document contain the revision level; no other page of the document contains this information. The title page of this document does not contain an issue date.

(vi) Airbus A330 ALS Part 4—Ageing Systems Maintenance, Revision 03, dated September 9, 2011. Only the title page and Record of Revision of this document contain the revision level; no other page of the document contains this information. The title page of this document does not contain an issue date.

(vii) Airbus A340 ALS Part 4—Ageing Systems Maintenance, Revision 01, dated December 15, 2009. Only the title page and Record of Revision of this document contains the revision level; no other page of this document contains this information. The title page of this document does not contain an issue date.

(viii) Airbus A340 ALS Part 4—Ageing Systems Maintenance, Revision 02, dated October 12, 2011. Only the title page and Record of Revision of this document contain the revision level; no other page of the document contains this information. The title page of this document does not contain an issue date.

(ix) Airbus A340 ALS Part 4—Ageing Systems Maintenance, Revision 03, dated November 15, 2012. Only the title page and Record of Revision of this document contain the revision level; no other page of the document contains this information. The title page of this document does not contain an issue date.

(4) The following service information was approved for IBR on May 4, 2005 (60 FR 16104, March 30, 2005).

(i) Airbus Service Bulletin A330–27–3007, Revision 01, dated September 18, 1996.

(ii) Airbus Service Bulletin A330–27–3015, dated June 7, 1995.

(iii) Airbus Service Bulletin A330–27–3047, Revision 01, dated November 26, 1997.

(iv) Airbus Service Bulletin A330–27–3050, dated November 15, 1996.

(v) Airbus Service Bulletin A330–27–3052, Revision 03, dated December 5, 2001.

(vi) Airbus Service Bulletin A330–27–3085, Revision 02, dated September 5, 2002.

(vii) Airbus Service Bulletin A330–27–3093, Revision 01, dated September 5, 2002.

(viii) Airbus Service Bulletin A330–55–3020, Revision 01, dated October 21, 1998.

(ix) Airbus Service Bulletin A340–27–4007, dated April 7, 1994.

(x) Airbus Service Bulletin A340–27–4025, dated June 7, 1995.

(xi) Airbus Service Bulletin A340–27–4054, Revision 01, dated November 26, 1997.

(xii) Airbus Service Bulletin A340–27–4057, dated November 15, 1996.

(xiii) Airbus Service Bulletin A340–27–4059, Revision 03, dated December 5, 2001.

(xiv) Airbus Service Bulletin A340–27–4089, Revision 02, dated September 5, 2002.

(xv) Airbus Service Bulletin A340–27–4099, Revision 01, dated September 5, 2002.

(xvi) Airbus Service Bulletin A340–55–4021, Revision 01, October 21, 1998.

(5) For Airbus service information identified in this AD, contact Airbus SAS—Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; email *airworthiness.A330-A340@airbus.com;* Internet: *http://www.airbus.com*.

(6) For TRW Aeronautical Systems, SAMM Avionique, and Lucas Aerospace service information identified in this AD, contact Goodrich Corporation, Actuation Systems, Stafford Road, Fordhouses, Wolverhampton WV10 7EH, England; telephone +44 (0) 1902 624938; fax +44 (0) 1902 788100; email *techpubs.wolverhampton@goodrich.com;* Internet *http://www.goodrich.com/TechPubs*.

(7) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(8) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html*.

Issued in Renton, Washington, on June 21, 2013.

Jeffrey E. Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–18774 Filed 8–5–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0209; Directorate Identifier 2012–NM–127–AD; Amendment 39–17514; AD 2013–14–09]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

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

ACTION: Final rule.

SUMMARY: We are superseding airworthiness directive (AD) 2012–14–04 for certain Bombardier, Inc. Model DHC–8–100, –200, and –300 series airplanes. AD 2012–14–04 required replacing certain parking brake accumulators. This new AD retains this requirement. This new AD also requires installing restraint devices around the parking brake accumulator end caps. We are issuing this AD to prevent failure of a parking brake accumulator screw cap or end cap resulting in loss of the number 2 hydraulic system and damage to airplane structures, which could adversely affect the controllability of the airplane.

DATES: This AD becomes effective September 10, 2013.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of September 10, 2013.

The Director of the Federal Register approved the incorporation by reference of certain other publications listed in this AD as of August 27, 2012 (77 FR 42956, July 23, 2012).

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the

U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Cesar Gomez, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7318; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2012–14–04, which applies to the specified products. The NPRM was published in the **Federal Register** on March 26, 2013 (78 FR 18257), and proposed to correct an unsafe condition for the specified products. Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, issued Canadian Airworthiness Directive CF–2011–29R1, dated May 24, 2012 (the Mandatory Continuing Airworthiness Information, referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> Seven cases of on-ground hydraulic accumulator screw cap or end cap failure have been experienced on CL–600–2B19 * * * aeroplanes, resulting in loss of the associated hydraulic system and high-energy impact damage to adjacent systems and structure. To date, the lowest number of flight cycles accumulated at the time of failure has been 6991.
>
> Although there have been no failures to date on any DHC–8 aeroplanes, similar accumulators to those installed on the CL–600–2B19, Part Numbers (P/N)08–60162–001 and 08–60162–002 (Parking Brake Accumulator), are installed on the aeroplanes listed in the Applicability section of this [TCCA] directive.
>
> A detailed analysis of the systems and structure in the potential line of trajectory of a failed screw cap/end cap for the accumulator has been conducted. It has identified that the worst-case scenarios would be the loss of number 2 hydraulic system, and damage to aeroplane structures.
>
> This [original TCCA] directive [which corresponds to FAA AD 2012–14–04, Amendment 39–17118 (77 FR 42956, July 23, 2012)] gives instructions to determine the part number and serial number of the existing parking brake accumulator, and where applicable, replace the accumulator.
>
> Revision 1 of this [TCCA] AD mandates the installation of restraint devices around [all] the parking brake accumulator end caps to hold them in place in the event of an end cap failure.

Uncontained failure of the parking brake accumulator screw caps and/or end caps could result in loss of the number 2 hydraulic system, and damage to airplane structures, and could adversely affect the controllability of the airplane. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM (78 FR 18257 March 26, 2013) or on the determination of the cost to the public.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting this AD as proposed–except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM (78 FR 18257 March 26, 2013) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (78 FR 18257 March 26, 2013).

Costs of Compliance

We estimate that this AD will affect about 129 products of U.S. registry.

The actions that were required by AD 2012–14–04, Amendment 39–17118 (77 FR 42956, July 23, 2012), and retained in this AD take about 2 work-hours per product, at an average labor rate of $85 per work-hour. Based on these figures, the estimated cost of the currently required actions is $170 per product.

We estimate that it will take about 15 work-hours per product to comply with the new basic requirements of this AD. The average labor rate is $85 per work-hour. Required parts will cost about $5,302 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $848,433, or $6,577 per product.

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.

We are 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

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);

3. Will not affect intrastate aviation in Alaska; and

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

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2012–14–04, Amendment 39–17118 (77 FR 42956, July 23, 2012), and adding the following new AD:

2013–14–09 Bombardier, Inc.: Amendment 39–17514. Docket No. FAA–2013–0209; Directorate Identifier 2012–NM–127–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective September 10, 2013.

(b) Affected ADs

This AD supersedes AD 2012–14–04, Amendment 39–17118 (77 FR 42956, July 23, 2012).

(c) Applicability

This AD applies to Bombardier, Inc. Model DHC–8–101, –102, –103, –106, –201, –202, –301, –311, and –315 airplanes, certificated in any category, serial numbers 003 and subsequent.

(d) Subject

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

(e) Reason

This AD was prompted by reports of hydraulic accumulator screw cap or end cap failure. We are issuing this AD to prevent failure of a parking brake accumulator screw cap or end cap resulting in loss of the number 2 hydraulic system and damage to airplane structures, which could adversely affect the controllability of the airplane.

(f) Compliance

You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

(g) Retained Inspection and Replacement

This paragraph restates the requirements of paragraph (g) of AD 2012–14–04, Amendment 39–17118 (77 FR 42956, July 23, 2012), with no changes. Within 2,000 flight hours or 12 months after August 27, 2012 (the effective date of AD 2012–14–04), whichever occurs first: Inspect to determine the part number (P/N) and serial number of the parking brake hydraulic accumulator, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 8–32–170, dated February 25, 2011. A review of airplane maintenance records is acceptable in lieu of this inspection if the part number and serial number of the parking brake hydraulic accumulator can be conclusively determined from that review.

(1) For accumulators not having P/N 0860162001 or 0860162002: No further action is required by this paragraph.

(2) For accumulators having P/N 0860162001 or 0860162002: Before further flight, do the applicable actions specified in paragraphs (g)(2)(i) and (g)(2)(ii) of this AD.

(i) If the serial number is listed in the table in paragraph 3.B.(2) of Bombardier Service Bulletin 8–32–170, dated February 25, 2011: No further action is required by this paragraph.

(ii) If the serial number is not listed in the table in paragraph 3.B.(2) of Bombardier Service Bulletin 8–32–170, dated February 25, 2011: Within 2,000 flight hours or 12 months after August 27, 2012 (the effective date of AD 2012–14–04, Amendment 39–17118 (77 FR 42956, July 23, 2012)), whichever occurs first, replace the accumulator with a new non-suspect accumulator, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 8–32–172, dated March 15, 2011.

(h) Retained Parts Installation Prohibition

This paragraph restates the requirements of paragraph (h) of AD 2012–14–04, Amendment 39–17118 (77 FR 42956, July 23, 2012), with no changes. As of August 27, 2012 (the effective date of AD 2012–14–04), no person may install a parking brake accumulator, P/N 0860162001 or 0860162002 with a serial number that is not listed in the table in paragraph 3.B.(2) of Bombardier Service Bulletin 8–32–170, dated February 25, 2011, on any airplane.

(i) New Requirement of This AD: Install Restraint Devices on All Airplanes

Within 6,000 flight hours or 36 months after the effective date of this AD, whichever occurs first: Install restraint devices around the parking brake hydraulic accumulator end caps by incorporating Bombardier ModSum 8Q101901, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 8–32–169, Revision A, dated December 16, 2011.

(j) Credit for Previous Actions

This paragraph provides credit for actions required by paragraph (i) of this AD, if those actions were performed before the effective date of this AD using Bombardier Service Bulletin 8–32–169, dated November 25, 2011, which is not incorporated by reference in this AD.

(k) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, 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 ACO, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; fax 516–794–5531. 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. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(l) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Canadian Airworthiness Directive CF–2011–29R1, dated May 24, 2012, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov*.

(2) Service information identified in this AD that is not incorporated by reference may be obtained at the address specified in paragraph (m)(5) of this AD.

(m) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on September 10, 2013.

(i) Bombardier Service Bulletin 8–32–169, Revision A, dated December 16, 2011.

(ii) Reserved.

(4) The following service information was approved for IBR on August 27, 2012 (77 FR 42956, July 23, 2012).

(i) Bombardier Service Bulletin 8–32–170, dated February 25, 2011.

(ii) Bombardier Service Bulletin 8–32–172, dated March 15, 2011.

(5) For service information identified in this AD, contact Bombardier, Inc., Q-Series Technical Help Desk, 123 Garratt Boulevard, Toronto, Ontario M3K 1Y5, Canada; telephone 416–375–4000; fax 416–375–4539; email *thd.qseries@aero.bombardier.com;* Internet *http://www.bombardier.com*.

(6) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(7) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html*.

Issued in Renton, Washington, on July 5, 2013.

Jeffrey E. Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–18771 Filed 8–5–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0093; Directorate Identifier 2011–NM–109–AD; Amendment 39–17515; AD 2013–14–10]

RIN 2120–AA64

Airworthiness Directives; Gulfstream Aerospace LP (Type Certificate Previously Held by Israel Aircraft Industries, Ltd.) Airplanes

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

ACTION: Final rule.

SUMMARY: We are superseding airworthiness directive (AD) 2010–11–02 for all Gulfstream Aerospace LP (Type Certificate Previously Held by Israel Aircraft Industries, Ltd.) Model Gulfstream 100 airplanes, and Model Astra SPX and 1125 Westwind Astra airplanes. AD 2010–11–02 required amending the airplane flight manuals (AFMs) to include additional procedures for verifying complete closure and locking of the main entry door (MED). AD 2010–11–02 also required modifying the warning and caution lights panel (WACLP), changing the WACLP and MED wiring, changing the wiring harness connecting the MED to the WACLP, and revising the log of modification of the AFM if necessary. This new AD revises the compliance time and removes an airplane from the applicability. This AD was prompted by a report of a MED opening in flight on an unmodified airplane. We are issuing this AD to prevent incomplete closure of the MED, which may result in the door opening in flight and possible separation of the door, causing damage to the airplane structure and left engine by flying debris and objects.

DATES: This AD becomes effective September 10, 2013.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of September 10, 2013.

The Director of the Federal Register approved the incorporation by reference of certain other publications listed in this AD as of June 25, 2010 (75 FR 28485, May 21, 2010).

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Tom Stafford, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone (425) 227–1622; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. The NPRM was published in the **Federal Register** on February 26, 2013 (78 FR 12995), and proposed to supersede AD 2010–11–02, Amendment 39–16307 (75 FR 28485, May 21, 2010), which superseded AD 2007–03–05, Amendment 39–14916 (72 FR 4414, January 31, 2007). The NPRM proposed to correct an unsafe condition for the specified products. The Civil Aviation Authority of Israel (CAAI), which is the aviation authority for Israel, has issued Israeli Airworthiness Directive 31–06–11–05R1, dated May 18, 2011 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> To increase pilots' awareness to the possibility of incomplete closure of the Main Entry Door (MED) by the following means:
>
> 1. Splitting the common caution light *CABIN DOOR* signaling both MED Improper Closure and MED Inflatable Seal Failure into two separate lights: *CABIN DOOR* and *CABIN DOOR SEAL.*
>
> 2. Converting the separated *CABIN DOOR* Caution light into a Warning light by changing its color to red.
>
> **NOTE:** Airplane Flight Manuals (AFM'S) refer to these changes as MOD G1–20052.
>
> Incomplete closure of the MED may be followed by in-flight opening and possible separation of the door. As a result, the MED, the adjacent fuselage structure and other parts of the aircraft may be damaged due to opening forces and landing impact.
>
> Damage to the aircraft structure and to the left engine by flying debris and objects may also occur.
>
> * * * * *

This AD retains the actions required by AD 2010–11–02, Amendment 39–16307 (75 FR 28485, May 21, 2010). This AD limits the existing compliance time. This AD also removes the airplane having serial number (S/N) 158 from the applicability because the modification was done in production. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM (78 FR 12995, February 26, 2013) or on the determination of the cost to the public.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting this AD as proposed except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM (78 FR 12995, February 26, 2013) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (78 FR 12995, February 26, 2013).

Costs of Compliance

The new requirements of this AD add no additional economic burden. The current costs for this AD are repeated for the convenience of affected operators, as follows:

We estimate that this AD will affect about 160 products of U.S. registry.

The actions that were required by AD 2010–11–02, Amendment 39–16307 (75 FR 28485, May 21, 2010), and retained in this AD take about 60 work-hours per product, at an average labor rate of $85 per work-hour. Required parts cost about $600 per product. Based on these figures, the estimated cost of the actions required by this AD is $5,700 per product.

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.

We are 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

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on

the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);

3. Will not affect intrastate aviation in Alaska; and

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

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2010–11–02, Amendment 39–16307 (75 FR 28485, May 21, 2010), and adding the following new AD:

2013–14–10 Gulfstream Aerospace LP (Type Certificate Previously Held by Israel Aircraft Industries, Ltd.): Amendment 39–17515. Docket No. FAA–2013–0093; Directorate Identifier 2011–NM–109–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective September 10, 2013.

(b) Affected ADs

This AD supersedes AD 2010–11–02, Amendment 39–16307 (75 FR 28485, May 21, 2010).

(c) Applicability

This AD applies to Gulfstream Aerospace LP (Type Certificate previously held by Israel Aircraft Industries, Ltd.) Model Gulfstream 100 airplanes, and Model Astra SPX and 1125 Westwind Astra airplanes; certificated in any category; all serial numbers except serial number 158.

(d) Subject

Air Transport Association (ATA) of America Code 31: Indicating/Recording Systems.

(e) Reason

This AD was prompted by a report of a main entry door (MED) opening in flight on an unmodified airplane. We are issuing this AD to prevent incomplete closure of the main entry door, which may result in the door opening in flight and possible separation of the door, causing damage to the airplane structure and left engine by flying debris and objects.

(f) Compliance

You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

(g) Retained Revisions to Airplane Flight Manuals

This paragraph restates the requirements of paragraph (f) of AD 2010–11–02, Amendment 39–16307 (75 FR 28485, May 21, 2010). Within 10 days after February 15, 2007 (the effective date of AD 2007–03–05, Amendment 39–14916 (72 FR 4414, January 31, 2007)), amend Section IV, Normal Procedures, of Gulfstream airplane flight manuals (AFMs) Model 1125 Astra, 25W–1001–1; Model Astra SPX, SPX–1001–1; and Model G100, G100–1001–1; as applicable; to include the language specified in figure 1 to paragraph (g) of this AD. Insertion of copies of figure 1 to paragraph (g) of this AD at the appropriate places of the AFMs is acceptable. The actions required by this paragraph may be accomplished by a holder of a Private Pilot's License.

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Figure 1 to Paragraph (g) of this AD – AFM Revision

1. **BEFORE ENGINE START:**

(PRE and POST Mod 20052/Gulfstream Service Bulletin 100-31-284):
CABIN DOOR – CLOSED (Physically verify door latch handle pin is fully engaged in the handle lock)

2. **BEFORE TAXIING:**

Change the CABIN DOOR procedure as follows (POST Mod 20052/Gulfstream Service Bulletin 100-31-284):
Check **CABIN DOOR** light – OUT

3. **BEFORE TAKE-OFF:**

Insert between the POSITION lights switch and the THRUST LEVERS procedures:
(PRE Mod 20052/Gulfstream Service Bulletin 100-31-284):
Check **CABIN DOOR** light – OUT (50% N1 may be required)

(POST Mod 20052/Gulfstream Service Bulletin 100-31-284):
Check **CABIN DOOR** light – OUT
CABIN DOOR SEAL light – OUT (50% N1 may be required)

Note: Mod 20052 is equivalent to Gulfstream Service Bulletin 100-31-284, dated August 17, 2006.

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(h) Retained Modification With Reduced Compliance Time and New Service Information

This paragraph restates the requirements of paragraph (g) of AD 2010–11–02, Amendment 39–16307 (75 FR 28485, May 21, 2010), with a reduced compliance time and new service information.

(1) Within 250 flight hours after June 25, 2010 (the effective date of AD 2010–11–02, Amendment 39–16307 (75 FR 28485, May 21, 2010)), but no later than within 6 months after the effective date of this AD: Modify the warning and caution lights panel (WACLP), in accordance with the Accomplishment Instructions of the applicable service bulletin identified in paragraph (h)(1)(i), (h)(1)(ii), or (h)(1)(iii) of this AD.

(i) Honeywell Service Bulletin 80–0548–31–0001, dated April 1, 2006.

(ii) Honeywell Service Bulletin 80–0548–31–0002, dated March 1, 2006.

(iii) Honeywell Service Bulletin 80–5090–31–0001, dated March 1, 2006.

(2) Within 250 flight hours after June 25, 2010 (the effective date of AD 2010–11–02, Amendment 39–16307 (75 FR 28485, May 21, 2010)), but no later than within 6 months after the effective date of this AD: Change the WACLP and MED wiring, in accordance with the Accomplishment Instructions of Gulfstream Service Bulletin 100–31–284, dated August 17, 2006; or Gulfstream Service Bulletin 100–31–284, Revision 1, dated May 27, 2011. As of the effective date of this AD, Gulfstream Service Bulletin 100–31–284, Revision 1, dated May 27, 2011, must be used to accomplish the actions required by this paragraph.

(3) Within 250 flight hours after June 25, 2010 (the effective date of AD 2010–11–02, Amendment 39–16307 (75 FR 28485, May 21, 2010)), but no later than within 6 months after the effective date of this AD: Change the wiring harness connecting the MED to the WACLP, in accordance with the Accomplishment Instructions of Gulfstream Service Bulletin 100–31–284, dated August 17, 2006; or Gulfstream Service Bulletin 100–31–284, Revision 1, dated May 27, 2011. As

of the effective date of this AD, Gulfstream Service Bulletin 100–31–284, Revision 1, dated May 27, 2011, must be used to accomplish the actions required by this paragraph.

(4) Within 250 flight hours after June 25, 2010 (the effective date of AD 2010–11–02, Amendment 39–16307 (75 FR 28485, May 21, 2010)), but no later than within 6 months after the effective date of this AD: Verify that the log of modification of the relevant AFM includes a reference to MOD G1–20052, and, if no reference is found, revise the log of modification of the AFM to include a reference to the modification.

(5) Doing the modifications specified in paragraphs (h)(1), (h)(2), (h)(3), and (h)(4) of this AD terminates the requirements of paragraph (g) of this AD. After the modifications have been done, the AFM limitation required by paragraph (g) of this AD may be removed from the AFM.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, 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 International Branch, send it to ATTN: Tom Stafford, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone (425) 227–1622; fax (425) 227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* 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. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(j) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on September 10, 2013.

(i) Gulfstream Service Bulletin 100–31–284, Revision 1, dated May 27, 2011.

(ii) Reserved.

(4) The following service information was approved for IBR on June 25, 2010 (75 FR 28485, May 21, 2010).

(i) Gulfstream Service Bulletin 100–31–284, dated August 17, 2006.

(ii) Honeywell Service Bulletin 80–0548–31–0001, dated April 1, 2006.

(iii) Honeywell Service Bulletin 80–0548–31–0002, dated March 1, 2006.

(iv) Honeywell Service Bulletin 80–5090–31–0001, dated March 1, 2006.

(5) For service information identified in this AD, contact Gulfstream Aerospace Corporation, P.O. Box 2206, Mail Station D–25, Savannah, Georgia 31402–2206; telephone 800–810–4853; fax 912–965–3520; *email pubs@gulfstream.com;* Internet *http://www.gulfstream.com/product_support/technical_pubs/pubs/index.htm.*

(6) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(7) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on July 9, 2013.

Jeffrey E. Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–18768 Filed 8–5–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1156; Directorate Identifier 2011–NM–205–AD; Amendment 39–17500; AD 2013–13–12]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are superseding airworthiness directive (AD) 2000–06–13 R1, which applied to certain The Boeing Company Model 737–200, –200C, –300, and –400 series airplanes. AD 2000–06–13 R1 required repetitively inspecting for cracking of the corners of the door frame and the cross beams of the aft cargo door, and corrective actions if necessary. AD 2000–06–13 R1 also required modifying the aft cargo door, which terminates the repetitive inspections. This new AD adds airplanes to the applicability, adds inspections and related investigative and corrective actions, revises certain inspection types, and reduces a certain compliance time for modifying the doors. This AD was prompted by reports of cracking in the forward and aft corner frames of the aft cargo door and in the lower cross beam. We are issuing this AD to prevent fatigue cracking of the corners of the door frame and the cross beams of the aft cargo door, which could result in rapid depressurization of the airplane.

DATES: This AD is effective September 10, 2013.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of September 10, 2013.

The Director of the Federal Register approved the incorporation by reference of a certain other publication listed in this AD as of May 9, 2000 (65 FR 17583, April 4, 2000).

The Director of the Federal Register approved the incorporation by reference of a certain other publication listed in this AD as of December 24, 1998 (63 FR 67769, December 9, 1998).

ADDRESSES: For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington 98057–3356. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Alan Pohl, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton,

Washington 98057–3356; phone: 425–917–6450; fax: 425–917–6590; email: *alan.pohl@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001), which revised AD 2000–06–13, Amendment 39–11654 (65 FR 17583, April 4, 2000). AD 2000–06–13 superseded AD 98–25–06, Amendment 39–10931 (63 FR 67769, December 9, 1998). AD 2000–06–13 R1 applied to the specified products. The NPRM published in the **Federal Register** on December 4, 2012 (77 FR 71723). The NPRM proposed to continue to require repetitively inspecting for cracking of the corners of the door frame and the cross beams of the aft cargo door; doing corrective actions if necessary; and modifying the aft cargo door, which terminates the repetitive inspections. The NPRM also proposed to add airplanes to the applicability, add inspections and related investigative and corrective actions, revise certain inspection types, and reduce a certain compliance time for modifying the doors.

Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the proposal (77 FR 71723, December 4, 2012) and the FAA's response to each comment.

Request To Revise Compliance Time

Boeing requested that we revise paragraph (o) of the NPRM (77 FR 71723, December 4, 2012), which specified the compliance time by referring to paragraph 1.E. of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011. Boeing requested that we change this compliance time to ''4,500 door flight cycles after the effective date of this AD'' to avoid a potential conflict with other compliance times in the NPRM. Boeing explained a scenario in which an operator could comply with paragraph (o) of the NPRM within the required compliance time, but then be immediately out of compliance with the proposed inspection in paragraphs (p) and (q) of the NPRM.

We partially agree with the request. As written, the compliance time in paragraph (o) of the NPRM (77 FR 71723, December 4, 2012) could result in a compliance conflict with other requirements of this AD for doors subject to Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010. We disagree, however, with Boeing's requested compliance time, which would be unnecessarily more restrictive on operators. Also, the referenced doors that have accumulated fewer than 27,000 total flight cycles should be provided the same compliance time as doors subject to Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011. We have therefore revised paragraphs (p) and (q) in this final rule to change the compliance time to a threshold of 27,000 total flight cycles on the door, with a grace period of 4,500 flight cycles. Since paragraph (u)(4) of the NPRM is therefore no longer necessary, we have removed that paragraph from this final rule.

Request To Revise Requirement To Determine Door Configuration

Southwest Airlines (SWA) requested that we revise paragraph (o) of the NPRM (77 FR 71723, December 4, 2012), which specified to ''Inspect the door to determine the configuration, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011.'' SWA considered that the intent of this proposed requirement could be accomplished by records research instead of a physical inspection. The commenter noted that the Accomplishment Instructions of this service bulletin specify only identifying the part number of the aft cargo door assembly, and does not specify a method of accomplishment.

We agree with the commenter that a records review is acceptable in lieu of accomplishing an inspection to determine the configuration of the door. We have changed paragraph (o) accordingly in this final rule.

Request To Refer To Revised Service Information

All Nippon Airways (ANA) and Boeing requested that we revise the NPRM (77 FR 71723, December 4, 2012) to also refer to Boeing Special Attention Service Bulletin 737–52–1154, Revision 1, dated August 3, 2011, in all locations where Boeing Service Bulletin 737–52–1154, dated December 17, 2010, is cited. The commenters noted that some locations of the NPRM referred to only the original version, but other paragraphs referred to the original version ''as revised by Boeing Special Attention Service Bulletin 737–52–1154, Revision 1, dated August 3, 2011.''

We agree with the commenter and have revised paragraphs (r)(2) and (u)(2) in this final rule to also add ''as revised by Boeing Special Attention Service Bulletin 737–52–1154, Revision 1, dated August 3, 2011,'' after the original service bulletin citation.

Request To Clarify Access Procedures

ANA noted that paragraph (s) of the NPRM (77 FR 71723, December 4, 2012) identified certain Parts in the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011, for compliance with the proposed requirements. ANA stated that Part 2, which was not identified in paragraph (s) of the NPRM, provides access procedures. ANA questioned whether the AD required specific procedures for access.

We agree, and have added new paragraph (u)(4) in this final rule to clarify that the access and restoration procedures specified in the referenced service information are not required by this AD.

Request To Clarify Required Part References for Compliance

ANA noted that paragraph (t) of the NPRM (77 FR 71723, December 4, 2012) referred to Parts 1, 3, 4, 7, and 8 of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011. Table 3 and Table 4 of that service bulletin also refer to Parts 5 and 6 of that service bulletin. ANA questioned whether operators might do Part 5 and Part 6, which describe the preventive modification procedures, if no cracks are found. To avoid the need for requests for alternative methods of compliance (AMOCs) regarding this proposed requirement, ANA requested that we revise paragraph (t) of the NPRM to clarify that compliance is ''in accordance with Parts 1, 2, 3, 4, 5, 6, 7, and 8'' of that service bulletin.

We disagree with the commenter. Paragraph (s) requires actions in accordance with Parts 5 and 6 of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011. Paragraph (t) of this AD requires other actions, done in accordance with Parts 1, 3, 4, 7, and 8 of that service bulletin. We find it unnecessary to change this AD regarding this issue.

Request To Exclude Certain Supplemental Structural Inspections

Paragraph (v) of the NPRM (77 FR 71723, December 4, 2012) would provide relief from certain supplemental structural inspections specified in Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011, and Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December

17, 2010. Boeing requested that we revise paragraph (v) of the NPRM to also provide relief from the supplemental structural inspections specified in Table 5 of paragraph 1.E., ''Compliance,'' of Boeing Service Bulletin 737–52–1154, dated December 17, 2010. Boeing noted that the NPRM would require inspection of the adjacent cross beam if cracks are found in the lower cross beam, and repair of any cracked adjacent cross beam, in accordance with Boeing Service Bulletin 737–52–1154, dated December 17, 2010, but the damage-tolerance inspections associated with that repair are not mentioned.

We agree with the request. We have revised paragraph (v) in this final rule to also include reference to Table 5 of Boeing Service Bulletin 737–52–1154, dated December 17, 2010.

Request To Delay Final Rule Pending Revised Service Information

ANA stated that Boeing was in the process of revising Boeing Service Bulletins 737–52–1153 and 737–52–1154 based on ANA's validation. ANA requested that we cite the revised service information, if it is available before the final rule is issued, to reduce additional burden for Boeing and the operators. Boeing reported that Boeing Service Bulletin 737–52–1154 was being revised to add extra material to the repair parts to address issues regarding repair kits found during the validation of the bulletin.

We disagree to delay issuance of the final rule pending issuance of revised service information. Accomplishing the service information specified in this AD addresses the identified unsafe condition. When the revised service bulletins are presented to us for review, however, we might consider approving them as AMOCs for this AD. We have not changed this final rule regarding this issue.

Additional Changes Made to This AD

We have revised paragraph (v) and Note 2 to paragraph (v) of this final rule. We have designated paragraph (v) as paragraph (v)(1) of this final rule, and have reidentified Note 2 to paragraph (v) as paragraph (v)(2) of this final rule.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this AD with the changes described previously—and minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM (77 FR 71723, December 4, 2012) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (77 FR 71723, December 4, 2012).

We also determined that these changes will not increase the economic burden on any operator or increase the scope of this AD.

Costs of Compliance

We estimate that this AD affects 581 airplanes of U.S. registry. We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Number of airplanes of U.S. registry	Cost on U.S. operators
Detailed inspection (retained action).	2 work-hours × $85 per hour = $170 per inspection cycle.	$0	$170 per inspection cycle	494	$83,890 per inspection cycle.
High frequency eddy current inspection (retained action).	4 work-hours × $85 per hour = $340 per inspection cycle.	0	$340 per inspection cycle	494	$167,960 per inspection cycle.
Modification (retained action).	144 work-hours × $85 per hour = $12,240.	5,430	$17,670	494	$8,728,980.
Determination of door configuration (new action).	1 work-hour × $85 per hour = $85.	0	$85	581	$49,385.
Inspections (new action)	6 work-hours × $85 per hour = $510 per inspection cycle.	0	$510 per inspection cycle	581	$296,310 per inspection cycle.
Modification (new action)	59 work-hours × $85 per hour = $5,015.	30,536	$35,551	*	Unknown.

* The number of airplanes that require this modification depends on no cracking being found during a certain inspection.

We estimate the following costs to do any necessary related investigative and corrective actions that would be required based on the results of the inspections. We have no way of determining the number of aircraft that might need these actions:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Related investigative and corrective actions	59 work-hours × $85 per hour = $5,015	$30,536	$35,551

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.

We are 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

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

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

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

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001), and adding the following new AD:

2013–13–12 The Boeing Company: Amendment 39–17500 ; Docket No. FAA–2012–1156; Directorate Identifier 2011–NM–205–AD.

(a) Effective Date

This AD is effective September 10, 2013.

(b) Affected ADs

This AD supersedes AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001).

(c) Applicability

This AD applies to all The Boeing Company Model 737–200, –200C, –300, –400, and –500 series airplanes, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 52, Doors.

(e) Unsafe Condition

This AD was prompted by reports of cracking in the forward and aft corner frame of the aft cargo door and in the lower cross beam. We are issuing this AD to prevent fatigue cracking of the corners of the door frame and the cross beams of the aft cargo door, which could result in rapid depressurization of the airplane.

(f) Compliance

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

(g) Affected Airplanes for Retained Paragraphs

Paragraphs (h), (i), (j), (k), and (l) of this AD are restated from AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001). These paragraphs apply to Model 737–200 and –200C series airplanes, line numbers 6 through 873 inclusive; and Model 737–200, –200C, –300, and –400 series airplanes, line numbers 874 through 1642 inclusive; equipped with an aft cargo door having Boeing part number (P/N) 65–47952–1 or P/N 65–47952–524, excluding airplanes identified in paragraphs (g)(1) and (g)(2) of this AD.

(1) Those airplanes on which that door has been modified as specified in Boeing Service Bulletin 737–52–1079. Or,

(2) Those airplanes on which the door assembly having P/N 65–47952–524 includes four straps (P/Ns 65–47952–139, 65–47952–140, 65–47952–141, and 65–47952–142) and a thicker lower cross beam web (P/N 65–47952–157).

(h) Retained Inspections and Corrective Actions

This paragraph restates the actions required by paragraph (a) of AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001), with revised service information. For airplanes identified in paragraph (g) of this AD: Within 90 days or 700 flight cycles after December 24, 1998 (the effective date of AD 98–25–06, Amendment 39–10931 (63 FR 67769, December 9, 1998)), whichever occurs later, perform an internal detailed visual inspection to detect cracking of the corners of the door frame and the cross beams of the aft cargo door, in accordance with Boeing Service Bulletin 737–52–1079, Revision 5, dated May 16, 1996; Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999; or Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010. Accomplishment of the modification required by paragraph (l) of this AD constitutes terminating action for the repetitive inspection requirements of this paragraph. Doing the inspections required by paragraph (p) or (s) of this AD terminates the inspections required by this paragraph.

(1) If no cracking is detected, accomplish the requirements of either paragraph (h)(1)(i) or (h)(1)(ii) of this AD.

(i) Repeat the internal visual inspection thereafter at intervals not to exceed 4,500 flight cycles. Or

(ii) Prior to further flight, modify the corners of the door frame and the cross beams of the aft cargo door, in accordance with Boeing Service Bulletin 737–52–1079, Revision 5, dated May 16, 1996; Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999; or Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010. Accomplishment of such modification constitutes terminating action for the repetitive inspection requirements of paragraph (h)(1)(i) of this AD.

(2) If any cracking is detected in the upper or lower cross beams, prior to further flight, modify the cracked beam, in accordance with Part I of the Accomplishment Instructions of Boeing Service Bulletin 737–52–1079, Revision 5, dated May 16, 1996; Part I of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999; or Part II of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010. Accomplishment of such modification constitutes terminating action for the repetitive inspection requirements of paragraph (h)(1)(i) of this AD for the modified beam.

(3) If any cracking is detected in the forward or aft upper door frame, prior to further flight, repair the frame and modify the corners of the door frame of the aft cargo door, in accordance with Part I of the Accomplishment Instructions of Boeing Service Bulletin 737–52–1079, Revision 5, dated May 16, 1996; Part I of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999; or Part II of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010; except as provided by paragraph (i) of this AD. Accomplishment of such modification constitutes terminating action for the repetitive inspection requirements of paragraph (h)(1)(i) of this AD for the upper door frame.

(4) If any cracking is detected in the forward or aft lower door frame, prior to further flight, replace the damaged frame with a new frame, and modify the corners of the door frame of the aft cargo door, in accordance with Part I of the Accomplishment Instructions of Boeing Service Bulletin 737–52–1079, Revision 5, dated May 16, 1996; Part I of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999; or Part II of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010. Accomplishment of such modification constitutes terminating

action for the repetitive inspection requirements of paragraph (h)(1)(i) of this AD for the lower door frame.

(i) Retained Exception for Certain Actions Specified in Paragraphs (h) and (l) of This AD

This paragraph restates the requirement of paragraph (b) of AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001). For actions required by paragraphs (h) and (l) of this AD: Where Boeing Service Bulletin 737–52–1079, Revision 5, dated May 16, 1996; Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999; or Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010; specifies that certain repairs are to be accomplished in accordance with instructions received from Boeing, this AD requires that, prior to further flight, such repairs be accomplished in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA; or using a method approved in accordance with the procedures specified in paragraph (x) of this AD.

(j) Retained Corrective Actions for Certain Cracking Found During Inspection Required by Paragraph (h) of This AD

This paragraph restates the corrective action required by paragraph (c) of AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001), with revised service information. If any cracking of the outer chord of the upper or lower cross beams of the aft cargo door is detected during any inspection required by paragraph (h) of this AD, prior to further flight, accomplish the repair specified in paragraph (j)(1), (j)(2), (j)(3), or (j)(4) of this AD. For a repair method to be approved, as required by paragraphs (j)(1), (j)(3), and (j)(4) of this AD, the approval letter must specifically reference this AD.

(1) Repair in accordance with a method approved by the Manager, Seattle ACO.

(2) Repair in accordance with Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999; or Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010.

(3) Repair in accordance with data meeting the type certification basis of the airplane approved by a Boeing Company Designated Engineering Representative who has been authorized by the FAA to make such findings.

(4) Repair in accordance with a method approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) whom we have authorized to make those findings.

(k) Retained Inspections and Corrective Actions for Airplanes Identified in Paragraph (g) of This AD

This paragraph restates the actions required by paragraph (d) of AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001), with revised service information. For airplanes identified in paragraph (g) of this AD: Within 4,500 flight cycles or 1 year after May 9, 2000 (the effective date of AD 2000–06–13, Amendment 39–11654 (65 FR 17583, April 4, 2000), whichever occurs later, perform a high frequency eddy current inspection (HFEC) to detect cracking of the four corners of the door frame of the aft cargo door, using a method approved in accordance with the procedures specified in paragraph (x) of this AD, or in accordance with Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999; or Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010. Accomplishment of the modification required by paragraph (l) of this AD constitutes terminating action for the repetitive inspection requirements of this paragraph. Doing the inspections required by paragraph (p) or (s) of this AD terminates the inspections required by this paragraph.

Note 1 to paragraph (k) of this AD: Additional guidance for the inspection can be found in Boeing 737 Nondestructive Test Manual, Part 6, Chapter 51–00–00 (Figure 4 or Figure 23).

(1) If no cracking of the corners of the door frame of the aft cargo door is detected, repeat the HFEC inspections thereafter at intervals not to exceed 4,500 flight cycles until accomplishment of the modification specified in paragraph (l) of this AD.

(2) If any cracking of the corners of the door frame of the aft cargo door is detected, prior to further flight, replace the damaged frame with a new frame, and modify the four corners of the door frame, in accordance with Part II and Part III of the Accomplishment Instructions of Boeing Service Bulletin 737–52–1079, Revision 5, dated May 16, 1996; Part II and Part III of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999; or Part III and Part IV of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010. Accomplishment of such modification constitutes terminating action for the repetitive inspection requirements of paragraph (k)(1) of this AD for that door frame.

(l) Retained Terminating Action for Inspections Specified in Paragraphs (h) and (k) of This AD

This paragraph restates the action required by paragraph (e) of AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001), with revised service information. For airplanes identified in paragraph (g) of this AD: Within 4 years or 12,000 flight cycles after August 15, 2001 (the effective date of AD 2000–06–13 R1), whichever occurs later, modify the four corners of the door frame and the cross beams of the aft cargo door, in accordance with Part II of the Accomplishment Instructions of Boeing Service Bulletin 737–52–1079, Revision 5, dated May 16, 1996; Part II of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999; or Part III of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010. Accomplishment of that modification constitutes terminating action for the repetitive inspection requirements of paragraphs (h) and (k) of this AD.

(m) Retained Method of Compliance

This paragraph restates the method of compliance of Note 3 of AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001). Accomplishment of the modification required by paragraph (a) of AD 90–06–02, Amendment 39–6489 (55 FR 8372, March 7, 1990), is considered acceptable for compliance with the requirements of paragraph (l) of this AD.

(n) Retained Credit for Previous Actions

This paragraph restates the credit given for service information specified in Note 4 of AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001). This paragraph provides credit for the modification of the corners of the door frame and the cross beams of the aft cargo door required by paragraph (l) of this AD, if the modification was accomplished prior to August 15, 2001 (the effective date of AD 2000–06–13 R1), using Boeing Service Bulletin 737–52–1079, dated December 16, 1983; Revision 1, dated December 15, 1988; Revision 2, dated July 20, 1989; Revision 3, dated May 17, 1990; or Revision 4, dated February 21, 1991.

(o) New Requirement for Determining Door Configuration

At the applicable time specified in Table 1 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011, except as provided by paragraph (u)(1) of this AD: Inspect to determine the configuration of the aft cargo door, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011. A review of airplane maintenance records is acceptable in lieu of this inspection if the configuration of the cargo door can be conclusively determined from that review.

(p) New Requirements for Certain Doors Subject to Boeing Alert Service Bulletin 737–52A1079, Revision 7, Dated December 17, 2010

If, during the inspection required by paragraph (o) of this AD, any door is determined to be from any airplane having line numbers 6 through 873 inclusive, and neither the modification nor the repair specified in any service bulletin identified in paragraphs (p)(1) through (p)(7) of this AD has been done as of the effective date of this AD: Do a one-time HFEC and a one-time ultrasonic inspection for cracking of the upper and lower corner frames and the upper and lower cross beams, and do all applicable related investigative and corrective actions, in accordance with Parts II, III, IV, and VI of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010; and, as applicable, the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–52–1154, dated December 17, 2010, as revised by Boeing Special Attention Service Bulletin 737–52–1154, Revision 1, dated August 3, 2011; except as provided by paragraphs (u)(2) and (u)(3) of this AD. Do the inspections before the accumulation of 27,000 total flight cycles on the door, or within 4,500 door flight cycles after the

effective date of this AD, whichever occurs later (for airplanes on which the door flight cycles are known); or within 4,500 flight cycles after the effective date of this AD (for airplanes on which door flight cycles are not known). Do all applicable related investigative and corrective actions before further flight. If no cracking is found during the initial inspections, before further flight, do the modification in accordance with Part III of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010. Doing the inspection specified in this paragraph terminates the inspections required by paragraphs (h) and (k) of this AD.

(1) Boeing Service Bulletin 737–52–1079, dated December 16, 1983.

(2) Boeing Service Bulletin 737–52–1079, Revision 1, dated December 15, 1988.

(3) Boeing Service Bulletin 737–52–1079, Revision 2, dated July 20, 1989.

(4) Boeing Service Bulletin 737–52–1079, Revision 3, dated May 17, 1990.

(5) Boeing Service Bulletin 737–52–1079, Revision 4, dated February 21, 1991.

(6) Boeing Service Bulletin 737–52–1079, Revision 5, dated May 16, 1996.

(7) Boeing Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999.

(q) Requirements for All Doors Subject to Boeing Alert Service Bulletin 737–52A1079, Revision 7, Dated December 17, 2010

If, during the inspection required by paragraph (o) of this AD, any door is determined to be from any airplane having line numbers 6 through 873 inclusive: Before the accumulation of 27,000 total flight cycles on the door, or within 4,500 door flight cycles after the effective date of this AD, whichever occurs later, (for airplanes on which the door flight cycles are known); or within 4,500 flight cycles after the effective date of this AD (for airplanes on which door flight cycles are not known); inspect the lower corner frames to determine if the door has reinforcement angles, P/N 65C25180–9, –43, –10, –11, or –12, that were installed as specified in any service bulletin identified in paragraphs (q)(1) through (q)(5) of this AD. If any affected reinforcement angle is found, do a one-time general visual inspection for edge margin and do a detailed inspection for cracks; in accordance with Part V of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010.

(1) Boeing Service Bulletin 737–52–1079, dated December 16, 1983.

(2) Boeing Service Bulletin 737–52–1079, Revision 1, dated December 15, 1988.

(3) Boeing Service Bulletin 737–52–1079, Revision 2, dated July 20, 1989.

(4) Boeing Service Bulletin 737–52–1079, Revision 3, dated May 17, 1990.

(5) Boeing Service Bulletin 737–52–1079, Revision 4, dated February 21, 1991.

(r) Corrective Actions for Inspections Specified in Paragraph (q) of This AD

If, during any inspection required by paragraph (q) of this AD, any crack is found, or if any edge margin does not meet the specification identified in Part V of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010, before further flight, do the actions specified in paragraphs (r)(1), (r)(2), and (r)(3) of this AD.

(1) Replace the corner reinforcement angle, in accordance with Part III of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010.

(2) Do a one-time detailed inspection or HFEC inspection for cracking at the forward and aft ends of cross beam D, in accordance with Part 1 of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–52–1154, dated December 17, 2010; or Boeing Special Attention Service Bulletin 737–52–1154, dated December 17, 2010, as revised by Boeing Special Attention Service Bulletin 737–52–1154, Revision 1, dated August 3, 2011. If any cracking is found, before further flight, do all applicable repairs in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–52–1154, dated December 17, 2010; or Boeing Special Attention Service Bulletin 737–52–1154, dated December 17, 2010, as revised by Boeing Special Attention Service Bulletin 737–52–1154, Revision 1, dated August 3, 2011, except as provided by paragraph (u)(2) of this AD.

(3) Do a one-time detailed inspection or ultrasonic inspection for cracking on the frames, in accordance with Part 2 (detailed inspection) or Part 8 (ultrasonic inspection) of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–52–1154, dated December 17, 2010, as revised by Boeing Special Attention Service Bulletin 737–52–1154, Revision 1, dated August 3, 2011. If any cracking is found, before further flight, replace the frame in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010.

(s) Requirements for Doors Subject to Boeing Alert Service Bulletin 737–52A1153, Dated July 13, 2011

If, during the action required by paragraph (o) of this AD, a door is determined to be from an airplane having line numbers 874 and subsequent: At the applicable time specified in Tables 1 and 2 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011, except as provided by paragraph (u)(1) of this AD, do high frequency and detailed inspections for cracks in the forward and aft ends of cross beam E, and do all applicable related investigative and corrective actions, in accordance with Parts 1, 3, 4, 5, and 6 of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011; and, as applicable, the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–52–1154, dated December 17, 2010, as revised by Boeing Special Attention Service Bulletin 737–52–1154, Revision 1, dated August 3, 2011; except as provided by paragraph (u)(2) of this AD. Do all applicable related investigative and corrective actions at the applicable time specified in Tables 1 and 2 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011, except as provided by paragraph (u)(1) of this AD. If no cracking is found during the inspections specified in Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011, at the applicable time specified in Tables 1 and 2 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011, except as provided by paragraph (u)(1) of this AD, do the modification in accordance with Parts 5 and 6, as applicable, of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011. Repeat the inspections thereafter at the times specified in Tables 1 and 2 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011, until the preventative modification or repair is done to both ends of cross beam E in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011. Doing the inspection specified in this paragraph terminates the inspections required by paragraphs (h) and (k) of this AD.

(t) One Time Inspections for Doors Subject to Boeing Alert Service Bulletin 737–52A1153, Dated July 13, 2011

If, during the actions required by paragraph (o) of this AD, a door is determined to be from an airplane having line numbers 874 and subsequent: At the applicable time specified in Tables 3 and 4 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011, except as provided by paragraph (u)(1) of this AD, do a one-time ultrasonic inspection of the frame and a detailed inspection of the reinforcing angle for cracks of the forward and aft ends of cross beam E, and do all applicable related investigative and corrective actions, in accordance with Parts 1, 3, 4, 7, and 8 of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011; and, as applicable; the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–52–1154, dated December 17, 2010, as revised by Boeing Special Attention Service Bulletin 737–52–1154, Revision 1, dated August 3, 2011; except as provided by paragraph (u)(2) of this AD. Do all applicable related investigative and corrective actions before further flight.

(u) Service Information Exceptions

The following exceptions apply to this AD.

(1) Where paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011, specifies a compliance time ''after the original issue date of this service bulletin,'' this AD requires compliance within the specified compliance time after the effective date of this AD.

(2) Where Boeing Special Attention Service Bulletin 737–52–1154, dated December 17, 2010; and Boeing Special Attention Service Bulletin 737–52–1154, dated December 17, 2010, as revised by Boeing Special Attention Service Bulletin 737–52–1154, Revision 1, dated August 3, 2011, specify to contact Boeing for repair, before further flight, repair using a method approved in accordance with the procedures specified in paragraph (x) of this AD.

(3) Where Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010, specifies to contact Boeing for repair, before further flight, repair using a method approved in accordance with the procedures specified in paragraph (x) of this AD.

(4) This AD does not require accomplishment of the access and restoration procedures identified in the Work Instructions of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010; Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011; Boeing Special Attention Service Bulletin 737–52–1154, dated December 17, 2010; and Boeing Special Attention Service Bulletin 737–52–1154, dated December 17, 2010, as revised by Boeing Special Attention Service Bulletin 737–52–1154, Revision 1, dated August 3, 2011.

(v) Supplemental Structural Inspections

(1) The supplemental structural inspections specified in Tables 5 and 6 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011; and Tables 3 and 4 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010; and Table 5 of paragraph 1.E., ''Compliance,'' of Boeing Service Bulletin 737–52–1154, dated December 17, 2010, as revised by Boeing Special Attention Service Bulletin 737–52–1154, Revision 1, dated August 3, 2011, are not required by this AD.

(2) The damage tolerance inspections specified in Tables 5 and 6 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011; and Tables 3 and 4 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010; and Table 5 of paragraph 1.E., ''Compliance,'' of Boeing Service Bulletin 737–52–1154, dated December 17, 2010, as revised by Boeing Special Attention Service Bulletin 737–52–1154, Revision 1, dated August 3, 2011; may be used in support of compliance with section 121.1109(c)(2) or 129.109(b)(2) of the Federal Aviation Regulations (14 CFR 121.1109(c)(2) or 14 CFR 129.109(b)(2)). The corresponding actions specified in the Accomplishment Instructions and figures of Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011; and Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010; are not required by this AD.

(w) Credit for Previous Actions

(1) This paragraph provides credit for actions required by paragraphs (p), (q), and (r) of this AD, if the actions were accomplished before the effective date of this AD using any service information specified in paragraph (w)(1)(i), (w)(1)(ii), (w)(1)(iii), (w)(1)(iv), (w)(1)(v), (w)(1)(vi), or (w)(1)(vii) of this AD.

(i) Boeing Service Bulletin 737–52–1079, dated December 16, 1983.

(ii) Boeing Service Bulletin 737–52–1079, Revision 1, dated December 15, 1988.

(iii) Boeing Service Bulletin 737–52–1079, Revision 2, dated July 20, 1989.

(iv) Boeing Service Bulletin 737–52–1079, Revision 3, dated May 17, 1990.

(v) Boeing Service Bulletin 737–52–1079, Revision 4, dated February 21, 1991.

(vi) Boeing Service Bulletin 737–52–1079, Revision 5, dated May 16, 1996.

(vii) Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999.

(2) This paragraph provides credit for actions required by paragraphs (s) and (t) of this AD, if the actions were accomplished before the effective date of this AD using Boeing Service Bulletin 737–52–1154, dated December 17, 2010, provided that any alternative detailed inspections specified in Part 17 of the Accomplishment Instructions of Boeing Service Bulletin 737–52–1154, dated December 17, 2010, were done in accordance with Part 11 of the Accomplishment Instructions of Boeing Service Bulletin 737–52–1154, dated December 17, 2010.

(x) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle ACO, 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 ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@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.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes ODA that has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) AMOCs approved previously in accordance with AD 2000–06–13, Amendment 39–11654 (65 FR 17583, April 4, 2000); and AD 2000–06–13 R1, Amendment 39–12317 (66 FR 36146, July 11, 2001); are approved as AMOCs for the corresponding requirements of this AD.

(y) Related Information

For more information about this AD, contact Alan Pohl, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6450; fax: 425–917–6590; email: *alan.pohl@faa.gov.*

(z) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on September 10, 2013.

(i) Boeing Alert Service Bulletin 737–52A1153, dated July 13, 2011.

(ii) Boeing Alert Service Bulletin 737–52A1079, Revision 7, dated December 17, 2010.

(iii) Boeing Special Attention Service Bulletin 737–52–1154, dated December 17, 2010.

(iv) Boeing Special Attention Service Bulletin 737–52–1154, Revision 1, dated August 3, 2011.

(4) The following service information was approved for IBR on May 9, 2000 (65 FR 17583, April 4, 2000).

(i) Boeing Alert Service Bulletin 737–52A1079, Revision 6, dated November 18, 1999.

(ii) Reserved.

(5) The following service information was approved for IBR on December 24, 1998 (63 FR 67769, December 9, 1998).

(i) Boeing Service Bulletin 737–52–1079, Revision 5, dated May 16, 1996.

(ii) Reserved.

(6) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.*

(7) You may view this service information at FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington 98057–3356. For information on the availability of this material at the FAA, call 425–227–1221.

(8) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on June 18, 2013.

John P. Piccola,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–18765 Filed 8–5–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 100 and 165

[Docket No. USCG–2012–1057]

RIN 1625–AA08; AA00

Special Local Regulations and Safety Zones; Recurring Events in Northern New England

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is updating special local regulations and permanent safety zones in the Coast Guard Captain of the Port Northern New England Zone for annual recurring marine events. When these special local regulations or safety zones are activated and subject to enforcement this rule will restrict vessels from portions of water areas during these annual recurring events. The revised special local regulations and safety zones will expedite public notification of events, and ensure the protection of the maritime public and event participants from the hazards associated with these annual recurring events.

DATES: This rule is effective September 5, 2013.

This rule will be enforced during dates and times specified in TABLES 1 and 2.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2012–1057 and are available online by going to *http://www.regulations.gov,* inserting ''USCG–2012–1057'' in the ''SEARCH'' box, and then clicking ''Search.'' This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Ensign Elizabeth Morris, Waterways Management Division at Coast Guard Sector Northern New England, telephone 207–767–0398, email *Elizabeth.V.Morris@uscg.mil.* If you have questions on viewing the docket, call Barbara Hairston, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

A. Regulatory History and Information

On Tuesday, March 22, 2013, the Coast Guard published a notice of proposed rulemaking (NPRM) entitled ''Special Local Regulations and Safety Zones; Recurring Events in Northern New England'' in the **Federal Register.** We received no comments or requests for a public meeting on the proposed rule.

B. Basis and Purpose

The legal basis for this rule is 33 U.S.C. 1231, 1233; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, and 160.5; Public Law 107–295, 116 Stat. 2064; and Department of Homeland Security Delegation No. 0170.1, which collectively authorize the Coast Guard to define regulatory safety zones and special local regulations.

Swim events, fireworks displays, and marine events are held on an annual recurring basis on the navigable waters within the Coast Guard COTP Northern New England Zone. In the past, the Coast Guard has established special local regulations, regulated areas and safety zones for these annual recurring events on a case by case basis to ensure the protection of the maritime public and event participants from the hazards associated with these events. The Coast Guard has not received public comments or concerns regarding the impact to waterway traffic from these annually recurring events.

This rulemaking updates the existing regulation in order to meet the Coast Guard's intended purpose of ensuring safety during these events.

C. Background

The Coast Guard is amending 33 CFR 100.120 (Special Local Regulations) and 33 CFR 165.171 (Safety Zones).

The rule updates the list of annual recurring events listed in the attached TABLES in the Coast Guard COTP Northern New England Zone. The TABLES provide the event name, sponsor, and type, as well as approximate dates and locations of the events. The specific times, dates, regulated areas, and enforcement period for each event will be provided through the Local Notice to Mariners, Broadcast Notice to Mariners or through a Notice of Enforcement published in the **Federal Register**.

D. Discussion of the Final Rule and Comments

The Coast Guard did not receive any comments in response to the NPRM published in the **Federal Register** on Tuesday, March 22, 2013. Therefore, the Coast Guard did not change anything in the final regulation because there were no comments.

E. Regulatory Analyses

The Coast Guard developed this proposed rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on these statutes or executive orders.

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

We expect the economic impact of this rule to be minimal. Although this regulation may have some impact on the public, the potential impact will be minimized for the following reasons: The Coast Guard is only modifying an existing regulation to account for new information.

2. Impact on Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which might be small entities: owners or operators of vessels intending to transit, fish, or anchor in the areas where the listed annual recurring events are being held.

The rule will not have a significant economic impact on a substantial number of small entities for the following reasons: vessels will only be restricted from safety zones and special local regulation areas for a short duration of time; vessels may transit in portions of the affected waterway except for those areas covered by the regulated areas; and notifications will be made to the local maritime community through the Local Notice to Mariners and Broadcast Notice to Mariners well in advance of the events. In addition, this action is only modifying an existing rule which, in and of itself, did not have a significant impact on a substantial number of small entities.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this 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.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule affects your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

4. Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

6. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

7. Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

8. Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

9. Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

10. Indian Tribal Governments

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

11. Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

12. Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

13. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraphs (34)(g) and (34)(h) of the Instruction since it involves establishment of safety zones for marine related fireworks events and special local regulations for regattas, respectively. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects

33 CFR Part 100

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

33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR parts 100 and 165 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

■ 2. In § 100.120, revise the TABLE TO § 100.120 to read as follows:

§ 100.120 Special Local Regulations; Marine Events Held in the Coast Guard Sector Northern New England Captain of the Port Zone.

* * * * *

TABLE TO § 100.120

5.0	MAY
5.1 Champlain Bridge Celebration Flotilla Parade	• Event Type: Regatta and Boat Parade.

TABLE TO § 100.120—Continued

	• Sponsor: Lake Champlain Maritime Museum. • Date: A two day event on Saturday and Sunday during the third weekend in May.* • Time (Approximate): 12:00 p.m. to 2:00 p.m. each day. • Location: The regulated area includes all waters of Lake Champlain in the vicinity of the new bridge between Crown Point, New York and Chimney Point, Vermont within the following points (NAD 83): 44°02′29″ N, 073°26′26″ W. 44°02′38″ N, 073°25′58″ W. 44°01′18″ N, 073°24′08″ W. 44°01′04″ N, 073°24′31″ W.
5.2 Tall Ships Visiting Portsmouth	• Event Type: Regatta and Boat Parade. • Sponsor: Portsmouth Maritime Commission, Inc. • Date: A four day event from Friday through Monday on a weekend between the 15th of May and the 15th of June.* • Time (Approximate): 9:00 a.m. to 8:00 p.m. each day. • Location: The regulated area includes all waters of Portsmouth Harbor, New Hampshire in the vicinity of Castle Island within the following points (NAD 83): 43°03′11″ N, 070°42′26″ W. 43°03′18″ N, 070°41′51″ W. 43°04′42″ N, 070°42′11″ W. 43°04′28″ N, 070°44′12″ W. 43°05′36″ N, 070°45′56″ W. 43°05′29″ N, 070°46′09″ W. 43°04′19″ N, 070°44′16″ W. 43°04′22″ N, 070°42′33″ W.
6.0	JUNE
6.1 Bar Harbor Blessing of the Fleet	• Event Type: Regatta and Boat Parade. • Sponsor: Town of Bar Harbor, Maine. • Date: A one day event on a Sunday between the 15th of May and the 15th of June.* • Time (Approximate): 12:00 p.m. to 1:30 p.m. • Location: The regulated area includes all waters of Bar Harbor, Maine within the following points (NAD 83): 44°23′32″ N, 068°12′19″ W. 44°23′30″ N, 068°12′00″ W. 44°23′37″ N, 068°12′00″ W. 44°23′35″ N, 068°12′19″ W.
6.2 Charlie Begin Memorial Lobster Boat Races	• Event Type: Power Boat Race. • Sponsor: Boothbay Harbor Lobster Boat Race Committee. • Date: A one day event on Saturday during the third weekend of June.* • Time (Approximate): 10:00 a.m. to 3:00 p.m. • Location: The regulated area includes all waters of Boothbay Harbor, Maine in the vicinity of John's Island within the following points (NAD 83): 43°50′04″ N, 069°38′37″ W. 43°50′54″ N, 069°38′06″ W. 43°50′49″ N, 069°37′50″ W. 43°50′00″ N, 069°38′20″ W.
6.3 Rockland Harbor Lobster Boat Races	• Event Type: Power Boat Race. • Sponsor: Rockland Harbor Lobster Boat Race Committee. • Date: A one day event on Sunday during the third weekend of June.* • Time (Approximate): 9:00 a.m. to 5:00 p.m. • Location: The regulated area includes all waters of Rockland Harbor, Maine in the vicinity of the Rockland Breakwater Light within the following points (NAD 83): 44°05′59″ N, 069°04′53″ W. 44°06′43″ N, 069°05′25″ W. 44°06′50″ N, 069°05′05″ W. 44°06′05″ N, 069°04′34″ W.
6.4 Windjammer Days Parade of Ships	• Event Type: Tall Ship Parade. • Sponsor: Boothbay Region Chamber of Commerce. • Date: A one day event on last Wednesday of June.* • Time (Approximate): 12:00 p.m. to 5:00 p.m. • Location: The regulated area includes all waters of Boothbay Harbor, Maine in the vicinity of Tumbler's Island within the following points (NAD 83):

TABLE TO § 100.120—Continued

	43°51′02″ N, 069°37′33″ W. 43°50′47″ N, 069°37′31″ W. 43°50′23″ N, 069°37′57″ W. 43°50′01″ N, 069°37′45″ W. 43°50′01″ N, 069°38′31″ W. 43°50′25″ N, 069°38′25″ W. 43°50′49″ N, 069°37′45″ W.
7.0	JULY
7.1 Moosabec Lobster Boat Races	• Event Type: Power Boat Race. • Sponsor: Moosabec Boat Race Committee. • Date: A one day event held on July 4th.* • Time (Approximate): 10:00 a.m. to 12:30 p.m. • Location: The regulated area includes all waters of Jonesport, Maine within the following points (NAD 83): 44°31′21″ N, 067°36′44″ W. 44°31′36″ N, 067°36′47″ W. 44°31′44″ N, 067°35′36″ W. 44°31′29″ N, 067°35′33″ W.
7.2 The Great Race	• Event Type: Rowing and Paddling Boat Race. • Sponsor: Franklin County Chamber of Commerce. • Date: A one day event on a Sunday between the 15th of August and the 15th of September.* • Time (Approximate): 10:00 a.m. to 12:30 p.m. • Location: The regulated area includes all waters of Lake Champlain in the vicinity of Saint Albans Bay within the following points (NAD 83): 44°47′18″ N, 073°10′27″ W. 44°47′10″ N, 073°08′51″ W.
7.3 Searsport Lobster Boat Races	• Event Type: Power Boat Race. • Sponsor: Searsport Lobster Boat Race Committee. • Date: A one day event on the second Saturday of July.* • Time (Approximate): 9:00 a.m to 4:00 p.m. • Location: The regulated area includes all waters of Searsport Harbor, Maine within the following points (NAD 83): 44°26′50″ N, 068°55′20″ W. 44°27′04″ N, 068°55′26″ W. 44°27′12″ N, 068°54′35″ W. 44°26′59″ N, 068°54′29″ W.
7.4 Stonington Lobster Boat Races	• Event Type: Power Boat Race. • Sponsor: Stonington Lobster Boat Race Committee. • Date: A one day event on the second Saturday of July.* • Time (Approximate): 8:00 a.m. to 3:30 p.m. • Location: The regulated area includes all waters of Stonington, Maine within the following points (NAD 83): 44°08′55″ N, 068°40′12″ W. 44°09′00″ N, 068°40′15″ W. 44°09′11″ N, 068°39′42″ W. 44°09′07″ N, 068°39′39″ W.
7.5 Mayor's Cup Regatta	• Event Type: Sailboat Parade. • Sponsor: Plattsburgh Sunrise Rotary. • Date: A one day event on the second Saturday of July.* • Time (Approximate): 10:00 a.m. to 4:00 p.m. • Location: The regulated area includes all waters of Cumberland Bay on Lake Champlain in the vicinity of Plattsburgh, New York within the following points (NAD 83): 44°39′26″ N, 073°26′25″ W. 44°41′27″ N, 073°23′12″ W.
7.6 The Challenge Race	• Event Type: Rowing and Paddling Boat Race. • Sponsor: Lake Champlain Maritime Museum. • Date: A one day event on the third Saturday of July.* • Time (Approximate): 11:00 a.m. to 3:00 p.m. • Location: The regulated area includes all waters of Lake Champlain in the vicinity of Button Bay State Park within the following points (NAD 83): 44°12′25″ N, 073°22′32″ W. 44°12′00″ N, 073°21′42″ W. 44°12′19″ N, 073°21′25″ W.

TABLE TO § 100.120—Continued

	44°13′16″ N, 073°21′36″ W.
7.7 Yarmouth Clam Festival Paddle Race	• Event Type: Rowing and Paddling Boat Race. • Sponsor: Maine Island Trail Association. • Date: A one day event on the third Saturday of July.* • Time (Approximate): 8:00 a.m. to 4 p.m. • Location: The regulated area includes all waters in the vicinity of the Royal River outlet and Lane's Island within the following points (NAD 83): 43°47′47″ N 070°08′40″ W 43°47′50″ N 070°07′13″ W 43°47′06″ N 070°07′32″ W 43°47′17″ N 070°08′25″ W
7.8 Friendship Lobster Boat Races	• Event Type: Power Boat Race. • Sponsor: Friendship Lobster Boat Race Committee. • Date: A one day event on a Saturday on a weekend between the 15th of July and the 15th of August.* • Time (Approximate): 9:30 a.m. to 3:00 p.m. • Location: The regulated area includes all waters of Friendship Harbor, Maine within the following points (NAD 83): 43°57′51″ N, 069°20′46″ W. 43°58′14″ N, 069°19′53″ W. 43°58′19″ N, 069°20′01″ W. 43°58′00″ N, 069°20′46″ W.
7.9 Arthur Martin Memorial Regatta	• Event Type: Rowing and Paddling Boat Race. • Sponsor: I Row. • Date: A one day event on the third Saturday of July.* • Time (Approximate): 9:0.0. a.m. to 1:00 p.m. • Location: The regulated area includes all waters of the Piscataqua River, in the vicinity of Kittery Point, Maine within the following points (NAD 83): 43°03′51″ N, 070°41′55″ W. 43°04′35″ N, 070°42′18″ W. 43°04′42″ N, 070°43′15″ W. 43°05′14″ N, 070°43′12″ W. 43°05′14″ N, 070°43′06″ W. 43°04′44″ N, 070°43′11″ W. 43°04′35″ N, 070°42′13″ W. 43°03′53″ N, 070°41′40″ W.
7.10 Harpswell Lobster Boat Races	• Event Type: Power Boat Race. • Sponsor: Harpswell Lobster Boat Race Committee. • Date: A one day event on a Sunday between the 15th of July and the 15th of August.* • Time (Approximate): 10:00 a.m. to 3:00 p.m. • Location: The regulated area includes waters of Middle Bay near Harpswell, Maine within the following points (NAD 83): 43°44′15″ N, 070°02′06″ W. 43°44′59″ N, 070°01′21″ W. 43°44′51″ N, 070°01′05″ W. 43°44′06″ N, 070°01′49″ W.
8.0	AUGUST
8.1 Eggemoggin Reach Regatta	• Event Type: Wooden Boat Parade. • Sponsor: Rockport Marine, Inc. and Brookline Boat Yard. • Date: A one day event on a Saturday between the 15th of July and the 15th of August.* • Time (Approximate): 11:00 a.m. to 7:00 p.m. • Location: The regulated area includes all waters of Eggemoggin Reach and Jericho Bay in the vicinity of Naskeag Harbor, Maine within the following points (NAD 83): 44°15′16″ N, 068°36′26″ W. 44°12′41″ N, 068°29′26″ W. 44°07′38″ N, 068°31′30″ W. 44°12′54″ N, 068°33′46″ W.
8.2 Southport Rowgatta Rowing and Paddling Boat Race	• Event Type: Rowing and Paddling Boat Race. • Sponsor: Boothbay Region YMCA. • Date: A one day event on the second Saturday of August.* • Time (Approximate): 8:00 a.m. to 3:00 p.m.

TABLE TO § 100.120—Continued

	• Location: The regulated area includes all waters of Sheepscot Bay and Boothbay, on the shore side of Southport Island, Maine within the following points (NAD 83): 43°50′26″ N, 069°39′10″ W. 43°49′10″ N, 069°38′35″ W. 43°46′53″ N, 069°39′06″ W. 43°46′50″ N, 069°39′32″ W. 43°49′07″ N, 069°41′43″ W. 43°50′19″ N, 069°41′14″ W. 43°51′11″ N, 069°40′06″ W.
8.3 Winter Harbor Lobster Boat Races	• Event Type: Power Boat Race. • Sponsor: Winter Harbor Chamber of Commerce. • Date: A one day event on the second Saturday of August.* • Time (Approximate): 9:00 a.m. to 3:00 p.m. • Location: The regulated area includes all waters of Winter Harbor, Maine within the following points (NAD 83): 44°22′06″ N, 068°05′13″ W. 44°23′06″ N, 068°05′08″ W. 44°23′04″ N, 068°04′37″ W. 44°22′05″ N, 068°04′44″ W.
8.4 Lake Champlain Dragon Boat Festival	• Event Type: Rowing and Paddling Boat Race. • Sponsor: Dragonheart Vermont. • Date: A one day event on the second Sunday of August.* • Time (Approximate): 7:00 a.m. to 5:00 p.m. • Location: The regulated area includes all waters of Burlington Bay within the following points (NAD 83): 44°28′51″ N, 073°13′28″ W. 44°28′40″ N, 073°13′40″ W. 44°28′37″ N, 073°13′29″ W. 44°28′40″ N, 073°13′17″ W.
8.5 Merritt Brackett Lobster Boat Races	• Event Type: Power Boat Race. • Sponsor: Town of Bristol, Maine. • Date: A one day event on the second Sunday of August.* • Time (Approximate): 10:00 a.m. to 3:00 p.m. • Location: The regulated area includes all waters of Pemaquid Harbor, Maine within the following points (NAD 83): 43°52′16″ N, 069°32′10″ W. 43°52′41″ N, 069°31′43″ W. 43°52′35″ N, 069°31′29″ W. 43°52′09″ N, 069°31′56″ W.
8.6 Multiple Sclerosis Regatta	• Event Type: Regatta and Sailboat Race. • Sponsor: Maine Chapter, Multiple Sclerosis Society. • Date: A one day event on the third Saturday of August.* • Time (Approximate): 10:00 a.m. to 4:00 p.m. • Location: The regulated area for the start of the race includes all waters of Casco Bay, Maine in the vicinity of Peaks Island within the following points (NAD 83): 43°40′24″ N, 070°14′20″ W. 43°40′36″ N, 070°13′56″ W. 43°39′58″ N, 070°13′21″ W. 43°39′46″ N, 070°13′51″ W.
8.7 Multiple Sclerosis Harborfest Lobster Boat/Tugboat Races	• Event Type: Power Boat Race. • Sponsor: Maine Chapter, National Multiple Sclerosis Society. • Date: A one day event on the third Sunday of August.* • Time (Approximate): 10:00 a.m. to 3:00 p.m. • Location: The regulated area includes all waters of Portland Harbor, Maine in the vicinity of Maine State Pier within the following points (NAD 83): 43°40′25″ N, 070°14′21″ W. 43°40′36″ N, 070°13′56″ W. 43°39′58″ N, 070°13′21″ W. 43°39′47″ N, 070°13′51″ W.
9.0	SEPTEMBER
9.1 Pirates Festival Lobster Boat Races	• Event Type: Power Boat Race. • Sponsor: Eastport Pirates Festival. • Date: A one day event on the second Sunday of September.* • Time (Approximate): 11:00 a.m. to 6:00 p.m.

TABLE TO § 100.120—Continued

	• Location: The regulated area includes all waters in the vicinity of Eastport Harbor, Maine within the following points (NAD 83): 44°54′14″ N, 066°58′52″ W. 44°54′14″ N, 068°58′56″ W. 44°54′24″ N, 066°58′52″ W. 44°54′24″ N, 066°58′56″ W.

*Dates subject to change within the timeframes noted. Exact date and time will be posted in Notice of Enforcement and Local Notice to Mariners.

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 33 CFR 1.05–1, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 4. In § 165.171, revise the TABLE TO § 165.171 to read as follows:

§ 165.171 Safety Zones for fireworks displays and swim events held in Coast Guard Sector Northern New England Captain of the Port Zone.

* * * * *

TABLE TO § 165.171

5.0	MAY
5.1 Hawgs, Pies, & Fireworks	• Event Type: Fireworks Display. • Sponsor: Gardiner Maine Street. • Date: One night event on a Saturday between the 15th of May and the 15th of June.* • Time (Approximate): 8:00 pm to 10:00 pm. • Location: In the vicinity of the Gardiner Waterfront, Gardiner, Maine in approximate position: 44°13′52″ N, 069°46′08″ W (NAD 83).
6.0	JUNE
6.1 Rotary Waterfront Days Fireworks	• Event Type: Fireworks Display. • Sponsor: Gardiner Rotary. • Date: Two night event on Wednesday and Saturday during the third week of June.* • Time (Approximate): 8:00 pm to 10:00 pm. • Location: In the vicinity of the Gardiner Waterfront, Gardiner, Maine in approximate position: 44°13′52″ N, 069°46′08″ W (NAD 83).
6.2 Windjammer Days Fireworks	• Event Type: Fireworks Display. • Sponsor: Boothbay Harbor Region Chamber of Commerce. • Date: One night event on the last Wednesday of June.* • Time (Approximate): 8:00 pm to 10:30 pm. • Location: In the vicinity of McFarland Island, Boothbay Harbor, Maine in approximate position: 43°50′38″ N, 069°37′57″ W (NAD 83).
7.0	JULY
7.1 Vinalhaven 4th of July Fireworks	• Event Type: Firework Display. • Sponsor: Vinalhaven 4th of July Committee. • Date: First Saturday in July.* • Time (Approximate): 8:00 pm to 10:30 pm. • Location: In the vicinity of Grime's Park, Vinalhaven, Maine in approximate position: 44°02′34″ N, 068°50′26″ W (NAD 83).
7.2 Burlington Independence Day Fireworks	• Event Type: Firework Display. • Sponsor: City of Burlington, Vermont. • Date: July 3rd.* • Time (Approximate): 9:00 pm to 11:00 pm. • Location: From a barge in the vicinity of Burlington Harbor, Burlington, Vermont in approximate position: 44°28′31″ N, 073°13′31″ W (NAD 83).
7.3 Camden 3rd of July Fireworks	• Event Type: Fireworks Display. • Sponsor: Camden, Rockport, Lincolnville Chamber of Commerce. • Date: July 3rd.* • Time (Approximate): 8:00 pm to 10:00 pm. • Location: In the vicinity of Camden Harbor, Maine in approximate position:

TABLE TO § 165.171—Continued

	44°12′32″ N, 069°02′58″ W (NAD 83).
7.4 Bangor 4th of July Fireworks	• Event Type: Fireworks Display. • Sponsor: Bangor 4th of July Fireworks. • Date: July 4th.* • Time (Approximate): 8:00 pm to 10:30 pm. • Location: In the vicinity of the Bangor Waterfront, Bangor, Maine in approximate position: 44°47′27″ N, 068°46′31″ W (NAD 83).
7.5 Bar Harbor 4th of July Fireworks.	• Event Type: Fireworks Display. • Sponsor: Bar Harbor Chamber of Commerce. • Date: July 4th.* • Time (Approximate): 8:00 pm to 10:30 pm. • Location: In the vicinity of Bar Harbor Town Pier, Bar Harbor, Maine in approximate position: 44°23′31″ N, 068°12′15″ W (NAD 83).
7.6 Boothbay Harbor 4th of July Fireworks	• Event Type: Fireworks Display. • Sponsor: Town of Boothbay Harbor. • Date: July 4th.* • Time (Approximate): 8:00 pm to 10:30 pm. • Location: In the vicinity of McFarland Island, Boothbay Harbor, Maine in approximate position: 43°50′38″ N, 069°37′57″ W (NAD 83).
7.7 Colchester 4th of July Fireworks	• Event Type: Fireworks Display. • Sponsor: Town of Colchester, Recreation Department. • Date: July 4th.* • Time (Approximate): 8:00 pm to 10:00 pm. • Location: In the vicinity of Bayside Beach and Mallets Bay in Colchester, Vermont in approximate position: 44°32′44″ N, 073°13′10″ W (NAD 83).
7.8 Eastport 4th of July Fireworks	• Event Type: Fireworks Display. • Sponsor: Eastport 4th of July Committee. • Date: July 4th.* • Time (Approximate): 9:00 pm to 9:30 pm. • Location: From the Waterfront Public Pier in Eastport, Maine in approximate position: 44°54′25″ N, 066°58′55″ W (NAD 83).
7.9 Ellis Short Sand Park Trustee Fireworks	• Event Type: Fireworks Display. • Sponsor: William Burnham. • Date: July 4th.* • Time (Approximate): 8:30 pm to 11:00 pm. • Location: In the vicinity of York Beach, Maine in approximate position: 43°10′27″ N, 070°48′31″ W (NAD 83).
7.10 Hampton Beach 4th of July Fireworks	• Event Type: Fireworks Display. • Sponsor: Hampton Beach Village District. • Date: July 4th. • Location: In the vicinity of Hampton Beach, New Hampshire in approximate position: 42°54′40″ N, 070°36′25″ W (NAD 83).
7.11 Jonesport 4th of July Fireworks	• Event Type: Fireworks Display. • Sponsor: Jonesport 4th of July Committee. • Date: July 4th.* • Time (Approximate): 9:30 pm to 10:00 pm. • Location: In the vicinity of Beals Island, Jonesport, Maine in approximate position: 44°31′18″ N, 067°36′43″ W (NAD 83).
7.12 Main Street Heritage Days 4th of July Fireworks	• Event Type: Fireworks Display. • Sponsor: Main Street Inc. • Date: July 4th.* • Time (Approximate): 8:00 pm to 10:30 pm. • Location: In the vicinity of Reed and Reed Boat Yard, Woolwich, Maine in approximate position: 43°54′56″ N, 069°48′16″ W (NAD 83).
7.13 Portland Harbor 4th of July Fireworks	• Event Type: Fireworks Display. • Sponsor: Department of Parks and Recreation, Portland, Maine.

TABLE TO § 165.171—Continued

	• Date: July 4th.* • Time (Approximate): 8:30 pm to 10:30 pm. • Location: In the vicinity of East End Beach, Portland, Maine in approximate position: 43°40′16″ N, 070°14′44″ W (NAD 83).
7.14 St. Albans Day Fireworks	• Event Type: Fireworks Display. • Sponsor: St. Albans Area Chamber of Commerce. • Date: July 4th.* • Time 9:00 pm to 10:00 pm. • Location: From the St. Albans Bay dock in St. Albans Bay, Vermont in approximate position: 44°48′25″ N, 073°08′23″ W (NAD 83).
7.15 Stonington 4th of July Fireworks	• Event Type: Fireworks Displa. • Sponsor: Deer Isle—Stonington Chamber of Commerce. • Date: July 4th.* • Time (Approximate): 8:00 pm to 10:30 pm. • Location: In the vicinity of Two Bush Island, Stonington, Maine in approximate position: 44°08′57″ N, 068°39′54″ W (NAD 83).
7.16 Shelburne Sprint Triathlon	• Event Type: Swim Event. • Sponsor: Race Vermont. • Date: A multiple day event throughout July and August.* • Time (Approximate): 7:00 am to 11:00 am. • Location: The regulated area includes all waters of Lake Champlain in the vicinity of Shelburne Beach in Shelburne, Vermont within a 400 yard radius of the following point (NAD 83): 44°21′45″ N, 075°15′58″ W.
7.17 Urban/EPIC Triathlon	• Event Type: Swim Event. • Sponsor: Tri-Maine Productions. • Date: A one day event on Saturday during the second week of July.* • Time (Approximate): 7:00 am to 11:00 am. • Location: The regulated area includes all waters of Portland Harbor in the vicinity of East End Beach in Portland, Maine within the following points (NAD 83): 43°40′00″ N, 070°14′20″ W. 43°40′00″ N, 070°14′00″ W. 43°40′15″ N, 070°14′29″ W. 43°40′17″ N, 070°13′22″ W.
7.18 St. George Days Fireworks	• Event Type: Fireworks. • Sponsor: Town of St. George. • Date: A one day event held on third Saturday in July.* • Time (Approximate): 8:30 pm to 10:30 pm. • Location: The regulated area includes all waters of Inner Tenants Harbor, ME, in approximate position (NAD 83): 43°57′41.37″ N, 069°12′45″ W.
7.19 Tri for a Cure Swim Clinics	• Event Type: Swim Event. • Sponsor: Maine Cancer Foundation. • Date: A multi-day training event held during July.* • Time (Approximate): 8:30 am to 11:30 am. • Location: The regulated area includes all waters of Portland Harbor, Maine in the vicinity of Spring Point Light within the following points (NAD 83): 43°39′01″ N, 070°13′32″ W. 43°39′07″ N, 070°13′29″ W. 43°39′06″ N, 070°13′41″ W. 43°39′01″ N, 070°13′36″ W.
7.20 Tri for a Cure Triathlon	• Event Type: Swim Event. • Sponsor: Maine Cancer Foundation. • Date: A one day event on the second Sunday of August.* • Time (Approximate): 12:30 pm to 4:30 pm. • Location: The regulated area includes all waters of Portland Harbor, Maine in the vicinity of Spring Point Light within the following points (NAD 83): 43°39′01″ N, 070°13′32″ W. 43°39′07″ N, 070°13′29″ W. 43°39′06″ N, 070°13′41″ W. 43°39′01″ N, 070°13′36″ W.

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7.21 Richmond Days Fireworks	• Event Type: Fireworks Displa. • Sponsor: Town of Richmond, Maine. • Date: A one day event on the fourth Saturday of July.* • Time (Approximate): 8:00 pm to 10:00 pm. • Location: From a barge in the vicinity of the inner harbor, Tenants Harbor, Maine in approximate position: 44°08′42″ N, 068°27′06″ W (NAD83).
7.22 Colchester Triathlon	• Event Type: Swim Event. • Sponsor: Colchester Parks and Recreation Department. • Date: A one day event on the last Wednesday of July.* • Time (Approximate): 7:00 am to 11:00 am. • Location: The regulated area includes all waters of Malletts Bay on Lake Champlain, Vermont within the following points (NAD 83): 44°32′18″ N, 073°12′35″ W. 44°32′28″ N, 073°12′56″ W. 44°32′57″ N, 073°12′38″ W.
7.23 Peaks to Portland Swim	• Event Type: Swim Event. • Sponsor: Cumberland County YMCA. • Date: A one day event on the last Saturday of July.* • Time (Approximate): 5:00 am to 1:00 pm. • Location: The regulated area includes all waters of Portland Harbor between Peaks Island and East End Beach in Portland, Maine within the following points (NAD 83): 43°39′20″ N, 070°11′58″ W. 43°39′45″ N, 070°13′19″ W. 43°40′11″ N, 070°14′13″ W. 43°40′08″ N, 070°14′29″ W. 43°40′00″ N, 070°14′23″ W. 43°39′34″ N, 070°13′31″ W. 43°39′13″ N, 070°11′59″ W.
7.24 Friendship Days Fireworks	• Event Type: Fireworks Display. • Sponsor: Town of Friendship. • Date: A one day event on the last Saturday of July.* • Time (Approximate): 8:00 pm to 10:30 pm. • Location: In the vicinity of the Town Pier, Friendship Harbor, Maine in approximate position: 43°58′23″ N, 069°20′12″ W (NAD83).
7.25 Champ Chum Swim	• Event Type: Swim Event. • Sponsor: Against Malaria Foundation. • Date: A one day event on the last Saturday of July.* • Time (Approximate): 8:00 am to 12:00 pm. • Location: The regulated area includes all waters of Lake Champlain between Thompson's Point, Vermont and Spilt Rock in Adirondack Park, New York within the following points (NAD 83): 44°16′04″ N, 073°18′19″ W. 44°16′08″ N 073°19′17″ W.
7.26 Bucksport Festival and Fireworks	• Event Type: Fireworks Display. • Sponsor: Bucksport Bay Area Chamber of Commerce. • Date: A one day event on the last Saturday of July.* • Time (Approximate): 8:00 pm to 10:30 pm. • Location: In the vicinity of the Verona Island Boat Ramp, Verona, Maine, in approximate position: 44°34′9″ N, 068°47′28″ W (NAD83).
8.0	AUGUST
8.1 Sprucewold Cabbage Island Swim	• Event Type: Swim Event. • Sponsor: Sprucewold Association. • Date: A one day event on the first Saturday of August.* • Time (Approximate): 1:00 pm to 6:00 pm. • Location: The regulated area includes all waters of Linekin Bay between Cabbage Island and Sprucewold Beach in Boothbay Harbor, Maine within the following points (NAD 83): 43°50′37″ N, 069°36′23″ W. 43°50′37″ N, 069°36′59″ W. 43°50′16″ N, 069°36′46″ W. 43°50′22″ N, 069°36′21″ W.
8.2 Westerlund's Landing Party Fireworks	• Event Type: Fireworks Display. • Sponsor: Portside Marina.

TABLE TO § 165.171—Continued

	• Date: A one day event on the first Saturday of August.* • Time (Approximate): 8:00 pm to 10:30 pm. • Location: In the vicinity of Westerlund's Landing in South Gardiner, Maine in approximate position: 44°10′19″ N, 069°45′24″ W (NAD 83).
8.3 Y-Tri Triathlon	• Event Type: Swim Event. • Sponsor: Plattsburgh YMCA. • Date: A one day event on the first Saturday of August.* • Time (Approximate): 9:00 am to 10:00 am. • Location: The regulated area includes all waters of Treadwell Bay on Lake Champlain in the vicinity of Point Au Roche State Park, Plattsburgh, New York within the following points (NAD 83): 44°46′30″ N, 073°23′26″ W. 44°46′17″ N, 073°23′26″ W. 44°46′17″ N, 073°23′46″ W. 44°46′29″ N, 073°23′46″ W.
8.4 York Beach Fire Department Fireworks	• Event Type: Fireworks Display. • Sponsor: York Beach Fire Department. • Date: A one day event on Sunday during the first week in August.* • Time (Approximate): 8:30 pm to 11:30 pm. • Location: In the vicinity of Short Sand Cove in York, Maine in approximate position: 43°10′27″ N, 070°36′25″ W (NAD 83).
8.5 Rockland Breakwater Swim	• Event Type: Swim Event. • Sponsor: Pen-Bay Masters. • Date: A one day event on the fourth Saturday of August.* • Time (Approximate): 7:30 am to 1:30 pm. • Location: The regulated area includes all waters of Rockland Harbor, Maine in the vicinity of Jameson Point within the following points (NAD 83): 44°06′16″ N, 069°04′39″ W. 44°06′13″ N, 069°04′36″ W. 44°06′12″ N, 069°04′43″ W. 44°06′17″ N, 069°04′44″ W. 44°06′18″ N, 069°04′40″ W.
8.6 Tri for Preservation	• Event Type: Swim Event. • Sponsor: Tri-Maine Productions. • Date: A one day event in August.* • Time (Approximate): 7:30 am to 9:00 am. • Location: In the vicinity of Crescent Beach State Park in Cape Elizabeth, Maine in approximate position: 43°33′46″ N, 070°13′48″ W. 43°33′41″ N, 070°13′46″ W. 43°33′44″ N, 070°13′40″ W. 43°33′47″ N, 070°13′46″ W.
9.0	SEPTEMBER
9.1 Windjammer Weekend Fireworks	• Event Type: Fireworks Display. • Sponsor: Town of Camden, Maine. • Date: A one day event on the first Friday of September.* • Time (Approximate): 8:00 pm to 9:30 pm. • Location: From a barge in the vicinity of Northeast Point, Camden Harbor, Maine in approximate position: 44°12′10″ N, 069°03′11″ W (NAD 83).
9.2 Eastport Pirate Festival Fireworks	• Event Type: Fireworks Display. • Sponsor: Eastport Pirate Festival. • Date: A one day event on the second Saturday of September.* • Time (Approximate): 7:00 pm to 10:00 pm. • Location: From the Waterfront Public Pier in Eastport, Maine in approximate position: 44°54′17″ N, 066°58′58″ W (NAD 83).
9.3 The Lobsterman Triathlon	• Event Type: Swim Event. • Sponsor: Tri-Maine Productions. • Date: A one day swim event on the second Saturday of September.* • Time (Approximate): 8:00 am to 11:00 am. • Location: The regulated area includes all waters in the vicinity of Winslow Park in South Freeport, Maine within the following points (NAD 83):

TABLE TO § 165.171—Continued

	43°47′59″ N, 070°06′56″ W. 43°47′44″ N 070°06′56″ W. 43°47′44″ N 070°07′27″ W. 43°47′57″ N 070°07′27″ W.
9.4 Burlington Triathlon	• Event Type: Swim Event. • Sponsor: Race Vermont. • Date: A one day swim event on the second Sunday of September.* • Time (Approximate): 7:00 am to 10:00 am. • Location: The regulated area includes all waters in the vicinity of North Beach, Burlington, Vermont within the following points (NAD 83): 44°29′31″ N, 073°14′22″ W. 44°29′12″ N, 073°14′14″ W. 44°29′17″ N, 073°14′34″ W.
9.5 Eliot Festival Day Fireworks	• Event Type: Fireworks Display. • Sponsor: Eliot Festival Day Committee. • Date: A one day event on the fourth Saturday of September.* • Time (Approximate): 8:00 pm to 10:30 pm. • Location: In the vicinity of Eliot Town Boat Launch, Eliot, Maine in approximate position: 43°08′56″ N, 070°49′52″ W (NAD 83).

*Dates subject to change within the timeframes noted. Exact date and time will be posted in Notice of Enforcement and Local Notice to Mariners.

Dated: June 24, 2013.

B.S. Gilda,

Captain, U.S. Coast Guard, Captain of the Port Sector Northern New England.

[FR Doc. 2013–18893 Filed 8–5–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2013–0011]

RIN 1625–AA00

Safety Zones; Pacific Northwest Grain Handlers Association Facilities; Columbia and Willamette Rivers

AGENCY: Coast Guard, DHS.

ACTION: Temporary interim rule and request for comments.

SUMMARY: The Coast Guard has established temporary safety zones around the following Pacific Northwest Grain Handlers Association facilities: the Columbia Grain facility on the Willamette River in Portland, OR, the United Grain Corporation facility on the Columbia River in Vancouver, WA, the Temco Irving facility on the Willamette River in Portland, OR, the Temco Kalama facility on the Columbia River in Kalama, WA, and the Louis Dreyfus Commodities facility on the Willamette River in Portland, OR. These safety zones extend approximately between the navigable channel and the shoreline of the facility described. These safety zones have been established to ensure that on-water protest activities near these facilities do not create hazardous navigation conditions for vessels protesting, transiting in the navigable channel, or attempting to moor at the facilities and that any on-water activities do not create hazardous conditions while grain-shipment vessels are moored at the facilities. This rule revises the safety zones already promulgated to add one additional grain facility, respond to comments already received, and to correct typographical errors in previous versions of the safety zones at the Columbia Grain and United Grain Corporation facilities.

DATES: This rule will be enforced with actual notice from July 24, 2013, until August 6, 2013. This rule is effective in the Code of Federal Regulations from August 6, 2013, until November 4, 2013.

Comments and related material must be received by the Coast Guard on or before September 5, 2013.

Requests for public meetings must be received by the Coast Guard on or before August 13, 2013.

ADDRESSES: Documents mentioned in this preamble are part of Docket Number USCG–2013–0011. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*, type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Open Docket Folder'' on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

You may submit comments, identified by docket number, using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov*.

(2) *Fax:* (202) 493–2251.

(3) *Mail or Delivery:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Deliveries accepted between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. The telephone number is 202–366–9329.

See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for further instructions on submitting comments. To avoid duplication, please use only one of these three methods.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Lieutenant Junior Grade Ian P. McPhillips, Waterways Management Division, Marine Safety Unit Portland, U.S. Coast Guard; telephone (503) 240–9319, email. If you have questions on viewing or submitting material to the docket, call Barbara Hairston, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR Federal Register

NPRM Notice of Proposed Rulemaking

A. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

1. Submitting Comments

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. You may submit your comments and material online at *http://www.regulations.gov*, or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov*, type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Submit a Comment'' on the line associated with this rulemaking.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

2. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*, type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

3. Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

4. Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one, using one of the methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

B. Regulatory History and Information

On February 4, 2013, the Coast Guard published a temporary interim rule and request for comments titled, ''Safety Zones; Pacific Northwest Grain Handlers Association Facilities; Columbia and Willamette Rivers'' in the **Federal Register** (78 FR 7665). In that temporary interim rule, the Coast Guard established temporary safety zones near four Pacific Northwest Grain Handlers Association facilities. This rule adds an additional safety zone near the Louis Dreyfus Commodities facility to those already established, corrects an error in the geographic coordinates of two others, and further defines grain-shipment assist vessels. The errors revised in this rule are incorrect geographic coordinates for the Columbia Grain and United Grain Corporation facilities. The portions of this rulemaking that are unchanged from the previous rulemaking were previously subject to notice and comment.

Some parts of this regulation have not been subject to public notice and comment. The Louis Dreyfus Commodities safety zone, the corrections to positions in previously listed safety zones, and the revised definition of grain-shipment assist vessels are being published with without prior notice and comment pursuant to authority under section 4(a) of the Administrative Procedure Act. Section 4(a) authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) for this rule because to do so would be impracticable. Neither grain shipment vessels nor potential protest activity can be postponed by the Coast Guard. Additionally, delayed promulgation may result in injury or damage to the maritime public, persons participating in protest activities, vessel crews, the vessels themselves, the facilities, and law enforcement personnel from hazardous, close-quarters protest activities that may occur prior to conclusion of a notice and comment period before promulgation.

Although the Coast Guard has good cause to issue this temporary rule without first publishing a proposed rule, you are invited to submit post-promulgation comments and related material regarding the portions of this rule that have changed from the previous rulemaking, which was subject to notice and comment through March 6, 2013. All comments will be reviewed as they are received. Your comments will assist us in drafting future rules should they be necessary, and may result in changes to this temporary interim rule before it expires.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. To delay the effective date would be impracticable since the arrival of grain-shipment vessels cannot be delayed by the Coast Guard and protest activities are unpredictable and potentially volatile and may result in injury to persons, property, or the environment. Delaying the effective date until 30 days after publication may mean that grain-shipment vessels will have arrived or departed the Columbia and Willamette Rivers before the end of the 30 day period. This delay would eliminate the safety zones' effectiveness and usefulness in protecting persons, property, and the safe navigation of maritime traffic before 30 days have elapsed.

The previous rule was published in the **Federal Register** on February 4, 2013 (78 FR 7665). Although the Coast Guard had good cause to issue that temporary interim rule without first publishing a proposed rule, it invited the submission of post-promulgation comments and related material regarding that rule through March 6,

2013. The Coast Guard received one comment.

C. Basis and Purpose

These safety zones have been implemented to ensure the safe navigation of maritime traffic on the Columbia and Willamette Rivers and their tributaries while grain-shipment and grain-shipment assist vessels transit to and from these Pacific Northwest Grain Handlers Association facilities and to ensure that vessels remain safely moored at these Coast Guard regulated facilities. In addition, these safety zones around the grain facilities are intended to ensure that members of the maritime public, those participating in protest activities on the water, law enforcement personnel, and vessel crews are not injured. Recreational boating, fishing, and protest activity afloat in these safety zones is particularly hazardous because of the effects of strong river currents, the maneuvering characteristics of grain-shipment vessels, and the safety sensitive mid-stream personnel transfers conducted by grain-shipment assist vessels with which recreational boaters and protesters may be unfamiliar. These safety zones apply equally to all waterway users and are intended to allow maximum use of the waterway consistent with safe navigation. The impact of the safety zones on maritime activity in the area is minimal because they have been enforced for narrow spans of time and only after notice is provided via Broadcast Notice to Mariners.

Grain-shipment vessel means any vessel bound for or departing or having previously loaded cargo at any of the following waterfront facilities: Columbia Grain in Portland, OR, United Grain Corporation in Vancouver, WA, Temco Irving in Portland, OR, Temco Kalama in Kalama, WA, or Louis Dreyfus Commodities in Portland, OR. This includes any vessel leaving anchor in the Columbia and Willamette Rivers that is bound for or had previously departed from the aforementioned waterfront facilities. Grain-shipment assist vessel means any vessel bound for or departing from a grain-shipment vessel to assist it in navigation during the movement of the grain-shipment vessel in the Columbia and Willamette Rivers and their tributaries. This includes but is not limited to tugs, pilot boats, and launches.

D. Discussion of Comments, Changes and the Interim Rule

The Coast Guard received one comment on the temporary interim rule published on February 4, 2013. The commenter asserted that the safety zones were unnecessary and overbroad. Specifically, the commenter questioned the necessity of the size of these zones. The sizes of these zones are based on the average size of the vessels calling on the affected facilities. The deep-draft grain shipment vessels that call on these facilities are typically between 600 and 800 feet in length. In general, deep-draft grain shipment vessels maneuvering to berth approach at slow ahead, roughly between 6 knots and 4 knots. At this speed, these vessels can stop in four ship lengths or about 1,000 yards. Based on these speed and deceleration rates, a vessel would have roughly two minutes to clear the 150 yard width of the zone in sufficient time so as not to collide with incoming vessels. Establishing a safety zone that can be enforced before this two minute pre-collision period significantly reduces the risk posed by limited ship-to-boat communications and the potential for small boat propulsion failure.

The commenter expressed the importance of ''on-water picketing'' in publicizing the ongoing labor dispute and concern that the safety zones unnecessarily burden the International Longshore and Warehouse Union's ability to convey their message. The line of sight on the river is approximately 450 yards. Consequently, only one of the five safety zones contained in 33 CFR 165.T13–240 could conceivably put vessels wishing to be seen out of sight of arriving vessels and then only until the in-bound vessel crosses the first 20 or 30 yards of the zone. As no safety zone extends more than 175 yards from the shore of any facility, none of the zones put vessels wishing to be seen out of sight of the facilities, as those wishing to picket could do so adjacent to the safety zone. Though the commenter emphasized its targeted audience is those involved in delivering grain shipments, it is worth noting that the facilities adjacent to which these safety zones have been established are not located in areas accessible to the general public like a park or boardwalk, such that the safety zones deprive vessel operators from being within sight of large audiences.

The commenter also criticized the suggested on-water assembly areas because most are upstream of the facility and not downstream of the facility. These areas were suggested prior to the regulation, but after dialogue between the union members and the Captain of the Port. Vessel operators may operate in any part of the river outside of the zones so long as they do so in accordance with the navigational rules. Finally, the comment misconceives the safety zones as being continuously enforced. The rule has been and will be enforced for narrow spans of time and only after notice is provided via Broadcast Notice to Mariners.

The safety zone around Columbia Grain is enclosed by three lines and the shoreline: Line one starting on the shoreline at 45–38′34″ N/122–46′11″ W then heading 150 yards offshore to 45–38′37″ N/122–46′16″ W then heading up river 380 yards to 45–38′30″ N/122–46′28″ W then heading 150 yards to the shoreline ending at 45–38′27″ N/122–46′24″ W. In essence, these boundaries extend from the shoreline of the facility 150 yards onto the river from each corner of the facility and encompass all waters and structures therein. The typographical correction to this zone aligns the listed coordinates with the described dimensions. No person or vessel may enter or remain in the safety zone unless authorized by the Sector Columbia River Captain of the Port or his designated representatives.

The safety zone around United Grain Corporation is also enclosed by three lines and the shoreline: line one starting on the shoreline at 45–37′52″ N/122–41′46″ W then heading 150 yards offshore to 45–37′48″ N/122–41′50″ W then heading up river 470 yards to 45–37′40″ N/122–41′34″ W then heading 175 yards to the shoreline ending at 45–37′44″ N/122–41′29″ W. In essence, these boundaries extend from the shoreline of the facility 150 yards onto the river from each corner of the facility and encompass all waters and structures therein. The typographical correction to this zone aligned the listed coordinates with the described dimensions. No person or vessel may enter or remain in the safety zone unless authorized by the Sector Columbia River Captain of the Port or his designated representatives.

The safety zone around the Temco grain facility in Kalama, WA is also enclosed by three lines and the shoreline: line one starting on the shoreline at 45–59′10″ N/122–50′09″ W then heading 150 yards offshore to 45–59′09″ N/122–50′14″ W then heading up river 385 yards to 45–58′58″ N/122–50′07″ W then heading 150 yards to the shoreline ending at 45–59′00″ N/122–50′01″ W. In essence, these boundaries extend from the shoreline of the facility 150 yards onto the river from each corner of the facility and encompass all waters and structures therein. No person or vessel may enter or remain in the safety zone unless authorized by the Sector Columbia River Captain of the Port or his designated representatives.

The safety zone around the Temco grain facility in Portland, OR is also enclosed by three lines and the

shoreline: line one starting on the shoreline at 45–32′10″ N/122–40′34″ W then heading 150 yards offshore to 45–32′09″ N/122–40′39″ W then heading up river 275 yards to 45–32′01″ N/122–40′33″ W then heading 150 yards to the shoreline ending at 45–32′04″ N/122–40′28″ W. In essence, these boundaries extend from the shoreline of the facility 150 yards onto the river from each corner of the facility and encompass all waters and structures therein. No person or vessel may enter or remain in the safety zone unless authorized by the Sector Columbia River Captain of the Port or his designated representatives.

The safety zone around Louis Dreyfus Commodities in Portland, OR is also enclosed by three lines and the shoreline: line one starting on the shoreline at 45–31′49″ N/122–40′15″ W then heading 70 yards offshore to 45–31′48″ N/122–40′17″ W then heading up river 300 yards to 45–31′41″ N/122–40′09″ W then heading 100 yards to the shoreline ending at 45–31′43″ N/122–40′06″ W. In essence, these boundaries extend from the shoreline of the facility 70–100 yards onto the river from each corner of the facility and encompass all waters and structures therein. No person or vessel may enter or remain in the safety zones unless authorized by the Sector Columbia River Captain of the Port or his designated representatives.

E. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on these statutes and executive orders.

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. Although this rule will restrict access to the regulated areas, the effect of this rule will not be significant because: (i) The safety zones are limited in size; (ii) the official on-scene patrol may authorize access to the safety zones; (iii) the safety zones will effect limited geographical locations for a limited time; and (iv) the Coast Guard will make notifications via maritime advisories so mariners can adjust their plans accordingly.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will not have a significant economic impact on a substantial number of small entities for the following reasons: (i) The safety zones are limited in size; (ii) the official on-scene patrol may authorize access to the safety zones; (iii) the safety zones will effect limited geographical locations for a limited time; and (iv) the Coast Guard will make notifications via maritime advisories so mariners can adjust their plans accordingly.

3. Assistance for Small Entities

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

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

4. Collection of Information

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

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. In preparing this temporary interim rule, the Coast Guard carefully considered the rights of lawful protestors. The safety zones created by this rule do not prohibit members of the public from assembling on shore or expressing their points of view from locations on shore. In addition, the Captain of the Port has, in coordination with protesters, recommended water areas in the vicinity of these safety zones where those desiring to do so can assemble and express their views without compromising navigational safety. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

7. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

8. Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

9. Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

10. Protection of Children From Environmental Health Risks

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

11. Indian Tribal Governments

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

12. Energy Effects

This action is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

14. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves the establishment of temporary safety zones around the Columbia Grain facility on the Willamette River in Portland, OR, the United Grain Corporation facility on the Columbia River in Vancouver, WA, the Temco Irving facility on the Willamette River in Portland, OR, the Temco Kalama facility on the Columbia River in Kalama, WA, and the Louis Dreyfus Commodities facility on the Willamette River in Portland, OR. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 165

Harbors, Marine Safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T13–240 to read as follows:

§ 165.T13–240 Safety Zones; Pacific Northwest Grain Handlers Association Facilities; Columbia and Willamette Rivers.

(a) *Definitions.* As used in this section:

(1) *Federal Law Enforcement Officer* means any employee or agent of the United States government who has the authority to carry firearms and make warrantless arrests and whose duties involve the enforcement of criminal laws of the United States.

(2) *Navigable waters of the United States* means those waters defined as such in 33 CFR part 2.

(3) *Navigation Rules* means the International Regulations for Preventing Collisions at Sea, 1972 (commonly called 72 COLREGS) and the Inland Navigation Rules published in 33 CFR Part 83.

(4) *Official Patrol* means those persons designated by the Captain of the Port to monitor a vessel safety zone, permit entry into the zone, give legally enforceable orders to persons or vessels within the zone and take other actions authorized by the Captain of the Port. Federal Law Enforcement Officers authorized to enforce this section are designated as the Official Patrol.

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

(6) *Grain-shipment vessel* means any vessel bound for, departing from, or having previously loaded cargo at any of the following waterfront facilities: Columbia Grain in Portland, OR, United Grain Corporation in Vancouver, WA, Temco Irving in Portland, OR, Temco Kalama in Kalama, WA, or Louis Dreyfus Commodities in Portland, OR. This includes any vessel leaving anchor in the Columbia and Willamette Rivers that is bound for or had previously departed from the aforementioned waterfront facilities.

(7) *Grain-shipment assist vessel* means any vessel bound for or departing from a grain-shipment vessel to assist it in navigation during the movement of the grain-shipment vessel in the Columbia and Willamette Rivers and their tributaries. This includes but is not limited to tugs, pilot boats, and launches.

(8) *Oregon Law Enforcement Officer* means any Oregon Peace Officer as defined in Oregon Revised Statutes section 161.015.

(9) *Washington Law Enforcement Officer* means any General Authority Washington Peace Officer, Limited Authority Washington Peace Officer, or Specially Commissioned Washington Peace Officer as defined in Revised Code of Washington section 10.93.020

(b) *Locations.* The following areas are safety zones:

(1) Columbia Grain: All navigable waters of the United States within the Sector Columbia River Captain of the Port Zone enclosed by three lines and the shoreline: Line one starting on the shoreline at 45–38′34″ N/122–46′11″ W then heading 150 yards offshore to 45–38′37″ N/122–46′16″ W then heading up river 380 yards to 45–38′30″ N/122–46′28″ W then heading 150 yards to the shoreline ending at 45–38′27″ N/122–46′24″ W.

(2) United Grain Corporation: All navigable waters of the United States within the Sector Columbia River Captain of the Port Zone enclosed by three lines and the shoreline: Line one starting on the shoreline at 45–37′52″ N/122–41′46″ W then heading 150 yards offshore to 45–37′48″ N/122–41′50″ W then heading up river 470 yards to 45–37′40″ N/122–41′34″ W then heading 175 yards to the shoreline ending at 45–37′44″ N/122–41′29″ W.

(3) Temco Portland: All navigable waters of the United States within the Sector Columbia River Captain of the Port Zone enclosed by three lines and the shoreline: Line one starting on the shoreline at 45–32′10″ N/122–40′34″ W then heading 150 yards offshore to 45–32′09″ N/122–40′39″ W then heading up river 275 yards to 45–32′01″ N/122–40′33″ W then heading 150 yards to the shoreline ending at 45–32′04″ N/122–40′28″ W.

(4) Temco Kalama: All navigable waters of the United States within the Sector Columbia River Captain of the Port Zone enclosed by three lines and the shoreline: Line one starting on the shoreline at 45–59′10″ N/122–50′09″ W then heading 150 yards offshore to 45–59′09″ N/122–50′14″ W then heading up river 385 yards to 45–58′58″ N/122–50′07″ W then heading 150 yards to the shoreline ending at 45–59′00″ N/122–50′01″ W.

(5) Louis Dreyfus Commodities: All navigable waters of the United States

within the Sector Columbia River Captain of the Port Zone enclosed by three lines and the shoreline: Line one starting on the shoreline at 45–31′49″ N/122–40′15″ W then heading 70 yards offshore to 45–31′48″ N/122–40′17″ W then heading up river 300 yards to 45–31′41″ N/122–40′09″ W then heading 100 yards to the shoreline ending at 45–31′43″ N/122–40′06″ W.

(c) *Effective Period.* The safety zones created in this section will be in effect from July 24, 2013 and will be enforced until 90 days from date of publication in the **Federal Register**. They will be activated for enforcement as described in paragraph (d) of this section.

(d) *Enforcement Periods.* The Sector Columbia River Captain of the Port will cause notice of the enforcement of the grain facilities safety zones to be made by all appropriate means to effect the widest publicity among the affected segments of the public as practicable, in accordance with 33 CFR 165.7. Such means of notification may include, but are not limited to, Broadcast Notices to Mariners or Local Notices to Mariners. The Sector Columbia River Captain of the Port will issue a Broadcast Notice to Mariners notifying the public when enforcement of the safety zone is suspended. Upon notice of enforcement by the Sector Columbia River Captain of the Port, the Coast Guard will enforce the safety zone in accordance with rules set out in this section. Upon notice of suspension of enforcement by the Sector Columbia River Captain of the Port, all persons and vessels are authorized to enter, transit, and exit the safety zone, consistent with the Navigation Rules.

(e) *Regulation.* (1) In accordance with the general regulations in § 165.23 of this part, entry into or movement within these zones is prohibited unless authorized by the Sector Columbia River Captain of the Port, the official patrol, or other designated representatives of the Captain of the Port.

(2) To request authorization to enter or operate within the safety zone contact the on-scene official patrol on VHF-FM channel 16 or 13, or the Sector Columbia River Command Center at phone number (503) 861–6211. Authorization will be granted based on the necessity of access and consistent with safe navigation.

(3) Vessels authorized to enter or operate within the safety zone shall operate at the minimum speed necessary to maintain a safe course and shall proceed as directed by the on-scene official patrol. The Navigation Rules shall apply at all times within the safety zone.

(4) Maneuver-restricted vessels. When conditions permit, the on-scene official patrol, or a designated representative of the Captain of the Port at the Sector Columbia River Command Center, should:

(i) Permit vessels constrained by their navigational draft or restricted in their ability to maneuver to enter or operate within the safety zone in order to ensure a safe passage in accordance with the Navigation Rules; and

(ii) Permit commercial vessels anchored in a designated anchorage area to remain at anchor within the safety zone; and

(iii) Permit vessels that must transit via a navigable channel or waterway to enter or operate within the safety zone in order to do so.

(f) *Exemption.* Public vessels as defined in paragraph (a) of this section are exempt from complying with paragraph (e) of this section.

(g) *Enforcement.* Any Coast Guard commissioned, warrant, or petty officer may enforce the rules in this section. In the navigable waters of the United States to which this section applies, when immediate action is required and representatives of the Coast Guard are not present or are not present in sufficient force to provide effective enforcement of this section, any Federal Law Enforcement Officer, Oregon Law Enforcement Officer, or Washington Law Enforcement Officer may enforce the rules contained in this section pursuant to 46 U.S.C. 70118. In addition, the Captain of the Port may be assisted by other federal, state, or local agencies in enforcing this section.

(h) *Waiver.* The Captain of the Port Columbia River may waive any of the requirements of this section for any vessel or class of vessels upon finding that operational conditions or other circumstances are such that application of this section is unnecessary or impractical for the purpose of port safety or environmental safety.

Dated: July 24, 2013.

B.C. Jones,

Captain, U.S. Coast Guard, Captain of the Port, Sector Columbia River.

[FR Doc. 2013–18983 Filed 8–5–13; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2010–0298, FRL–9843–2]

Disapproval of State Implementation Plan; Infrastructure Requirements for the 1997 8-Hour Ozone National Ambient Air Quality Standard; Montana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is disapproving the State Implementation Plan (SIP) submitted by the State of Montana to demonstrate that the SIP meets one of the infrastructure requirements of the Clean Air Act (CAA) for the National Ambient Air Quality Standards (NAAQS) promulgated for ozone on July 18, 1997. The CAA requires that each state, after a new or revised NAAQS is promulgated, review their SIPs to ensure that they meet infrastructure requirements. The State of Montana submitted certifications of their infrastructure SIP for the 1997 ozone NAAQS on November 28, 2007 and December 22, 2009. EPA is disapproving Montana's submissions with respect to the infrastructure element regarding state boards.

DATES: *Effective Date:* This final rule is effective September 5, 2013.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R08–OAR–2010–0298. All documents in the docket are listed on the *www.regulations.gov* Web site. 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 either electronically through *www.regulations.gov* or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Kathy Ayala, Air Program, U.S. Environmental Protection Agency (EPA), Region 8, Mail Code 8P–AR,

1595 Wynkoop Street, Denver, Colorado 80202–1129, (303) 312–6142, *ayala.kathy@epa.gov*.

SUPPLEMENTARY INFORMATION:

Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.

(iii) The initials *NAAQS* mean or refer to National Ambient Air Quality Standards.

(iv) The initials *SIP* mean or refer to State Implementation Plan.

(v) The words *State* or *Montana* mean the State of Montana, unless the context indicates otherwise.

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I. Background

Infrastructure requirements for SIPs are provided in sections 110(a)(1) and (2) of the CAA. Section 110(a)(2) lists the specific infrastructure elements that a SIP must contain or satisfy. The element that is the subject of this action, section 110(a)(2)(E)(ii), is described in detail in our proposal of May 31, 2013 (78 FR 32613). The State of Montana submitted certifications of their infrastructure SIP for the 1997 ozone NAAQS on November 28, 2007 and December 22, 2009. We acted on those submissions, with the exception of element 110(a)(2)(E)(ii), on July 22, 2011 (76 FR 43918).

On May 31, 2013, EPA published a notice of proposed rulemaking (NPR) for the remaining portion of the two Montana submissions. The NPR proposed disapproval of the Montana submissions with respect to infrastructure element 110(a)(2)(E)(ii) regarding requirements for state boards under section 128. The reasons for this disapproval are detailed within our proposal. In summary, the Montana SIP fails to include provisions which meet the explicit legal requirements of section 128.

II. Response to Comments

No comments were received.

III. Final Action

EPA is disapproving Montana's November 28, 2007 and December 22, 2009 submissions for the 1997 ozone NAAQS with respect to infrastructure element 110(a)(2)(E)(ii) regarding requirements for state boards under CAA section 128.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to act on SIP submissions in accordance with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to either approve or disapprove state choices, in accordance with the criteria of the Clean Air Act. Accordingly, this action merely disapproves a state submission that does not meet Federal requirements. This action does not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set for in the EO and does not impose additional requirements beyond those imposed by state law. For these reasons, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 7, 2013. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: July 24, 2013.

Shaun L. McGrath,

Regional Administrator, Region 8.

[FR Doc. 2013–18842 Filed 8–5–13; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 130312235–3658–02]

RIN 0648–BD04

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery Off the Southern Atlantic States; Regulatory Amendment 18

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement Regulatory Amendment 18 to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP) (Regulatory Amendment 18), as prepared and submitted by the South Atlantic Fishery Management Council (South Atlantic Council). This rule updates the annual catch limits (ACLs) for vermilion snapper and red porgy, modifies the vermilion snapper commercial trip limit, and removes the recreational 5-month seasonal closure for vermilion snapper. The purpose of this rule is to help achieve optimum yield (OY) for snapper-grouper resources in accordance with the requirements of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

DATES: This rule is effective September 5, 2013.

ADDRESSES: Electronic copies of Regulatory Amendment 18, which includes an environmental assessment, a Regulatory Flexibility Act, and a regulatory impact review may be obtained from the Southeast Regional Office Web site at *http://sero.nmfs.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Kate Michie, telephone: 727–824–5305, or email: *kate.michie@noaa.gov.*

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery of the South Atlantic, which includes vermilion snapper and red porgy, is managed under the FMP. The FMP was prepared by the South Atlantic Council and is implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Act.

On May 8, 2013, NMFS published a proposed rule for Regulatory Amendment 18 and requested public comment (78 FR 26740). The proposed rule and Regulatory Amendment 18 outline the rationale for the actions contained in this final rule. A summary of the actions implemented by this final rule is provided below.

Management Measures Contained in This Final Rule

This final rule revises the commercial and recreational ACLs for vermilion snapper and red porgy, revises the vermilion snapper commercial trip limit, and removes the recreational closed season for vermilion snapper.

Vermilion Snapper ACLs

A Southeast Data, Assessment, and Review (SEDAR) stock assessment update for South Atlantic vermilion snapper was completed in October 2012 (SEDAR 17 update). The SEDAR 17 update indicates vermilion snapper is not undergoing overfishing and is not overfished. Additionally, the SEDAR 17 update indicates the vermilion snapper biomass exceeds the target equilibrium biomass. This means that the acceptable biological catch (ABC) level and the ACL may be increased to allow for harvest of that excess biomass without jeopardizing the sustainability of the stock. The Comprehensive ACL Amendment (77 FR 15916, March 16, 2012) established an ABC control rule for assessed snapper-grouper species. The Comprehensive ACL Amendment established an ABC for vermilion snapper of 1,109,000 lb (503,034 kg), round weight. Using the ABC control rule and the results of the SEDAR 17 update, the South Atlantic Council's Scientific and Statistical Committee (SSC) recommended increasing the ABC for vermilion snapper to 1,372,000 lb (622,329 kg), round weight, for 2013; then decreasing the ABC to 1,312,000 lb (595,113 kg), round weight, for 2014; 1,289,000 lb (584,681 kg), round weight, for 2015; and 1,269,000 lb (575,609 kg), round weight, for 2016 and subsequent years. The ABC is gradually decreased over 3 years to allow for the harvest of excess biomass and is then held at a constant level when the population size reaches the equilibrium target level. The South Atlantic Council accepted the SSC's recommendation.

This final rule increases the vermilion snapper ACLs based on the revised ABC values. Amendment 16 to the FMP (Amendment 16) established sector allocations for vermilion snapper of 68 percent for the commercial sector and 32 percent for the recreational sector (74 FR 30964, June 29, 2009). Additionally, Amendment 16 established two commercial fishing seasons for vermilion snapper. The first season is January through June, and the second is July through December. Using the SSC's ABC recommendation, the ACL formula established in the Comprehensive ACL Amendment where ABC = ACL = OY, and the established allocation formula, this rule revises the commercial ACLs in round weight as follows: 932,960 lb (423,200 kg) for 2013; 892,160 lb (404,700 kg) for 2014; 876,520 lb (397,600 kg) for 2015; and 862,920 lb (391,400 kg) for 2016 and subsequent fishing years. The commercial ACLs are further divided equally between the first and second commercial fishing seasons, resulting in commercial ACLs for each season of 466,480 lb (211,592 kg), round weight (or 420,252 lb (190,623 kg), gutted weight) for 2013; 446,080 lb (202,338 kg), round weight (or 401,874 lb (182,287 kg), gutted weight) for 2014; 438,260 lb (198,791 kg), round weight (or 394,829 lb (179,091 kg), gutted weight) for 2015; and 431,460 lb (195,707 kg), round weight (or 388,703 lb (176,313 kg), gutted weight) for 2016 and subsequent fishing years. Any unused portion of the commercial ACL from the first part of the fishing year will be added to the commercial ACL for the second part of the fishing year.

The recreational ACLs are set at: 395,532 lb (179,410 kg), gutted weight, 439,040 lb (199,145 kg), round weight, for 2013; 378,234 lb (171,564 kg), gutted weight, 419,840 lb (190,436 kg), round weight, for 2014; 371,604 lb (168,557 kg), gutted weight, 412,480 lb (187,098 kg), round weight, for 2015; and 365,838 lb (165,941 kg), gutted weight, 406,080 lb (184,195 kg), round weight, for 2016 and subsequent fishing years.

Vermilion Snapper Commercial Trip Limit

In the past, in-season closures have been required because the commercial ACLs have been harvested before the end of each spilt season. Increasing the vermilion snapper ACLs allows for increased harvest and increases the probability the commercial split seasons will be extended. However, even with a larger commercial ACL, in-season commercial closures are still expected. Therefore, this final rule reduces the commercial trip limit for vermilion snapper from 1,500 lb (680 kg), gutted weight, to 1,000 lb (454 kg), gutted weight (or 1,100 lb (503 kg), round weight). This rule also reduces the commercial trip limit to 500 lb (227 kg), gutted weight (or 555 lb (252 kg), round weight) after 75 percent of the commercial ACL is reached or projected to be reached. Reducing the commercial trip limit and implementing a trip limit step down should help control the rate of commercial harvest and reduce the

probability that in-season closures are implemented during either split season.

Vermilion Snapper Recreational Seasonal Closure

This rule removes the 5-month November through March recreational seasonal closure for vermilion snapper that was established in Amendment 16. This seasonal closure was implemented to address overfishing of the species (74 FR 30964, June 29, 2009). However, the SEDAR 17 update indicated that vermilion snapper is not overfished and is no longer undergoing overfishing. Further, an analysis conducted by NMFS indicates the recreational sector will likely harvest between 64 percent and 75 percent of the 2013 recreational ACL. Although the ACL will decrease slightly each year for the next several years, it is unlikely that the recreational vermilion snapper ACL will be met or exceeded in any given year in the near future. Amendment 17B to the FMP implemented recreational AMs for vermilion snapper that if the ACL is exceeded, any ACL overage is mitigated by reducing the recreational ACL for the following fishing year (75 FR 82280, December 30, 2010). Thus, no adverse biological impacts to the vermilion snapper resource are anticipated as a result of removing the seasonal closure.

In addition, in early 2013, the Southeast Fisheries Science Center (SEFSC) implemented a new electronic reporting system for headboats operating in the South Atlantic and Gulf of Mexico. The Gulf of Mexico Fishery Management Council and South Atlantic Council are currently developing amendments that would require federally permitted headboats to report all landings electronically at an increased frequency to the SEFSC. The SEFSC is also developing a similar program for charterboats. These improvements to the recreational harvest monitoring program are expected to increase the accuracy and timeliness of landings information, and help reduce the likelihood of recreational ACL overages.

Red Porgy ACLs

A SEDAR stock assessment update was completed for red porgy in October 2012 (2012 SEDAR 1 update). The objective of the 2012 SEDAR 1 update was to update the 2002 SEDAR 1 benchmark assessment and the 2006 SEDAR 1 update for red porgy. The 2012 SEDAR 1 update indicates the red porgy stock is not undergoing overfishing but is still overfished; however, the 2012 SEDAR 1 update also indicates the stock is no longer rebuilding. All rebuilding projections performed in the 2012 SEDAR 1 update indicate that red porgy will not be rebuilt by the end of its rebuilding timeframe (2018). Therefore, the South Atlantic Council has requested a new benchmark assessment for the stock to be completed in 2014. After the new benchmark assessment is conducted, the South Atlantic Council may reconsider the rebuilding plan and modifications to management measures as necessary.

Based on the outcome of the 2012 SEDAR 1 update, and the ABC control rule established in the Comprehensive ACL Amendment, the SSC recommended a new ABC for red porgy that is lower than the current ABC of 395,304 lb (179,307 kg), round weight (landed catch). The South Atlantic Council accepted the SSC's recommendation and, therefore, Regulatory Amendment 18 implements the following ABCs: For 2013, the ABC for red porgy decreases to 306,000 lb (138,799 kg), round weight; for 2014, the ABC increases to 309,000 lb (140,160 kg), round weight; and for 2015 and subsequent fishing years, the ABC increases to 328,000 lb (148,778 kg), round weight. These ABC values are based on the yield at 75 percent of F_{MSY} (the fishing mortality at MSY).

Based on these new ABCs, this final rule reduces the commercial and recreational ACLs for red porgy. Currently, the red porgy stock ACL is equal to the ABC and is divided equally between the commercial and recreational sectors according to the formula established in the Comprehensive ACL Amendment. Thus, this rule sets the commercial and recreational ACLs for red porgy, at 153,000 lb (69,400 kg), round weight (or 147,115 lb (66,730 kg), gutted weight) for 2013; 154,500 lb (70,080 kg), round weight (or 148,558 lb (67,385 kg), gutted weight) for 2014; and 164,000 lb (74,389 kg), round weight, (or 157,692 lb (71,528 kg), gutted weight) for 2015 and subsequent fishing years.

Additional Management Measures Contained in Regulatory Amendment 18

Regulatory Amendment 18 also includes several actions that are not contained in this final rule. Based on the new ABCs, Regulatory Amendment 18 specifies a new MSY and OY for vermilion snapper. Using the SEDAR 17 update results, the values for MSY and OY are updated to incorporate the most recent harvest information for the stock. The vermilion snapper MSY value is revised to 1,563,000 lb (708,965 kg), round weight. The vermilion snapper OY values are revised to 1,372,000 lb (622,329 kg), round weight for 2013; 1,312,000 lb (595,113 kg), round weight for 2014; 1,289,000 lb (584,681 kg), round weight for 2015; and 1,269,000 lb (575,609 kg), round weight for 2016 and subsequent fishing years. Regulatory Amendment 18 also revises the OY to equal the ABC based on the SEDAR 17 update.

Additionally, Regulatory Amendment 18 modifies the MSY and OY values for red porgy according to the new ABCs. The red porgy MSY value is revised to 834,000 lb (378,296 kg), round weight. The red porgy OY values are revised to 306,000 lb (138,799 kg), round weight for 2013; 309,000 lb (140,160 kg), round weight for 2014; and 328,000 lb (148,778 kg), round weight for 2015 and subsequent fishing years. The OY for red porgy is set equal to the ABC and the ACL as specified in the ACL formula established in the Comprehensive ACL Amendment. Regulatory Amendment 18 also updates the recreational ACT for red porgy based on the revised ABC using the ACT control rule established in the Comprehensive ACL Amendment. However, the recreational ACT is not included in the regulatory text, because it is a performance measure and not an actual limit on harvest.

Comments and Responses

NMFS received six comment submissions on the proposed rule, which included five letters from individuals and one letter from a Federal agency. One of the individual submissions commented on issues beyond the scope of those addressed in this rule. The Federal agency stated that it had no comment. Three of the comments support the actions taken in this rule. For the reasons explained above, NMFS agrees with the comments that support the removal of the recreational 5-month seasonal closure for vermilion snapper, the increase in the vermilion snapper ACL, and reduction of the vermilion snapper commercial trip limit. The comments that oppose one or more of the management measures in Regulatory Amendment 18 and the proposed rule are summarized and responded to below.

Comment 1: The red porgy ACL should not be reduced.

Response: NMFS disagrees that it is unnecessary to reduce the ACL for red porgy. Red porgy is currently in the 13th year of an 18-year rebuilding plan that was established in 2000. In 2006, an update assessment indicated that red porgy was no longer undergoing overfishing and was rebuilding, but the stock remained overfished. In response to this determination, the South Atlantic

Council developed a constant fishing mortality rate rebuilding strategy for red porgy and specified a 395,304-lb (179,307-kg), round weight, total allowable catch. In 2012, another update assessment also determined that red porgy was not undergoing overfishing but was overfished. The update also indicated that rebuilding is not occurring as expected due to poor recruitment and that the red porgy stock will not be rebuilt by the end of the rebuilding period, even in the absence of fishing mortality. Therefore, the South Atlantic Council requested a new SEDAR benchmark stock assessment for 2014. Until then, the SSC recommended, and the Council set, harvest levels for red porgy based on the yield at 75 percent of F_{MSY}. This results in lower ACLs but is necessary to ensure that fishing mortality remains less than F_{MSY} and will provide greater opportunity for the stock to rebuild until the Council can review the new benchmark assessment.

Comment 2: The fishing seasons for all snapper-grouper species should be opened simultaneously and then closed as each stock meets its respective ACL.

Response: The only snapper grouper-species considered in Regulatory Amendment 18 were vermilion snapper and red porgy, and modifying the fishing season for red porgy was not addressed in the amendment. Regulatory Amendment 18 did include alternatives for various vermilion snapper fishing seasons, including establishing concurrent black sea bass and vermilion snapper fishing season openings to provide additional opportunities for harvest and to potentially reduce any derby fishing conditions (the race to catch fish). However, the South Atlantic Council wanted to consider additional alternatives for vermilion snapper fishing seasons and decided to address those in a separate regulatory amendment to avoid delaying the increase in the vermilion snapper ACL.

Classification

The Regional Administrator, Southeast Region, NMFS has determined that this final rule is necessary for the conservation and management of the species within Regulatory Amendment 18 and is consistent with the FMP, the Magnuson-Stevens Act, and other applicable law.

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

A FRFA was prepared for this action. The FRFA incorporates the IRFA, a summary of the significant economic issues raised by public comment, NMFS' responses to those comments, and a summary of the analyses completed to support the action. The FRFA follows.

No public comments specific to the IRFA were received and, therefore, no public comments are addressed in this FRFA. No changes in the final rule were made in response to public comment.

On June 20, 2013, the Small Business Administration (SBA) issued a final rule revising the small business size standards for several industries effective July 22, 2013 (78 FR 37398). The rule increased the size standard for Finfish Fishing from $4.0 to $19.0 million, Shellfish Fishing from $4.0 to $5.0 million, and Other Marine Fishing from $4.0 to $7.0 million. Pursuant to the Regulatory Flexibility Act, and prior to SBA's June 20, 2013, final rule, an initial regulatory flexibility analysis was developed for this action using SBA's former size standards. Subsequent to the June 20, 2013 rule, NMFS has reviewed the final regulatory flexibility analysis (FRFA) prepared for this action in light of the new size standards. Under the former, lower size standards, all entities subject to this action were considered small entities, thus they all would continue to be considered small under the new standards. NMFS has determined that the new size standards do not affect the analyses prepared for this action.

NMFS agrees that the South Atlantic Council's choice of preferred alternatives would best achieve the South Atlantic Council's objectives while minimizing, to the extent practicable, the adverse effects on fishers, support industries, and associated communities. The preamble to this final rule provides a statement and need for, and objectives of, this rule.

The Magnuson-Stevens Act provides the statutory basis for this rule. No duplicative, overlapping, or conflicting Federal rules have been identified. In addition, no new reporting, record-keeping, or other compliance requirements are introduced by this rule.

NMFS expects this final rule to directly affect commercial fishermen and for-hire vessel operators in the South Atlantic snapper-grouper fishery. The Small Business Administration established small entity size criteria for all major industry sectors in the U.S., including fish harvesters. A business involved in fish harvesting is classified as a small business if independently owned and operated, is not dominant in its field of operation (including its affiliates), and its combined annual receipts are not in excess of $19.0 million (NAICS code 114111, finfish fishing) for all of its affiliated operations worldwide. For for-hire vessels, all qualifiers apply except that the annual receipts threshold is $7.0 million (NAICS code 713990, recreational industries).

From 2007–2011, an annual average of 249 vessels with valid Federal permits to operate in the commercial snapper-grouper fishery landed at least 1 lb (0.4 kg) of vermilion snapper. These vessels generated dockside revenues of approximately $7.5 million (2011 dollars) from all South Atlantic species caught in the same trips as vermilion snapper, of which $3.1 million (2011 dollars) were from vermilion snapper. Each vessel, therefore, generated an average of approximately $30,000 in gross revenues, of which $12,000 were from vermilion snapper. For the same period, an annual average of 190 vessels with valid Federal permits to operate in the commercial snapper-grouper fishery landed at least 1 lb (0.4 kg) of red porgy. These vessels generated dockside revenues of approximately $6.2 million (2011 dollars) from all species caught in the same trips as red porgy, of which $226,000 (2011 dollars) were from red porgy. Each vessel, therefore, generated an average of approximately $32,000 in gross revenues, of which $1,000 were from red porgy. Commercial vessels that operate in the vermilion snapper or red porgy components of the snapper-grouper fishery may also operate in other fisheries, the revenues of which are not reflected in these totals. Based on revenue information, all commercial vessels affected by the rule can be considered small entities.

From 2005–2010, an annual average of 1,985 vessels had valid Federal permits to operate in the for-hire component of the recreational sector of the snapper-grouper fishery. As of January 22, 2013, 1,462 vessels held South Atlantic for-hire snapper-grouper Federal permits, and about 75 of these vessels are estimated to have operated as headboats in 2013. The for-hire fleet consists of charter boats, which charge a fee on a vessel basis, and headboats, which charge a fee on an individual angler (head) basis. Average annual revenues (2011 dollars) per vessel for charter boats are estimated to be $126,032 for Florida vessels, $53,443 for Georgia vessels, $100,823 for South Carolina vessels, and $101,959 for North Carolina vessels. For headboats, the corresponding estimates are $209,507 for Florida vessels and $153,848 for vessels in the other South Atlantic states. For state headboat estimates other than Florida, aggregated economic information is provided because the

headboat sample sizes were small and providing more detailed revenue estimate information on a state-by-state basis could disclose sensitive financial information. Based on these average revenue figures, all for-hire operations that would be affected by the rule can be considered small entities.

NMFS expects the final rule to directly affect all federally permitted commercial vessels harvesting vermilion snapper or red porgy and for-hire vessels that operate in the South Atlantic snapper-grouper fishery. All directly affected entities have been determined, for the purpose of this analysis, to be small entities. Therefore, NMFS determines that this final rule will affect a substantial number of small entities.

Because NMFS determines that all entities expected to be affected by the actions in this final rule are small entities, the issue of disproportional effects on small versus large entities does not arise in the present case.

The vermilion snapper commercial and recreational ACLs for 2013 through 2016, and subsequent fishing years, will be increased relative to the 2012 ACL values. This action will likely provide the snapper-grouper commercial sector a longer fishing season that will result in higher industry revenues and possibly profits to commercial vessels. Relative to the 2012 vermilion snapper commercial ACL, the commercial ACL increases will generate additional ex-vessel revenues to commercial vessels. Based on past ex-vessel data applied to the increased ACLs, these additional revenues will be about $817,974 (2011 dollars) in 2013, and as the commercial ACL decreases to its lowest level in the 2016 fishing year, and subsequent years, the additional revenues will also be reduced to about $586,000 (2011 dollars).

The possibility of increased profits for commercial vessels from an increase in revenues will have to be balanced with the reduced vermilion snapper commercial trip limit. The trip limit, in conjunction with the increased commercial ACLs, is expected to extend the first commercial season by approximately 3½ weeks beyond the 2012 closure date, and the second season by approximately 3 weeks beyond the 2012 closure date. Before reaching 75 percent of the commercial ACL, the trip limit will benefit those who presently are harvesting less than 1,000 lb (454 kg), gutted weight, per trip, because it will allow them to continue to harvest that same amount per trip for an extended period and therefore generate more revenues and likely more profits for the entire fishing year. However, the trip limit will effectively increase the fishing cost per harvested fish of those vessels already harvesting more than 1,000 lb (454 kg), gutted weight, per trip, although these fishermen could still take advantage of an extended season. A similar situation with respect to those catching above or below the trip limit will occur once the trip limit is reduced to 500 lb (227 kg), gutted weight. If the extended season brings in relatively higher ex-vessel prices, those not adversely affected by the commercial trip limit will very likely experience profit increases and those adversely affected by the trip limit will not necessarily experience profit reductions. Given this condition, it appears that the net effects on vessel profits will be positive. However, more vessels will be adversely affected once the trip limit of 500 lb (227 kg), gutted weight, takes effect. This trip limit could result in greater profit reductions to adversely affected vessels. The overall net effects of the commercial ACL increases and commercial trip limit reductions on vessel profits cannot be ascertained.

In principle, the increase in the vermilion snapper recreational ACL will benefit the for-hire vessels, but this result is highly dependent on whether the seasonal closure is eliminated. In recent years, the recreational sector has not fully reached its ACL, and this could be a result of the November through March closure of the vermilion snapper recreational sector. Eliminating this seasonal closure will very likely increase the trips of for-hire vessels targeting vermilion snapper so that net operating revenues, or profits, of these vessels will also likely increase. An in-season recreational sector quota closure, however, will constrain any increases in the profits of for-hire vessels, but projections indicate that the recreational ACLs are unlikely to be reached during the fishing year, at least in the short-term. It is, therefore, likely that the recreational ACL increases, in conjunction with the elimination of the seasonal closure, will result in profit increases for the for-hire vessels. Assuming that the recreational ACL is not reached, and therefore no in-season AM closure is triggered, eliminating the recreational seasonal closure for vermilion snapper will increase the net operating revenues of charter boats by approximately $47,000 (2011 dollars) annually, and those of headboats by approximately $158,000 (2011 dollars) annually.

The red porgy commercial and recreational ACLs for 2013 through 2015 will be reduced from the current ACL, which would, in principle, negatively affect both commercial and for-hire vessels. Since increasing the commercial ACL in 2009 (74 FR 58902, November 16, 2009), the red porgy commercial sector has exceeded its ACL only once (in 2011), and in other years red porgy commercial landings were substantially lower than the sector's ACL. Based on a running average of commercial landings as a proxy for future landings, the red porgy commercial ACLs for 2013 through 2015 are unlikely to be exceeded and therefore will not trigger an in-season closure of the commercial sector. Thus, unless there is a significant increase in commercial landings through a substantial increase in the stock size or fishing effort, the reduced commercial ACLs will likely not reduce the landings, revenues, and profits of commercial vessels. If the commercial ACLs are reached but not exceeded, commercial vessels could generate additional revenues from the commercial ACLs. Relative to the landings and revenues in 2012 and assuming the commercial ACLs are reached, additional revenues (2011 dollars) to commercial vessels will be approximately $259,000 in 2013, $261,000 in 2014, and $277,000 in 2015, and thereafter.

Annually from 2007 through 2011, recreational landings of red porgy have remained at very low levels, averaging approximately 110,000 lb (49,941 kg), round weight. In 2012, total recreational landings of approximately 137,000 lb (62,199 kg), round weight, were less than 30 percent of the recreational sector's ACL. Therefore, the reduced recreational ACL will most likely have no effects on the profits of for-hire vessels, at least in the short-term. The long-term effects on profits depend on whether for-hire vessel trips targeting red porgy substantially increase. If such an increase in for-hire vessel trips ever occurs, for-hire profits will also increase.

The following discussion analyzes the alternatives that were not preferred by the South Atlantic Council, or alternatives for which the South Atlantic Council chose the no action alternative.

Two alternatives, including the preferred alternative, were considered for revising the vermilion snapper commercial and recreational ACLs. The only other alternative is the no action alternative, which would maintain the ACLs at a lower level than the preferred alternative. Selecting the no action alternative would lead to forgone profit increases for commercial and for-hire vessels that would otherwise be realized under the preferred alternative. The no

action alternative was not selected because a new stock assessment update was recently completed for vermilion snapper and thus it would not have been based on the best available science.

Three alternatives, including the preferred alternative, were considered for revising the commercial trip limit for vermilion snapper. The first alternative, the no action alternative, would maintain the trip limit at 1,500 lb (680 kg), gutted weight, which would be higher than that in the preferred alternative. Although, in principle, this alternative would have no effects on commercial vessel profits, there would be a higher probability of an ever-shortening commercial season, thereby adversely affecting the profits of many commercial vessels. The second alternative is a trip limit of 1,000 lb (454 kg), gutted weight, the same as the preferred alternative, but without the step down to a 500-lb (227-kg), gutted weight, trip limit when 75 percent of the commercial ACL has been met or is projected to be met. This alternative would result in shorter first and second commercial fishing seasons than the preferred alternative. As with the preferred alternative, it would increase the cost per landed fish of those already harvesting above the trip limit, although those vessels could increase their overall revenues by taking more fishing trips during the extended commercial season. The net effect on their profits would be positive only if ex-vessel prices substantially improved during the extended season. However, those vessels currently landing below the commercial trip limit would likely experience increased revenues and likely profits for the entire fishing year due to the extended season. As with the preferred alternative, this alternative's overall net effects on the profits of commercial vessels cannot be ascertained. It is noted that this alternative would adversely affect fewer vessels than the preferred alternative. However, considering that the commercial sector has been reaching its ACL in recent years, this alternative would have a higher probability of allowing overages to occur than the preferred alternative. Overages of the commercial ACL could lead to overfishing of vermilion snapper which would necessitate more restrictive measures that could, in turn, reduce the future revenues and profits of commercial vessels. As discussed in the amendment, the alternatives, other than the preferred alternative, were not selected because they did not best meet the objectives of Regulatory Amendment 18.

Two alternatives, including the preferred alternative, were considered for modifying the recreational seasonal closure for vermilion snapper. The only other alternative is the no action alternative, which would maintain the November through March closure of the recreational sector for vermilion snapper. This alternative would lead to forgone for-hire vessel profits that would otherwise be realized with the preferred alternative. As discussed in the amendment, the alternatives, other than the preferred alternative, were not selected because they did not best meet the objectives of Regulatory Amendment 18.

Three alternatives, including the preferred alternative, were considered for revising the commercial and recreational ACLs for red porgy. The first alternative, the no action alternative, would retain the current ACL, which would be higher than the ACLs under the preferred alternative. Although this alternative would, in principle, provide for better profitability prospects for both the commercial and for-hire vessels, its effects in the short-term would be equivalent to those of the preferred alternative because, based on historical landings through 2012, the commercial and recreational landings would likely be less than the commercial and recreational ACLs of the preferred alternative. The second alternative is similar to the preferred alternative, except that it would set the sector ACLs for 2013 through 2018, and subsequent years until modified. The effects of this alternative on commercial and for-hire vessels would be identical to those of the preferred alternative for the 2013 through 2015 fishing years. In the 2016 through 2018 fishing years, this alternative would provide for increased sector ACLs and thus, in principle, would provide commercial vessels a better environment for generating higher revenues and profits. Assuming the commercial sector fully reached its annual ACL in 2016 through 2018, this alternative would allow for additional revenues of approximately $127,000 (2011 dollars) over the preferred alternative for the 3-year period (2016–2018). However, using a running average of commercial landings through 2012 as a proxy for future landings, the commercial ACLs under this alternative would likely not be reached. Therefore, the effects of this alternative on commercial vessels are virtually identical to those of the preferred alternative for the 3-year period (2016–2018). This alternative and the preferred alternative would most likely have identical effects on for-hire vessels in 2016 through 2018. Recreational landings of red porgy have stayed at very low levels, making it unlikely that the recreational ACLs under this alternative, or the preferred alternative, would be reached. The South Atlantic Council will receive a new benchmark stock assessment for red porgy in 2014. As described in Regulatory Amendment 18, the assessment results will be considered by the South Atlantic Council in 2015, and any necessary changes to the ACLs or other management measures will be developed during 2015 with possible implementation in 2016. Hence the ACLs for 2016, and beyond, may be revised based on the best scientific information available at that time. The non-preferred alternatives were not selected because they did not best meet the objectives of Regulatory Amendment 18. Additionally, the no action alternative was not selected based on the results of the recent stock assessment and the need to use the best available science for deciding upon the ACL alternatives.

The South Atlantic Council also considered two alternatives to modify the commercial fishing season for vermilion snapper, from which they selected the no action alternative. The no action alternative would maintain the split of the commercial fishing year, with January through June as the first season and July through December as the second season. This alternative would split the commercial ACL between the two seasons.

The second alternative consists of two sub-alternatives. The first sub-alternative would split the commercial fishing year into January through May as the first season and June through December as the second season. The second sub-alternative would split the commercial fishing year into January through April as the first season and May through December as the second season. In both sub-alternatives, the commercial ACL would be split equally between the two seasons.

The South Atlantic Council noted the complexity of modifying the commercial fishing season for vermilion snapper, and decided to move it to Regulatory Amendment 14, currently under development, for consideration with possible additional alternatives. The timing of the opening and closing of the season for vermilion snapper can impact the seasons for other snapper-grouper species, particularly the shallow-water grouper complex and black sea bass. The South Atlantic Council decided that a different amendment that would jointly consider the fishing seasons for vermilion

snapper and black sea bass was the better approach. As a result of that decision, completion of Regulatory Amendment 18 would not be delayed by the consideration of a broader set of actions within the amendment, thus allowing the realization of more socio-economic benefits from increased ACLs for vermilion snapper.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as small entity compliance guides. As part of the rulemaking process, NMFS prepared a fishery bulletin, which also serves as a small entity compliance guide. The fishery bulletin will be sent to all interested parties.

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Red porgy, Snapper-Grouper, South Atlantic, Vermilion snapper.

Dated: August 1, 2013.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

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

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

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

§ 622.183 [Amended]

■ 2. In § 622.183, paragraph (b)(4) is removed and reserved.

■ 3. In § 622.190, the introductory text of paragraph (a), and paragraphs (a)(4)(i), (a)(4)(ii), and (a)(6) are revised to read as follows:

§ 622.190 Quotas.

* * * * *

(a) *South Atlantic snapper-grouper, excluding wreckfish.* The quotas apply to persons who are not subject to the bag limits. (See § 622.11 for applicability of the bag limits.) The quotas are in gutted weight, that is eviscerated but otherwise whole, except for the quotas in paragraphs (a)(4), (a)(5), and (a)(6) of this section which are in both gutted weight and round weight.

* * * * *

(4) * * *

(i) For the period January through June each year.

(A) For the 2013 fishing year—420,252 lb (190,623 kg), gutted weight; 466,480 lb (211,592 kg), round weight.

(B) For the 2014 fishing year—401,874 lb (182,287 kg), gutted weight; 446,080 lb (202,338 kg), round weight.

(C) For the 2015 fishing year—394,829 lb (179,091 kg), gutted weight; 438,260 lb (198,791 kg), round weight.

(D) For the 2016 and subsequent fishing years—388,703 lb (176,313 kg), gutted weight; 431,460 lb (195,707 kg), round weight.

(ii) For the period July through December each year.

(A) For the 2013 fishing year—420,252 lb (190,623 kg), gutted weight; 466,480 lb (211,592 kg), round weight.

(B) For the 2014 fishing year—401,874 lb (182,287 kg), gutted weight; 446,080 lb (202,338 kg), round weight.

(C) For the 2015 fishing year—394,829 lb (179,091 kg), gutted weight; 438,260 lb (198,791 kg), round weight.

(D) For the 2016 and subsequent fishing years—388,703 lb (176,313 kg), gutted weight; 431,460 lb (195,707 kg), round weight.

* * * * *

(6) *Red porgy*—(i) For the 2013 fishing year—147,115 lb (66,730 kg), gutted weight; 153,000 lb (69,400 kg), round weight.

(ii) For the 2014 fishing year—148,558 lb (67,385 kg), gutted weight; 154,500 lb (70,080 kg), round weight.

(iii) For the 2015 and subsequent fishing years—157,692 lb (71,528 kg), gutted weight; 164,000 lb (74,389 kg), round weight.

* * * * *

■ 4. In § 622.191, paragraph (a)(6) is revised to read as follows:

§ 622.191 Commercial trip limits.

* * * * *

(a) * * *

(6) *Vermilion snapper.* (i) Until 75 percent of either quota specified in § 622.190(a)(4)(i) or (ii) is reached or projected to be reached, 1,000 lb (454 kg), gutted weight; 1,110 lb (503 kg), round weight.

(ii) After 75 percent of either quota specified in § 622.190(a)(4)(i) or (ii) is reached or projected to be reached, 500 lb (227 kg), gutted weight; 555 lb (252 kg), round weight. When the conditions in this paragraph (a)(6)(ii) have been reached, the Assistant Administrator will implement this trip limit change by filing a notification with the Office of the Federal Register.

(iii) See § 622.190(c)(1) for the limitations regarding vermilion snapper after either quota specified in § 622.190(a)(4)(i) or (ii) is reached or projected to be reached.

* * * * *

■ 5. In § 622.193, paragraphs (f) and (v) are revised to read as follows:

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

* * * * *

(f) *Vermilion snapper*—(1) *Commercial sector.* If commercial landings, as estimated by the SRD, reach or are projected to reach the applicable commercial ACL (commercial quota) specified in § 622.190(a)(4)(i) or (ii), the AA will file a notification with the Office of the Federal Register to close the commercial sector for that portion of the fishing year applicable to the respective quota.

(2) *Recreational sector.* (i) If recreational landings, as estimated by the SRD, reach or are projected to reach the applicable recreational ACL specified in paragraph (f)(2)(iv) of this section and vermilion snapper are overfished, based on the most recent Status of U.S. Fisheries Report to Congress, the AA will file a notification with the Office of the Federal Register to close the recreational sector for vermilion snapper for the remainder of the fishing year. On and after the effective date of such notification, the bag and possession limit of vermilion snapper in or from the South Atlantic EEZ is zero. This bag and possession limit also applies in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in state or Federal waters.

(ii) Without regard to overfished status, if vermilion snapper recreational landings exceed the applicable recreational ACL, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year, to reduce the ACL for that fishing year by the amount of the overage.

(iii) Recreational landings will be evaluated relative to the ACL based on a moving multi-year average of landings, as described in the FMP.

(iv) The recreational ACL for vermilion snapper is 395,532 lb (179,410 kg), gutted weight, 439,040 lb (199,145 kg), round weight, for 2013; 378,234 lb (171,564 kg), gutted weight, 419,840 lb (190,436 kg), round weight, for 2014; 371,604 lb (168,557 kg), gutted

weight, 412,480 lb (187,098 kg), round weight, for 2015; and 365,838 lb (165,941 kg), gutted weight, 406,080 lb (184,195 kg), round weight, for 2016 and subsequent fishing years.

* * * * *

(v) *Red porgy*—(1) *Commercial sector.* (i) If commercial landings for red porgy, as estimated by the SRD, reach or are projected to reach the applicable commercial ACL (commercial quota) specified in § 622.190(a)(6), the AA will file a notification with the Office of the Federal Register to close the commercial sector for the remainder of the fishing year.

(ii) If commercial landings exceed the applicable commercial ACL, and red porgy are overfished, based on the most recent Status of U.S. Fisheries Report to Congress, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the fishing year to reduce the ACL for that following year by the amount of the overage in the prior fishing year.

(2) *Recreational sector.* (i) If recreational landings for red porgy, as estimated by the SRD, exceed the applicable recreational ACL specified in paragraph (v)(2)(ii) of this section then during the following fishing year, recreational landings will be monitored for a persistence in increased landings and, if necessary, the AA will file a notification with the Office of the Federal Register, to reduce the length of the following recreational fishing season by the amount necessary to ensure recreational landings do not exceed the recreational ACL in the following fishing year. However, the length of the recreational fishing season will not be reduced during the following fishing year if recreational landings do not exceed the applicable ACL or if the RA determines, using the best scientific information available, that a reduction in the length of the following fishing season is unnecessary.

(ii) The recreational ACL for red porgy is 147,115 lb (66,730 kg), gutted weight, 153,000 lb (69,400 kg), round weight, for 2013; 148,558 lb (67,385 kg), gutted weight, 154,500 lb (70,080 kg), round weight, for 2014; 157,692 lb (71,528 kg), gutted weight, 164,000 lb (74,389 kg), round weight, for 2015 and subsequent fishing years.

* * * * *

[FR Doc. 2013–18984 Filed 8–5–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 121009528–2729–02]

RIN 0648–XC749

Fisheries of the Northeastern United States; Scup Fishery; Adjustment to the 2013 Winter II Quota

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

ACTION: Temporary rule; inseason adjustment.

SUMMARY: NMFS adjusts the 2013 Winter II commercial scup quota. This action complies with Framework Adjustment 3 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan, which established a process to allow the rollover of unused commercial scup quota from the Winter I period to the Winter II period.

DATES: Effective November 1, 2013, through December 31, 2013.

FOR FURTHER INFORMATION CONTACT: Carly Bari, Fishery Management Specialist, (978) 281–9224.

SUPPLEMENTARY INFORMATION: NMFS published a final rule in the **Federal Register** on November 3, 2003 (68 FR 62250), implementing a process, for years in which the full Winter I commercial scup quota is not harvested, to allow unused quota from the Winter I period (January 1 through April 30) to be added to the quota for the Winter II period (November 1 through December 31), and to allow adjustment of the commercial possession limit for the Winter II period commensurate with the amount of quota rolled over from the Winter I period.

For 2013, the initial Winter II quota is 3,750,249 lb (1,701 mt), and the best available landings information indicates that 3,182,749 lb (1,444 mt) remain of the Winter I quota of 10,613,157 lb (4,814 mt). Consistent with the intent of Framework 3, the full amount of unused 2013 Winter I quota is transferred to Winter II, resulting in a revised 2013 Winter II quota of 6,932,998 lb (3,145 mt). Because the amount transferred is greater than 2,000,000 lb (907 mt), the possession limit per trip will increase to 8,000 lb (3,629 kg) during the Winter II quota period, consistent with the final rule Winter I to Winter II possession limit increase table published in the 2013 final scup specifications Table 7 (77 FR 76942, December 31, 2012).

Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

The Assistant Administrator for Fisheries, NOAA (AA), has determined good cause exists pursuant to 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment on this in-season adjustment because it is impracticable and contrary to the public interest. The landings data upon which this action is based are not available on a real-time basis and, consequently, were compiled only a short time before the determination was made that this action is warranted. If implementation of this in-season action is delayed to solicit prior public comment, the objective of the fishery management plan to achieve the optimum yield from the fishery could be compromised; deteriorating weather conditions during the later part of the fishery year will reduce fishing effort and could result in the annual quota from being fully harvested. This would conflict with the agency's legal obligation under the Magnuson-Stevens Fishery Conservation and Management Act to achieve the optimum yield from a fishery on a continuing basis, resulting in a negative economic impact on vessels permitted to fish in this fishery.

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

Dated: July 31, 2013.

Kelly Denit,

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

[FR Doc. 2013–18974 Filed 8–5–13; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 78, No. 151
Tuesday, August 6, 2013

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–2013–0575; Directorate Identifier 2013–NE–21–AD]

RIN 2120–AA64

Airworthiness Directives; Turbomeca S.A. Turboshaft Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Turbomeca S.A. ASTAZOU XIV B and XIV H engines. This proposed AD was prompted by reports of cracks on the 2nd-stage turbine disc. This proposed AD would require replacement of the 2nd-stage turbine disc. We are proposing this AD to prevent disc cracking, uncontained 2nd-stage turbine blade release, damage to the engine, and damage to the helicopter.

DATES: We must receive comments on this proposed AD by October 7, 2013.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

For service information identified in this proposed AD, contact Turbomeca, S.A., 40220 Tarnos, France; phone: 33 (0)5 59 74 40 00; telex: 570 042; fax: 33 (0)5 59 74 45 15. You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the Mandatory Continuing Airworthiness Information (MCAI), the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (phone: 800–647–5527) is the same as the Mail address provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Frederick Zink, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7779; fax: 781–238–7199; email: *frederick.zink@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2013–0575; Directorate Identifier 2013–NE–21–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of the Web site, anyone can find and read the comments in any of our dockets, including, if provided, the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2013–0111R1, dated June 3, 2013 (referred to hereinafter as ''the MCAI), to correct an unsafe condition for the specified products. The MCAI states:

> Some cracks have been reported on the second stage turbine disc of ASTAZOU XIV engines inducted into a Repair Centre. These cracks are located in the serrations of the disc. The results of the technical investigation concluded that the cracks were present on non-shot peened second stage turbine discs (discs on which AB 138 modification was not incorporated), and on second stage turbine discs that were shot peened during their service life (discs on which AB 138 modification was incorporated after initial service use without shot peening). Until now, no crack has been reported on second stage turbine discs shot peened since new, these discs accounting for more than half of all ASTAZOU XIV flight hours. It was not possible to clearly identify what caused the cracks.
>
> This condition, if not corrected, could lead to some events of disc serrations rupture, possibly resulting in uncontained second stage turbine blade release with consequent damage to, and reduced control of, the helicopter.

You may obtain further information by examining the MCAI in the AD docket.

FAA's Determination and Requirements of This Proposed AD

These engines have been approved by the aviation authority of France, and are approved for operation in the United States. Pursuant to our bilateral agreement with the European Community, EASA has notified us of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all information provided by EASA and determined the unsafe condition exists and is likely to exist or develop on other engines of the same type design. This proposed AD would require replacement of the 2nd-stage turbine disc.

Costs of Compliance

We estimate that this proposed AD affects 6 products of U.S. registry. We

also estimate that it would take about 5 hours per product to comply with this proposed AD. The average labor rate is $85 per hour. Required parts cost about $6,560 per product. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $41,910. Our cost estimate is exclusive of possible warranty coverage.

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.

We are 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

We 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) Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction, and

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

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 (AD):

Turbomeca S.A.: Docket No. FAA–2013–0575; Directorate Identifier 2013–NE–21–AD.

(a) Comments Due Date

We must receive comments by October 7, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Turbomeca S.A. ASTAZOU XIV B and XIV H engines.

(d) Reason

This AD was prompted by reports of cracks on the 2nd-stage turbine disc. We are issuing this AD to prevent disc cracking, uncontained 2nd-stage turbine blade release, damage to the engine, and damage to the helicopter.

(e) Actions and Compliance

Unless already done, do the following actions.

(1) For ASTAZOU XIV B engines that have not incorporated AB 138 modification remove 2nd-stage turbine disk part number (P/N) 0265260270 as follows:

(i) For engines with 1,800 or more engine cycles since new (CSN) or since last overhaul (CSLO), remove 2nd-stage turbine disk P/N 0265260270 within 10 operating hours after the effective date of this AD.

(ii) For engines with less than 1,800 CSN or CSLO, remove 2nd-stage turbine disk P/N 0265260270 within 300 operating hours after the effective date of this AD or before 1800 CSN or CSLO, whichever comes first.

(2) For ASTAZOU XIV B engines that have incorporated AB 138 modification, remove 2nd-stage turbine disk P/N 0283270200 with P/N 0265260270 written or scratched onto the disk within 1,800 CSN or CSLO, or within 10 operating hours after the effective date of this AD, whichever occurs later.

(3) For ASTAZOU XIV H engines, remove 2nd-stage turbine disk P/N 0265260270 within 300 operating hours after the effective date of this AD.

(g) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, FAA, may approve AMOCs to this AD. Use the procedures found in 14 CFR 39.19 to make your request.

(h) Related Information

(1) For more information about this AD, contact Frederick Zink, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7779; fax: 781–238–7199; email: *frederick.zink@faa.gov.*

(2) Refer to European Aviation Safety Agency Airworthiness Directive 2013–0111R1, dated June 3, 2013, for more information. You may examine the AD on the Internet at *http://www.regulations.gov.*

(3) Turbomeca S.A. Alert Mandatory Service Bulletin (MSB) No. A283 72 0809, Version A, dated May 16, 2013, and Turbomeca S.A. Alert MSB No. A283 72 0808, Version A, dated May 16, 2013, which are not incorporated by reference in this AD, can be obtained from Turbomeca S.A. using the contact information in paragraph (h)(4) of this AD.

(4) For service information identified in this AD, contact Turbomeca, S.A., 40220 Tarnos, France; phone: 33 (0)5 59 74 40 00; telex: 570 042; fax: 33 (0)5 59 74 45 15. You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

Issued in Burlington, Massachusetts, on July 19, 2013.

Colleen M. D'Alessandro,

Assistant Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2013–18908 Filed 8–5–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2013–0083; 4500030113]

RIN 1018–AY55

Endangered and Threatened Wildlife and Plants; Endangered Species Status for the Sharpnose Shiner and Smalleye Shiner

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list the sharpnose shiner (*Notropis oxyrhynchus*) and smalleye shiner (*N. buccula*), two fish species from Texas, as endangered species under the

Endangered Species Act of 1973, as amended (Act). If we finalize this rule as proposed, it would add these species to the List of Endangered and Threatened Wildlife and extend the Act's protections to these species.

DATES: *Written comments:* We will accept comments received or postmarked on or before October 7, 2013. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, below) must be received by 11:59 p.m. Eastern Time on the closing date.

Public informational session and public hearing: We will hold a public hearing on September 4, 2013. The public information session will begin at 5:00 p.m., and the public hearing will begin at 6:30 p.m. and end at 8:00 p.m. Central Time.

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

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter FWS–R2–ES–2013–0083, which is the docket number for this rulemaking. Then click on the Search button. When you have located this proposed rule, you may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R2–ES–2013–0083; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov* under Docket Number FWS–R2–ES–2013–0083. This generally means that we will post any personal information you provide us (see the Information Requested section below for more information).

Public informational session and public hearing: The public informational session and hearing will be held in the Upstairs Conference Room at the Abilene Civic Center, 1100 North 6th Street, Abilene, Texas.

FOR FURTHER INFORMATION CONTACT: Erik Orsak, Acting Field Supervisor, U.S. Fish and Wildlife Service, Arlington, Texas, Ecological Services Field Office, 2005 NE Green Oaks Blvd., Suite 140, Arlington, TX 76006; by telephone 817–277–1100; or by facsimile 817–277–1129. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, if a species is determined to be an endangered or threatened species throughout all or a significant portion of its range, we are required to promptly publish a proposal in the **Federal Register** and make a determination on our proposal within 1 year. Critical habitat shall be designated, to the maximum extent prudent and determinable, for any species determined to be an endangered or threatened species under the Act. Listing a species as an endangered or threatened species and designations and revisions of critical habitat can only be completed by issuing a rule. Elsewhere in today's **Federal Register** (and available online at *www.regulations.gov* at Docket Number FWS–R2–ES–2013–0083), we propose to designate critical habitat for the sharpnose shiner (*Notropis oxyrhynchus*) and smalleye shiner (*N. buccula*) under the Act.

This rule consists of a proposed rule to list the sharpnose shiner and smalleye shiner as endangered species. The sharpnose shiner and smalleye shiner are currently candidate species for which we have on file sufficient information on biological vulnerability and threats to support preparation of a listing proposal, but for which development of a listing regulation has been precluded by other higher priority listing activities. This proposed rule reassesses all available information regarding status of and threats to the sharpnose shiner and smalleye shiner.

The basis for our action. Under the Act, we can determine if a species is in danger of extinction throughout all or a significant portion of its range now (endangered) or likely to become endangered in the foreseeable future (threatened). As part of our analysis we consider whether it is endangered or threatened because of any five factors affecting its continued existence: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We have determined that habitat loss and modification due to river fragmentation and decreased river flow resulting mainly from reservoir impoundments and drought are primary threats to the species.

We will seek peer review. We are seeking comments from knowledgeable individuals with scientific expertise to review our analysis of the best available science and application of that science and to provide any additional scientific information to improve this proposed rule. Because we will consider all comments and information we receive during the comment period, our final determinations may differ from this proposal.

Information Requested

Public Comments

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

(1) The sharpnose and smalleye shiners' biology, range, and population trends, including:

(a) Biological or ecological requirements of these species, including habitat requirements for feeding, breeding, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns;

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

(e) Past and ongoing conservation measures for these species, their habitat, or both.

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

(3) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to this species and existing regulations that may be addressing those threats.

(4) Additional information concerning the historical and current status, range, distribution, and population size of this species, including the locations of any additional populations of this species.

(5) Information on the projected and reasonably likely impacts of climate change on sharpnose and smalleye shiners.

(6) The relationship between groundwater withdrawal and the reduction of surface water flow in areas occupied by sharpnose and smalleye shiners.

(7) The relationship between saltcedar encroachment and the reduction of surface water flow.

(8) The causation of toxic golden algal blooms and their potential effect on sharpnose and smalleye shiners.

(9) Sources of surface water contamination, particularly petroleum products, in the upper Brazos River basin.

(10) Information regarding future reservoir impoundments (and other fish barrier construction) within the upper Brazos River basin and their potential effects on surface water flows and fish migration within habitat occupied by these species.

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

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act (16 U.S.C. 1531 *et seq.*) directs that determinations as to whether any species is an endangered or threatened species must be made ''solely on the basis of the best scientific and commercial data available.''

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

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov* at Docket No. FWS–R2–ES–2013–0083, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Arlington, Texas, Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

The June 2013 Sharpnose Shiner and Smalleye Shiner Species Status Assessment Report (SSA Report; Service 2013, entire; see Status Assessment for the Sharpnose Shiner and Smalleye Shiner section, below), as well as comments and materials we receive and other supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov* at Docket Number FWS–R2–ES–2013–0083 or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Arlington, Texas, Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Public Hearing

Section 4(b)(5) of the Act provides for one or more public hearings on this proposal, if requested. We will hold a public hearing on Wednesday, September 4, 2013. The public information session will begin at 5:00 p.m., and the public hearing will begin at 6:30 p.m. and end at 8:00 p.m. Central Time. The public informational session and hearing will be held in the Upstairs Conference Room at Abilene Civic Center, 1100 North 6th Street, Abilene, Texas. People needing reasonable accommodation in order to attend and participate in the public hearing should contact Erik Orsak, Field Supervisor, Arlington, Texas, Ecological Services Office, as soon as possible (see **FOR FURTHER INFORMATION CONTACT**).

Peer Review

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of five appropriate and independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our listing determination is based on scientifically sound data, assumptions, and analyses. The peer reviewers have expertise in the biology and ecology of riverine fishes and are currently reviewing the species status report, which will inform our final determination. We will invite comment from the peer reviewers during this public comment period.

We will consider all comments and information we receive during this comment period on this proposed rule during our preparation of a final determination. Accordingly, the final decision may differ from this proposal.

Previous Federal Actions

On June 13, 2002, the sharpnose shiner (*Notropis oxyrhynchus*) and smalleye shiner (*N. buccula*) were made candidates for listing (67 FR 40657) under the Act. On May 11, 2004, we received a petition to list the sharpnose shiner and smalleye shiner, which were already on the candidate list; we published our petition finding on May 11, 2005 (70 FR 24899). Because the sharpnose shiner and smalleye shiner were previously identified through our candidate assessment process, the species had already received the equivalent of a substantial 90-day finding and a warranted, but precluded, 12-month finding (67 FR 40657, June 13, 2002). Through the annual candidate review process (69 FR 24876, May 4, 2004; 70 FR 24870, May 11, 2005; 71 FR 53756, September 12, 2006; 72 FR 69034, December 6, 2007; 73 FR 75176, December 10, 2008; 74 FR 57804, November 9, 2009; 75 FR 69222, November 10, 2010; 76 FR 66370, October 26, 2011; 77 FR 69994, November 21, 2012), the Service continued to solicit information from the public regarding these species.

Status Assessment for the Sharpnose Shiner and Smalleye Shiner

Introduction

The June 2013 SSA Report (Service 2013, entire; available online at *www.regulations.gov* under Docket Number FWS–R2–ES–2013–0083), provides a thorough assessment of sharpnose shiner and smalleye shiner biology and natural history, and assesses demographic risks, threats, and limiting factors in the context of determining viability and risk of extinction for the species. In the SSA Report, we compile biological data and a description of past, present, and likely future threats (causes and effects) facing the sharpnose shiner and smalleye shiner. Because data in these areas of science are limited, some uncertainties are associated with this assessment. Where we have substantial uncertainty, we have attempted to make our necessary assumptions explicit in the SSA Report. We base our assumptions in these areas on the best available scientific and commercial data. Importantly, the SSA Report does not represent a decision by the Service on whether these taxa should be proposed for listing as endangered or threatened species under the Act. The SSA Report does, however, provide the scientific basis that informs our decisions, which involve the further application of standards within the Act and its regulations and policies.

Summary of Biological Status and Threats

Our June 2013 SSA Report documents the results of the comprehensive biological status review for the sharpnose shiner and smalleye shiner, and provides a thorough account of the species' overall viability and, conversely, extinction risk (Service

2013, entire). The following is a summary of the results and conclusions from the SSA Report.

The sharpnose shiner and smalleye shiner are small minnows native to arid prairie streams of Texas originating from the Brazos River. The naturally occurring historical distribution the sharpnose shiner included the Brazos River, Colorado River, and Wichita River in Texas, while the naturally occurring historical distribution of the smalleye shiner included only the Brazos River.

In conducting our status assessment, we first considered what each of the two shiners need to ensure viability. We generally define viability as the ability of the species to persist over the long term and, conversely, to avoid extinction. We then evaluated whether those needs currently exist and the repercussions to the species when those needs are missing, diminished, or inaccessible. We next considered the factors that are causing the species to lack what it needs, including historical, current, and future factors. Finally, considering the information reviewed, we evaluated the current status and future viability of the species in terms of resiliency, redundancy, and representation. Resiliency is the ability of the species to withstand stochastic events and, in the case of the shiners, is best measured by the extent of suitable habitat in terms of stream length. Redundancy is the ability of a species to withstand catastrophic events by spreading the risk and can be measured through the duplication and distribution of resilient populations across its range. Representation is the ability of a species to adapt to changing environmental conditions and can be measured by the breadth of genetic diversity within and among populations and the ecological diversity of populations across the species' range. In the case of the shiners, we evaluate representation based on the extent of the geographical range and the variability of habitat characteristics within their range as indicators of genetic and ecological diversity.

Our assessment found that both species of shiners have an overall low viability (or low probability of persistence) in the near term (over about the next 10 years) and a decreasing viability (increasing risk of extinction) in the long-term future (over the next 11 to 50 years). For the shiners to be considered viable, individual fish need specific vital resources for survival and completion of their life cycles. Both species need wide, shallow, flowing waters generally less than half a meter deep (1.6 ft) with sandy substrates, which are found in mainstem rivers in the arid prairie region of Texas. The most important part of their life history is their reproductive strategies. Both species broadcast-spawn eggs and sperm into open water asynchronously (fish not spawning at the same time) from April through September during periods of low flow and synchronously (many fish spawning at the same time) during periods of elevated streamflow. Their eggs are semi-buoyant and remain suspended 1 or 2 days in flowing water as they develop into larvae. Larval fish remain suspended in the flowing water column an additional 2 to 3 days as they develop into free-swimming juvenile fish. In the absence of sufficient water velocities, suspended eggs and larvae sink into the substrate and subsequently die.

To sustain populations of the shiners, experimental analysis suggests estimated mean spawning season river flows of 2.61 cubic meters per second (m^3s^{-1}) (92 cubic feet per second (cfs)) and 6.43 m^3s^{-1} (227 cfs) are required for the sharpnose and smalleye shiners, respectively. It is also estimated that populations of shiners require approximately 275 kilometers (km) (171 miles (mi)) of unobstructed, flowing water during the breeding season to support a successfully reproductive population. This length of stream allows the eggs and larvae to remain suspended in the water column and survive until they mature sufficiently to swim on their own. In addition, these fish only naturally live for 1 or 2 years, making the populations particularly vulnerable when the necessary streamflow conditions for reproduction are lacking for more than one season. Across their range, these species also need unobstructed river lengths to allow for upstream and downstream movements to survive seasons with poor environmental conditions in certain river reaches. Unobstructed river reaches allow some fish to survive and recolonize degraded reaches when conditions improve.

The current conditions of both species indicate that they do not have the necessary resources for persistence in the immediate future. Both species have experienced dramatic range reduction, with both fish having lost at least half of their historical range. Both species are now restricted to one population in the upper Brazos River basin. As a result, sharpnose and smalleye shiners currently lack redundancy, which is significantly reducing the viability of these species as a whole. In addition, streamflows within their current extant range are insufficient during some years to support successful reproduction, such as occurred in 2011. These fish have been resilient to past stressors that occur over short durations, and their populations appear capable of recovering naturally even when an entire year's reproductive effort is lost. However, without human intervention, given their short lifespan and restricted range, stressors that persist for two or more reproductive seasons (such as a severe drought) severely limit these species' current viability, placing them at a high risk of extinction now.

The two primary factors affecting the current and future conditions of these shiners are river fragmentation by impoundments and alterations of the natural streamflow regime (by impoundments, drought, groundwater withdrawal, and saltcedar encroachment) within their range. Other secondary factors, such as water quality degradation and commercial harvesting for fish bait, likely also impact these species but to a lesser degree. These multiple factors are not acting independently, but are acting together as different sources (or causes), which can result in cumulative effects to lower the overall viability of the species.

Fish barriers such as impoundments are currently restricting the upstream and downstream movement of migrating fish and prevent survival of the semi-buoyant eggs and larvae of sharpnose and smalleye shiners. This is because the eggs and larvae cannot remain suspended in the water column under non-flowing conditions in reservoirs or if streamflows cease. Of the area once occupied by one or both species in the Brazos, Colorado, and Wichita Rivers, only two contiguous river segments remain with unobstructed lengths (without dams) greater than 275 km (171 mi): The upper Brazos River (where the fish are extant) and the lower Brazos River (where the fish are functionally extirpated). The effects of habitat fragmentation have occurred and continue to occur throughout the range of both species and are expected to increase if proposed new reservoirs are constructed. Habitat fragmentation is affecting both species at the individual, population, and species levels, and puts the species at a high risk of extinction currently and increasingly so into the long-term future.

The historical ranges of both species have been severely fragmented, primarily by large reservoir impoundments, resulting in the isolation of one population of each species in the upper Brazos River basin. The construction of Possum Kingdom Reservoir in 1941, for example, eliminated the ability of these species to migrate downstream to wetter areas when the upper Brazos River

experiences drought. There is also a number of existing in-channel structures (primarily pipeline crossings and low-water crossings) within the occupied range of these species, some of which are known to restrict fish passage during periods of low flow. Species extirpation has already occurred in areas where river segments have been fragmented and reduced to less than 275 km (171 mi) in length.

In addition, future fragmentation of the remaining occupied habitat of the upper Brazos River by new impoundments would decrease the contiguous, unfragmented river habitat required by these species for successful reproduction. Texas does not have adequate water supplies to meet current or projected water demand in the upper Brazos River region, and additional reservoir construction is considered imminent. Possible new impoundments include the 2012 State Water Plan's proposed Post Reservoir in Garza County, the Double Mountain Fork Reservoir (East and West) in Stonewall County, and the South Bend Reservoir in Young County. Because extirpation of these species is expected to occur in occupied river fragments reduced to less than 275 km (171 miles) in length, any new structures further fragmenting stream habitats significantly increase the likelihood of extinction for both species.

The natural flow regime is considered one of the most important factors to which native riverine species, like the shiners, become adapted, and alterations to it can have severe impacts on fishes. A majority of sharpnose and smalleye shiner reproductive output occurs through synchronized spawning during periods of elevated flow associated with storms, although successful reproduction is also possible during periods of low to moderate flow. When streamflows are insufficient, the fish cannot successfully spawn and reproduce. There are several environmental changes that are a source of declining streamflows within the range of the shiners. Downstream of reservoirs, streamflows are lowered and stabilized, which has reduced or, in some areas, eliminated successful reproduction in these species. In addition, groundwater withdrawal and depletion will reduce or eliminate the remaining springs and seeps of the Brazos River basin, which will lower river flow. Drought is another obvious source of impact that negatively affects streamflow and has severe impacts on sharpnose and smalleye shiner reproduction. Severe droughts in this region are expected to become more common as a result of ongoing climate change. Finally, saltcedar encroachment is another source of environmental change that not only is affecting streamflows but also restricts channel width and increases channel depth. These stream channel changes reduce the amount of wide channels and shallow waters preferred by sharpnose and smalleye shiners. Flow reduction and an altered flow regime have occurred and continue to occur throughout the range of these species and are expected to impact both species at the individual, population, and species levels.

Within the reduced range of these species in the upper Brazos River basin, there are currently at least 13 impoundments or other structures affecting (to varying degrees) the amount of stream flow within the occupied range of these species. These reservoirs serve as water supplies for various consumptive water uses and reduce downstream flows available for the fishes. Because the current impoundments restrict stream flow below the minimum levels required for both species, we expect these impoundments to impact both species at the individual, population, and species levels.

Additional future impoundments, reservoir augmentations, and water diversions are under consideration for construction within the upper Brazos River, which would further reduce flows and fragment remaining habitat. The construction of at least some of these structures to meet future water demand in the region is highly likely to occur within the next 50 years. These future impoundments, reservoir augmentatons, and water diversions will further increase the likelihood of extinction for both species.

Besides impoundments and diversions of water from reservoirs, there are other sources causing reduced stream flows in the upper Brazos River basin. One such source is climate change, which is projected to result in warmer temperatures and drier conditions in the upper Brazos River in the future. This trend is already becoming apparent and exacerbates the likelihood of species extinction from loss of river flow. Reductions to river flow and river drying are also expected to increase as groundwater withdrawals negatively impact already reduced spring flows. Saltcedar encroachment also intensifies evaporative water loss along occupied river segments. There are several existing efforts addressing threats to natural flow regimes, including the Texas Environmental Flows Program, saltcedar control programs, and groundwater conservation districts. However, these programs and conservation efforts have not alleviated ongoing and future threats negatively affecting water flow in the upper Brazos River.

The effects of reduced stream flows on the shiners were dramatically demonstrated during the summer spawning season of 2011. During 2011, Texas experienced the worst 1-year drought on record, and the upper Brazos River went dry. Some individual fish presumably found refuge from the drying river in Possum Kingdom Lake downstream. However, the non-flowing conditions in the river made reproduction impossible, and any shiners in the lake would have faced increased predation pressure from large, lake-adapted, piscivorous fish. Fearing possible extinction of these species, State fish biologists from Texas captured sharpnose and smalleye shiners from isolated pools in 2011, prior to their complete drying, and maintained a small population in captivity until they were released back into the lower Brazos River the following year. During the 2011 drought, no sharpnose shiner or smalleye shiner reproduction was documented. Given their short lifespan (they typically live only two reproductive seasons), a similar drought in 2012 would have likely led to extinction of both species. However, 2012 fish survey results of the upper Brazos River indicated drought conditions were not as intense as those in 2011, and sharpnose and smalleye shiners persisted.

As remaining habitat of the shiners becomes more fragmented and drought conditions intensify, the single remaining population of sharpnose shiners and smalleye shiners will become more geographically restricted, further reducing the viability of the species into the future. Under these conditions, the severity of secondary threats, such as water quality degradation from pollution and golden algal blooms, and legally permitted commercial bait fish harvesting, will have a larger impact on the species and a single pollutant discharge, golden algal bloom, or commercial harvesting or other local event will severely increase the risk of extinction of both species.

The shiners currently have limited viability and increased vulnerability to extinction because of their stringent life-history requirement of long, flowing rivers to complete their reproductive cycle. With a short lifespan allowing only one or two breeding seasons and the need for unobstructed river reaches greater than 275 km (171 mi) in length containing average flows greater than

2.61 m^3s^{-1} (92 cfs) and 6.43 m^3s^{-1} (227 cfs) (for the sharpnose and smalleye shiners, respectively) during the summer, both species are at a high risk of extirpation when rivers are fragmented by fish barriers and flows are reduced from human use and drought-enhanced water shortages. These conditions have already resulted in a significant range reduction and isolation of the one remaining population of both fish into the upper Brazos River. The extant population of each shiner species is located in a contiguous stretch of river long enough to support reproduction, is of adequate size, and is generally considered resilient to local or short-term environmental changes. However, with only one location, the species lack any redundancy, and it is presumed these species lack the genetic and ecological representation to adapt to ongoing threats. Given the short lifespan and restricted range of these species, without human intervention, lack of adequate flows (due to drought and other stressors) persisting for two or more consecutive reproductive seasons would likely lead to species extinction. With human water use and ongoing regional drought, the probability of this happening in the near term (about the next 10 years) is high, putting the species at a high risk of extinction. Over the longer term (the next 11 to 50 years), these conditions will only continue to deteriorate as human water use continues, including possible construction of new dams within the extant range, and as there are enhanced chances of drought due to ongoing climate change. In conclusion, the current condition of both species is at a low viability (low probability of persistence), and their viability is only expected to decline into the future.

Determination

Standard for Review

Section 4 of the Act, and its implementing regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(b)(1)(a), the Secretary is to make endangered or threatened determinations required by subsection 4(a)(1) solely on the basis of the best scientific and commercial data available to her after conducting a review of the status of the species and after taking into account conservation efforts by States or foreign nations. The standards for determining whether a species is endangered or threatened are provided in section 3 of the Act. An endangered species is any species that is ''in danger of extinction throughout all or a significant portion of its range.'' A threatened species is any species that is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' Under section 4(a)(1) of the Act, in reviewing the status of the species to determine if it meets the definitions of endangered or threatened, we determine whether any species is an endangered species or a threatened species because of any of the following five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence.

Proposed Listing Status Determination

Based on our review of the best available scientific and commercial information, we conclude that the sharpnose shiner and smalleye shiner are currently in danger of extinction throughout all of their range, and, therefore, both meet the definition of an endangered species. This finding, explained below, is based on our conclusions that these species exhibit low viability, as characterized by not having the resiliency to overcome persistent threats and insufficient population redundancy. We found the sharpnose shiner and smalleye shiner are in danger of extinction now, and the situation will not improve without significant conservation intervention. We, therefore, find that the sharpnose shiner and smalleye shiner warrant listing as endangered species.

On the basis of our biological review documented in the June 2013 SSA Report, we found that the sharpnose shiner and smalleye shiner are vulnerable to extinction due to their reduced ranges and their highly specific reproductive strategies. These species are currently restricted to the upper Brazos River and its major tributaries, which represents a greater than 70 percent reduction in range for the sharpnose shiner and a greater than 50 percent range reduction for the smalleye shiner. The occupied river segments of the upper Brazos River currently retain the necessary length (greater than 275 km (171 miles)) to support successful broadcast-spawning reproduction in these species. However, these river segments have naturally occurring periods of low flow, periods completely lacking flow, and periods of complete drying—often during the dry summer months, which is also when these species spawn. The eggs and larvae of these species require flowing water of sufficient velocity to keep their eggs and larvae afloat and alive. During periods of insufficient river flow, reproduction is not successful and no young are produced.

Our review found the primary factors leading to a high risk of extinction for these fishes include habitat loss and modification due to river fragmentation and decreased river flow, resulting mainly from reservoir impoundments. Drought, exacerbated by climate change, and groundwater withdrawals also act as sources to reduce stream flows and modify stream habitats. Fragmentation due to reservoir construction has resulted in a substantially reduced range with only one isolated population of each species in the upper Brazos River. With only one isolated population remaining, these species have no redundancy, reduced resiliency due to the inability to disperse downstream, and limited representation. This situation puts the species in danger of extinction from only one adverse event (such as insufficient flow rates for 2 consecutive years). Secondary causes of habitat modifications include water quality degradation and saltcedar encroachment that alters stream channels. As population sizes decrease, localized concerns, such as commercial harvesting of individuals, also increases the risk of extinction.

We evaluated whether the sharpnose shiner and smalleye shiner are in danger of extinction now (i.e., an endangered species) or are likely to become in danger of extinction in the foreseeable future (i.e., a threatened species). The foreseeable future refers to the extent to which the Secretary can reasonably rely on predictions about the future in making determinations about the conservation status of the species. A key statutory difference between an endangered species and a threatened species is the timing of when a species may be in danger of extinction, either now (endangered species) or in the foreseeable future (threatened species). Because of the fact-specific nature of listing determinations, there is no single metric for determining if a species is presently ''in danger of extinction.'' In the case of the sharpnose shiner and smalleye shiner, the best available information indicates the severe range reduction and isolation of these species to a single population in the upper Brazos River places these species in danger of extinction now, and the situation is exacerbated by the ongoing and intensifying effects of river fragmentation, climate-change-induced

drought, saltcedar encroachment, water quality degradation, and commercial bait harvesting. The current threats affecting these species are expected to continue (or even increase without substantial conservaton efforts), causing both species to be in danger of extinction now—as nearly occurred during the drought of 2011. Therefore, because these species have been reduced to less than half of their previously occupied range and because both species are restricted to a single, non-resilient population at a high risk of extinction from a variety of unabated threats, we find both species are in danger of extinction now and meet the definition of an endangered species.

In conclusion, after a review of the best available scientific and commercial information as it relates to the status of the species and the five listing factors, we find the sharpnose shiner and smalleye shiner are in danger of extinction now. Therefore, we propose to list the sharpnose shiner and smalleye shiner as endangered species in accordance with section 3(6) of the Act.

Under the Act and our implementing regulations, a species may warrant listing if it is endangered or threatened throughout all or a significant portion of its range. The threats to the survival of the sharpnose shiner and smalleye shiner occur throughout these species' ranges and are not restricted to any particular significant portion of those ranges. Accordingly, our assessments and determinations apply to the species throughout their entire ranges.

Available Conservation Measures

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

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act requires the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a recovery outline shortly after a species is listed, preparation of a draft and final recovery plan, and revisions to the plan as significant new information becomes available. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. The recovery plan identifies site-specific management actions that will achieve recovery of the species, measurable criteria that determine when a species may be downlisted or delisted, and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (comprising species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our Web site (*http://www.fws.gov/endangered*), or from our Arlington, Texas, Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

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

If these species are listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the State of Texas would be eligible for Federal funds to implement management actions that promote the protection and recovery of the sharpnose shiner and smalleye shiner. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants.*

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

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Federal agency actions within the species' habitat that may require conference or consultation or both as described in the preceding paragraph may include but are not limited to: Permitting of interbasin water transfers, permitting of large groundwater withdrawal projects, permitting of in-channel mining and dredging, issuance of section 404 Clean Water Act (33 U.S.C. 1251 *et seq.*) permits by the U.S. Army Corps of Engineers, and construction and maintenance of roads or highways by the Federal Highway Administration.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. The prohibitions of section 9(a)(2) of the Act, codified at 50 CFR 17.21 for endangered

wildlife, in part, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these), import, export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. Under the Lacey Act (18 U.S.C. 42–43; 16 U.S.C. 3371–3378), it is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered and threatened wildlife species under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22 for endangered species, and at 17.32 for threatened species. With regard to endangered wildlife, a permit must be issued for the following purposes: For scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities.

Our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), is to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of species proposed for listing. The following activities could potentially result in a violation of section 9 of the Act; this list is not comprehensive:

(1) Unauthorized collecting, handling, possessing, selling, delivering, carrying, or transporting of the species, including import or export across State lines and international boundaries, except for properly documented antique specimens of these taxa at least 100 years old, as defined by section 10(h)(1) of the Act.

(2) Unauthorized destruction or alteration of sharpnose and smalleye shiner habitats (e.g., unpermitted in-stream dredging, impoundment, or construction; water diversion or withdrawal; channelization; discharge of fill material) that impairs essential behaviors such as breeding, feeding, or sheltering, or results in killing or injuring sharpnose or smalleye shiners. Such activities could include, but are not limited to, the destruction of upland riparian areas in a manner that it negatively impacts the river ecosystem.

(3) Capture, survey, or collection of specimens of this taxon without a permit from the Service under section 10(a)(1)(A) of the Act.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Arlington, Texas, Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Required Determinations

Clarity of the Rule

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

(1) Be logically organized;

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

(3) Use clear language rather than jargon;

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

(5) Use lists and tables wherever possible.

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

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with listing a species as an endangered or threatened species under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

References

A complete list of references used in support of this proposed rulemaking is available on the Internet at *http://www.regulations.gov* under Docket Number FWS–R2–ES–2013–0083 in the June 2013 Status Assessment Report for the Sharpnose Shiner and Smalleye Shiner (Service 2013, Literature Cited) and upon request from the Arlington, Texas, Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this document are the staff members of the Arlington, Texas, Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

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

PART 17—[AMENDED]

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

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

■ 2. In § 17.11(h), add entries for ''Shiner, sharpnose'' and ''Shiner, smalleye'' in alphabetical order under FISHES to the List of Endangered and Threatened Wildlife, to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	
FISHES							
*	*	*	*	*	*	*	
Shiner, sharpnose	*Notropis oxyrhynchus.*	U.S. (TX)	Entire	E		NA	NA
Shiner, smalleye	*Notropis buccula*	U.S. (TX)	Entire	E		NA	NA

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*

* * * * *

Dated: July 15, 2013.

Daniel M. Ashe,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2013–18211 Filed 8–5–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R6–ES–2013–0081; 4500030113]

RIN 1018–AY95

Endangered and Threatened Wildlife and Plants; Threatened Species Status for Graham's Beardtongue (Penstemon grahamii) and White River Beardtongue (Penstemon scariosus var. albifluvis)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, propose to list Graham's beardtongue (*Penstemon grahamii*) and White River beardtongue (*Penstemon scariosus* var. *albifluvis*) as threatened species throughout their ranges under the Endangered Species Act of 1973, as amended (Act). If we finalize this rule as proposed, it would add Graham's and White River beardtongues to the List of Endangered and Threatened Plants under the Act and extend the Act's protections to these species throughout their ranges.

DATES: We will accept all comments received or postmarked on or before October 7, 2013. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by September 20, 2013.

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

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* Search for Docket No. FWS–R6–ES–2013–0081, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on ''Comment Now!'' If your comments will fit in the provided comment box, please use this feature of *http://www.regulations.gov,* as it is most compatible with our comment review procedures. If you attach your comments as a separate document, our preferred file format is Microsoft Word. If you attach multiple comments (such as form letters), our preferred format is a spreadsheet in Microsoft Excel.

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R6–ES–2013–0081; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

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

Any additional tools or supporting information that we may develop for this rulemaking will be available at *http://www.fws.gov/mountain-prairie/species/plants/2utahbeardtongues/,* at *http://www.regulations.gov* at Docket No. FWS–R6–ES–2013–0081, and at the Utah Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Larry Crist, Field Supervisor, U.S. Fish and Wildlife Service, Utah Ecological Services Field Office, 2369 West Orton Circle, Suite 50, West Valley City, UT 84119; by telephone at 801–975–3330; or by facsimile at 801–975–3331. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Endangered Species Act of 1973, as amended (Act), if a species is determined to be an endangered or threatened species throughout all or a significant portion of its range, we are required to promptly publish a proposal in the **Federal Register** and make a determination on our proposal within one year. Listing a species as an endangered or threatened species can only be completed by issuing a rule. In the case of Graham's beardtongue, a June 9, 2011, court decision reinstated our January 19, 2006, proposed rule (71 FR 3158) to list Graham's beardtongue as a threatened species and ordered us to reconsider, with all deliberate speed, a new final rule with respect to whether this species should be listed as an endangered or threatened species under the Act. We have determined that enough new information exists to warrant a new proposed rule for the Graham's beardtongue.

This rule consists of a proposed rule to list the Graham's beardtongue and White River beardtongue as threatened species under the Act.

The basis for our action. Under the Act, we can determine that a species is an endangered or threatened species based on any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

We have determined that energy exploration and development are threats to both Graham's and White River beardtongues. In addition, the cumulative impacts of increased energy development, livestock grazing, invasive weeds, small population sizes, and climate change are threats to these species. Therefore, these species qualify for listing under the Act, which can only be done by issuing a rule.

We will seek peer review. We are seeking comments from knowledgeable individuals with scientific expertise to review our analysis of the best available science and application of that science and to provide any additional scientific information to improve this proposed rule. Because we will consider all comments and information we receive during the comment period, our final determinations may differ from this proposal.

Information Requested

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

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

(a) Biological or ecological requirements of these species;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns; and

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

(2) The factors that are the basis for making a listing determination for a species under section 4(a) of the Act (16 U.S.C. 1531 *et seq.*), which are:

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

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

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

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

(3) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to these species and regulations that may be addressing those threats.

(4) Additional information concerning the historical and current status, range, distribution, and population size of these species, including the locations of any additional populations of these species.

(5) Past and ongoing conservation measures for these species, their habitats or both.

(6) Current or planned activities in the areas occupied by these species and possible impacts of these activities on these species.

(7) Any information on the biological or ecological requirements of these species and ongoing conservation measures for these species and their habitats.

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or threatened species must be made ''solely on the basis of the best scientific and commercial data available.''

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

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.* Please include sufficient information with your comments to allow us to verify any scientific or commercial information you include.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Utah Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Background—Graham's beardtongue

Previous Federal Actions

For a detailed description of Federal actions concerning Graham's beardtongue, please refer to the January 19, 2006, proposed rule to list the species with critical habitat (71 FR 3158) and the December 19, 2006, withdrawal of the proposed rule to list the species with critical habitat (71 FR 76024).

The document we published on December 19, 2006 (71 FR 76024), withdrew the proposed listing and critical habitat rule for Graham's beardtongue that we published on January 19, 2006 (71 FR 3158). The December 19, 2006, withdrawal also addressed comments we received on the proposed rule to list Graham's beardtongue and summarized threats affecting the species. The withdrawal of the proposed rule was based on information provided during the public comment period. This information led us to conclude that the threats to Graham's beardtongue identified in the proposed rule, particularly energy development, were not as significant as previously believed and that currently available data did not indicate that threats to the species and its habitat, as analyzed under the five listing factors described in section 4(a)(1) of the Act, were likely to endanger the species in the foreseeable future throughout all or a significant portion of its range.

On December 16, 2008, the Center for Native Ecosystems, Southern Utah Wilderness Alliance, Utah Native Plant Society, and Colorado Native Plant Society filed a complaint in the United States District Court for the District of Colorado challenging the withdrawal of our proposal to list Graham's beardtongue. The court ruled in favor of the plaintiffs on June 9, 2011, vacating our December 2006 withdrawal and reinstating our January 2006 proposed rule.

The best available information for Graham's beardtongue has changed considerably since 2006, when the proposed rule was published and then withdrawn. We believe it is appropriate to publish a revised proposed listing rule to better reflect new information regarding Graham's beardtongue. A revised proposed critical habitat rule for the Graham's beardtongue is published elsewhere in today's **Federal Register**.

Species Information

Taxonomy and Species Description

Graham's beardtongue was described as a species in 1937 as an herbaceous perennial plant in the plantain family (Plantaginaceae). For most of the year when the plant is dormant, it exists as a small, unremarkable basal rosette of leaves. During flowering the plant becomes a ''gorgeous, large-flowered penstemon'' (Welsh *et al.* 2003, p. 625). Similar to other species in the beardtongue (*Penstemon*) genus, Graham's beardtongue has a strongly bilabiate (two-lipped) flower with a prominent infertile staminode (sterile male flower part)—the ''beardtongue'' that typifies the genus. The combination of its large, vivid pink flower and densely bearded staminode with short, stiff, golden-orange hairs makes Graham's beardtongue quite distinctive. Each year an individual plant can produce one to a few flowering stems that can grow up to 18 centimeters (cm) (7.0 inches (in)) tall (with some exceptions), with one to 20 or more flowers on each flowering stem.

Distribution

When we published the proposed listing rule in 2006, there were 109 plant records, or ''points,'' across Graham's beardtongue's known range,

and the total species' population size was estimated at 6,200 individuals. Point data represent a physical location where one or more plants were observed on the ground. Point data are usually collected by GPS and stored as a ''record'' in a geographic information system database.

Since 2006, we have completed many surveys for this species. The range of Graham's beardtongue is essentially the same as it was in 2006: a horseshoe-shaped band about 80 miles long and 6 miles wide extending from the extreme southeastern edge of Duchesne County in Utah to the northwestern edge of Rio Blanco County in Colorado (Figure 1). However, we have identified larger numbers of plants and a greater distribution of the species across its range. Data we compiled from the Vernal and Meeker Field Offices of the Bureau of Land Management (BLM), and Utah and Colorado Natural Heritage Programs (UNHP and CNHP) include 4,460 points representing 31,702 plants. Most of these locations were documented after 2006. Although the overall number of plants has increased with additional surveys, this does not mean the total population is increasing. Rather, we now have a more complete picture of how many total Graham's beardtongue individuals exist, and this number likely has not changed substantially since the species was named in 1937. We assume that the current known range of this species has not change substantially from what it was historically.

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Figure 1. Graham's beardtongue's range.

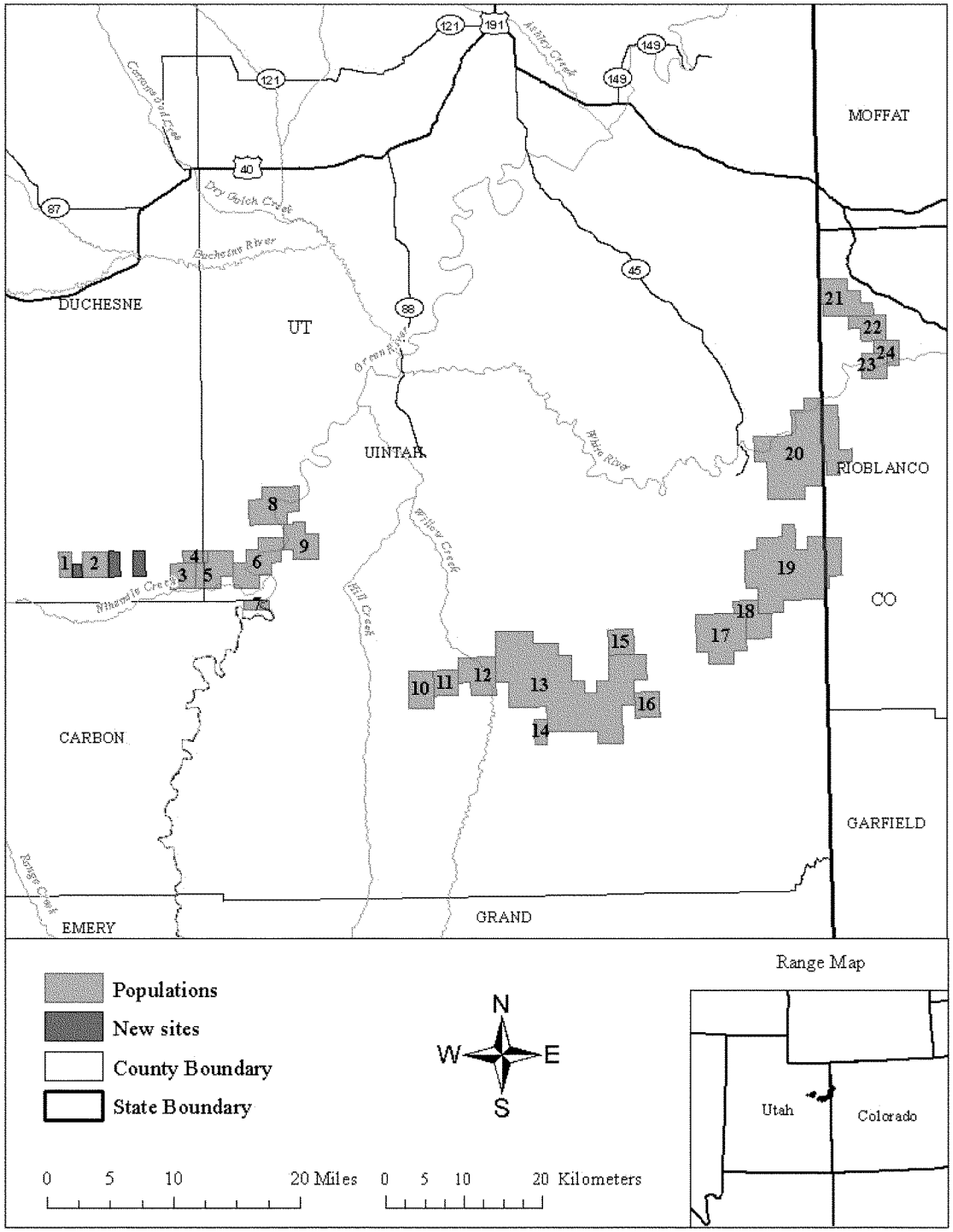


Figure 1. Graham's beardtongue's range.

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We mapped all plant points and grouped them into populations (Figure 1). First, we followed standardized methods used by the national network of Natural Heritage Programs, and identified the species' element occurrences (EO). EOs are plant points that are grouped together based on geographic proximity (NatureServe 2004, p. 6). Natural Heritage Program criteria (NatureServe 2004, p. 6) classifies points into discrete EOs if they are within 2 kilometers (km) (1.2 miles (mi)) of each other and separated by suitable habitat. We did not always have specific habitat suitability information and in these cases relied on the 2-km (1.2-mi) distance as our primary classification factor. Next, we included updated survey information collected from 2006 to the present and determined the number of distinct EOs. Overall, we documented 24 EOs: 20 in Utah and 4 in Colorado. For the purpose

of this proposed listing rule, we consider EOs to be synonymous with populations and hereafter will use the term ''populations'' when describing the distribution of the species (Figure 1).

New sites of Graham's beardtongue were found in May of 2013. Approximately 350 plants were counted, about 1 percent of the known population. Because the number counted was only about 1 percent of the total population, including these additional plants does not perceptibly change our threats analysis. We included the new points in our map (Figure 1). However, information from surveys during the 2013 field season continues to be submitted. Once the field season is completed and we have finalized data, we will update the threats analysis using those data.

The biggest change in the population size and distribution of Graham's beardtongue from the 2006 proposed rule to this proposed rule is that many additional surveys were conducted in the middle of the species' range (populations 10 through 20, see Figure 1), increasing the total population estimate for Graham's beardtongue fivefold. In particular, we now estimate that one population (referred to as population 20) comprises about 23 percent of the species' total population, compared to our estimate of only 2 percent in 2006. In 2006, we noted that population 20 was an important connectivity link between the Utah and Colorado populations of this species, and we still consider this to be true, especially given the large number of plants found in this population.

Approximately 59 percent of the total known population of Graham's beardtongue is on BLM-managed lands, with the remainder on non-Federal lands with State and private ownership (Table 1). This distribution is essentially unchanged from our 2006 finding. A land exchange between the BLM and the State of Utah planned for 2013 will decrease the number of known plants on Federal lands and increase the plants on State lands by 1 percent (see X. Inadequacy of Existing Regulatory Mechanisms below for more details).

Table 1. Number of individuals of Graham's beardtongue by land owner.

	Number of individuals	Percent of total
Federal	18,678	59
Private	8,137	26
State	4,887	15
Tribal	0	0
Total	31,702	100

Two sites of Graham's beardtongue within population 13 (see Figure 1) were monitored from 2004 to 2012, and two additional sites within population 13 were monitored from 2010 to 2012. These sites were stable or slightly declining over the period of study (McCaffery 2013, p. 9). Recruitment for these sites of Graham's beardtongue was low and sporadic (McCaffery 2013, p. 11). In addition, Graham's beardtongue flowered sporadically, indicating that conditions were not always suitable for flowering to occur (McCaffery 2013, p. 9). Small population sizes and low recruitment make this species more vulnerable to stochastic events, and changes in stressors or habitat conditions may negatively impact the long-term growth of these sites (McCaffery 2013, p. 9). No link was found between reproduction and precipitation on a regional level, but it is likely the correct environmental factors driving reproduction and survival have not been measured (McCaffery 2013, p. 10). A combination of several factors could be driving population dynamics of Graham's beardtongue; for example, herbivory and climate could be interacting to influence reproduction. Plants at one of the study sites were negatively impacted by herbivory from tiger moth caterpillars (possibly *Arctia caja utahensis*) (see II. Grazing and Trampling, below), but a cool, wet spring in 2011 reduced herbivory on reproductive plants (Dodge and Yates 2011, pp. 7–8). Further studies are necessary to determine if herbivory or other factors are driving population dynamics of this species.

Habitat

Graham's beardtongue is an endemic plant found mostly in exposed oil shale strata of the Parachute Creek Member and other unclassified members of the Green River geologic formation. Most populations are associated with the surface exposure of the petroleum-bearing oil shale Mahogany ledge (Shultz and Mutz 1979, p. 40; Neese and Smith 1982, p. 64). Soils at these sites are shallow with virtually no soil horizon development, and the surface is usually covered with broken shale chips or light clay derived from the thinly bedded shale. About a third of all known point locations of plants in our files grow on slopes that are 10 degrees or less, with an average slope across all known points of 17.6 degrees (Service 2013, p. 2). The species' average elevation is 1,870 meters (m) (6,134 feet (ft)), with a range in elevation from 1,426 to 2,128 m (4,677 to 6,982 ft) (Service 2013, p. 4). Individuals of Graham's beardtongue usually grow on southwest-facing exposures (Service 2013, p. 1).

Graham's beardtongue is associated with a suite of species similarly adapted to xeric growing conditions on highly basic calcareous shale soils, including (but not limited to) saline wildrye (*Leymus salinus*), mountain thistle (*Cirsium eatonii* var. *eriocephalum*), spiny greasebush (*Glossopetalon spinescens* var. *meionandra*), Utah juniper (*Juniperus osteosperma*), twoneedle piñon (*Pinus edulis*), and shadscale saltbush (*Atriplex confertifolia*) (UNHP 2013, entire). Graham's beardtongue co-occurs with eight other rare species that are similarly endemic and restricted to the Green River Formation, including White River beardtongue.

Biology

Graham's beardtongue individuals may live 20 to 30 years; however, we do not know the plant's average lifespan (Service 2012a, p. 2). Graham's beardtongue is not as genetically diverse as other common, widespread beardtongues from the same region (Arft 2002, p. 5). However, populations 1 through 9 (see Figure 1) have minor morphological differences from the rest of the Graham's beardtongue population (Shultz and Mutz 1979, p. 41) and may, due to geographic isolation, be genetically divergent from the remainder of the species' population, although this hypothesis has never been tested.

Graham's beardtongue usually flowers for a short period of time in late May through early July. Pollinators and flower visitors of Graham's beardtongue include the bees *Anthophora lesquerellae, Osmia sanrafaelae, Osmia rawlinsi;* the sweat bees *Lasioglossum sisymbrii* and *Dialictus* sp.; and the masarid wasp *Pseudomasaris vespoides,* which is thought to be the primary pollinator for Graham's beardtongue (Lewinsohn and Tepedino 2007, p. 245; Dodge and Yates 2008, p. 30). At least one large pollinator, *Bombus huntii* (Hunt's bumblebee), is known to visit Graham's beardtongue (71 FR 3158, January 19, 2006), which is not unexpected due to the relatively large size of Graham's beardtongue's flowers compared to other beardtongues.

Graham's beardtongue has a mixed mating system, meaning individuals of this species can self-fertilize, but they produce more seed when they are cross-pollinated (Dodge and Yates 2009, p. 18). Thus, pollinators are important to this species for maximum seed and fruit production. Based on the size of the largest Graham's beardtongue pollinators (i.e., Hunt's bumblebee), we

expect they are capable of travelling and transporting pollen for distances of at least 700 m (2,297 ft) (Service 2012b, pp. 8, 12). Therefore, maintaining sufficiently large numbers and population distribution of Graham's beardtongue ensures cross-pollination can occur and prevents inbreeding depression (Dodge and Yates 2009, p. 18). Pollinators generally need a diversity of native plants for foraging throughout the seasons, nesting and egg-laying sites, and undisturbed places for overwintering (Shepherd *et al.* 2003, pp. 49–50). Thus, it is important to protect vegetation diversity within and around Graham's beardtongue populations to maintain a diversity of pollinators.

Background—White River beardtongue

Previous Federal Actions

On November 28, 1983, White River beardtongue (as *Penstemon albifluvis*) was designated as a category 1 candidate under the Act (48 FR 53640). Category 1 candidate species were defined as ''taxa for which the Service currently has on file substantial information on biological vulnerability and threat(s) to support the appropriateness of proposing to list the taxa as Endangered or Threatened species. . . . Development and publication of proposed rules on these taxa are anticipated, but because of the large number of such taxa, could take some years'' (48 FR 53641, November 28, 1983). In the February 28, 1996, candidate notice of review (CNOR) (61 FR 7596), we abandoned the use of numerical category designations and changed the status of White River beardtongue to a candidate under the current definition. We maintained White River beardtongue as a candidate species in subsequent updated notices of review between 1996 and 2012, including the most recent CNOR published on November 21, 2012 (77 FR 69994).

On September 9, 2011, we reached an agreement with plaintiffs in Endangered Species Act Section 4 Deadline Litig., Misc. Action No. 10–377 (EGS), MDL Docket No. 2165 (D. DC), to systematically review and address the needs of all species listed in the 2010 CNOR, which included White River beardtongue.

Species Information

Taxonomy and Species Description

White River beardtongue is an herbaceous perennial plant in the plantain family (Plantaginaceae). White River beardtongue is a shrubby plant with showy lavender flowers. It grows up to 50 cm (20 in) tall, with multiple clusters of upright stems. It has long, narrow, green leaves. Like other members of the beardtongue genus and like Graham's beardtongue, it has a strongly bilabiate (two-lipped) flower with a prominent infertile staminode (sterile male flower part), or ''beardtongue.'' Blooming occurs from May into early June, with seeds produced by late June (Lewinsohn 2005, p. 9).

White River beardtongue was first described as a new species, *Penstemon albifluvis,* in 1982 (England 1982, entire). In 1984, the taxon was described as variety *P. scariosus* var. *albifluvis* (Cronquist *et al.* 1984, p. 442). *P. s.* var. *albifluvis* has a shorter corolla and shorter anther hairs than typical *P. scariosus.* White River beardtongue is also unique from *P. scariosus* because it is endemic to low-elevation oil shale barrens near the White River along the Utah-Colorado border (see ''Habitat'' below for more information), while typical *P. scariosus* habitat occurs at higher elevations on the West Tavaputs and Wasatch Plateaus of central Utah (Cronquist *et al.* 1984, p. 442).

Distribution

The historical range of White River beardtongue has not changed since the species was first described in 1982 (England 1982, pp. 367–368). White River beardtongue was first discovered along the north bank of the White River one mile upstream from the Ignacio Bridge (England 1982, pp. 367). The historical range was described as occurring from east central Uintah County, Utah, to Rio Blanco County, Colorado (England 1982, pp. 367).

White River beardtongue's current range extends from Raven Ridge west of Rangely in Rio Blanco County, Colorado, to the vicinity of Willow Creek in Uintah County, Utah. The bulk of the species' range occurs between Raven Ridge and Evacuation Creek in eastern Utah, a distance of about 30 km (20 miles) (Figure 2) (CNHP 2012, entire; UNHP 2012, entire). We acknowledge that herbarium collections from 1977 to 1998 (UNHP 2012, entire) indicate that the species' range might extend farther west to Willow Creek, Buck Canyon, and Kings Well Road. However, we have not revisited these herbarium collection locations to confirm the species' presence; it is possible that the herbarium collections represent individuals of the closely related and nearly indistinguishable Garrett's beardtongue (*Penstemon scariosus* var. *garettii*). Therefore, we consider these to be unverified locations and exclude these records from further analysis of threats (Figure 2).

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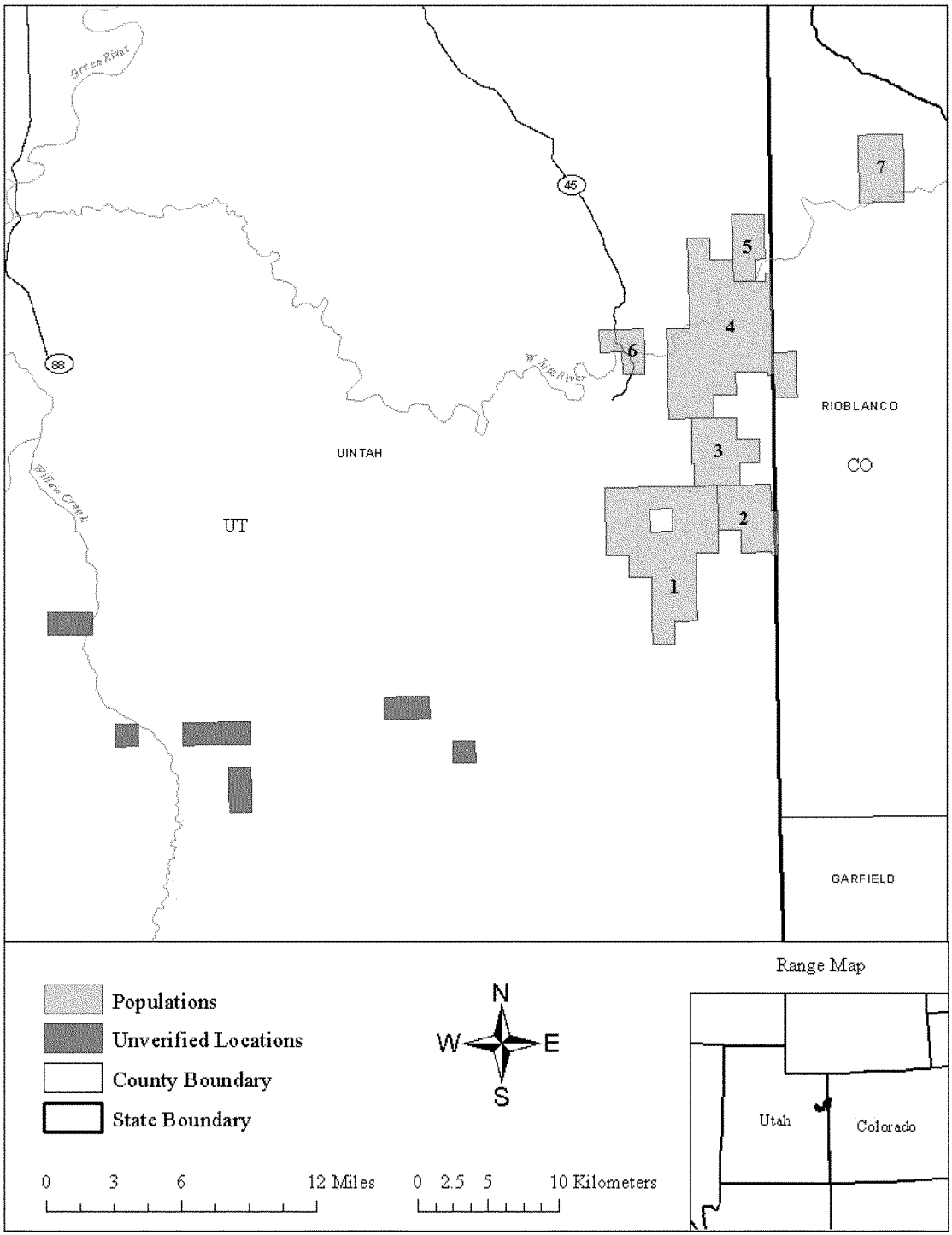


Figure 2. White River beardtongue's range.

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We do not have complete surveys for White River beardtongue and thus do not know the total population for this species. The best total population estimate is approximately 11,423 individuals, excluding the unverified locations. It is quite likely that the total population is higher, and it may be as high as 25,000 plants (Service 2012; Franklin 1994), but we do not have survey data to confirm this higher population level. Therefore, we use the 11,423 population figure throughout our analysis in this proposed rule.

Utah Natural Heritage Program and Colorado Natural Heritage Program data include 20 populations of White River beardtongue in Utah and 1 population in Colorado (Figure 2; see our previous explanation of populations and EOs, or element occurrences, in the ''Distribution'' section for Graham's beardtongue, above). Based on updated survey information from the past few years, we conducted our own analysis in which we combined several of the existing EOs because of close proximity (see *Species Information* for Graham's

beardtongue, above, for more information). Overall, we delineated seven populations in the main portion of White River beardtongue's range. Approximately 62 percent of the known population of White River beardtongue occurs on BLM land, with the remainder occurring on State and private lands (Table 2).

Table 2. Number of individuals of White River beardtongue by land owner.

	Number of individuals	Percent of total
Federal	7,054	62
Private	3,093	27
State	1,276	11
Tribal	0	0
Total	11,423	100

Two sites of White River beardtongue were monitored from 2004 to 2012 (populations 1 and 6, see Figure 2), and one site was monitored from 2010 to 2012 (population 3, see Figure 2). At one site, plants declined over this time, and the other two sites increased slightly (McCaffery 2013, p. 8). White River beardtongue tended to flower each year regardless of new seedling recruitment, in contrast to Graham's beardtongue (McCaffery 2013, p. 9). Like Graham's beardtongue, White River beardtongue is vulnerable to stochastic events as well as increases in stressors or declining habitat conditions (McCaffery 2013, p. 9). Also like Graham's beardtongue, no link was found between reproduction and precipitation on a regional level (McCaffery 2013, p. 10), but this should be studied on a more local scale. In 2009, a significant recruitment event occurred in two of the study populations (Dodge and Yates 2010, pp. 11–12). Many of these seedlings died between 2009 and 2010, but the net result was an increase in population size by the end of the study (Dodge and Yates 2011, p. 6), and this pulse of recruitment had a strong influence on the estimate of population growth (McCaffery 2013, p. 10). Continued monitoring is necessary to determine how frequent recruitment occurs and how this influences the long-term trends of this species. In addition, like Graham's beardtongue, we need further studies to determine what factors are driving population dynamics of White River beardtongue.

Habitat

White River beardtongue is restricted to calcareous (containing calcium carbonate) soils derived from oil shale barrens of the Green River Formation in the Uinta Basin of northeastern Utah and adjacent Colorado. It overlaps with Graham's beardtongue at sites in the eastern portion of Graham's beardtongue's range.

White River beardtongue is associated with the Mahogany ledge. The habitat of White River beardtongue is a series of knolls and slopes of raw oil shale derived from the Green River geologic formation (Franklin 1995, p. 5). These soils are often white or infrequently red, fine-textured, shallow, and usually mixed with fragmented shale. These very dry substrates occur in lower elevations of the Uinta Basin, between 1,500 and 2,040 m (5,000 and 6,700 ft). About one-fifth of all known point locations of White River beardtongue are on slopes of 10 degrees or less, with an average slope for all known points of 19.2 degrees (Service 2013, p. 3). The species grows at an average elevation of 1,847 m (6,060 ft), with a range in elevation from 1,523 to 2,044 m (4,998 to 6,706 ft) (Service 2013, p. 4). White River beardtongue individuals usually grow on southwest-facing exposures (Service 2013, p. 1).

Other species found growing with White River beardtongue include (but are not limited to) saline wildrye (*Leymus salinus*), mountain thistle (*Cirsium eatonii* var. *eriocephalum*), spiny greasebush (*Glossopetalon spinescens* var. *meionandra*), Utah juniper (*Juniperus osteosperma*), twoneedle piñon (*Pinus edulis*), and shadscale saltbush (*Atriplex confertifolia*) (UNHP 2013, entire), and many of the other oil shale endemics also found growing with Graham's beardtongue (Neese and Smith 1982, p. 58; Goodrich and Neese 1986, p. 283).

Biology

This species is probably long-lived due to the presence of a substantial and multi-branched woody stem (Lewinsohn 2005, p. 3), and individual plants living for 30 years are known to occur (Service 2012c, p. 3). Most plants begin to flower when the woody stem reaches 3 to 4 cm (1 to 1.5 in.) in height (Lewinsohn 2005, p. 4), usually in May and June.

The species is pollinated by a wasp, *Pseudomasaris vespoides,* and several native, solitary bee species in the genera *Osmia, Ceratina, Anthophora, Lasioglossum, Dialictus,* and *Halictus* (Sibul and Yates 2006, p. 14; Lewinsohn and Tepedino 2007, p. 235). We consider these pollinators to be medium in size as compared to the larger pollinators generally associated with Graham's beardtongue (see Background–Graham's beardtongue, ''Biology'', above). White River beardtongue has a mixed mating system, meaning it can self-fertilize but produces more seed when it is cross-pollinated (Lewinsohn and Tepedino 2007, p. 234). Thus, pollinators are important to this species for maximum seed and fruit production.

Based on the medium size of White River beardtongue pollinators, we expect the pollinators are capable of travelling at least 500 meters (1,640 ft) and thus are likely to move pollen across this distance (Service 2012b, pp. 8, 13). Although White River beardtongue has low flower visitation rates by pollinators, there is no evidence that pollinators are limiting for this species (Lewinsohn and Tepedino 2007, p. 235). It is important to maintain the diversity of pollinators by maintaining vegetation diversity for White River beardtongue because it stabilizes the effects of fluctuations in pollinator populations (Lewinsohn and Tepedino 2007, p. 236).

We have very little information regarding the genetic diversity of White River beardtongue. This species, like Graham's beardtongue, is likely not as genetically diverse as other common, sympatric beardtongues (Arft 2002, p. 5).

Summary of Factors Affecting the Species

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, we may list a species based on any of the following five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination. Stressors that fall under each of these factors are discussed below individually. We then summarize where each of these stressors or potential threats falls within the five factors.

We consider a species viable if it can persist over the long term, thus avoiding extinction. A species can be conserved (and is thus viable) if it has the three Rs: Representation, resiliency, and redundancy (Shaffer and Stein 2000). Representation, or preserving some of everything, means conserving not just a species but its associated plant communities, pollinators, and pollinator habitats. Resiliency and redundancy ensure there is enough of a species so

that it can survive into the future. Resiliency means ensuring that the habitat is adequate for a species and its representative components. Redundancy ensures an adequate number of sites and individuals. This methodology has been widely accepted as a reasonable conservation methodology (Tear *et al.* 2005, p. 841).

We participated in expert workshops—including experts from The Nature Conservancy, Red Butte Garden, UNHP, CNHP, the Service, the BLM, and the Natural Resources Conservation Service—in 2008 and 2012, to evaluate the best available scientific information for Graham's and White River beardtongues (The Nature Conservancy 2008, entire; Service 2012c, entire). We used the information from these workshops to complete a species status assessment for both Graham's and White River beardtongues. We determined that both species need the following resources for viability:

- Suitable soils and geology
- Sufficient number of pollinators
- Intact associated and adjacent plant community (both within and outside of suitable or occupied habitat)
- Minimum reproductive effort or reproductive success
- Suitable microclimate conditions for germination and establishment
- Sufficient rain and temperatures suitable for breaking seed dormancy and successful reproduction (natural climate)
- Minimum habitat patch or population size
- Genetic diversity or heterozygosity
- Habitat connectivity and integrity
- Viable, long-lived seedbank
- Minimum number of individuals
- Minimum number of viable populations

The list is the same for both Graham's and White River beardtongues because they grow in similar habitat in the same geographic area, even overlapping in places. However, specifics for each resource can differ between the two species.

To determine the current and future status of Graham's and White River beardtongues, through our species status assessment we evaluated if these resource needs are currently met and how these resources are likely to change in the future. If the resources are not currently met or are predicted to be unmet in the future, we determined the cause of the resource insufficiency. The underlying stressor causing the resource insufficiency is then considered a threat to Graham's and White River beardtongues. We discuss these stressors in the following section.

I. Energy Exploration and Development

Graham's and White River beardtongues are particularly vulnerable to the effects of energy development because their ranges overlap almost entirely with oil shale and tar sands development areas, as well as ongoing traditional oil and gas drilling.

Impacts from energy exploration and development include the removal of soil and vegetation when unpaved roads, well pads, evaporation ponds, disposal pits, and pipelines are constructed (BLM 2008a, pp. 448–449). Increased disturbance from these developments, coupled with climate change (see IX. Climate Change, below), will facilitate the invasion and spread of nonnative species such as cheatgrass (*Bromus tectorum*), halogeton (*Halogeton glomeratus*) and Russian thistle (*Salsola tragus*) (Brooks and Pyke 2001, entire; Grace *et al.* 2001, entire; Brooks 2003, p. 432; Friggens *et al.* 2012, entire), which can outcompete native plants and increase the risk of catastrophic wildfires (see VI. Wildfire and VII. Invasive Weeds, below).

Energy developments also result in increased road traffic and consequent increases in dust emissions; for every vehicle travelling one mile (1.6 km) of unpaved roadway once a day, every day for a year, approximately 2.5 tons of dust are deposited along a 305-m (1,000-ft) wide corridor centered on the road (Sanders 2008, p. 20). Excessive dust can clog plant pores, increase leaf temperature, alter photosynthesis, and affect gas and water exchange (Sharifi *et al.* 1997, p. 842; BLM 2012a; Ferguson *et al.* 1999, p. 2), negatively affecting plant growth and reproduction.

Roads may act as a barrier to bee movement by influencing bees to forage on only one side of the road (Bhattacharya *et al.* 2003, pp. 42–43) or within isolated habitat patches (Goverde *et al.* 2002, entire). Although bees and other pollinators are quite capable of crossing roads or other human-disturbed areas, the high site fidelity of bumblebees makes them more apt to remain on one side of a disturbed area (Bhattacharya *et al.* 2003, p. 42). The implication of this type of pollinator behavior for rare plants is that the probability for outcrossing is reduced (Cane 2001, entire), thereby reducing genetic variability and reproductive success.

Habitat loss or fragmentation from energy development can result in higher extinction probabilities for plants because remaining plant populations are confined to smaller patches of habitat that are isolated from neighboring populations (Jules 1998, p. 1; Soons 2003, p. 115). Habitat fragmentation and low population numbers pose a threat to rare plant species' genetic potential to adapt to changing environmental conditions (Mathies *et al.* 2004, pp. 484–486). Smaller and more isolated populations produce fewer seeds and pollen, and thus attract fewer and a lower diversity of pollinators (Paschke *et al.* 2003, p. 1,258; Lienert 2004, p. 62); for a more complete discussion, see section VIII. Small Population Size, below).

Oil Shale and Tar Sands

The Energy Policy Act of 2005 (42 U.S.C. 13201 *et seq.*) establishes that oil shale, tar sands, and other strategic unconventional fuels should be developed to reduce the nation's dependence on imported oil. At 42 U.S.C. 15927(m)(1)(B), the Energy Policy Act identifies the Green River Region, including the entire range of Graham's and White River beardtongues, as a priority for oil shale and tar sand development. Provisions of the Energy Policy Act of 2005 provide economic incentives for oil shale development. For example, previous Mineral Leasing Act of 1920 (30 U.S.C. 181 *et seq.*) restrictions limited oil shale lease sizes to 2,072 hectares (ha) (5,120 acres (ac)), and restricted leasing opportunities to just one lease tract per individual or corporation. Lease size restrictions effectively limited development because of a lack of available acreage to accommodate necessary infrastructure and facilities. The Energy Policy Act of 2005 now allows an individual or corporation to acquire multiple lease tracts up to 20,234 ha (50,000 ac) in any one State, removing the restrictions of the Mineral Leasing Act of 1920 (Bartis *et al.* 2005, p. 48).

As we discussed in our January 19, 2006, proposed rule (71 FR 3158), Graham's beardtongue is closely associated with the richest oil shale-bearing strata in the Mahogany ledge, which makes the species highly vulnerable to extirpation from potential oil shale or tar sands mining (Shultz and Mutz 1979, p. 42; Neese and Smith 1982, p. 64; Service 2005, p. 5). This association is particularly true for the easternmost populations of Graham's beardtongue (populations 10–24, see Figure 1), where approximately 63 percent of all known Graham's beardtongue plants are directly associated with the Mahogany ledge where it outcrops or is less than 152 m (500 ft) below the surface (Service 2013, p. 5). White River beardtongue is also associated with the Mahogany ledge's oil shale-bearing strata. Approximately 69 percent of the known White River

beardtongue plants are directly associated with the Mahogany ledge where it outcrops or is less than 152 m (500 ft) below the surface (Service 2013, p. 5). This shallow overburden (the soil and other material that lies over a geologic deposit) becomes important when evaluating the type of mining (e.g., surface or subsurface) that will be used to extract the oil shale resource. As discussed below, surface mining, in which all surface vegetation and soils are removed, is likely the preferred extraction method in these areas.

The feasibility of oil shale and tar sands development was uncertain when the original proposed listing rule was withdrawn in 2006 (71 FR 76024, December 19, 2006). Our January 19, 2006, proposed rule (71 FR 3158) concluded that Graham's beardtongue was at risk due to the increased potential of energy development, both traditional and oil shale and tar sands. Our December 19, 2006, withdrawal of the proposed rule (71 FR 76024) concluded that oil shale and tar sands development was likely to occur first in the Piceance Basin in Colorado or in other areas that do not overlap with the range of Graham's beardtongue, and to use underground mining technologies that reduce surface disturbance. We further concluded that development of oil shale and tar sands resources in Graham's beardtongue habitat was not likely to occur, if at all, until at least 20 years into the future, and was uncertain due to technological and economic uncertainty. But as discussed below, it is now highly likely that oil shale and tar sands mining will occur across the ranges of both of these species in the near future.

In 2012, the BLM issued an Oil Shale and Tar Sands (OSTS) Final Programmatic Environmental Impact Statement (PEIS) analyzing the impacts of designating public lands as available for commercial leasing for oil shale and tar sands development in Colorado, Utah, and Wyoming. The PEIS opens approximately 144,473 ha (357,000 ac) in Utah and 10,522 ha (26,000 ac) in Colorado for oil shale leasing, and approximately 52,609 ha (130,000 ac) in Utah for tar sands leasing (BLM 2012b, p. ES–10). Although leasing has not yet occurred, it is highly likely to happen in the near future.

In Utah, 40 and 56 percent, respectively, of Graham's and White River beardtongues' total populations overlap the designated oil shale and tar sands leasing areas on BLM lands (Service 2013, p. 6). Existing regulatory mechanisms only provide limited protection to the beardtongues on Federal lands (see X. Inadequacy of Existing Regulatory Mechanisms, below). We know of 18,678 Graham's beardtongue plants on BLM lands, and 12,831 of these (or 69 percent) overlap designated oil shale and tar sands leasing areas. Our data also show that of 7,054 White River beardtongue plants known to occur on BLM lands, 6,389 (or 91 percent) overlap with designated oil shale and tar sands leasing areas. Designated oil shale leasing areas in Colorado do not overlap any known populations for either Graham's beardtongue or White River beardtongue—in fact, designated oil shale areas in Colorado are at least 32 km (20 mi) away from the closest known populations (Service 2013, p. 7).

Oil shale and tar sands development on Federal lands is likely to indirectly impact Graham's and White River beardtongues by increasing habitat fragmentation, fugitive dust, and weed encroachment. A majority of all known Graham's beardtongue and White River beardtongue plants on BLM land occurs where the overburden over the richest oil-shale-bearing geologic stratum is shallow—either outcropping or less than 152 m (500 ft) subsurface (Service 2013, p. 5). Surface strip mining in these areas is likely to be the preferred extraction method (BLM 2012b, p. A–22), which would result in the complete loss of all surface vegetation. Although direct impacts to Graham's and White River beardtongues on Federal lands will be minimized because existing conservation measures protect plants by 91 m (300 ft), the existing conservation measures are inadequate to minimize impacts from the indirect effects listed above or to protect from accidental loss that may occur (see X. Inadequacy of Existing Regulatory Mechanisms, below). These indirect effects are likely to impact 40 and 56 percent of all known plants of Graham's and White River beardtongues, respectively. Neither species is likely to be able to sustain this amount of impact and still be able to persist into the future. Protection of Graham's and White River beardtongues will need to happen on a landscape level to be effective at protecting these species from indirect and cumulative impacts (see XI. Cumulative Effects from All Factors, below) of oil shale and tar sands development, and this type of protection is not currently afforded to either species.

Furthermore, about 41 percent and 38 percent, respectively, of Graham's and White River beardtongues occur on State and private lands where they are afforded no protection. Oil shale and tar sands development here is highly likely to directly remove all individuals of these two species, in particular where these species overlap with the oil-rich Mahogany layer. We estimate that most known Graham's and White River beardtongues on State and private lands occur where the Mahogany layer outcrops or is less than 152 m (500 ft) below the surface (or approximately 26 and 28 percent of the total known populations of Graham's and White River beardtongues, respectively), making these areas more likely to be surface mined. As a result, these areas are the most vulnerable to direct loss if oil shale and tar sands development expands across the region. The remainder of all known plants on State and private lands is likely to be impacted by increased disturbance from oil shale and tar sands development, but at worst may be lost as well. In addition, land ownership throughout the Uinta Basin is a checkerboard of private, State, and Federal ownership. Total losses of Graham's and White River beardtongues on private and State lands will have additional, indirect impacts through habitat fragmentation on those individuals occurring on Federal lands.

In the past, we concluded that oil shale and tar sands development was economically uncertain due to the highly volatile energy market (71 FR 76024, December 19, 2006). Indeed, oil shale and tar sands are more expensive to produce than conventional oil (BLM 2011, entire). In addition, the amount of water required to process these oil sources was considered a technological limitation (BLM 2011, entire). Despite these difficulties, three oil shale projects or explorations are planned on private, State, and BLM lands in Uintah County, Utah. The first project is proposed by Enefit American Oil, which is wholly owned by the Estonian government. In 2011, Enefit acquired all of the assets owned by Oil Shale Exploration Company (BLM 2012b, p. A–76). This includes an oil shale research, development, and demonstration (RD&D) lease property on BLM land in the Uinta Basin, Utah. Enefit's planned operations include completing the RD&D project and expanding operations to the surrounding lands that they privately own. Enefit expects to begin construction of an industrial development complex in 2017, with commercial production online by 2020 (Bernard and Hughes 2012, p. 18; Bernard 2013, p. A–11).

The Enefit project will develop oil shale operations on up to 10,117 ha (25,800 ac) of private and State property using surface and subsurface mining techniques (Enefit 2012, p. 6). Surface mining will occur where the oil shale formation is outcropped or covered by

a minimal amount of overburden (Enefit 2012, p. 6), resulting in the removal of all soils and vegetation in the area. The project area overlaps 19 percent of all known Graham's beardtongue plants and 26 percent of all known White River beardtongue plants (Service 2013, p. 9). At worst, all of the Graham's and White River beardtongues plants growing in this project area will be lost. At best, the Enefit project will fragment habitat and reduce connectivity for both species. Populations 19 and 20 of Graham's beardtongue will be impacted, reducing gene flow between the Utah and Colorado populations of Graham's beardtongue. The Enefit project occurs in the heart of White River beardtongue's distribution, and all Utah populations (excluding the Colorado population, 7, see Figure 2) will become more highly fragmented with more isolated populations that are vulnerable to extinction.

A second project will be conducted by Red Leaf Resources on Utah School and Institutional Trust Lands Administration (SITLA) land, within population 13 (see Figure 1) and overlapping 627 known Graham's beardtongue plants (about 2 percent of all known plants). Oil shale will be surface mined at the site, removing all soils and vegetation in the area. This project was initially planned to begin in 2013 (Bernard and Hughes 2012, entire), but is postponed awaiting the results of preliminary water monitoring (Loomis 2012, entire; Baker 2013, entire). The third project is an application by Ambre Energy to drill oil shale test wells on BLM land in the Vernal Field Office area, planned to begin in 2013. The applicant for this project proposes to drill 6 test wells, 3 of which occur in known Graham's beardtongue habitat, although individual plants will be avoided by 91 m (300 ft). Neither of these projects overlaps with White River beardtongue.

Tar sands lease areas overlap 24 and 3 percent of the total known populations of Graham's and White River beardtongues, respectively. The impacts of tar sands mining will be similar to those from oil shale mining. However, we are aware of only one approved proposed tar sands project in the State of Utah (Loomis 2012, p. 1), and the project does not overlap with any known populations of Graham's beardtongue or White River beardtongue.

In summary, the total impact of the currently planned oil shale development projects alone (Enefit, Red Leaf) is substantial. The likely loss of up to 21 percent (19 percent from Enefit and 2 percent from Red Leaf) of Graham's beardtongue and 26 percent (all from the Enefit project) of White River beardtongue will decrease the viability of both species by reducing total numbers and increasing habitat fragmentation, which will lead to smaller and more isolated populations that are prone to extinction (see VIII. Small Population Size, below). Moreover, the initiation of these projects (including the drilling of test wells on BLM lands) and the recent BLM leasing decisions indicate the renewed interest in oil shale and tar sands mining and the increased likelihood of development across the ranges of these two species. As described above, we estimate that 26 and 28 percent of all known Graham's and White River beardtongues occur on non-federal lands where the Mahogany layer outcrops or is less than 152 m (500 ft) below the surface (the number of Graham's beardtongue on non-federal lands will increase by 1 percent within the next year through a land exchange; see X. Inadequacy of Existing Regulatory Mechanisms, below) and are vulnerable to total loss if oil shale and tar sands development proceeds, which appears likely.

On BLM lands, 40 and 56 percent of all known Graham's and White River beardtongues are located within potential oil shale and tar sands lease areas. Most also occur on Mahogany oil-shale ledge outcroppings or where the overburden is shallow, meaning that surface mining would be the preferable extraction methodology, with the resulting loss of all surface vegetation. By adding the number of plants likely to be impacted by oil shale and tar sands development across all landowners (Table 3), we estimate that as much as 82 and 94 percent of the total known populations of Graham's and White River beardtongues will be vulnerable to both direct loss and indirect negative impacts such as habitat fragmentation from oil shale and tar sands development. These levels of impact are likely to lead to severe declines in both species across their ranges.

Table 3. Total percent of populations likely to be impacted by oil shale and tar sands development.

	Graham's beardtongue		White River beardtongue	
	# plants	% total	# plants	% total
BLM Oil Shale and Tar Sands Lease Areas	12,831	40	6,389	56
Private and State Lands	13,024	41	4,369	38
Total	25,855	82	10,758	94

* Totals may not sum due to rounding.

Traditional Oil and Gas Drilling

Historically, impacts to both beardtongue species from traditional oil and gas development were largely avoided because development within the species' habitat was minimal. However, the previously described Energy Policy Act of 2005 enables leasing of oil and gas and tar sands separately, even when the two are found in the same area. Previously, the law required a combined tar sands/oil and gas lease, effectively delaying leasing and extraction of oil and gas in tar sand areas because of concerns about conflicts between tar sands and traditional oil and gas development. Overall, the Energy Policy Act of 2005 effectively opened the entire range of both species to leasing for oil and gas development and made that leasing more efficient and effective.

The impacts of traditional oil and gas development on Graham's and White River beardtongues are expected to be high (BLM 2008b, p. 457). Although a high level of development within these species' habitats is not yet realized, we expect it to increase in the future. Most of the ranges of Graham's and White River beardtongues are underlain with deposits of traditional hydrocarbon resources, primarily natural gas (Service 2013, p. 8). In the past two decades, oil and gas production in Uintah County, Utah, has increased substantially. For example, oil production in Uintah County increased about 60 percent from 2002 to 2012, and gas production increased about 25 percent over this same time period (Utah Division of Oil 2012, entire). Drilling activities in Uintah County continue to increase: The number of new wells drilled in Uintah

County was 316 in 2009, and 631 in 2012 (Utah Division of Oil 2012, entire).

To quantify how much drilling has occurred within Graham's and White River beardtongues' habitat, we used the following methods to identify an analysis area for impacts to the species based upon the currently known plant locations and adjacent essential pollinator habitat. For Graham's beardtongue, we created an analysis area using known locations plus a distance of 700 m (2,297 ft) for pollinators. For White River beardtongue, we created an analysis area using known locations plus a distance of 500 m (1,640 ft) for pollinators. These distances (700 m and 500 m) were based on pollinator travel distance for important pollinators for each species (see *Species Information,* ''Biology'' for each plant, above). We then calculated the number of wells currently drilled within these areas.

Within the Graham's beardtongue analysis area, well drilling has occurred at a comparatively slow pace thus far: As of January 2013, 45 well pads were developed or approved within the analysis area for Graham's beardtongue, and 35 of these are in Utah (Service 2013, p. 8). We do not know actual surface disturbance associated with each well, so we estimate 5 acres of surface disturbance per well pad (based on assumptions made in the Vernal BLM Resource Management Plan (RMP) (BLM 2008b, p. 4–3)), including disturbance from associated roads and pipelines. Accordingly, we estimate that 103 ha (255 ac) of Graham's beardtongue habitat are disturbed from energy development, which is less than 1 percent of the total area included within the analysis area across the Graham's beardtongue's range.

Development within the White River beardtongue analysis area is similar; as of January 2013, 13 well pads were developed or approved in the White River beardtongue analysis area, 8 of which are in Utah (Service 2013, p. 8). Using the methods described above, less than 1 percent (26 ha (65 ac)) of the total area included within the White River beardtongue analysis area is likely disturbed by existing oil and gas activities.

Approximately 33 percent of the analysis areas for Graham's beardtongue and 20 percent for White River beardtongue, respectively, on State and Federal land are leased for traditional oil and gas development (Service 2013, p. 11). At the time of this analysis, one planned seismic exploration project overlaps with habitat for both beardtongue species. The initiation of this project indicates that traditional oil and gas development will very likely increase in the habitat of both of these species. Our estimate of impacts is likely an underestimate because we do not have information about how much private land is planned for development.

Although some oil and gas drilling to date has certainly impacted individuals of Graham's and White River beardtongues, development has not been at a high enough level to negatively impact the whole species. Additionally, neither Graham's beardtongue nor White River beardtongue currently appears to suffer from pollinator limitation (Lewinsohn and Tepedino 2007, entire; Dodge and Yates 2009, p. 12). Furthermore, populations monitored for 9 years are stable (Dodge and Yates 2011, entire). However, substantial numbers of Graham's and White River beardtongue individuals (and their habitat) occur in areas that are leased for oil and gas development (Table 4), and thus it is reasonable to conclude that the impacts of oil and gas activity will increase in the future as additional areas are developed.

Table 4. Graham's and White River beardtongue known plants (rangewide) within leased oil and gas areas on both BLM and State lands (Service 2013, p. 11). These were calculated based on oil and gas leases alone and may include overlap with oil shale and tar sands. Percentages may not add due to rounding.

	Graham's beardtongue		White River beardtongue	
	# plants	% total	# plants	% total
BLM Leases	8,829	14	2,547	11
State Leases	4,269	13	1,278	11
Total	13,098	27	3,825	22

Summary of All Energy Development

Several new oil shale projects are planned for the future (by 2020) within Graham's and White River beardtongue habitat. For the two projects occurring on private or State lands (Enefit and Redleaf) for which we have enough information to estimate impacts, substantial impacts are likely to occur for both species: Approximately 21 and 26 percent of the total known populations of Graham's and White River beardtongues in the center of their ranges are vulnerable to direct loss and the effects of increased disturbance. These direct impacts will reduce the redundancy and representation of both species. Although the market for oil shale and tar sands may still be uncertain, the commencement of these projects indicates progress toward imminent future development of oil shale and tar sands resources within the range of these species.

On BLM lands, approximately 40 and 56 percent of all known Graham's and White River beardtongue plants fall within areas that are open for oil shale and tar sands leasing, although these areas have not yet been leased. Twenty-seven and 22 percent of all known Graham's and White River beardtongue plants, respectively, fall within areas that are leased by the BLM and the State of Utah for traditional oil and gas development. Many, but not all, of these lease areas overlap with each other so that combined, we estimate that 50 and 66 percent of Graham's beardtongue and White River beardtongue, respectively, are on BLM lands within areas that are either leased for oil and gas development or open to leasing for oil shale and tar sands (Table 5).

Table 5. Areas identified for energy development for Graham's beardtongue and White River beardtongue across all landowner types. Numbers are not additive because many of these areas overlap.

	Graham's beardtongue		White River beardtongue	
	# plants	% of total	# plants	% of total
Existing BLM oil and gas leases	4,389	14	1,260	11
Vernal BLM Field Office 2013 proposed leases	2,458	8	130	1
Meeker BLM Field Office 2013 proposed leases	1	0	2	0
BLM oil shale and tar sands lease areas	12,831	40	6,389	56
Total Number of Plants that Overlap with All Energy Types on BLM Lands or Leases	15,750	50	7,531	66
Existing State of Utah oil and gas leases	4,269	13	1,278	11
Private and State lands (we assume all of these lands are open to energy development of any kind)	13,024	41	4,369	38
Total Number of Plants that Overlap with All Energy Types Across All Landowners	28,733	91	11,395	100

Even though individuals of these species on BLM lands will be mostly protected from direct loss through the 91-m (300-ft) setback conservation measure, a majority of both species will still be susceptible to the indirect effects of energy development (with an additional 1 percent of Graham's beardtongue likely to experience direct impacts when the land exchange is finalized; see X. Inadequacy of Existing Regulatory Mechanisms, below). In total, we estimate that 91 and 100 percent of Graham's and White River beardtongues are vulnerable to the impacts of all types of energy development across all landowners (Table 5). The indirect impacts from oil and gas development, such as habitat fragmentation and loss, are likely to reduce the resiliency of both species so that they cannot recover from most stressors. In conclusion, we consider energy exploration and development a future threat that will have a significant impact on both species.

II. Grazing and Trampling

Invertebrates, wildlife, and livestock all graze directly on individuals of Graham's and White River beardtongues (Sibul and Yates 2006, p. 9; Dodge and Yates 2010, p. 9; 2011, pp. 9, 12; UNHP 2012, entire). Grazers feed on all parts of the plant, including the seeds, damaging or destroying individual plants and effectively reducing their reproductive success.

It is likely that livestock are not the primary grazers of Graham's or White River beardtongues. High rates of herbivory on both beardtongue species was reported in every year of a 9-year monitoring study (Dodge and Yates 2011, pp. 7, 9). The impact of this herbivory was to reduce fruit and seed production (Dodge and Yates 2011, pp. 7, 9). The herbivory was attributed to rabbits, cattle, large mammals, deer, and invertebrates (Dodge and Yates 2011). In particular, tiger moth caterpillars (possibly *Arctia caja utahensis,* although this identification has not been positively confirmed) were noted on Graham's beardtongue plants at one site in 2009 and 2010 (Dodge and Yates 2011; Tepedino 2012). In these years, herbivory rates (measured by the number of plants browsed) were as high as 59 and 68 percent, respectively (Dodge and Yates 2011, p. 4). The grazing pressure fluctuates, however, as lower herbivory (28.6 percent) was noted in 2011, and plants at this site rebounded in size and reproduction to match other sites that experienced little to no grazing (Dodge and Yates 2011, p. 4).

The level of herbivory within all of the long-term monitoring plots for both beardtongue species fluctuated greatly over the course of the study. For Graham's beardtongue, across all monitoring sites and years, herbivory ranged from 4.7 to 84 percent; for White River beardtongue, herbivory ranged from 1.3 to 91 percent (Dodge and Yates 2011, entire). Herbivory appeared to decrease at times due to delayed plant development from the cool, wet springs of 2010 and 2011 (Dodge and Yates 2011, pp. 10–11). Despite high levels of herbivory, the populations were mostly stable over 9 years of monitoring (McCaffery 2013a, p. 4). Presumably, beardtongues would be adapted to herbivory by native grazers, which may explain why populations continue to remain stable despite high levels of herbivory.

Everywhere Graham's and White River beardtongues grow on BLM lands, they fall within a grazing allotment. This accounts for approximately 59 percent of all known Graham's beardtongue plants and 62 percent of all White River beardtongue plants. Most Graham's beardtongue plants occur within approximately 19 allotments with both sheep and cattle use. Seasons of use vary considerably, with most allotments grazed over the winter (from November or December to April), although some allotments are grazed in the spring and summer (BLM 2008c, pp. J1–4). Most White River beardtongue plants occur within six allotments: four sheep allotments with a season of use from October to May, one sheep allotment (Raven Ridge in Colorado) grazed from November to February, and one cattle allotment with season of use from April to June and October to February (BLM 2008c, pp. J1–4). Grazing in the spring and summer are more likely to directly impact beardtongue individuals than grazing in the winter. In addition, sheep are more likely to graze on forbs than cattle (Cutler 2011, entire); thus beardtongue individuals within sheep allotments are more likely to be grazed than those in cattle allotments. On the other hand, grazing pressure may have less of an impact on the beardtongues than it has in the past—in the past decade, BLM has reduced the number of grazing sheep by half on many of the allotments (Cutler 2011, entire). Grazing also likely occurs across other landowners, although we do not have data on these other lands.

Besides impacts from grazing, which we do not believe is negatively impacting Graham's or White River beardtongue at the species level, domestic livestock can impact rare and native plants by trampling them. As discussed in our 2006 proposed rule for Graham's beardtongue (71 FR 3158, January 19, 2006), trampling from domestic livestock may have localized effects on this species. We believe one population of Graham's beardtongue was eradicated by livestock trampling (Neese and Smith 1982, p. 66). Winter sheep grazing is the principal use across the range of White River beardtongue habitat, where sheep trailing (walking) likely results in damage or loss of plants (Franklin 1995, p. 6; UNHP 2012, entire). It is likely that some individuals of both beardtongue species, and particularly White River beardtongue as it tends to grow on slightly steeper slopes (see *Species Information,* ''Habitat'' for both beardtongues above), are afforded some protection from

trampling by cattle where they grow on steep slopes, as cattle generally avoid steep slopes and primarily graze on gentle slopes. However, this would not prevent trampling by sheep, which are not deterred by steep slopes.

Livestock grazing can negatively impact native plants indirectly through habitat degradation or by influencing plant community composition. Across the Colorado Plateau, livestock trampling and trailing breaks and damages biological soil crusts (Belnap and Gillette 1997, entire); alters plant community composition (Cole *et al.* 1997, entire); spreads and encourages weed seed establishment (Davies and Sheley 2007, p. 179); increases dust emissions (Neff *et al.* 2008, entire); and compacts soils, affecting water infiltration, soil porosity, and root development (Castellano and Valone 2007, entire). Crusts are not known to be a major component of the soils that Graham's and White River beardtongues inhabit, but livestock likely have altered the physical features of the plants' habitats. Although we do not have data indicating how livestock grazing has indirectly impacted Graham's beardtongue or White River beardtongue habitat, the invasive species cheatgrass, purple mustard, halogeton, and prickly Russian thistle have been documented growing with both beardtongues (see VII. Invasive Weeds, below) (Fitts and Fitts 2009, p. 23; CNHP 2012, entire; Service 2012a, entire; UNHP 2012, entire). We assume that grazing has caused ecological changes, including nonnative weed invasion and other physical changes, within beardtongue habitats. We make this assumption because of landscape–level ecological changes—such as annual weed invasion, plant community changes, and loss of biological soil crusts—known to have occurred across the Colorado Plateau due to introduced grazers such as cattle, horses, and sheep (Mack and Thompson 1982, entire; Cole *et al.* 1997, entire). We do not know the extent and severity of these changes.

In summary, herbivory and trampling from grazing on some locations of Graham's and White River beardtongues appear to be severe during some years, and it is likely that similar impacts occur across the ranges of the species. The documented effects of herbivory and trampling on Graham's and White River beardtongues to date are limited to a reduction in reproductive output in some years at specific sites and the possible loss of a historical population, rather than widespread impacts on habitat or population-level impacts on the species. Despite high levels of herbivory, populations appear to be stable. At present, we find that both species have sufficient resiliency, redundancy, and representation to recover from existing grazing and trampling impacts. Thus, we do not consider grazing to be a threat to these species. This factor should continue to be monitored, as the cumulative effects of livestock grazing, particularly habitat alteration, coupled with other disturbances may have a more severe negative effect on beardtongue species (see section XI. Cumulative Effects from All Factors, below, for more details). In particular, changing climate patterns may change the effects associated with herbivory from native grazers (see IX. Climate Change, below).

III. Unauthorized Collection

In our 2006 proposed rule (71 FR 3158, January 19, 2006), we determined that unauthorized collection of Graham's beardtongue may occur, but we never explicitly stated whether we believed it posed a threat to the species. Indeed, Graham's beardtongue is a unique and charismatic species that is prized by collectors and, at least at one point in time, was available commercially online (71 FR 3158, January 19, 2006). We know of no recent attempts to collect this species without proper authorizations. We are not aware of any instances where White River beardtongue was collected without proper authorizations that ensure species conservation. Although unauthorized collection may destroy some individuals, it is not likely to extirpate entire populations or lead to species-level impacts. Therefore, we do not consider unauthorized collection a threat to either beardtongue species.

IV. Off-Highway Vehicle Use

The use of off-highway or off-road vehicles (OHVs) may result in direct loss or damage to plants and their habitat through soil compaction, increased erosion, invasion of noxious weeds, and disturbance to pollinators and their habitat (Eckert *et al.* 1979, entire; Lovich and Bainbridge 1999, p. 316; Ouren *et al.* 2007, entire; BLM 2008b, pp. 4–94; Wilson *et al.* 2009, p. 1). To date, little OHV use has occurred within the ranges of Graham's beardtongue and White River beardtongue. For example, unauthorized OHV use was observed at four locations within White River beardtongue occupied habitat 10 to 20 years ago (UNHP 2012, entire). Federal and industry personnel were increasingly using OHVs in oil and gas field surveys and site location developments prior to 2008. However, since 2008, the revised Vernal Field Office Resource Management Plan (RMP) limits all vehicles to designated routes (BLM 2008c, p. 46). This protective measure provides conservation benefits within the habitat of Graham's and White River beardtongues. Given the low levels of documented unauthorized OHV use and the protections provided by the BLM Vernal RMP, we do not consider OHV use a threat to either beardtongue species.

V. Road Maintenance and Construction

Roads that cross through rare plant habitat can destroy habitat and populations, increase road dust, and disturb pollinators (Trombulak and Frissell 2000, entire). We consider this issue separately from roads created for oil and gas development, discussed above (see I. Energy Exploration and Development, above), although the effects are the same.

Many unpaved county roads cross through Graham's and White River beardtongue habitat, and most of these roads have existed for decades. Plants located near unpaved roads are prone to the effects of dust, fragmentation, and pollinator disturbance (see I. Energy Exploration and Development, above, for a thorough discussion of road effects). Conflicts can also arise from new paved roads or road upgrades, as described below.

In 2012, Seep Ridge Road, a formerly unpaved county road crossing through occupied Graham's beardtongue habitat, was re-aligned and paved. At least 322 individuals were within 300 feet of the proposed right-of-way. This project resulted in direct impacts to at least 31 Graham's beardtongue individuals that were transplanted out of the widened road right-of-way. The transplants will be revisited in 2013, but we do not expect any of them to have survived due to the drought conditions during the transplant (Dodge 2013, entire). The paving of Seep Ridge Road reduces the impacts of fugitive dust on the population of Graham's beardtongue bisected by the road. However, the widened road corridor directly decreased the number of plants on the east side of the road and may impede pollinator movement, leading to this population of Graham's beardtongue becoming more isolated. This patch may be more susceptible to extinction, although further study of this population and its genetic diversity should be undertaken.

Two of the long-term monitoring plots for Graham's and White River beardtongues are immediately adjacent to unpaved roads, and these populations were stable over the 9 years of the study (Dodge and Yates 2011, pp. 9, 12;

McCaffery 2013a, p. 4). However, one monitoring plot of White River beardtongue produces fewer flowers and fruits than other sites of White River beardtongue, potentially because of increased disturbance due to the nearby road (Dodge and Yates 2011, p. 12).

In summary, road maintenance and construction can destroy habitat and fragment populations, but this impact is site-specific and does not occur across the entire range of the species. Besides the Seep Ridge Road project, these types of projects occur infrequently, and we are not aware of other road construction or maintenance projects that have occurred, or are proposed to occur, in areas where they would impact Graham's beardtongue or White River beardtongue. Therefore, we do not consider road maintenance and construction to be a threat to either beardtongue species.

VI. Wildfire

In 2012, the Wolf Den Fire, believed to be started by dry lightning, burned 8,112 ha (20,046 ac) in Uintah County, including 394 ha (974 ac), approximately 1.5 percent, of the area within 700 m (2,297 ft) of known points of Graham's beardtongue and approximately 563 known plants (1.8 percent of the total known number of plants). No individuals of White River beardtongue were affected by this fire. Fires do not occur frequently in Graham's beardtongue or White River beardtongue habitat, but fire frequency and intensity is likely to increase with increased invasive weeds and climate change (see sections VII. Invasive Weeds, IX. Climate Change, and XI. Cumulative Effects from All Factors, below, for more information). At present, we do not expect wildfires at a large enough scale to pose a threat to either species. In addition, we do not yet know how these species respond to fire. It is likely that with patchy, low-intensity burns they would be able to re-sprout from their roots, which we have documented in the field for Graham's beardtongue (Brunson 2012, entire). We do not consider wildfire alone a threat to either species.

VII. Invasive Weeds

We noted the presence of the invasive, nonnative weeds cheatgrass and halogeton in Graham's beardtongue habitat in our 2006 proposed rule (71 FR 3158, January 19, 2006). Prickly Russian thistle and purple mustard also occur in Graham's and White River beardtongue habitat (Service 2012c, entire). The weeds have not been noted as highly prevalent in the barren oil shale soils where the beardtongue species grow, although this has never been directly studied. However, these invasive weeds are numerous in the habitat and plant communities immediately adjacent to beardtongue species habitat, most notably along disturbances (for example, roads and well pads) (Service 2012c, entire).

The spread of nonnative, invasive species is considered the second largest threat to imperiled plants in the United States (Wilcove *et al.* 1998, p. 2). Invasive plants—specifically exotic annuals—negatively affect native vegetation, including rare plants. One of the most substantial effects is the change in vegetation fuel properties that, in turn, alters fire frequency, intensity, extent, type, and seasonality (Menakis *et al.* 2003, p. 282; Brooks *et al.* 2004, entire; McKenzie *et al.* 2004, entire). Shortened fire return intervals make it difficult for native plants to reestablish or compete with invasive plants (D'Antonio and Vitousek 1992, pp. 68–77). Invasive weeds can exclude native plants and alter pollinator behaviors (D'Antonio and Vitousek 1992, pp. 68–77; DiTomaso 2000, p. 257; Mooney and Cleland 2001, pp. 74–75; Traveset and Richardson 2006, pp. 211–213). For example, cheatgrass outcompetes native species for soil, nutrients, and water (Melgoza *et al.* 1990, pp. 9–10; Aguirre and Johnson 1991, pp. 352–353).

Cheatgrass is a particularly problematic nonnative, invasive annual grass in the Intermountain West and, as discussed above, has been documented in Graham's and White River beardtongue habitat. If already present in the vegetative community, cheatgrass increases in abundance after a wildfire, increasing the chance for more frequent fires (D'Antonio and Vitousek 1992, pp. 74–75). In addition, cheatgrass invades areas in response to surface disturbances (Hobbs 1989, pp. 389–398; Rejmanek 1989, pp. 381–383; Hobbs and Huenneke 1992, pp. 324–330; Evans *et al.* 2001, p. 1,308). Cheatgrass is likely to increase due to climate change because invasive annuals increase biomass and seed production at elevated levels of carbon dioxide (Mayeaux *et al.* 1994, p. 98; Smith *et al.* 2000, pp. 80–81; Ziska *et al.* 2005, p. 1,328).

We have limited information on how much invasive weeds have impacted Graham's and White River beardtongues across their ranges, although it is likely that this is a factor that will increase in the future due to increased disturbance from oil and gas development, grazing (see II. Grazing and Trampling, above), and climate change. We do not currently consider invasive weeds alone to be a threat to either beardtongue species. However, with the amount of energy development that is likely to occur across the ranges of both species in the future (see I. Energy Exploration and Development, above), and given the likelihood that invasive species will increase with climate change (see XI. Cumulative Effects from All Factors, below), we conclude that invasive weeds are a future threat to these species.

VIII. Small Population Size

We lack complete information on the population genetics of Graham's and White River beardtongues. Preliminary genetic analysis shows that both beardtongues have less diversity than more common beardtongue species that have overlapping ranges (Arft unpublished report 2002). As previously described (see Background, ''Biology'' for both plants, above), both species have mixed mating systems and are thus capable of producing seed through self-fertilization or cross-pollination. However, the highest number of seeds and fruits are produced when flowers are cross-pollinated (Lewinsohn and Tepedino 2007, pp. 233–234). Increased disturbance and habitat fragmentation resulting in smaller population sizes could negatively impact both species because there would be fewer plants available for cross-pollination.

Small populations and species with limited distributions are vulnerable to relatively minor environmental disturbances (Given 1994, pp. 66–67). Small populations also are at an increased risk of extinction due to the potential for inbreeding depression, loss of genetic diversity, and lower sexual reproduction rates (Ellstrand and Elam 1993, entire; Wilcock and Neiland 2002, p. 275). Lower genetic diversity may, in turn, lead to even smaller populations by decreasing the species' ability to adapt, thereby increasing the probability of population extinction (S.C.H. and Kohn 1991, pp. 4, 28; Newman and Pilson 1997, p. 360).

Populations of either species with fewer than 150 individuals are more prone to extinction from stochastic events (McCaffery 2013b, p. 1). Overall, it appears that Graham's beardtongue has many small populations scattered across its range, although the largest population (population 19, which will be impacted should the Enefit project continue as planned) contains more than 10,000 plants. Of the 24 populations of Graham's beardtongue, approximately 15 contain fewer than 150 known plants. That means more than half the known populations are more prone to extinction from stochastic events due to small population size.

However, these populations account for 1 percent of the total known number of plants of Graham's beardtongue. Additionally, the numbers in our files do not necessarily represent complete population counts; some populations likely contain more plants and some fewer. On the other hand, its scattered distribution may contribute to Graham's beardtongue's overall viability and potential resilience. For example, small-scale stochastic events, such as the erosion of a hillside during a flood event, will likely impact only a single population or a portion of that population. Even larger, landscape-level events such as wildfires are not likely to impact the species as a whole (see section VI. Wildfire, above). We do not find that small population size is currently a species-level concern for Graham's beardtongue, although this is likely to change after oil shale development occurs (see XI. Cumulative Effects from All Factors, below).

White River beardtongue has only seven populations, and two of these have fewer than 150 individual plants. These two smaller populations account for less than 1 percent of the total species' population. As with Graham's beardtongue, these counts are based on incomplete surveys and are not necessarily representative of actual conditions on the ground. In addition, large areas of suitable habitat remain unsurveyed, so this species may be more widely distributed and populations are likely to have different numbers of plants than presented here. However, this species' range is much smaller than that of Graham's beardtongue, and thus we conclude that White River beardtongue may be more prone to extinction from landscape-level events.

In the absence of information identifying threats to the species and linking those threats to the rarity of the species, we do not consider small population size alone to be a threat. A species that has always been rare, yet continues to survive, could be well equipped to continue to exist into the future. This may be particularly true for Graham's and White River beardtongues. Many naturally rare species have persisted for long periods within small geographic areas, and many naturally rare species exhibit traits that allow them to persist, despite their small population sizes. Consequently, the fact that a species is rare does not necessarily indicate that it may be in danger of extinction in the future.

Based on Graham's and White River beardtongues' current population numbers and preliminary demographic analyses showing populations are, for the most part, stable, we conclude that small population size is not currently a threat to these species. However, this may change in the future as energy development in these species' habitat increases and the populations become smaller and more fragmented (see section XI. Cumulative Effects from All Factors, below).

IX. Climate Change

Our analyses under the Act include consideration of ongoing and projected changes in climate. The terms ''climate'' and ''climate change'' are defined by the Intergovernmental Panel on Climate Change (IPCC). ''Climate'' refers to the mean and variability of different types of weather conditions over time, with 30 years being a typical period for such measurements, although shorter or longer periods also may be used (IPCC 2007, p. 78). The term ''climate change'' thus refers to a change in the mean or variability of one or more measures of climate (e.g., temperature or precipitation) that persists for an extended period, typically decades or longer, whether the change is due to natural variability, human activity, or both (IPCC 2007, p. 78). Various types of changes in climate can have direct or indirect effects on species. These effects may be positive, neutral, or negative and they may change over time, depending on the species and other relevant considerations, such as the effects of interactions of climate with other variables (e.g., habitat fragmentation) (IPCC 2007, pp. 8–19). In our analyses, we use our expert judgment to weigh relevant information, including uncertainty, in our consideration of various aspects of climate change.

Climate change is potentially impacting Graham's and White River beardtongues now, and could continue to impact these species into the future. Over the last 50 years, average temperatures have increased in the Northern Hemisphere and extreme weather events have changed in frequency or intensity, including fewer cold days and nights, fewer frosts, more heat waves, and more hot days and nights (IPCC 2007, p. 30). In the southwestern United States, average temperatures increased approximately 1.5 degrees Fahrenheit (°F) compared to a 1960 to 1979 baseline (Karl 2009, p. 129). Climate modeling is not currently to the level of detail at which we can predict the amount of temperature and precipitation change precisely within the limited ranges of these two beardtongue species. Therefore, we generally address what could happen under current climate projections based upon what we know about the biology of these two species.

Climate changes will continue as hot extremes, heat waves, and heavy precipitation will increase in frequency, with the Southwest experiencing the greatest temperature increase in the continental United States (Karl 2009, p. 129). Annual mean precipitation levels are expected to decrease in western North America and especially the southwestern States by mid-century (IPCC 2007, p. 8; Seager *et al.* 2007, p. 1,181), with a predicted 10- to 30-percent decrease in precipitation in mid-latitude western North America by the year 2050 (Milly *et al.* 2005, p. 1). These changes are likely to increase drought in the areas where Graham's and White River beardtongues grow.

We do not have a clear understanding of how Graham's and White River beardtongues respond to precipitation, although generally plant numbers decrease during drought years and recover in subsequent seasons that are less dry. Graham's beardtongue may not respond as quickly as White River beardtongue to increased winter and spring moisture immediately preceding the growing season (Lewinsohn and Tepedino 2007, pp. 12–13). In addition, Graham's beardtongue flowering is sporadic and may be responding to environmental factors that we have not been able to measure in the field, such as precipitation. Graham's beardtongue may need more than one year of normal precipitation to recover from prolonged drought (Lewinsohn 2005, p. 13), although this hypothesis has not been tested. Conversely, current analyses indicate that there is no association between regional precipitation patterns and population demographics (McCaffery 2013a, p. 4), although regional weather stations used in the analysis are not likely to pick up site-specific precipitation that is more likely to influence these species' vital rates.

That these beardtongues are adapted to living on such hot and dry patches of soils (even more so than other native species in the same area) may mean they are better adapted to withstand stochastic events such as drought. However, increased intensity and frequency of droughts may offer Graham's and White River beardtongues populations fewer chances to recover and may lead to a decline in both species. Some estimate that approximately 20 to 30 percent of plant and animal species are at increased risk of extinction if increases in global average temperature exceed 2.7 to 4.5 °F (1.5 to 2.5 °C) (IPCC 2007, p. 48). By the end of this century, temperatures are expected to exceed this range by

warming a total of 4 to 10 °F (2 to 5 °C) in the Southwest (Karl 2009, p. 129).

Accelerating rates of climate change of the past 2 or 3 decades indicate that the extension of species' geographic range boundaries toward the poles or to higher elevations by progressive establishment of new local populations will become increasingly apparent in the relatively short term (Hughes 2005, p. 60). The limited range of oil shale substrate that Graham's and White River beardtongues inhabit could limit the ability of these species to adapt to changes in climactic conditions by progressive establishment of new populations. However, some experts believe that it may be possible for these species to move to other aspects within their habitat in order to adapt to a changing climate (Service 2012c, entire). For example, Graham's beardtongue is typically observed on west or southwest-facing slopes (see *Species Information,* ''Habitat'' for Graham's beardtongue, above). White River beardtongue exhibits a similar characteristic, although this species is more evenly distributed on different slope aspects (see *Species Information,* ''Habitat'' for White River beardtongue, above). It may be possible for these species to gradually move to cooler and wetter slope aspects (for example, north-facing hillsides) within oil shale soils in response to a hotter drier climate (Service 2012c, entire), but only if these types of habitat are within reasonable seed-dispersal distances and only if these habitats remain intact with increasing oil and gas development.

In summary, climate change is affecting and will affect temperature and precipitation events in the future. We expect that Graham's and White River beardtongues, like other narrow endemics, may be negatively affected by climate change-related drought. Current data are not reliable enough at the local level for us to draw conclusions regarding the impacts of climate change threats to Graham's and White River beardtongues. It is likely that the impacts of climate change will be more severe if oil and gas development destroy and fragment the habitat both species will need for refuge from an increasingly dry, hot climate, thus decreasing both species' resiliency, redundancy, and representation (see XI. Cumulative Effects from All Factors, below).

X. Inadequacy of Existing Regulatory Mechanisms

Federal

Within Colorado, the Raven Ridge Area of Critical Environmental Concern (ACEC) was established, in part, to protect listed and candidate species, including Graham's and White River beardtongues (BLM 1986, p. 2, BLM 1997, p. 2–17). The Federal Land Policy and Management Act (FLPMA) (43 U.S.C. 1701 *et seq.*) directs BLM, as part of the land use planning process, to give priority to the designation and protection of ACECs. FLPMA defines ACECs as ''areas within the public lands where special management attention is required . . . to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards'' (Sec. 103(a)). Designation as an ACEC recognizes an area as possessing relevant and important values that would be at risk without special management attention (BLM 2008b, p. 4–426).

Following an evaluation of the relevance and importance of the values found in potential ACECs, the BLM determines whether special management is required to protect those values and, if so, to specify what management prescriptions would provide that special management (BLM 2008b, p. 4–426—4–436). To protect listed and candidate species including the beardtongues, the Raven Ridge ACEC restricts motorized travel to existing roads and trails and includes a no surface occupancy (NSO) stipulation for new oil and gas leases within the ACEC (BLM 1997, p. 2–19, 2–44). The NSO designation prohibits long-term use or occupancy of the land surface for fluid mineral exploration or development to protect special resource values (BLM 2008c, p. 38). However, NSO stipulations do not apply to valid existing rights (BLM 1997, pp. 2–31), which account for 14 and 11 percent of the total known populations for Graham's and White River beardtongues, respectively. For example, an area that was leased for mineral development before the ACEC was established would not be subject to the NSO stipulation and could potentially develop well pads and associated infrastructure within an ACEC.

Eighty-seven percent (33 of 38) of all known Graham's beardtongue plants in Colorado occur within the Raven Ridge ACEC. About 2 percent (28 of 1,187) of the known White River beardtongue plants in Colorado also occur within the Raven Ridge ACEC. We expect the NSO stipulation will continue to provide sufficient protection to the plants in the ACEC. Twenty-one percent of the Raven Ridge ACEC is currently leased, and the NSO stipulations are in effect for this entire area. An additional 30 percent of the Raven Ridge ACEC was proposed for leasing in 2013, but the lease sale is now deferred for further analysis (BLM 2013, entire). To date, no wells have been drilled or approved within the Raven Ridge ACEC (Service 2013, p. 12). There are no ACECs established for either Graham's beardtongue or White River beardtongue in Utah.

Both species are listed as BLM sensitive plants in Colorado and Utah, which affords them limited policy-level protection through the Special Status Species Management Policy Manual #6840, which forms the basis for special status species management on BLM lands (BLM 2008a, entire). The BLM currently gives candidate species the same protection as listed species, and for both beardtongue species, conservation measures incorporated by the Vernal Field Office include a 91-m (300-ft) setback from surface-disturbing activities (BLM 2008c, p. L–16).

If these species were not candidates or listed under the Act, Graham's and White River beardtongues would likely remain BLM-sensitive plant species. The BLM currently requires 46 m (150 ft) between surface disturbance and BLM-sensitive plant species (Roe 2011, pers. comm.). If kept in place, these conservation measures will provide some level of protection to these species. However, we do not consider this distance sufficient to effectively prevent negative impacts associated with surface-disturbing activities or to protect unoccupied habitat to serve as a refuge for either species with climate change (see, I. Energy Exploration and Development for a discussion of fugitive dust travel distances). Additionally, the 46-m (150-ft) buffer for sensitive plant species is not official policy for the Vernal Field Office and could potentially change with new management or under specific project scenarios.

In 2007, a voluntary 5-year conservation agreement for Graham's beardtongue was signed by the Service, the BLM, and the Utah Department of Natural Resources (DNR). The agreement intended to create a program of conservation measures to address potential threats to Graham's beardtongue at the Federal, State, and local levels. The agreement includes the following conservation measures:

- Identify all occupied habitat of Graham's beardtongue.
- Census all occurrences of the species.
- Identify at least six permanent population monitoring sites throughout the species' range and conduct

population monitoring studies for Graham's beardtongue in each of those sites.

- Maintain Federal ownership of all occupied habitat.
- Avoid or minimize impacts to the species and its habitat from permitted surface disturbances, subject to valid existing lease rights and other valid existing rights.

Since the conservation agreement was signed, the BLM has funded surveys for both species, adding 4,000 new Graham's beardtongue points and 400 new White River beardtongue points to our files. In addition, a monitoring program on several populations of both species was initiated in 2004, and was funded partially with BLM money, through 2012.

However, BLM will not be able to retain Federal ownership of all occupied habitat, as recommended in the conservation agreement. The Utah Recreational Land Exchange Act of 2009 (Public Law 111–53, signed August 19, 2009) directed the exchange of lands within Grand, San Juan, and Uintah Counties, Utah, between the BLM and SITLA. The Act directs the Secretary of the Interior to convey to the State of Utah all rights, title, and interests to the Federal lands identified on the associated Grand County and Uintah County maps. Several of the parcels that will be transferred to SITLA include 346 known individual Graham's beardtongue plants within populations 13 and 16. We expect that more plants occur in these parcels than have been counted to date, so actual losses are likely to be higher. SITLA has not expressed an interest in protecting Graham's beardtongue on lands they manage (see discussion under ''State'' below) so any Graham's beardtongue individuals on parcels transferred to the State will be unprotected from energy development. These new SITLA lands occur in areas of high potential energy development (see I. Energy Exploration and Development, above). Although the land exchange is not yet final, we expect it to move forward as planned.

FLPMA requires the BLM to develop and revise land-use plans when appropriate (43 U.S.C. 1712(a)). The BLM developed a new resource management plan (RMP) for the Vernal Field Office to consolidate existing land-use plans and balance use and protection of resources (BLM 2008c, pp. 1–2). Through the Vernal Field Office RMP, the BLM commits to conserve and recover all special status species, including candidate species (BLM 2008c, p. 129). However, the RMP special status species goals and objectives do not legally ensure that all Federal actions avoid impacts to Graham's beardtongue or White River beardtongue. Conservation measures implemented by the BLM have not fully prevented impacts (for example, well pad development or road maintenance and construction in occupied habitat as discussed previously in I. Energy Exploration and Development, and V. Road Maintenance and Construction) to Graham's beardtongue or White River beardtongue. Therefore, we conclude that increased energy development in Graham's and White River beardtongue habitat will increase the direct loss of habitat and decrease the long-term ability to implement more effective conservation measures (see I. Energy Exploration and Development, above).

During oil and gas development activities that have occurred to date, the BLM minimized some impacts to Graham's beardtongue and its habitat through incorporation of conservation measures through section 7 consultation under the Act. Under the Act, Federal agencies are required to conference on species that are proposed for listing, including Graham's beardtongue, if their actions are likely to jeopardize the species. In practice, the BLM has conferenced on Graham's beardtongue for any proposed projects within its habitat. Conservation measures include moving well pad and pipeline locations to avoid direct impacts to the species. These measures minimize direct impacts to the species, particularly at the current low rates of development that have occurred in the habitat.

At current minimal levels of energy development (at the time of this analysis, 45 wells in Graham's beardtongue analysis area and 13 wells in White River beardtongue analysis area), we conclude that existing conservation measures, such as a 91-m (300-ft) setback are sufficient to protect these species. However, additional energy development is very likely to occur across the ranges of these two species at a high level. Existing conservation measures are not sufficient to protect these species from the increased indirect effects, such as habitat fragmentation and pollinator disturbance, that will result from more energy development.

State

No State laws or regulations protect rare plant species in either Utah or Colorado. Approximately 15 and 11 percent of all known plants of Graham's and White River beardtongues, respectively, occur on State land. After the land exchange, about 16 percent of all known Graham's beardtongue plants will be located on State lands.

The 2007 Graham's beardtongue conservation agreement was signed by the Utah DNR, the Service, and the BLM (see the section above, ''Federal,'' for a more thorough description of the conservation agreement). However, the agreement was not signed by local-level officials with Uintah County, or by SITLA, which manages most of the State lands where Graham's beardtongue is found. To date, SITLA has not required project proponents to protect Graham's beardtongue, White River beardtongue, or other rare or listed plant species on SITLA-managed lands in the Uinta Basin where oil and gas development (traditional or oil shale and tar sands) exists.

Local

As stated above, approximately 26 and 27 percent of all known plants of Graham's and White River beardtongues, respectively, occur on private lands. We are not aware of any city or county ordinances or zoning that provide for protection or conservation of Graham's and White River beardtongues and their habitats.

Summary of All Regulatory Levels

In summary, we find that existing conservation measures instituted by the BLM do not sufficiently address the identified threats to Graham's and White River beardtongues. Both species are afforded some protection on BLM lands as candidate and proposed species; however, the minimal protection provided to date would be reduced if we find that Graham's and White River beardtongues do not meet the definition of an endangered or threatened species. For example, if both species were removed from the candidate species list, the BLM would likely reduce the 91-m (300-ft) distance between disturbance and known plant locations to 46 m (150 feet), which we do not believe would sufficiently protect the plants or their pollinators. Additionally, as a species without listing status, the BLM would not conference with the Service on projects impacting Graham's beardtongue or White River beardtongue. At current low levels of energy development, a 91-m (300-ft) setback is sufficient to protect these species from negative impacts, but at full field development (one wellpad every 40 acres) or complete removal of vegetation and top soil (as would occur with oil shale or tar sands development), a 91-m (300-ft) setback distance is not sufficient to protect against landscape-level habitat fragmentation, loss of pollinator habitat and population connectivity, increased dust, and invasive weeds.

There are no existing regulations at the State or local levels to protect either species from the identified threat of energy development. Neither Graham's nor White River beardtongues has regulatory protection for approximately 41 and 38 percent, respectively, of the total number of known plants, where they occur on State or private lands. As such, the plants will receive no regulatory protection from the future threat of energy development (and this will increase by 1 percent for Graham's beardtongue after the land exchange takes place) on State or private lands.

Because of these issues, existing regulatory mechanisms are inadequate to protect the species from the threats we anticipate in the future, specifically energy development.

XI. Cumulative Effects From All Factors

The stressors discussed above pertain to the 5 listing factors described in the Act:

A. The present or threatened destruction, modification, or curtailment of habitat or range (energy exploration and development, off-highway vehicle use, grazing, road maintenance and construction, wildfire, invasive weeds);

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

C. Disease or predation (grazing and trampling);

D. The inadequacy of existing regulatory mechanisms; and

E. Other natural or manmade factors affecting the species' continued existence (climate change, small population size).

The combination of many of the factors described above is likely to increase the vulnerability of these species.

We conclude that the future development of oil shale (and to a lesser extent, tar sands) alone is a threat to both Graham's and White River beardtongues. The impacts of this development include a reduction in population numbers, increased fragmentation, and habitat loss, impacting as much as 82 and 94 percent of the total known populations of Graham's and White River beardtongues, respectively. If we include potential impacts from traditional oil and gas development, then 91 and 100 percent of Graham's and White River beardtongues, respectively, will be impacted by all types of energy development.

Both species will experience a reduction in total population sizes, and may lose entire populations from oil shale development. Smaller populations, as discussed above (see VIII. Small Population Size) are more prone to extinction, and these smaller populations will also experience more severe effects of other factors. For example, incremental increases in habitat alteration and fragmentation from increased energy development (including oil shale, tar sands, and traditional oil and gas) will increase weed invasion and fugitive dust, as well as increase the severity of impacts from other factors such as grazing, as grazers become more concentrated into undisturbed areas, and road maintenance, as more roads are constructed.

Climate change is likely to augment the ability of invasive, nonnative species to out-compete native plant species and also reduce the ability of native plant species to recover in response to perturbations. Climate change may also change the effects of grazing events from native grazers to the extent that reproduction of either beardtongue species is hindered so that populations are no longer resilient. This underscores the need to protect not only the associated plant communities within Graham's and White River beardtongue habitat, but those immediately adjacent to beardtongue habitat (Service 2012c, entire).

Without cohesive, landscape-level regulatory mechanisms in place to protect Graham's and White River beardtongues from development on public lands, as development increases, habitat fragmentation and negative effects associated with it are likely to increase, despite site-specific conservation measures to protect these species. In conclusion, we find that energy development alone, especially oil shale and tar sands development, is a threat to these species. Additionally, the synergistic effects of increased energy development, livestock grazing, invasive weeds, small population sizes, and climate change are threats to these species.

Proposed Determination

Standard Under the Act

Section 4 of the Act, and its implementing regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(b)(1)(a), the Secretary is to make endangered or threatened determinations required by section 4(a)(1) solely on the basis of the best scientific and commercial data available to her after conducting a review of the status of the species and after taking into account conservation efforts by States or foreign nations. The standards for determining whether a species is endangered or threatened are provided in section 3 of the Act. An endangered species is any species that is ''in danger of extinction throughout all or a significant portion of its range.'' A threatened species is any species that is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' Per section 4(a)(1) of the Act, in reviewing the status of the species to determine if it meets the definition of endangered or threatened, we determine whether any species is an endangered species or a threatened species because of any of the following five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence.

Proposed Listing Status Determination

After a review of the best available scientific information as it relates to the status of the species and the five listing factors described above, we have determined that Graham's and White River beardtongues meet the definition of threatened species (i.e., are likely to become endangered throughout all or a significant portion of their ranges within the foreseeable future).

Graham's and White River beardtongues are currently stable species with relatively restricted ranges limited to a specific soil type. The existing numbers of individuals and populations are sufficient for these species to remain viable into the future. Population viability analyses show that monitored populations of both species are, for the most part, currently stable. However, we conclude that habitat loss and fragmentation from energy development, particularly oil shale and tar sands, are a future threat to Graham's and White River beardtongues (Factor A). Oil shale and tar sands overlap most of the known habitat of these species. As oil shale and tar sands projects proceed across the ranges of both species, up to 82 and 94 percent of the total known populations of Graham's and White River beardtongues could be impacted. Two proposed oil shale projects on State and private lands are likely to result in the direct loss of 21 and 26 percent of the total known populations of Graham's and White River beardtongues, and this development is likely to begin within the next few years. These projects will

increase habitat fragmentation and isolate populations of both species. The combined impacts of traditional oil and gas and oil shale and tar sands development is likely to be high because approximately 91 and 100 percent of the total known populations for Graham's and White River beardtongues, respectively, overlap with all planned or potential energy development. In addition, there are no existing regulatory mechanisms that protect these species on State or private lands (Factor D), and the existing conservation measures on public lands will not afford sufficient protection from the indirect impacts of energy development. Cumulative impacts, such as increased development resulting in smaller, more fragmented populations that are more prone to extinction and increased invasion by nonnative weeds, are likely to be exacerbated by climate change (Factor E). As a result of these future threats, the viability of these species is likely to be severely diminished.

The Act defines an endangered species as any species that is ''in danger of extinction throughout all or a significant portion of its range'' and a threatened species as any species ''that is likely to become endangered throughout all or a significant portion of its range within the foreseeable future.'' We have carefully assessed the best scientific and commercial information available regarding the present and future threats to these species, and have determined that Graham's and White River beardtongues meet the definition of threatened species under the Act. Substantial threats are not currently occurring. However, threats are likely to occur in the future, within the next 20 years, at a high intensity and across both species' entire ranges. Because these threats place these species in danger of extinction at some point in the future and they are not in immediate danger of extinction, we find these species meet the definition of threatened species, not endangered species. Therefore, on the basis of the best available scientific and commercial information, we propose listing Graham's and White River beardtongues as threatened species in accordance with sections 3(20) and 4(a)(1) of the Act.

Significant Portion of the Range

In determining whether a species is threatened or endangered in a significant portion of its range, we first identify any portions of the range of the species that warrant further consideration. The range of a species can theoretically be divided into portions an infinite number of ways. However, there is no purpose to analyzing portions of the range that are not reasonably likely to be both (1) significant and (2) threatened or endangered. To identify only those portions that warrant further consideration, we determine whether there is substantial information indicating that: (1) The portions may be significant, and (2) the species may be in danger of extinction there or likely to become so within the foreseeable future. In practice, a key part of this analysis is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats applies only to portions of the species' range that are not significant, such portions will not warrant further consideration.

If we identify portions that warrant further consideration, we then determine whether the species is threatened or endangered in these portions of its range. Depending on the biology of the species, its range, and the threats it faces, the Service may address either the significance question or the status question first. Thus, if the Service considers significance first and determines that a portion of the range is not significant, the Service need not determine whether the species is threatened or endangered there. Likewise, if the Service considers status first and determines that the species is not threatened or endangered in a portion of its range, the Service need not determine if that portion is significant. However, if the Service determines that both a portion of the range of a species is significant and the species is threatened or endangered there, the Service will specify that portion of the range as threatened or endangered under section 4(c)(1) of the Act.

We evaluated the current range of Graham's and White River beardtongues to determine if there is any apparent geographic concentration of potential threats for either species. Both species are highly restricted in their ranges and the threats occur throughout their ranges. Having determined that both species are threatened throughout their entire ranges, we must next consider whether there are any significant portions of the ranges where the Graham's and White River beardtongues are in danger of extinction or likely to become endangered in the foreseeable future.

We found no portion of the Graham's and White River beardtongues' range where potential threats are significantly concentrated or substantially greater than in other portions of their range. Therefore, we find that factors affecting these species are essentially uniform throughout their range, indicating no portion of the range of either species warrants further consideration of possible endangered or threatened status under the Act. Therefore, we find there is no significant portion of the Graham's and White River beardtongues' range that may warrant a different status.

Available Conservation Measures

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

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act requires the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a recovery outline shortly after a species is listed and preparation of a draft and final recovery plan. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan identifies site-specific management actions that set a trigger for review of the five factors that control whether a species remains endangered or may be downlisted or delisted, and methods for monitoring recovery

progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (comprised of species experts, Federal and State agencies, nongovernment organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our Web site (*http://www.fws.gov/endangered*), or from our U.S. Fish and Wildlife Service, Utah Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

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

If these species are listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the States of Utah and Colorado would be eligible for Federal funds to implement management actions that promote the protection or recovery of Graham's and White River beardtongues. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants*.

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

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action is likely to adversely affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Federal agency actions within the species habitat that may require conference or consultation or both as described in the preceding paragraph include: Oil and gas leasing, exploration, and permitting; oil shale research; authorization of transmission towers, pipelines, and power lines; reclamation actions; travel management; and authorization of road maintenance by the BLM. Other types of actions that may require consultation include construction and management of gas pipeline and power line rights-of-way by the Federal Energy Regulatory Commission or provision of Federal funds to State and private entities through Federal programs, such as the Service's Landowner Incentive Program, State Wildlife Grant Program, and Federal Aid in Wildlife Restoration program.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered and threatened plants. All prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.61 and 50 CFR 17.71, apply. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, sell or offer for sale in interstate or foreign commerce, or remove and reduce the species to possession from areas under Federal jurisdiction. In addition, for plants listed as endangered, the Act prohibits the malicious damage or destruction on areas under Federal jurisdiction and the removal, cutting, digging up, damaging, or destroying of such plants in knowing violation of any State law or regulation, including State criminal trespass law. Certain exceptions to the prohibitions apply to agents of the Service and State conservation agencies. Utah does not have any law protecting listed species, and Colorado's Endangered Species law does not currently cover plants. Therefore, listing under the Act will offer additional protection to these species.

The Act, 50 CFR 17.62, and 50 CFR 17.72 also provide for the issuance of permits to carry out otherwise prohibited activities involving endangered and threatened plants under certain circumstances. Such permits are available for scientific purposes and to enhance the propagation or survival of the species. We anticipate that the only permits that would be sought or issued for Graham's beardtongue or White River beardtongue would be in association with research and recovery efforts. Requests for copies of the regulations regarding listed species and inquiries about prohibitions and permits may be addressed to U.S. Fish and Wildlife Service, Ecological Services, P.O. Box 25486—DFC, Denver, CO 80225–0486 (telephone 303–236–4256; facsimile 303–236–0027).

Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our listing determinations for these species are based on scientifically sound data, assumptions, and analyses. We will invite these peer reviewers to comment during the public comment period.

We will consider all comments and information we receive during the comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. Requests must be received within 45 days after the date of publication of this proposal in the **Federal Register**. Such requests must be sent to the address shown in the **FOR FURTHER INFORMATION CONTACT** section. We will schedule public hearing on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

Persons needing reasonable accommodations to attend and

participate in a public hearing should contact the Utah Ecological Service Field Office at (801) 975–3330 as soon as possible. To allow sufficient time to process requests, please call no later than one week before the hearing date. Information regarding this proposed rule is available in alternative formats upon request.

Required Determinations

Clarity of the Rule

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (5) Is the description of the rule in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the emergency rule? What else could we do to make the rule easier to understand?

Send a copy of any comments that concern how we could make this rule easier to understand to Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW., Washington, DC 20240. You also may email the comments to this address: *Exsec@ios.goi.gov.*

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with listing a species as an endangered or threatened species under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of all references cited in this rule is available on the Internet at *http://www.regulations.gov* at Docket No. FWS–R6–ES–2013–0081 or upon request from Larry Crist, Field Supervisor, U.S. Fish and Wildlife Service, Utah Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT** section).

Authors

The primary authors of this proposed rule are the staff members of the U.S. Fish and Wildlife Service, Utah Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

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

PART 17—[AMENDED]

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

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

■ 2. In § 17.12(h), add entries for ''*Penstemon grahamii*'' and ''*Penstemon scariosus* var. *albifluvis*'' in alphabetical order under FLOWERING PLANTS to the List of Endangered and Threatened Plants to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
*	*	*	*	*	*	*	
Penstemon grahamii	Graham's beardtongue.	U.S.A. (UT, CO)	Plantaginaceae	T	.....	NA	NA
*	*	*	*	*	*	*	
Penstemon scariosus var. *albifluvis*.	White River beardtongue.	U.S.A. (UT, CO)	Plantaginaceae	T	.....	NA	NA
*	*	*	*	*	*	*	

* * * * *

Dated: July 15, 2013.

Rowan W. Gould,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2013–18334 Filed 8–5–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2013–0008; 4500030113]

RIN 1018–AZ34

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Sharpnose Shiner and Smalleye Shiner

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the sharpnose shiner (*Notropis oxyrhynchus*) and smalleye shiner (*N. buccula*) under the Endangered Species Act of 1973, as amended (Act). In total, approximately 1,002 river kilometers (623 river miles) of river segments occupied by the species in Baylor, Crosby, Fisher, Garza, Haskell, Kent, King, Knox, Stonewall, Throckmorton, and Young Counties in the upper Brazos River basin of Texas fall within the boundaries of the proposed critical habitat. If we finalize this rule as proposed, it would extend the Act's protections to these species' critical habitat.

DATES:

Written comments: We will accept comments received or postmarked on or before October 7, 2013. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES,** below) must be received by 11:59 p.m. Eastern Time on the closing date.

Public informational session and public hearing: We will hold a public hearing on September 4, 2013. The public information session will begin at 5:00 p.m., and the public hearing will begin at 6:30 p.m. and end at 8:00 p.m. Central Time.

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

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search field, enter Docket No. FWS–R2–ES–2013–0008, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R2–ES–2013–0008; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov* under Docket Number FWS–R2–ES–2013–0008. This generally means that we will post any personal information you provide us (see the Information Requested section below for more information).

Coordinates or plot points: The coordinates or plot points or both from which the proposed critical habitat maps are generated and are available at *http://www.fws.gov/southwest/es/ArlingtonTexas/,* at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2013–0008, and at the Arlington, Texas Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that we may develop for this rulemaking will also be available at the Fish and Wildlife Service Web site and Field Office set out above, and may also be included in the preamble or at *http://www.regulations.gov.*

Public informational session and public hearing: The public informational session and hearing will be held in the Upstairs Conference Room at the Abilene Civic Center, 1100 North 6th Street, Abilene, Texas.

FOR FURTHER INFORMATION CONTACT: Erik Orsak, Acting Field Supervisor, U.S. Fish and Wildlife Service, Arlington, Texas, Ecological Services Field Office, 2005 NE Green Oaks Blvd., Suite 140, Arlington, TX 76006; by telephone 817–277–1100; or by facsimile 817–277–1129. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Endangered Species Act (Act), any species that is determined to be endangered or threatened requires critical habitat to be designated, to the maximum extent prudent and determinable. Designations and revisions of critical habitat can only be completed by issuing a rule. Elsewhere in today's **Federal Register**, we propose to list the sharpnose shiner and smalleye shiner as endangered species under the Act.

This rule consists of a proposed rule to designate critical habitat for the sharpnose shiner and smalleye shiner. The sharpnose shiner and smalleye shiner are proposed for listing under the Act. This rule proposes designation of critical habitat necessary for the conservation of the species.

The basis for our action. Under the Endangered Species Act, any species that is determined to be an endangered or threatened species shall, to the maximum extent prudent and determinable, have habitat designated that is considered to be critical habitat. Section 4(b)(2) of the Endangered Species Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. The species are proposed for listing as endangered, and we also propose to designate approximately 1,002 river kilometers (km) (623 miles (mi)) of the upper Brazos River basin and the upland areas extending beyond the bankfull river channel by 30 meters (m) (98 feet (ft)) on each side as critical habitat in the following Texas counties: Baylor, Crosby, Fisher, Garza, Haskell, Kent, King, Knox, Stonewall, Throckmorton, and Young.

We are preparing an economic analysis of the proposed designations of critical habitat. In order to consider economic impacts, we are preparing a new analysis of the economic impacts of the proposed critical habitat designations and related factors. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek additional public review and comment.

We will seek peer review. We are seeking comments from knowledgeable individuals with scientific expertise to review our analysis of the best available science and application of that science and to provide any additional scientific information to improve this proposed rule. Because we will consider all comments and information we receive during the comment period, our final determinations may differ from this proposal.

Information Requested

Public Comments

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

(1) The reasons why we should or should not designate habitat as ''critical habitat'' under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threats outweighs the benefit of designation such that the designation of critical habitat may not be prudent.

(2) Specific information on:

(a) The amount and distribution of the sharpnose shiner and smalleye shiner and their habitat;

(b) What areas, that were occupied at the time of listing (or are currently occupied) and that contain features essential to the conservation of the species, should be included in the designation and why;

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change; and

(d) What areas not occupied at the time of listing are essential for the conservation of the species and why.

(3) Land use designations and current or planned activities in the subject areas and their possible impacts of these activities on these species and proposed critical habitat.

(4) Information on the projected and reasonably likely impacts of climate change on the sharpnose shiner and smalleye shiner and proposed critical habitat.

(5) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation; in particular, we seek information on any impacts on small entities or families, and the benefits of including or excluding areas that exhibit these impacts.

(6) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(7) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding or to better accommodate public concerns and comments.

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

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

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov* at Docket No. FWS–R2–ES–2013–0008, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Arlington, Texas, Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Public Hearing

Section 4(b)(5) of the Act provides for one or more public hearings on this proposal, if requested. We will hold a public hearing on Wednesday, September 4, 2013. The public information session will begin at 5:00 p.m., and the public hearing will begin at 6:30 p.m. and end at 8:00 p.m. Central Time. The public informational session and hearing will be held in the Upstairs Conference Room at the Abilene Civic Center, 1100 North 6th Street, Abilene, Texas. People needing reasonable accommodation in order to attend and participate in the public hearing should contact Erik Orsak, Field Supervisor, Arlington, Texas, Ecological Services Office, as soon as possible (see **FOR FURTHER INFORMATION CONTACT**).

Peer Review

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our critical habitat designations are based on scientifically sound data, assumptions, and analyses. We will invite these peer reviewers to comment during this public comment period.

We will consider all comments and information we receive during this comment period on this proposed rule during our preparation of a final determination. Accordingly, the final decision may differ from this proposal.

Previous Federal Actions

All previous Federal actions are described in the proposal to list the sharpnose shiner and smalleye shiner as endangered species under the Act, which is published elsewhere in today's **Federal Register**.

Critical Habitat

Background

It is our intent to discuss below only those topics directly relevant to the proposed designation of critical habitat for the sharpnose shiner and smalleye shiner. For a thorough assessment of the species' biology and natural history, including limiting factors and species resource needs, please refer to the June 2013 version of the Status Assessment Report for the Sharpnose Shiner and Smalleye Shiner (SSA Report; Service 2013, entire, available online at *www.regulations.gov* under Docket No. FWS–R2–ES–2013–0008).

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

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

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

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

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

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and

procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical and biological features within an area, we focus on the principal biological or physical constituent elements (primary constituent elements such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. Primary constituent elements are those specific elements of the physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. For example, an area currently occupied by the species, but that was not occupied at the time of listing, may be essential to the conservation of the species and may be included in the critical habitat designation. We designate critical habitat in areas outside the geographic area occupied by a species only when a designation limited to its range would be inadequate to ensure the conservation of the species.

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

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. For the sharpnose and smalleye shiners, we rely on the June 2013 SSA Report (Service 2013, entire) and the proposed rule to list the species as endangered, which appears elsewhere in today's **Federal Register**. Additional information sources may include articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts' opinions or personal knowledge.

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

Prudency Determination

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

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

(2) Such designation of critical habitat would not be beneficial to the species.

There is currently no imminent threat of take attributed to noncommercial collection or vandalism for either of these species, and identification and mapping of critical habitat is not expected to initiate any such threat. In the absence of a finding that the designation of critical habitat would increase threats to a species, if there are any benefits to a critical habitat

designation, then a prudent finding is warranted. The potential benefits include: (1) Triggering consultation under section 7 of the Act in new areas for actions in which there may be a Federal nexus where it would not otherwise occur because, for example, it has become unoccupied or the occupancy is in question; (2) focusing conservation activities on the most essential features and areas; (3) providing educational benefits to State or county governments or private entities; and (4) preventing people from causing inadvertent harm to the species. Therefore, because we have determined that the designation of critical habitat would not likely increase the degree of threat to the species, and may provide some measure of benefit, we find that designation of critical habitat is prudent for the sharpnose shiner and smalleye shiner.

Critical Habitat Determinability

Having determined that designation is prudent, under section 4(a)(3) of the Act, we must find whether critical habitat for the sharpnose shiner and smalleye shiner is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(1) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(2) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

When critical habitat is not determinable, the Act provides for an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of the species and habitat characteristics where this species is located. This and other information represent the best scientific data available and led us to conclude that the designation of critical habitat is determinable for the sharpnose shiner and smalleye shiner.

Physical or Biological Features

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological features that are essential to the conservation of the species and which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographic, and ecological distributions of a species.

Sharpnose Shiner

We derive the specific physical or biological features required for the sharpnose shiner from studies of this species' habitat, ecology, and life history as described below. We have used the best available information, as described in the June 2013 SSA Report (Service 2013, Chapter 2). To identify the physical and biological needs of the sharpnose shiner, we have relied on conditions at currently occupied locations where the shiner has been observed during surveys and the best information available on the species. Below, we summarize the physical and biological features needed by foraging and breeding sharpnose shiners. For a complete review of the physical and biological features required by the sharpnose shiner, see Chapter 2 of the June 2013 SSA Report (Service 2013, Chapter 2). We have determined that the following physical or biological features are essential to the sharpnose shiner.

Space for Individual and Population Growth and for Normal Behavior

Sharpnose shiners occur in fairly shallow, flowing water, often less than 0.5 meters (m) deep with sandy substrates. They broadcast spawn semi-buoyant eggs and larvae that may remain suspended in the water column for several days before they are capable of independent swimming, indicating there is a minimum river segment length necessary to support successful reproduction. A comparison of minimum estimated reach length requirements for similar species and current modeling efforts for this species indicate an unobstructed reach length of greater than 275 kilometers (km) (171 miles (mi)) is likely required to complete the species' life history. Lengths greater than 275 km (171 mi) would also provide migratory pathways to refugia in which sharpnose shiners may survive drought conditions.

Therefore, based on the information above and additional analysis in the June 2013 SSA Report (Service 2013, Chapter 2), we identify flowing water of sufficient unobstructed length (275 km (171 mi)) to be a physical or biological feature essential to the conservation of the sharpnose shiner.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Sharpnose shiners are generalist feeders consuming aquatic and terrestrial invertebrates (mostly insects), plant material, and detritus. The presence of terrestrial insects in its diet suggests native riparian vegetation along the stream banks where the sharpnose shiners occur is important in providing food availability. The prevalence of sand-silt in the gut contents of sharpnose shiners indicate they likely forage among the sediments when food availability is low, suggesting river segments containing sandy substrates may be preferred by this species.

Flowing water of sufficient quality (minimal pollution, lacking golden alga toxicity, and within physiological tolerances) is required for the survival of these species. Sharpnose shiners can tolerate temperatures of 39.2 °C (102.6 °F) only briefly and generally require oxygen concentrations above 2.66 milligrams per liter (mg/L). Sharpnose shiners experience significant mortality at salinities greater than 15 parts per thousand (ppt) (25 millisiemens per centimeter (mS/cm)). The susceptibility of sharpnose shiners to environmental pollutants is not well understood; however, it has been observed that petroleum contamination, and possibly other pollutants, are capable of killing this species. Although the effects of golden alga on sharpnose shiners have not been documented, toxic blooms in occupied habitat are certain to cause mortality.

Native riparian vegetation adjacent to the river channel where the sharpnose shiner occurs is important as a source of food (terrestrial insects) and to maintain physical habitat conditions in the stream channel. Riparian areas are essential for energy and nutrient cycling, filtering runoff, absorbing and gradually releasing floodwaters, recharging groundwater, and maintaining stream flows. Healthy riparian corridors help ensure aquatic resources maintain the ecological integrity essential to stream fishes, including the sharpnose shiner. A riparian width of 30 m (98 ft) is generally sufficient to protect the water quality of adjacent streams and is expected to provide the necessary prey base for sharpnose shiners (Service 2013, Chapter 6).

Therefore, based on the information above and additional analysis in the June 2013 SSA Report (Service 2013, Chapter 2), we identify river segments containing flowing water of sufficient quality (i.e., within physiological tolerances, low in toxic pollutants, and lacking toxic golden alga blooms) with sandy substrates, and their associated native riparian vegetation, to be physical or biological features essential to the conservation of the sharpnose shiner.

Cover or Shelter

Specific cover or sheltering requirements for sharpnose shiners within the aquatic ecosystem have not been identified and may not be pertinent to their conservation because these fish mostly occur in open water. Therefore, we have not identified any specific cover or shelter habitat requirements to be physical or biological features essential to the conservation of the sharpnose shiner.

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

Successful reproduction by sharpnose shiners requires minimum levels of flowing water through the summer breeding season. Cyprinid eggs spawned into the pelagic zone (open water not near the river bottom) become semi-buoyant within 10 to 30 minutes, allowing them to drift through the water column for approximately 1 or 2 days prior to hatching. Larval stages may drift in the water column for an additional 2 to 3 days post-hatching.

Spawning occurs asynchronously (fish not spawning at the same time) from April through September during periods of no and low flow, and synchronously (many fish spawning at the same time) during elevated streamflow events. Successful recruitment (survival to the juvenile fish stage) does not occur during periods completely lacking flow. This is because in no-flow conditions, the floating eggs, zygotes, and larval fish of broadcast spawners sink and suffocate in the anoxic sediments and are more susceptible to predation. Modeling studies have estimated minimum mean summer discharge of 2.61 cubic meters per second (m^3s^{-1}) (92 cubic feet per second (cfs)) is necessary to sustain a population of sharpnose shiners.

Therefore, based on the information above and additional analysis in the June 2013 SSA Report (Service 2013, Chapter 2), we identify river segments with a minimum mean summer discharge of approximately 2.61 m^3s^{-1} (92 cfs) to be physical or biological features essential to the conservation of the sharpnose shiner.

Habitats That Are Protected From Disturbance or Are Representative of the Historic, Geographical, and Ecological Distributions of a Species

Sharpnose shiner habitat is subject to dynamic changes resulting from flooding and drying of occupied water ways. Consequently, fluctuating water levels create circumstances in which the extent of the sharpnose shiner's range vary over time, and may be periodically contracted or expanded depending on water availability. Worsening drought conditions are increasing the intensity and duration of river drying in the upper Brazos River basin. As a result of these dynamic changes, particularly during intense droughts, sharpnose shiners require unobstructed river segments through which they can migrate to find refuge from river drying. These fish can later emigrate from these refugia and recolonize normally occupied areas when suitable conditions return.

Therefore, based on the information above and additional analysis in the June 2013 SSA Report (Service 2013, Chapter 2), we identify unobstructed river segments of at least 275 km (171 mi) to be a physical or biological feature essential to the conservation of the sharpnose shiner.

Smalleye Shiner

We derive the specific physical or biological features required for the smalleye shiner from studies of this species' habitat, ecology, and life history as described below. We have used the best available information, as described in the June 2013 SSA Report (Service 2013, Chapter 2). To identify the physical and biological needs of the smalleye shiner, we have relied on conditions at currently occupied locations where the shiner has been observed during surveys and the best information available on the species. Below, we summarize the physical and biological features needed by foraging and breeding smalleye shiners. For a complete review of the physical and biological features required by the smalleye shiner, see Chapter 2 of the June 2013 SSA Report (Service 2013, Chapter 2). We have determined that the following physical or biological features are essential to the smalleye shiner.

Space for Individual and Population Growth and for Normal Behavior

Smalleye shiners occur in fairly shallow, flowing water, often less than 0.5 m deep with sandy substrates. They broadcast spawn semi-buoyant eggs and larvae that may remain suspended in the water column for several days before larval fish are capable of independent swimming, indicating there is a minimum stream reach length necessary to support successful reproduction. A comparison of minimum estimated reach length requirements for similar species and current modeling efforts for this species indicate that an unobstructed reach length of greater than 275 km (171 mi) is likely required to complete the species' life history. Lengths greater than 275 km (171 mi) would also provide migratory pathways to refugia in which smalleye shiners may survive drought conditions.

Therefore, based on the information above and additional analysis in the June 2013 SSA Report (Service 2013, Chapter 2), we identify flowing water of sufficient unobstructed length (275 km (171 mi)) to be a physical or biological feature essential to the conservation of the smalleye shiner.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Smalleye shiners are generalist feeders consuming aquatic and terrestrial invertebrates (mostly insects), plant material, and detritus. The presence of terrestrial insects in the smalleye shiner's diet suggests native riparian vegetation along the banks of inhabited rivers is important in providing food availability, as well as the general health of the aquatic riverine ecosystem. The prevalence of sand-silt in the gut contents of smalleye shiners indicate they likely forage among the sediments when food availability is low, suggesting river segments containing sandy substrates may be preferred by this species.

Water of sufficient quality (minimal pollution, lacking golden alga toxicity, and within physiological tolerances) is required for the survival of these species. Smalleye shiners can tolerate temperatures of 40.6 °C (105.1 °F) only briefly and generally require oxygen concentrations above 2.11 mg/L. Smalleye shiners experience significant mortality at salinities greater than 18 ppt (30 mS/cm). The susceptibility of smalleye shiners to environmental pollutants is not well understood; however, it has been observed that petroleum contamination, and possibly other pollutants, are capable of killing this species. Although the effects of golden alga on smalleye shiners have not been documented, blooms in occupied habitat are certain to cause mortality in this species.

Native riparian vegetation adjacent to the river channel where the smalleye

shiner occurs is important as a source of food (terrestrial insects) and to maintain physical habitat conditions in the stream channel. Riparian areas are essential for energy and nutrient cycling, filtering runoff, absorbing and gradually releasing floodwaters, recharging groundwater, and maintaining stream flows. Healthy riparian corridors help ensure aquatic resources maintain the ecological integrity essential to stream fishes, including the smalleye shiner. A riparian width of 30 m (98 ft) is generally sufficient to protect the water quality of adjacent streams and is expected to provide the necessary prey base for smalleye shiners (Service 2013, Chapter 6).

Therefore, based on the information above and additional analysis in the June 2013 SSA Report (Service 2013, Chapter 2), we identify sandy-bottomed river segments containing flowing water of sufficient quality (i.e., within physiological tolerance, low in toxic pollutants, and lacking toxic golden algal blooms), and their associated native riparian vegetation, to be physical or biological features essential to the conservation of the smalleye shiner.

Cover or Shelter

Specific cover or sheltering requirements for smalleye shiners within the aquatic ecosystem have not been identified and may not be pertinent to their conservation because these fish mostly occur in open water. Therefore, we have not identified any specific cover or shelter habitat requirements to be physical or biological features essential to the conservation of the smalleye shiner.

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

Successful reproduction by smalleye shiners requires minimum levels of flowing water through the summer breeding season. Cyprinid eggs spawned into the pelagic zone (open water not near the river bottom) become semi-buoyant within 10 to 30 minutes, allowing them to drift through the water column for approximately 1 or 2 days prior to hatching. Larval stages may drift in the water column for an additional 2 to 3 days post-hatching.

Spawning occurs asynchronously from April through September during periods of no and low flow, and synchronously during elevated streamflow events. Successful recruitment (survival to the juvenile fish stage) does not occur during periods completely lacking flow. This is because in no-flow conditions, the floating eggs, zygotes, and larval fish of broadcast spawners sink and suffocate in the anoxic sediments and are more susceptible to predation. Modeling studies have estimated minimum mean summer discharge of 6.43 m^3s^{-1} (227 cfs) is necessary to sustain a population of the smalleye shiner.

Therefore, based on the information above and additional analysis in the June 2013 SSA Report (Service 2013, Chapter 2), we identify river segments with a minimum mean summer discharge of approximately 6.43 m^3s^{-1} (227 cfs) to be physical or biological features essential to the conservation of the smalleye shiner.

Habitats That Are Protected From Disturbance or Are Representative of the Historic, Geographical, and Ecological Distributions of a Species

Smalleye shiner habitat is subject to dynamic changes resulting from flooding and drying of occupied water ways. Consequently, fluctuating water levels create circumstances in which the extent of the sharpnose and smalleye shiner's range vary over time, and may be periodically contracted or expanded depending on water availability. Worsening drought conditions are increasing the intensity and duration of river drying in the upper Brazos River basin. As a result of these dynamic changes, particularly during intense droughts, smalleye shiners require unobstructed river segments through which they can migrate to find refuge from river drying. These fish can later emigrate from these refugia and recolonize normally occupied areas when suitable conditions return.

Therefore, based on the information above and additional analysis in the June 2013 SSA Report (Service 2013, Chapter 2), we identify unobstructed river segments of at least 275 km (171 mi) to be a physical or biological feature essential to the conservation of the sharpnose shiner.

Summary of Physical or Biological Features

In summary, the sharpnose shiner and smalleye shiner need specific vital resources for survival and completion of their life histories. One of the most important aspects of their life histories is that their broadcast-spawn eggs and developing larvae require flowing water of sufficient length within which they develop into free-swimming juvenile fish. In addition, sharpnose shiners and smalleye shiners typically live for no more than two breeding seasons. As a result, if resources are not available in a single spawning season, their populations would be greatly impacted, and if resources are not available through two consecutive breeding seasons the impacts would be catastrophic.

The sharpnose shiner and smalleye shiner have exceptionally specialized habitat requirements to support these life-history needs and maintain adequate population sizes. Habitat requirements are characterized by river segments of greater than 275 km (171 mi) with estimated average spawning season flows greater than 2.61 m^3s^{-1} (92 cfs) for the sharpnose shiner and of 6.43 m^3s^{-1} (227 cfs) for the smalleye shiner. River segment lengths of 275 km (171 mi) or greater also aid in providing sharpnose and smalleye shiners refugia from river drying during severe drought. In addition, individual shiners also need sandy substrates to support foraging, water quality within their physiological and toxicological tolerances, and intact upland vegetation capable of supporting their prey base. Intact upland vegetation is also important in providing adequate filtration of surface water runoff to maintain a healthy aquatic ecosystem.

Populations of sharpnose shiners and smalleye shiners with a high likelihood of long-term viability require contiguous river segments containing the physical and biological features that are essential to the conservation of these species. This contiguous suitable habitat is necessary to retain the reproductive success of these species in the face of natural and manmade seasonal fluctuations of water availability. Sharpnose shiner and smalleye shiner habitat is subject to dynamic changes resulting from flooding and drying of occupied water ways. Consequently, fluctuating water levels create circumstances in which the extent of the sharpnose and smalleye shiner's range vary over time, and may be periodically contracted or expanded depending on water availability.

Primary Constituent Elements for the Sharpnose Shiner and Smalleye Shiner

According to 50 CFR 424.12(b), we are required to identify the physical or biological features essential to the conservation of the sharpnose shiner and smalleye shiner within the geographic area occupied by the species at the time of listing, focusing on the features' primary constituent elements. We consider primary constituent elements to be the elements of physical or biological features that provide for a species' life-history processes and that are essential to the conservation of the species.

Sharpnose Shiner

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes (Service 2013, Chapter 2), we determine that the primary constituent element (PCE) specific to the sharpnose shiner consists of a riverine system with habitat to support all life stages of sharpnose shiners, which includes:

(1) Unobstructed, sandy-bottomed river segments greater than 275 km (171 mi) in length.

(2) Flowing water of greater than approximately 2.61 m^3s^{-1} (92 cfs) averaged over the shiner spawning season (April through September).

(3) Water of sufficient quality to support survival and reproduction, characterized by:

a. Temperatures generally less than 39.2 °C (102.6 °F);

b. Dissolved oxygen concentrations generally greater than 2.66 mg/L;

c. Salinities generally less than 15 ppt (25 mS/cm); and

d. Sufficiently low petroleum and other pollutant concentrations such that mortality does not occur.

(4) Native riparian vegetation capable of maintaining river water quality, providing a terrestrial prey base, and maintaining a healthy riparian ecosystem.

Smalleye Shiner

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes (Service 2013, Chapter 2), we determine that the primary constituent element (PCEs) specific to the smalleye shiner consists of a riverine system with habitat to support all life history stages of smalleye shiners, which includes:

(1) Unobstructed, sandy-bottomed river segments greater than 275 km (171 mi) in length.

(2) Flowing water of greater than approximately 6.43 m^3s^{-1} (227 cfs) averaged over the shiner spawning season (April through September).

(3) Water of sufficient quality to support survival and reproduction, characterized by:

a. Temperatures generally less than 40.6 °C (105.1 °F);

b. Dissolved oxygen concentrations generally greater than 2.11 mg/L;

c. Salinities less than 18 ppt (30 mS/cm); and

d. Sufficiently low petroleum and other pollutant concentrations such that mortality does not occur.

(4) Native riparian vegetation capable of maintaining river water quality, providing a terrestrial prey base, and maintaining a healthy riparian ecosystem.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographic area occupied by the species at the time of listing contain features that are essential to the conservation of the species and which may require special management considerations or protection. The features essential to the conservation of these species may require special management considerations or protection to reduce the following threats: Habitat loss and modification from fragmentation of river segments; alteration to natural flow regimes by impoundment, groundwater withdrawal, and drought; water quality degradation; and invasive saltcedar encroachment.

River fragmentation decreases the unobstructed river length required for successful reproduction in these species. Impoundments, groundwater withdrawal, saltcedar encroachment, and drought have the potential to reduce river flow below the minimum requirement to keep the eggs and larvae of these species afloat and ultimately for sustainment of sharpnose and smalleye shiner populations. Water quality degradation resulting from pollution sources; lack of flows maintaining adequate temperatures, oxygen concentrations, and salinities; and the destruction of adjacent riparian vegetation's run-off filtering abilities may result in water quality parameters beyond which sharpnose and smalleye shiners are capable of surviving. As such, the features essential to the conservation of these species require special management from these threats.

For sharpnose shiners and smalleye shiners, special management considerations or protection are needed to address threats. Management activities that could ameliorate threats include, but are not limited to: (1) Removing or modifying existing minor fish barriers to allow fish passage; (2) managing existing reservoirs to allow sufficient river flow to support shiner reproduction and population growth; (3) protecting groundwater, surface water, and spring flow quantity; (4) protecting water quality by implementing comprehensive programs to control and reduce point sources and non-point sources of pollution; and (5) protecting and managing native riparian vegetation. A more complete discussion of the threats to the sharpnose shiner and smalleye shiner and their habitats can be found in the June 2013 SSA Report (Service 2013, Chapter 3).

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. For this proposed rule, we rely heavily on the analysis of biological information reviewed in the June 2013 SSA Report (Service 2013). In accordance with section 3(5)(A) of the Act and its implementing regulation at 50 CFR 424.12(e), we first determined what specific areas, within the geographical area occupied by the species at the time they are listed, contain the physical or biological features that are essential to the conservation of the species and which may require special management considerations or protections. Next, we considered whether designating any additional areas—outside those currently occupied at the time of listing—are necessary to ensure the conservation of the species. We are not currently proposing to designate any areas outside the geographical area occupied by the species because no areas were determined to be essential for the conservation of either species. Finally, we described how we determined the lateral extent and mapping processes used in developing the proposed critical habitat units.

Areas Occupied at the Time of Listing

For the purpose of designating critical habitat for the sharpnose and smalleye shiners, we defined occupancy based on several criteria. First, survey results since 2008 confirm that both species persist within the Brazos River basin of Texas upstream of Possum Kingdom Lake in the Brazos River main stem, Salt Fork of the Brazos River, Double Mountain Fork of the Brazos River, and North Fork Double Mountain Fork of the Brazos River (Service 2013, Chapter 4). We chose to use survey results from the last 5 years because these data are relatively consistent from year to year and represent the best available information for what areas should be considered occupied at the time of listing. Second, a lack of sufficient fish sampling exists for some tributaries once known to be historically occupied by one or both species. The sharpnose and smalleye shiner are similar in their biology, and they are both capable of colonizing river segments when conditions are favorable. Therefore, we considered tributary streams occupied at the time of listing if they were previously occupied by either species and are contiguous (i.e., lacking fish migration barriers) with areas in the

upper Brazos River confirmed to be occupied by both species. Third, tributaries for which we had no information that either species recently or historically occurred were not considered occupied, even if they were contiguous with areas that are currently occupied.

Segments considered to be occupied at the time of listing were then assessed to determine if they contained the physical or biological features for the species and whether they required special management or protection. River segments not exceeding 275 km (171 mi) upstream of the lentic waters of Possum Kingdom Lake were not included because they lack the necessary physical or biological features for successful reproduction. Segments that do not typically maintain suitable water quality conditions (i.e., within physiological tolerances, minimal pollution, lacking regular golden alga blooms) were not included because they would not likely support a viable population of shiners. Segments not likely to maintain minimum mean spawning season flows capable of sustaining populations of either species, even during favorable climatic conditions, were also not included because they would not support successful reproduction.

The lower Brazos River, where shiners were released in 2012, is considered unoccupied for the purposes of determining critical habitat because prior to their 2012 release, both species had become extirpated or were functionally extirpated from this area as no fish had been collected since 2006. The release effort in 2012 was likely insufficient to restart a population of these species in the lower Brazos River. Therefore, given the old age and small number of fish released in 2012, it is likely they are extirpated from this reach of the Brazos River (Service 2013, Chapter 4).

Areas Unoccupied at the Time of Listing

To determine if any areas not considered occupied at the time of listing are essential for the conservation of the species we considered: (1) Whether the area was historically occupied; (2) the potential contribution of the area to the conservation of each species based on our June 2013 SSA Report (Service 2013, Chapter 2); (3) whether the area could be restored to contain the habitat conditions needed to support the species; and (4) whether a viable population of the species could be reestablished at the site. We recognize that both species likely need additional areas beyond those currently occupied in order to have sufficient redundancy and resiliency for long-term viability. However, our review of the areas within the historical range found that none of them have all four of these necessary characteristics to be considered essential for the conservation of either species.

We considered four areas that were historically occupied by one or both species as possible critical habitat: The Colorado River, Wichita River, middle Brazos River (between Possum Kingdom Lake and the low water crossing near the City of Marlin, Falls County, Texas) and lower Brazos River (downstream of Marlin to the Gulf of Mexico). The smalleye shiner is not known to have naturally occurred outside of the Brazos River basin, so neither the Colorado nor Wichita Rivers were considered essential for the conservation of that species. For the sharpnose shiner, our review found that neither the Colorado nor Wichita Rivers were considered necessary to maintain viability of either species because of the limited abundance and distribution of this shiner historically. In addition, both of these rivers have extensive impoundments such that the unfragmented stream length needed for reproduction by these species is lacking. These impoundments are expected to continue to exist into the future with no apparent potential for their removal, thereby eliminating the ability of the Colorado or Wichita Rivers to contain the necessary habitat conditions to support either species. Therefore, the Colorado and Wichita Rivers were not proposed as critical habitat for either species because of limited importance to the conservation of the species and the inability to restore the necessary habitat conditions for the species.

The middle Brazos River also lacks the necessary unimpounded river length required to support sharpnose and smalleye shiner reproduction (Service 2013, Chapter 4). These impoundments are expected to exist into the future with no apparent potential for their removal. As a result, there is no ability for these areas to be restored to contain the necessary habitat conditions to support the species. Therefore, since this area of the middle Brazos River cannot be restored to appropriate habitat conditions we find it is not essential for the conservation of either species, and we did not propose it as critical habitat.

The lower Brazos River was also found to likely have limited importance to the overall viability for both species (Service 2013, Chapter 2). The lower Brazos River does contain an unimpounded stream length long enough to support reproduction of sharpnose and smalleye shiners; however, their populations in this segment have already declined to the point that we presume they are extirpated from this reach. We expect the extirpation was the result of poor habitat conditions. Both the flow regime and river channel morphology of the lower Brazos River are considerably different (higher flow and deeper, wider channel) than the upper Brazos River, so this segment may never have supported populations of either species independent of the upper Brazos River populations. As a result, it is unlikely that sharpnose and smalleye shiners are capable of sustaining populations in the lower Brazos River without constant emigration (downstream dispersal) from the upstream source population in the upper Brazos River, which is now isolated by impoundments in the middle Brazos River. Therefore, with limited importance and the inability to support populations, we find the lower Brazos River is not essential for the conservation of either species, and we did not propose this area for critical habitat.

In conclusion, based on the best available information we conclude that the areas within the historical range of one or both species, but not occupied by either species at the time of listing, are not essential for the conservation of either species. The Colorado and Wichita Rivers do not contribute substantially to the conservation of the sharpnose shiner. The middle Brazos River cannot be restored to contain the necessary habitat conditions to support either species. The lower Brazos River may not be important for the conservation of either species and is not likely able to support a viable population of either species. Therefore, we have not proposed any areas as critical habitat beyond what is occupied at the time of listing.

Lateral Extent

In determining the lateral extent (overbank areas adjacent to the river channel) of critical habitat along proposed riverine segments, we considered the definition of critical habitat under the Act. Under the Act, critical habitat must contain the physical or biological features essential to a species' conservation and which may require special management considerations or protection. Conservation of the river channel alone is not sufficient to conserve sharpnose and smalleye shiners because the nearby native riparian vegetation areas adjacent to the river channel where the shiners occur are important components of the critical habitat for the shiners as a source of food (terrestrial insects) and to maintain physical habitat conditions in

the stream channel. Riparian areas are essential for energy and nutrient cycling, filtering runoff, absorbing and gradually releasing floodwaters, recharging groundwater, and maintaining stream flows. Healthy riparian corridors help ensure aquatic resources maintain the ecological integrity essential to stream fishes, including the sharpnose shiner and smalleye shiner.

A riparian width of 5 to 30 m (16 to 98 ft) is generally sufficient to protect the water quality of adjacent streams. The ability of riparian buffers to filter surface runoff is largely dependent on vegetation density, type, and slope, with dense, grassy vegetation and gentle slopes facilitating filtration. A riparian buffer width of 30 to 500 m (98 to 1,640 ft) should be sufficient to provide wildlife habitat; however, the riparian zone of the upper Brazos River may never have been extensive due to the aridity of the area, and the terrestrial insect prey base of the shiners would likely persist at even the thinnest recommended width. A riparian width of 30 m (98 ft) beyond the bankfull width of the river should be sufficient to maintain proper runoff filtration and provide the water quality and food base required by sharpnose and smalleye shiners (Service 2013, Chapter 6). As such, the proposed critical habitat includes the stream and river segments identified below and an area extending 30 meters (98 ft) perpendicularly to the stream channel beyond bankfull width. The bankfull width is the width of the stream or river at bankfull discharge and often corresponds to the edge of the riparian vegetation. Bankfull discharge is significant because it is the flow at which water begins to leave the active channel and move into the floodplain and serves to identify the point at which the active channel ceases and the floodplain begins.

Mapping

For each species, we are proposing one critical habitat unit, divided into six subunits. These subunits are derived from the most recent USGS high-resolution National Hydrological Flowline Dataset. Although river channels migrate naturally, it is assumed the segment lengths and locations will remain reasonably accurate over an extended period of time. All mapping was performed using ArcMap version 10 (Environmental Systems Research Institute, Inc.), a computer Geographic Information System (GIS) program.

We set the limits of each critical habitat subunit by identifying landmarks (reservoirs and dams) that clearly act as barriers to fish migration. Partial barriers to fish migration that impede fish movement only during low river flow are not used to identify segment endpoints because it is presumed fish may occasionally be capable of traversing these impediments. Stream confluences are also used to delineate the boundaries of subunits contiguous with other critical habitat subunits because they are logical and recognizable termini.

When determining proposed critical habitat boundaries, we also made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical or biological features for the sharpnose shiner and smalleye shiner. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

Summary

In summary, we are proposing for designation as critical habitat geographic areas that we have determined are occupied by the sharpnose shiner and smalleye shiner at the time of listing and contain sufficient elements of physical or biological features to support life-history processes essential to the conservation of the species and that may require special management considerations or protection. We are not proposing to designate any unoccupied areas as critical habitat.

The critical habitat designation is defined by the maps, as modified by any accompanying regulatory text, presented at the end of this document in the Proposed Regulation Promulgation section. We will make the coordinates or plot points or both on which each map is based available to the public on *http://www.regulations.gov* at Docket No. FWS–R2–ES–2013–0008, at *http://www.fws.gov/southwest/es/ArlingtonTexas/,* and at the Arlington, Texas, Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT** above).

Proposed Critical Habitat Designation

We are proposing to designate a single critical habitat unit divided into six subunits in Texas of approximately 1,002 river km (623 mi) of the upper Brazos River basin and the upland areas extending beyond the bankfull river channel by 30 meters on each side. The six subunits proposed as critical habitat make up the contiguous, unobstructed section of the upper Brazos River system consisting of portions of the Brazos River main stem, Salt Fork of the Brazos River, White River, Double Mountain Fork of the Brazos River, North Fork Double Mountain Fork of the Brazos River, and South Fork Double Mountain Fork of the Brazos River. The critical habitat areas we describe below constitute our current best assessment of areas that contain the essential physical or biological features for both species (although the needs of both species differ slightly) and meet the definition of critical habitat for both shiner species. The subunits we propose as critical habitat are shown in Table 1.

TABLE 1—PROPOSED CRITICAL HABITAT SUBUNITS FOR THE SHARPNOSE SHINER AND SMALLEYE SHINER

Critical habitat subunit	Length of subunit in river kilometers (river miles)
Subunit 1. Upper Brazos River Main Stem	326.8 (203.1)
Subunit 2. Salt Fork of the Brazos River	275.1 (171.0)
Subunit 3. White River	40.3 (25.1)
Subunit 4. Double Mountain Fork of the Brazos River	239.8 (149.0)
Subunit 5. North Fork Double Mountain Fork of the Brazos River	108.6 (67.5)
Subunit 6. South Fork Double Mountain Fork of the Brazos River	11.1 (6.9)

TABLE 1—PROPOSED CRITICAL HABITAT SUBUNITS FOR THE SHARPNOSE SHINER AND SMALLEYE SHINER—Continued

Critical habitat subunit	Length of subunit in river kilometers (river miles)
Total	1,001.9 (622.5)

Note: Area sizes may not sum due to rounding.

The critical habitat areas include the river channels within the identified stream segments. The stream beds of navigable waters (stream beds maintaining an average width of at least 30 ft wide from the mouth up) in Texas are generally owned by the State, in trust for the public, while the lands alongside the streams can be privately owned. Therefore, for all stream segments included in the proposed critical habitat; the stream beds, including the small, seasonally dry portion of the stream beds between the bankfull width, where vegetation occurs; and the wetted channel, are owned by the State for the purposes of this proposed rule. To the best of our knowledge, all adjacent riparian areas are privately owned.

Unit Description

We determined the proposed unit of the upper Brazos River basin and its subunits are occupied by both species at the time of listing (Service 2013, Chapter 4). The upper Brazos River critical habitat unit, when considered in its entirety, exhibits all four of the primary constituent elements of critical habitat for both species. Some individual subunits may not contain all of the physical or biological features of critical habitat under all climatic conditions. For example, the elements of physical and biological features supporting the life-history processes of sharpnose and smalleye shiners are highly dependent on the naturally variable climatic conditions and river flow characteristics of the upper Brazos River basin and may not be present in all critical habitat subunits at all times (i.e., during severe droughts). However, each subunit likely contains suitable habitat during wet climatic conditions and will exhibit one or more of the essential physical or biological features that may require special management considerations or protection and are therefore included in the proposed designation under section 3(5)(A)(i) of the Act.

Subunits are designated based on sufficient elements of physical or biological features being present to support life-history processes of the sharpnose and smalleye shiners. Some subunits contain all of the identified elements of physical or biological features and support multiple life-history processes, while other subunits contain only some elements of the physical or biological features necessary to support each species' particular use of that habitat. The following subunit descriptions briefly describe each of the proposed critical habitat subunits and the reasons why they meet the definition of critical habitat for the sharpnose shiner and smalleye shiner. The subunits are generally numbered from downstream to upstream.

Subunit 1: Upper Brazos River Main Stem

Subunit 1 is 326.8 km (203.1 mi) long in Young, Throckmorton, Baylor, Knox, King, and Stonewall Counties. The downstream extent of the Upper Brazos River Main Stem Subunit is approximately 15 river km (9.3 miles) upstream of the eastern border of Young County where it intersects the upper portion of Possum Kingdom Lake. The upstream extent of this subunit is at the confluence of the Double Mountain Fork of the Brazos River and the Salt Fork of the Brazos River where they form the Brazos River main stem.

Subunit 1 provides an adequate length of unobstructed, sandy bottomed river (PCE 1) often with sufficient flow (PCE 2) and water quality (PCE 3) to support sharpnose and smalleye shiner survival and reproduction. However, during periods of severe drought, sufficient flow may not be maintained. Many upland areas adjacent to this subunit are encroached by saltcedar, although it generally contains the native riparian vegetation capable of maintaining river water quality and an adequate prey base for both shiner species (PCE 4).

Habitat features in this subunit are primarily threatened by groundwater withdrawal, saltcedar invasion, water quality degradation, drought, and impoundment. The South Bend Reservoir, identified as a feasible water management strategy by the Brazos G Regional Water Planning Group, would occur on this subunit if constructed, while the Throckmorton Reservoir and Millers Creek Reservoir Augmentation would occur on tributaries that discharge into this subunit (Service 2013, Chapter 3). The physical or biological features in this subunit may require special management considerations or protection to minimize impacts from these threats.

Subunit 2: Salt Fork of the Brazos River

Subunit 2 is 275.1 km (171 mi) long in Stonewall, Kent, and Garza Counties. The downstream extent of the Salt Fork of the Brazos River Subunit is at the confluence of the Double Mountain Fork of the Brazos River and the Salt Fork of the Brazos River where they form the Brazos River main stem. The upstream extent of this subunit is on the Salt Fork of the Brazos River at the McDonald Road crossing in Garza County, which acts as a barrier to fish passage.

Subunit 2 provides an adequate length of unobstructed, sandy bottomed river (PCE 1) often with sufficient flow (PCE 2) and water quality (PCE 3) to support sharpnose and smalleye shiner survival and reproduction. However, during periods of severe drought, sufficient flow may not be maintained and naturally occurring salt plumes may occasionally result in inadequate water quality. Many upland areas adjacent to this subunit are encroached by saltcedar, although it generally contains the native riparian vegetation capable of maintaining river water quality and an adequate prey base for both shiner species (PCE 4).

Habitat features in this subunit are primarily threatened by groundwater withdrawal, saltcedar invasion, desalination projects, water quality degradation, and drought. Several of these threats have the potential to decrease surface water volume available for fish use. The threat of reservoir impoundment is minimized because the highly saline water of this subunit is generally of little use for industrial, agricultural, and municipal needs. The physical or biological features in this subunit may require special management considerations or protection to minimize impacts from these threats.

Subunit 3: White River

Subunit 3 is 40.3 km (25.1 mi) long in Kent, Garza, and Crosby Counties. The downstream extent of the White River Subunit is at the confluence of the White River with the Salt Fork of the Brazos River. The upstream extent is immediately downstream of the White

River Lake impoundment on the White River.

Given the lack of adequate sampling from this area, records of the smalleye shiner from the White River are old and rare, and sharpnose shiners have never been recorded from this subunit (Service 2013, Chapter 2). However, records of both species have been documented within the last 5 years from the Salt Fork of the Brazos River less than 1 km (0.6 mi) downstream of the confluence of this subunit. Therefore, the White River Subunit is contiguous with areas currently occupied by both species, and there are no fish barriers to prevent them from migrating into this area. Therefore, given the information above and the biological similarity between these species, we consider this subunit within the geographic range occupied by both species. Furthermore, the White River provides surface water flow of relatively low salinity into the Salt Fork of the Brazos River, which may be important in maintaining the water quality of this downstream subunit.

Subunit 3 provides an adequate length of unobstructed, sandy bottomed river (PCE 1) when considered as part of the contiguous critical habitat unit as a whole. This subunit likely contains only sufficient flow (PCE 2) and water quality (PCE 3) to support sharpnose and smalleye shiner survival and reproduction under wet climatic conditions or when water is being released from upstream impoundments. During periods of severe drought, sufficient flow may not be maintained. Upland areas adjacent to this subunit are likely encroached by saltcedar, although it generally contains the native riparian vegetation capable of maintaining river water quality and an adequate prey base for both shiner species (PCE 4).

Habitat features in this subunit are primarily threatened by groundwater withdrawal, saltcedar invasion, water quality degradation, drought, and impoundment. Flow is normally available in this subunit only as a result of water release from White River Lake upstream of this subunit. Therefore, the physical or biological features in this subunit may require special management considerations or protection to minimize impacts from these threats.

Subunit 4: Double Mountain Fork of the Brazos River

Subunit 4 is 239.8 km (149 mi) long in Stonewall, Haskell, Fisher, and Kent Counties. The downstream extent of the Double Mountain Fork of the Brazos River Subunit is at the confluence of the Double Mountain Fork of the Brazos River and the Salt Fork of the Brazos River where they form the Brazos River main stem. The upstream extent of this subunit is at the confluence of the South Fork Double Mountain Fork of the Brazos River and the North Fork Double Mountain Fork of the Brazos River where they form the Double Mountain Fork of the Brazos River.

Subunit 4 provides an adequate length of unobstructed, sandy bottomed river (PCE 1) when considered as part of the contiguous critical habitat unit as a whole. This subunit likely contains sufficient flow (PCE 2) and water quality (PCE 3) to support sharpnose and smalleye shiner survival and reproduction most of the time although during periods of severe drought, sufficient flow may not be maintained. Upland areas adjacent to this subunit are likely encroached by saltcedar, but it generally contains the native riparian vegetation capable of maintaining river water quality and an adequate prey base for both shiner species (PCE 4).

Habitat features in this subunit are primarily threatened by groundwater withdrawal, saltcedar invasion, water quality degradation, drought, and impoundment. The Double Mountain Fork East and West Reservoirs, identified as feasible water management strategies by the Brazos G Regional Water Planning Group, would occur in this subunit if constructed (Service 2013, Chapter 3). Therefore, the physical or biological features in this subunit may require special management considerations or protection to minimize impacts from these threats.

Subunit 5: North Fork Double Mountain Fork of the Brazos River

Subunit 5 is 108.6 km (67.5 mi) long in Kent, Garza, and Crosby Counties. The downstream extent of the North Fork Double Mountain Fork Subunit is at the confluence of the South Fork Double Mountain Fork of the Brazos River and the North Fork Double Mountain Fork of the Brazos River where they form the Double Mountain Fork of the Brazos River. The upstream extent of this subunit is the earthen impoundment near Janes-Prentice Lake in Crosby County, Texas.

Subunit 5 provides an adequate length of unobstructed, sandy bottomed river (PCE 1) when considered as part of the contiguous critical habitat unit as a whole. This subunit likely contains sufficient flow (PCE 2) and water quality (PCE 3) to support sharpnose and smalleye shiner survival and reproduction much of the time, but during periods of severe drought, sufficient flow may not be maintained. Upland areas adjacent to this subunit are likely encroached by saltcedar, although it generally contains the native riparian vegetation capable of maintaining river water quality and an adequate prey base for both shiner species (PCE 4).

Habitat features in this subunit are primarily threatened by groundwater withdrawal, saltcedar invasion, water quality degradation, drought, and impoundment. Post Reservoir and the North Fork Diversion Reservoir, identified as feasible water management strategies by the Brazos G Regional Water Planning Group, would occur in this subunit if constructed (Service 2013, Chapter 3). Therefore, the physical or biological features in this subunit may require special management considerations or protection to minimize impacts from these threats.

Subunit 6: South Fork Double Mountain Fork of the Brazos River

Subunit 6 is 11.1 km (6.9 mi) long in Kent and Garza Counties. The downstream extent of the South Fork Double Mountain Fork Subunit is at the confluence of the South Fork Double Mountain Fork of the Brazos River and the North Fork Double Mountain Fork of the Brazos River where they form the Double Mountain Fork of the Brazos River. The upstream extent of this subunit is immediately downstream of the John T. Montford Dam of Lake Alan Henry. Although there is a lack of recent records (smalleye shiner last observed in 1992) in this subunit, it is contiguous with areas currently occupied by both species, and there are no known fish barriers to prevent them from migrating into this area. The subunit does not have public access, and there are few opportunities to survey for fish in this river segment. However, given the information above and the biological similarity between these species, we consider this subunit within the geographic range occupied by both sharpnose and smalleye shiners.

Subunit 6 provides an adequate length of unobstructed, sandy bottomed river (PCE 1) when considered as part of the contiguous critical habitat unit as a whole. This subunit likely contains only sufficient flow (PCE 2) and water quality (PCE 3) to support sharpnose and smalleye shiner survival and reproduction under wet climatic conditions or when water is being actively released from upstream impoundments. During periods of severe drought, sufficient flow may not be maintained. Upland areas adjacent to this subunit may be encroached by

saltcedar, although it generally contains the native riparian vegetation capable of maintaining river water quality and an adequate prey base for both shiner species (PCE 4).

Habitat features in this subunit are primarily threatened by drought and impoundment. Flow is normally present in this subunit only as a result of water released from Lake Alan Henry. Flow from this subunit directly affects surface water volume in the Double Mountain Fork of the Brazos River Subunit available for fish use. Therefore, the physical or biological features in this subunit may require special management considerations or protection to minimize impacts from these threats.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action that is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our regulatory definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F.3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.,* 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, or are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical or biological features to an extent that appreciably reduces the conservation value of critical habitat for the sharpnose shiner or smalleye shiner. As discussed above, the role of critical habitat is to support life-history needs of the species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the sharpnose shiner or smalleye shiner. These activities include, but are not limited to:

(1) Activities physically disturbing the riverine habitat upon which these shiner species depend, particularly by decreasing surface water flows or altering channel morphology. Such activities could include, but are not limited to, impoundment, in-stream mining, channelization, and dewatering. These activities could result in the physical destruction of habitat or the modification of habitat such that it no longer supports the reproduction of these species.

(2) Activities increasing the concentration of pollutants in surface water within areas designated as critical habitat. Such activities could include, but are not limited to, increases in impervious cover in the surface watershed, destruction of the adjacent upland areas by land uses incompatible with maintaining a healthy riverine system, and release of pollutants into

the surface water or connected groundwater. These activities could alter water conditions to levels that are beyond the tolerances of the shiner species and result in direct or cumulative adverse effects to these individuals and their life cycles.

(3) Activities depleting the underlying groundwater or otherwise diverting water to an extent that decreases or stops the flow of surface waters within areas designated as critical habitat. Such activities could include, but are not limited to, excessive water withdrawals from aquifers and diversion of natural discharge features. These activities could dewater habitat or reduce water quality to levels that are beyond the tolerances of the sharpnose and smalleye shiner, and result in direct or cumulative adverse effects to these individuals and their life cycles.

(4) Activities leading to the introduction, expansion, or increased density of an exotic plant or animal species that is detrimental to the sharpnose shiner or smalleye shiner or their habitat.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: ''The Secretary shall not designate as critical habitat any lands or other geographic areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.''

There are no Department of Defense lands within the proposed critical habitat designation for the sharpnose shiner or smalleye shiner; therefore we are not exempting any areas under section 4(a)(3)(B)(i) of the Act.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, we may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise his discretion to exclude the area only if such exclusion would not result in the extinction of the species.

Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we are preparing an analysis of the economic impacts of the proposed critical habitat designation and related factors. Potential land use sectors that may be affected by a sharpnose shiner and smalleye shiner critical habitat designation include sectors associated with construction or improvement of roads, bridges, pipelines, or bank stabilization; residential or commercial development; the control of surface waters or removal of groundwater; and irrigation water use and management.

During the development of a final designation, we will consider economic impacts, public comments, and other new information, and areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands where a national security impact might exist. There are no Department of Defense lands within the proposed critical habitat designation for the sharpnose shiner or smalleye shiner; therefore, currently, there are no areas proposed for exclusion based on impacts on national security.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors including whether the landowners have developed any HCPs or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at Tribal management in recognition of their capability to appropriately manage their own resources, and consider the government-to-government relationship of the United States with Tribal entities. We also consider any social impacts that might occur because of the designation.

When we evaluate the existence of a conservation plan when considering the benefits of exclusion, we consider a variety of factors, including but not limited to, whether the plan is finalized; how it provides for the conservation of the essential physical or biological features; whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan will be implemented into the future; whether the conservation strategies in the plan are likely to be effective; and whether the plan contains a monitoring program or adaptive management to ensure that the conservation measures are effective and can be adapted in the future in response to new information.

In preparing this proposal, we have determined that there are currently no HCPs for the sharpnose shiner or smalleye shiner. The proposed designation does not include any tribal lands or trust resources. We anticipate no impact on tribal lands, partnerships, or HCPs from this proposed critical habitat designation. Accordingly, we are not currently considering excluding any areas from the critical habitat

designation based on other relevant impacts.

Required Determinations

Regulatory Planning and Review—Executive Orders 12866 and 13563

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C 801 *et seq.*), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include such businesses as manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and forestry and logging operations with fewer than 500 employees and annual business less than $7 million. To determine whether small entities may be affected, we will consider the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

Importantly, the incremental impacts of a rule must be *both* significant and substantial to prevent certification of the rule under the RFA and to require the preparation of an initial regulatory flexibility analysis. If a substantial number of small entities are affected by the proposed critical habitat designation, but the per-entity economic impact is not significant, the Service may certify. Likewise, if the per-entity economic impact is likely to be significant, but the number of affected entities is not substantial, the Service may also certify.

Under the RFA, as amended, and following recent court decisions, Federal agencies are only required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself, and not the potential impacts to indirectly affected entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried by the Agency is not likely to adversely modify critical habitat. Therefore, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Under these circumstances, it is our position that only Federal action agencies will be directly regulated by this designation. Therefore, because Federal agencies are not small entities, the Service may certify that the proposed critical habitat rule will not have a significant economic impact on a substantial number of small entities.

We acknowledge, however, that in some cases, third-party proponents of the action subject to permitting or funding may participate in a section 7 consultation, and thus may be indirectly affected. We believe it is good policy to assess these impacts if we have sufficient data before us to complete the necessary analysis, whether or not this analysis is strictly required by the RFA. While this regulation does not directly regulate these entities, in our draft economic analysis we will conduct a brief evaluation of the potential number of third parties participating in consultations on an annual basis in order to ensure a more complete examination of the incremental effects of this proposed rule in the context of the RFA.

In conclusion, we believe that, based on our interpretation of directly regulated entities under the RFA and relevant case law, this designation of critical habitat will only directly regulate Federal agencies which are not by definition small business entities. As such, we certify that, if promulgated, this designation of critical habitat would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required. However, though not necessarily required by the RFA, in our draft economic analysis for this proposal we will consider and evaluate the potential effects to third parties that may be involved with consultations with Federal action agencies related to this action.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. We do not expect the designation of this proposed critical habitat to significantly affect energy supplies, distribution, or use. Oil and gas pipelines crossing the proposed critical habitat can be buried under the river channel and the contours of the channel bed returned to their natural state. Also, the minimal and unpredictable flows of the upper Brazos River are not well suited for hydroelectric power generation. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we conduct our economic analysis, and

review and revise this assessment as warranted.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule would significantly or uniquely affect small governments. The lands adjacent to the river channel being proposed for critical habitat designation are primarily owned by private landowners, which do not fit the definition of ''small governmental jurisdiction.'' Therefore, a Small Government Agency Plan is not required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

Takings—Executive Order 12630

In accordance with Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we are analyzing the potential takings implications of designating critical habitat for the sharpnose shiner and smalleye shiner in a takings implications assessment. The best information currently available indicates that this designation of critical habitat for the sharpnose shiner and smalleye shiner does not pose significant takings implications. However, we will further evaluate this issue as we conduct our economic analysis, and complete a takings implications assessment before issuing a final determination.

Federalism—Executive Order 13132

In accordance with Executive Order 13132 (Federalism), this proposed rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies. The designation of critical habitat in geographic areas currently occupied by the sharpnose shiner and smalleye shiner imposes no additional restrictions to those in place as a result of the listing of the species and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments because the areas that contain the physical or biological features essential to the conservation of the species are more clearly defined, and the elements of the features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, the proposed rule identifies the elements of physical or biological features essential to the conservation of the species. The areas of proposed critical habitat are presented on maps, and the rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. 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.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to NEPA (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

We determined there are no tribal lands that meet our criteria for critical habitat. Therefore, we are not proposing to designate critical habitat for sharpnose or smalleye shiners on tribal lands.

Clarity of the Rule

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

(1) Be logically organized;

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

(3) Use clear language rather than jargon;

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

(5) Use lists and tables wherever possible.

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

References Cited

A complete list of references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* under Docket No. FWS–R2–ES–2013–0008 in the June 2013 version of the Status Assessment Report for the Sharpnose Shiner and Smalleye Shiner (Service 2013), and upon request from the Arlington, Texas, Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this document are the staff members of the Arlington, Texas, Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

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

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

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

■ 2. In § 17.95, amend paragraph (e) by adding entries for ''Sharpnose Shiner (*Notropis oxyrhynchus*)'' and ''Smalleye Shiner (*Notropis buccula*)'' in the same alphabetical order that the species appear in the table at § 17.11(h), to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(e) *Fishes.*

* * * * *

Sharpnose Shiner (*Notropis oxyrhynchus*)

(1) Critical habitat units are depicted for Baylor, Crosby, Fisher, Garza, Haskell, Kent, King, Knox, Stonewall, Throckmorton, and Young Counties, Texas, on the maps below.

(2) Critical habitat includes the bankfull width of the river channel within the identified river segments indicated on the maps below, and includes a lateral distance of 30 meters (98 feet) on each side of the stream width at bankfull discharge. Bankfull discharge is the flow at which water begins to leave the channel and move into the floodplain, and generally occurs every 1 to 2 years.

(3) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of the sharpnose shiner consist of a riverine system with habitat to support all life-history stages of the sharpnose shiner, which includes:

(i) Unobstructed, sandy-bottomed river segments greater than 275 kilometers (171 miles) in length.

(ii) Flowing water of greater than 2.61 cubic meters per second (m^3s^{-1}) (92 cubic feet per second (cfs)) averaged over the shiner spawning season (April through September).

(iii) Water of sufficient quality to support survival and reproduction, characterized by:

(A) Temperatures generally less than 39.2 °C (102.6 °F);

(B) Dissolved oxygen concentrations generally greater than 2.66 milligrams per liter (mg/L);

(C) Salinities generally less than 15 parts per thousand (ppt) (25 millisiemens per centimeter (mS/cm)); and

(D) Sufficiently low petroleum and other pollutant concentrations such that mortality does not occur.

(iv) Native riparian vegetation capable of maintaining river water quality, providing a terrestrial prey base, and maintaining a healthy riparian ecosystem.

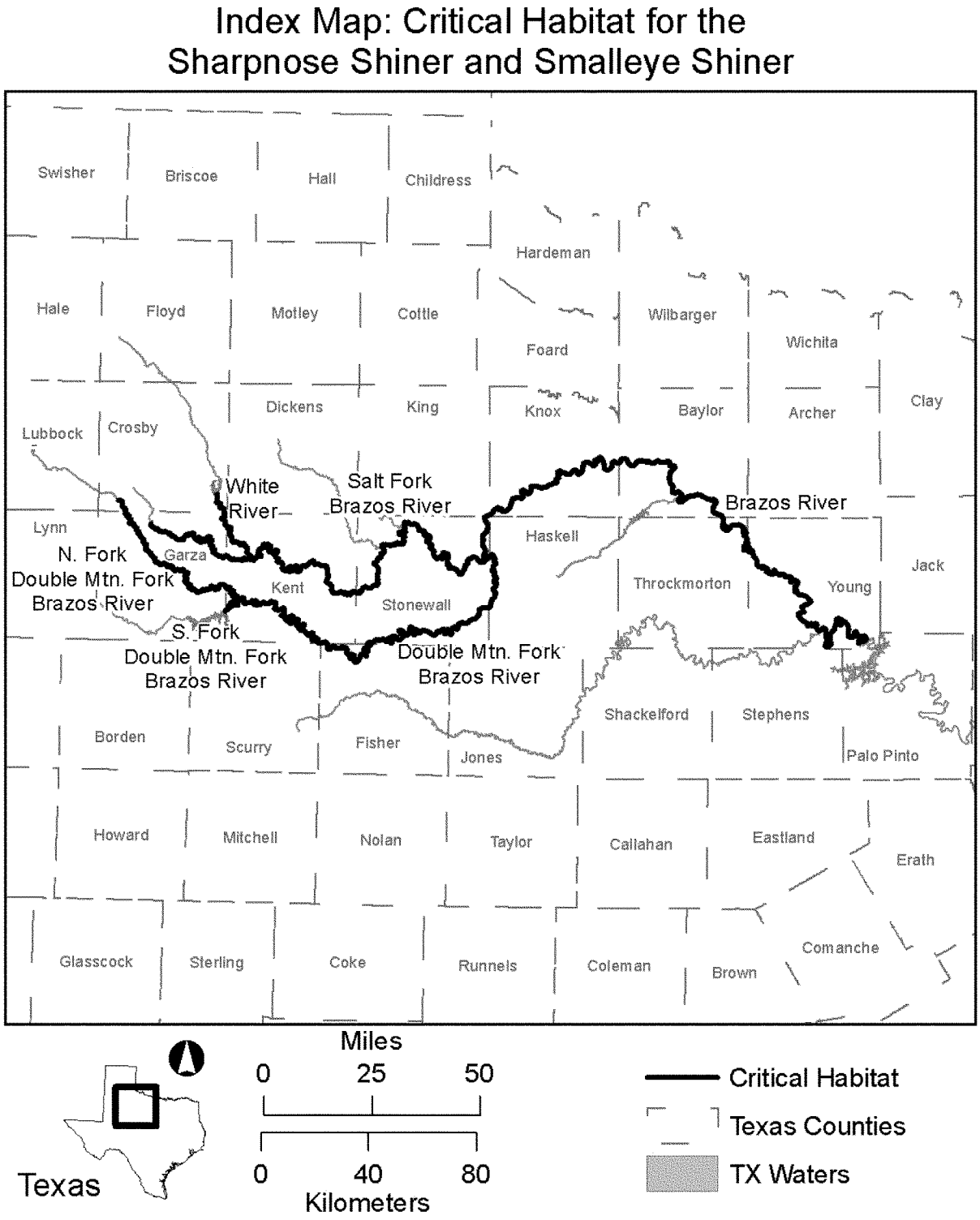
(4) Critical habitat does not include manmade structures (such as buildings, railroads, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(5) *Critical habitat map units.* Data layers defining map units were created using the USGS National Hydrography Dataset's flowline data in ArcMap (Environmental Systems Research Institute, Inc.), a computer geographic information system program. The 30-m (98-ft) lateral extent adjacent to each segment's active channel is not displayed in the included figures because it is not appropriate at these map scales. Segments were mapped using the NAD 1983 UTM Zone 14 projection. Endpoints of stream segments for each critical habitat subunit are reported as latitude, longitude in decimal degrees. The maps

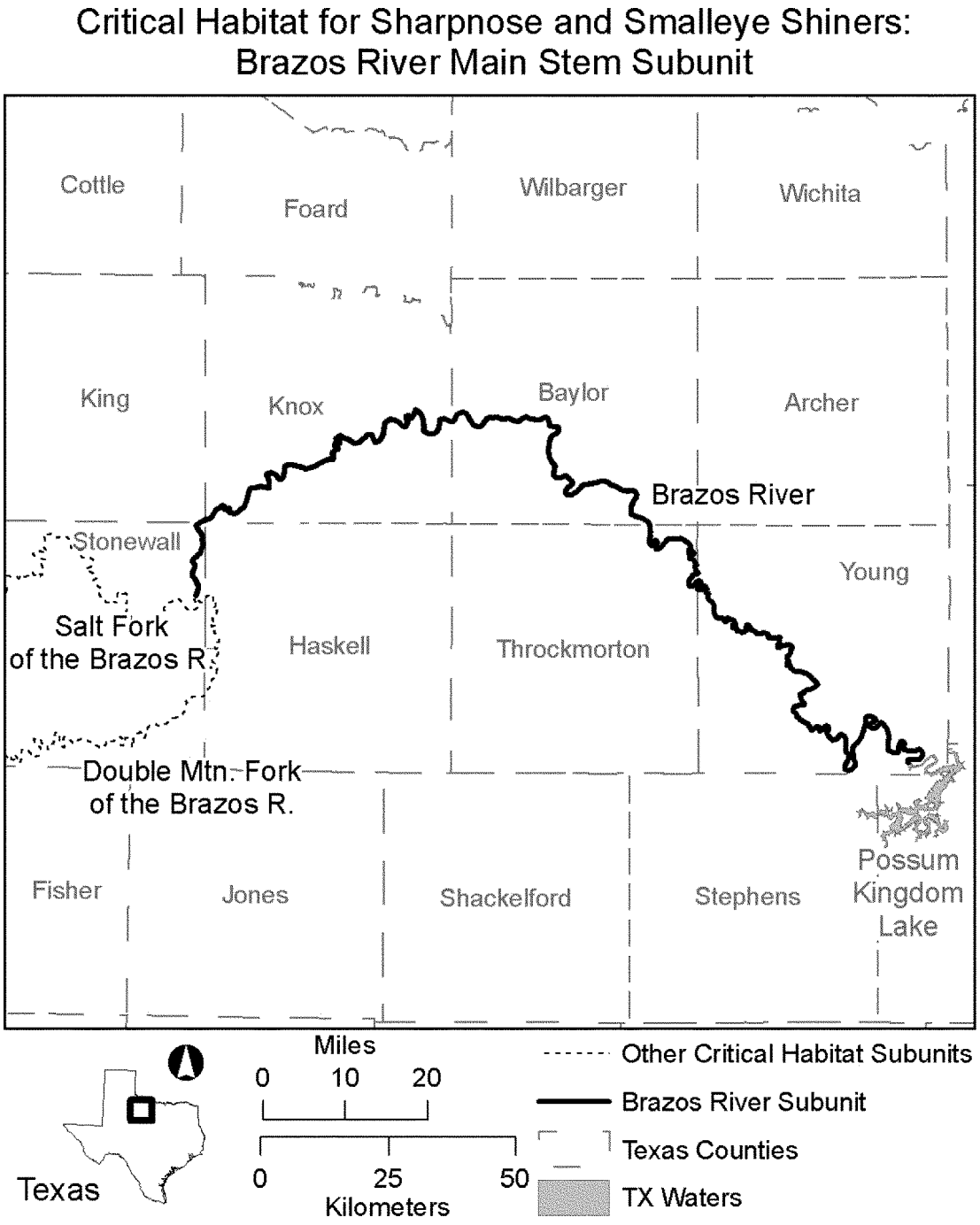
in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's Internet site (*http://www.fws.gov/southwest/es/ArlingtonTexas/*), at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2013–0008, and at the Arlington, Texas, Ecological Services Field Office. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(6) Index map of critical habitat for the sharpnose shiner and smalleye shiner follows:

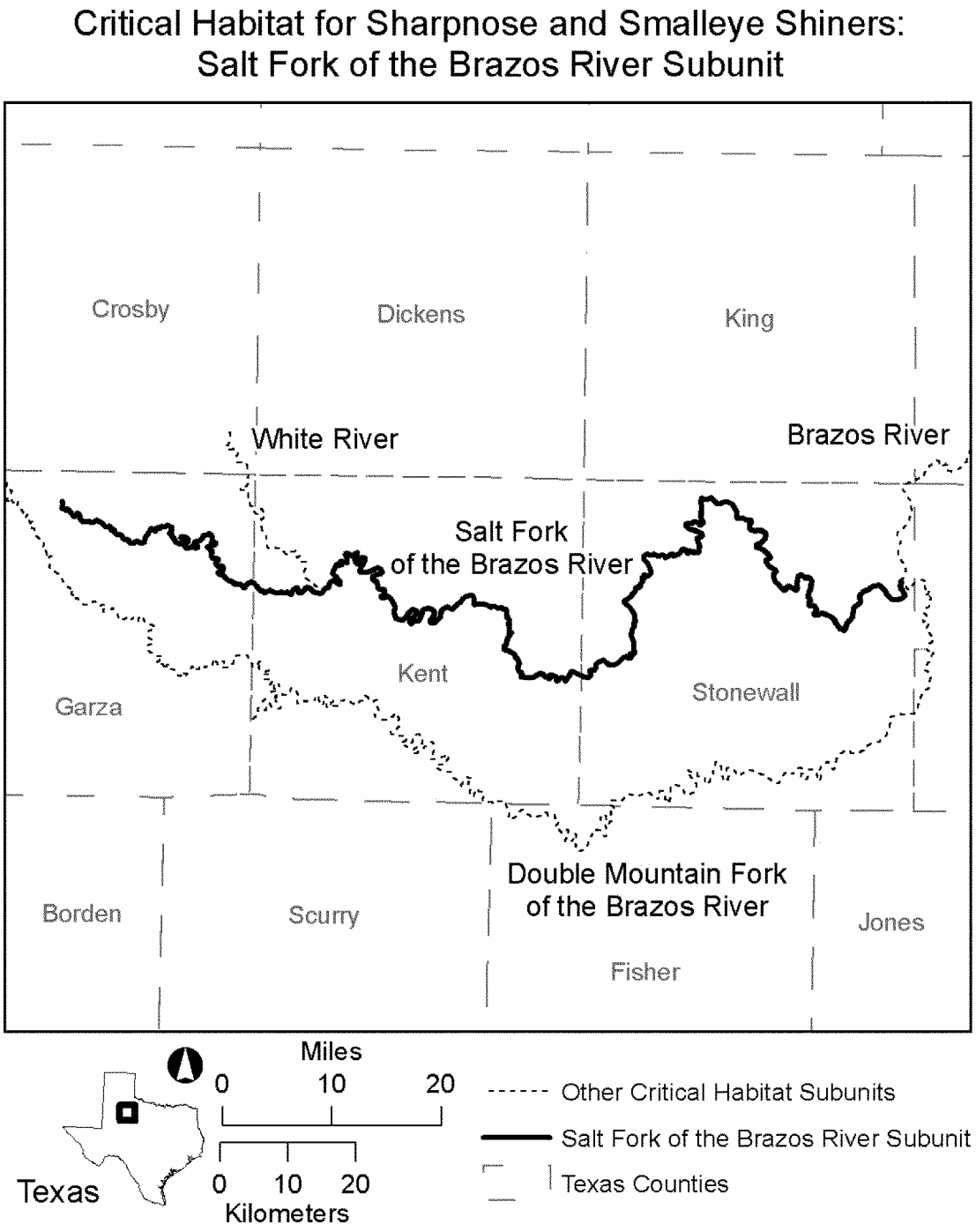
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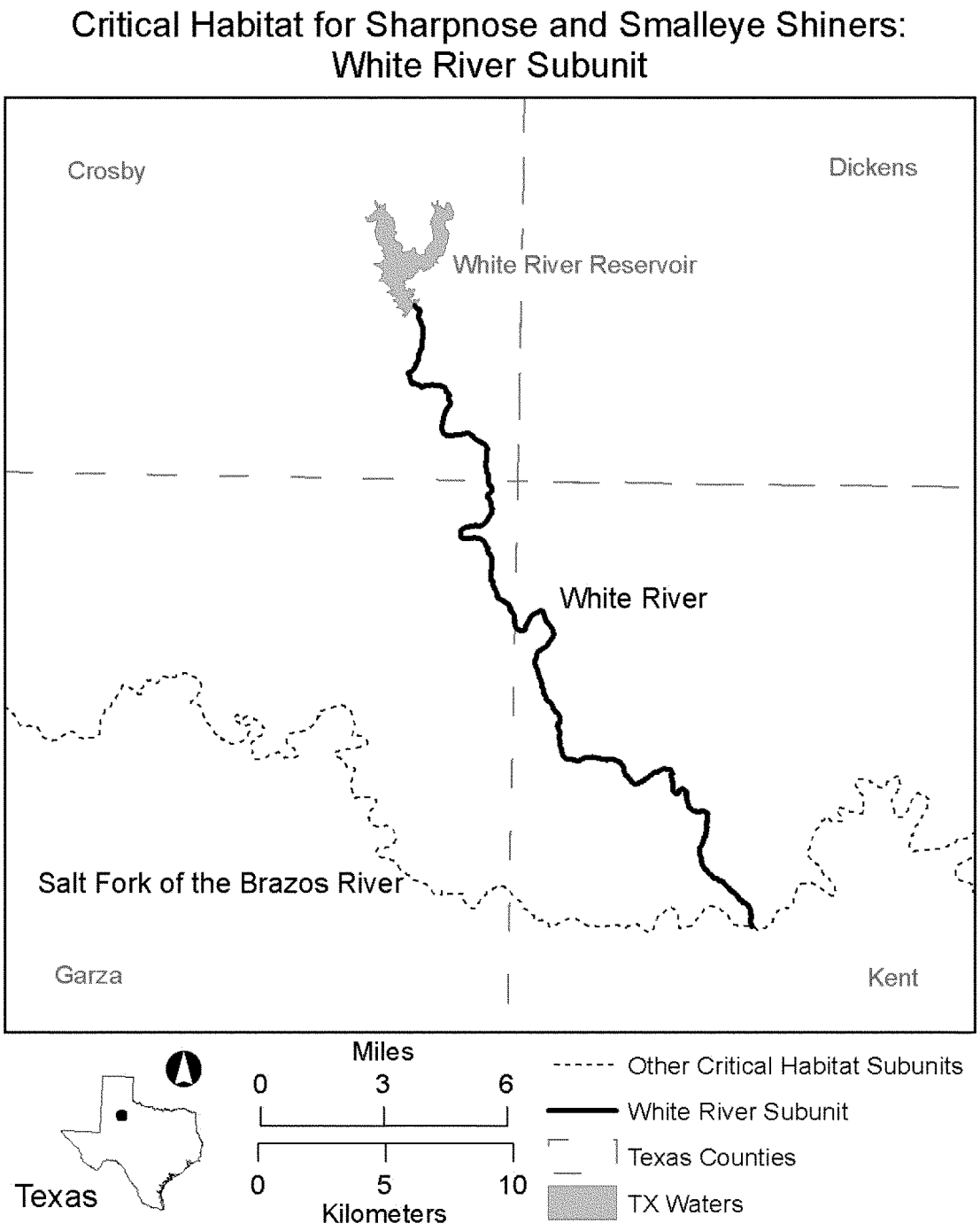
(7) Subunit 1: Upper Brazos River Main Stem from approximately 15 river km (9.3 miles) upstream of the eastern border of Young County where it intersects the upper portion of Possum Kingdom Lake (32.974302, −98.509880) upstream to the confluence of the Double Mountain Fork of the Brazos River and the Salt Fork of the Brazos River where they form the Brazos River main stem (33.268404, −100.010209); Baylor, King, Knox, Stonewall, Throckmorton, and Young Counties, Texas. Map of Upper Brazos River Main Stem Subunit follows:



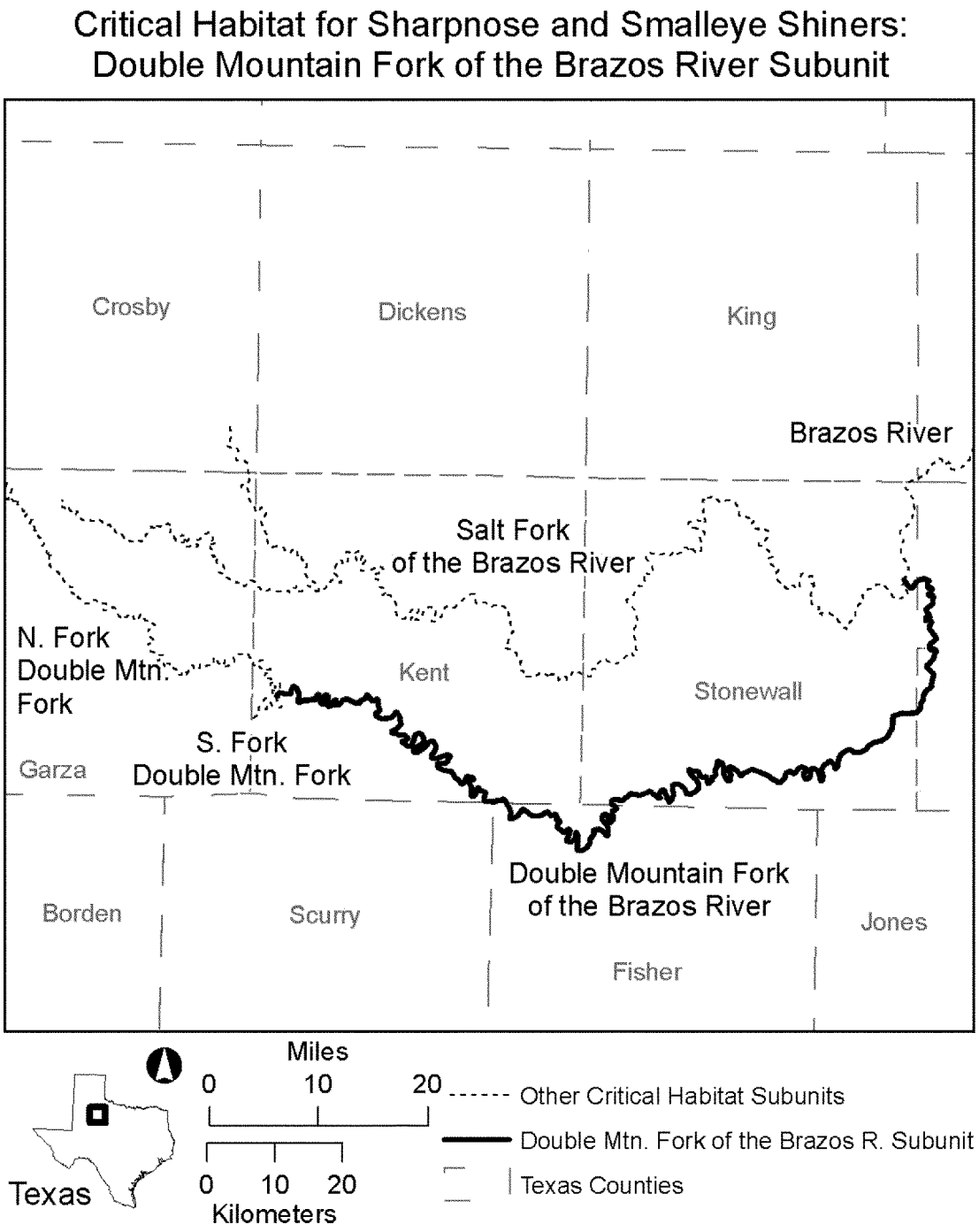
(8) Subunit 2: Salt Fork of the Brazos River from its confluence with the Double Mountain Fork of the Brazos River (33.268404, −100.010209) upstream to the McDonald Road crossing (33.356258, −101.345890); Garza, Kent, and Stonewall Counties, Texas. Map of Salt Fork of the Brazos River Subunit follows:



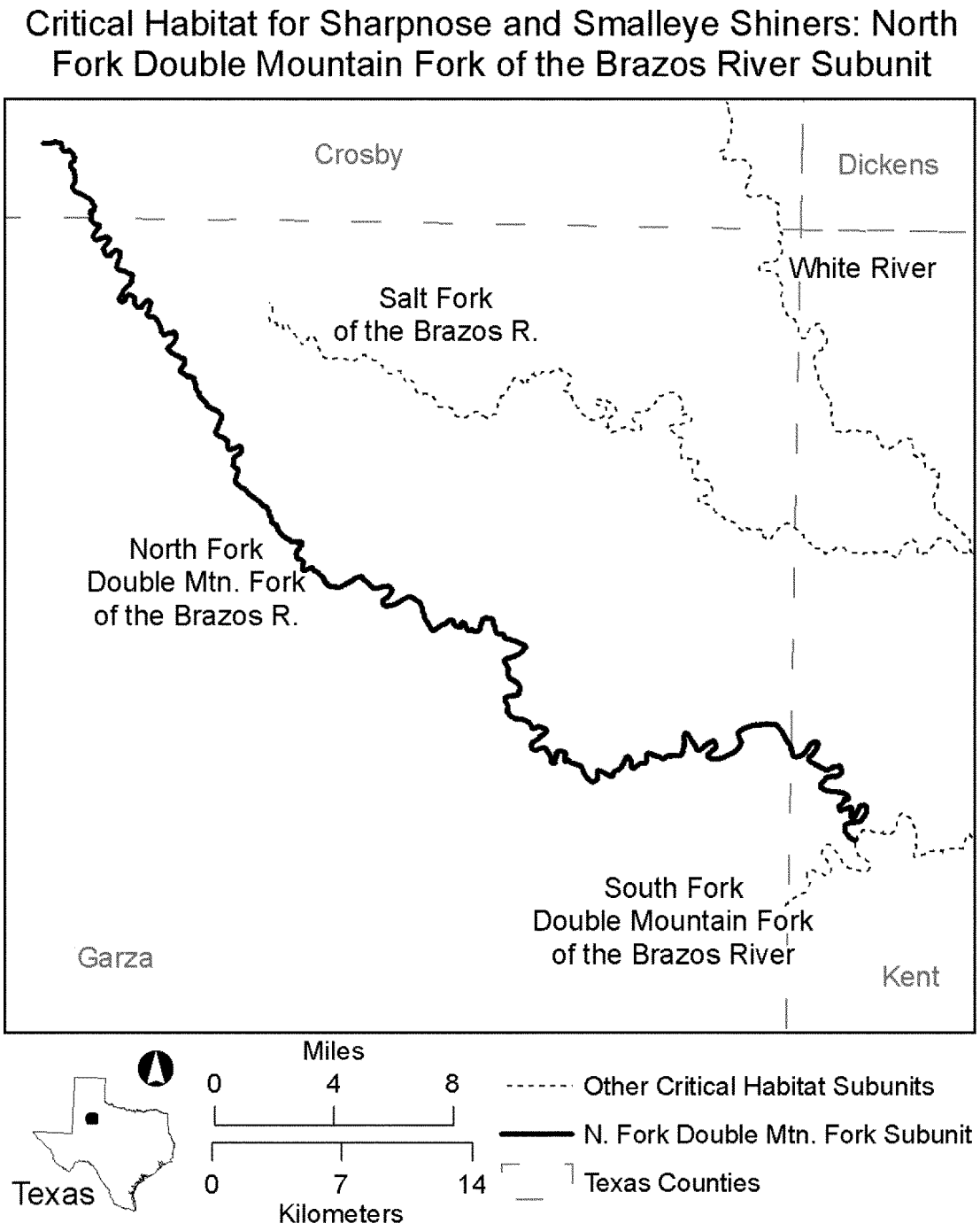
(9) Subunit 3: White River from its confluence with the Salt Fork of the Brazos River (33.241172, −100.936181) upstream to the White River Lake impoundment (33.457240, −101.084546); Crosby, Garza, and Kent Counties, Texas. Map of White River Subunit follows:



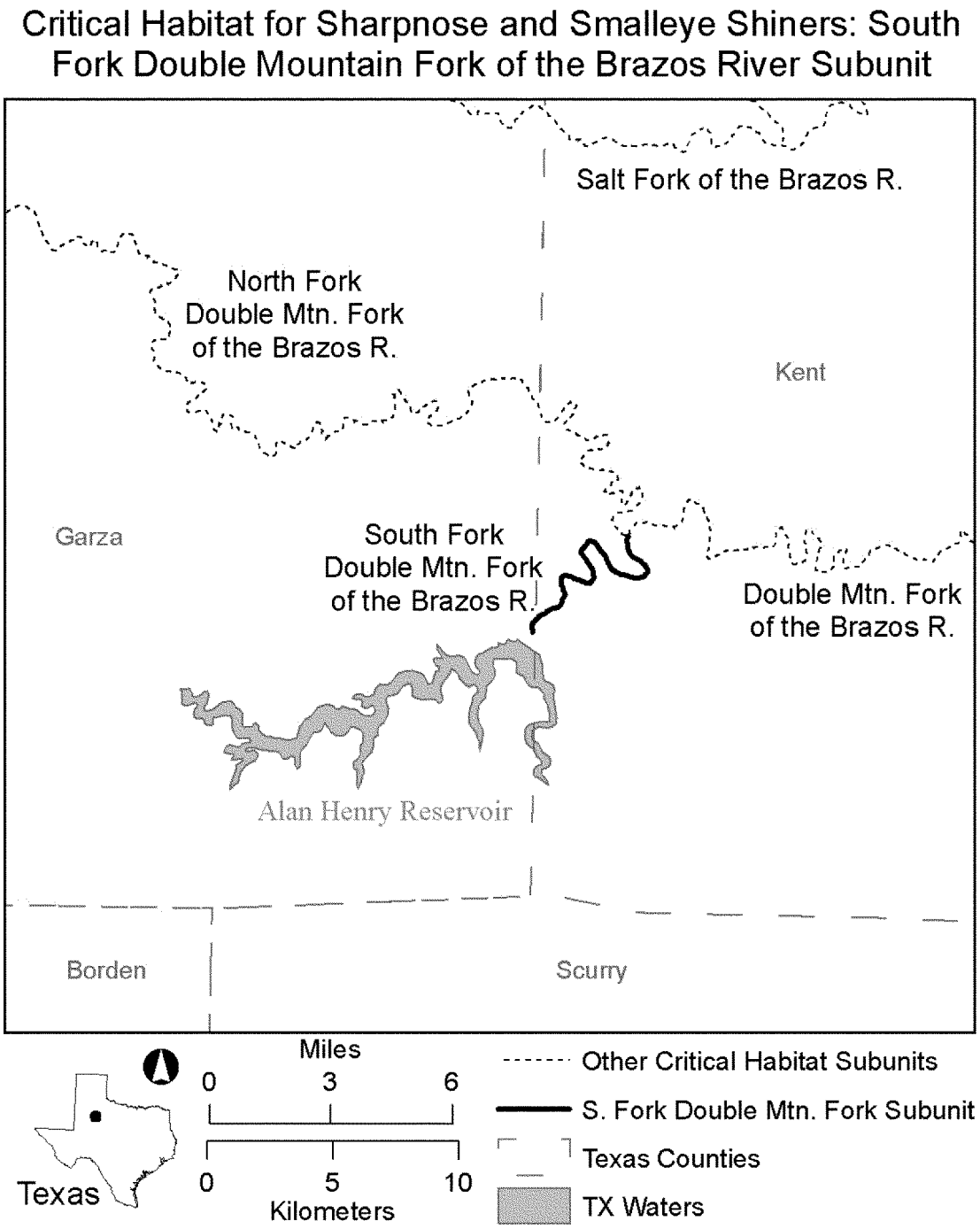
(10) Subunit 4: Double Mountain Fork of the Brazos River from its confluence with the Salt Fork of the Brazos River (33.268404, −100.010209) upstream to the confluence of the South Fork Double Mountain Fork of the Brazos River and the North Fork Double Mountain Fork of the Brazos River where they form the Double Mountain Fork of the Brazos River (33.100269, −100.999803); Fisher, Haskell, Kent, and Stonewall Counties, Texas. Map of Double Mountain Fork of the Brazos River Subunit follows:



(11) Subunit 5: North Fork Double Mountain Fork of the Brazos River from its confluence with the South Fork Double Mountain Fork of the Brazos River (33.100269, −100.999803) upstream to the earthen impoundment near Janes-Prentice Lake (33.431515, −101.479610); Crosby, Garza, and Kent Counties, Texas. Map of North Fork Double Mountain Fork of the Brazos River Subunit follows:



(12) Subunit 6: South Fork Double Mountain Fork of the Brazos River from its confluence with the North Fork Double Mountain Fork of the Brazos River (33.100269, −100.999803) upstream to the John T. Montford Dam of Lake Alan Henry (33.065008, −101.039780); Garza and Kent Counties, Texas. Map of South Fork Double Mountain Fork of the Brazos River Subunit follows:



Smalleye Shiner (*Notropis buccula*)

(1) Critical habitat units are depicted for Baylor, Crosby, Fisher, Garza, Haskell, Kent, King, Knox, Stonewall, Throckmorton, and Young Counties, Texas, on the maps.

(2) Critical habitat includes the bankfull width of the river channel within the identified river segments indicated on the maps, and includes a lateral distance of 30 meters (98 feet) on each side of the stream width at bankfull discharge. Bankfull discharge is the flow at which water begins to leave the channel and move into the floodplain and generally occurs every 1 to 2 years.

(3) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of the smalleye shiner consist of a riverine system with habitat to support all life-history stages of the smalleye shiner, which includes:

(i) Unobstructed, sandy-bottomed river segments greater than 275 kilometers (171 miles) in length.

(ii) Flowing water of greater than 6.43 cubic meters per second (m^3s^{-1}) (227 cubic feet per second (cfs)) averaged over the shiner spawning season (April through September).

(iii) Water of sufficient quality to support survival and reproduction, characterized by:

(A) Temperatures generally less than 40.6 °C (105.1 °F);

(B) Dissolved oxygen concentrations generally greater than 2.11 milligrams per liter (mg/L);

(C) Salinities generally less than 18 parts per thousand (ppt) (30 millisiemens per centimeter (mS/cm)); and

(D) Sufficiently low petroleum and other pollutant concentrations such that mortality does not occur.

(iv) Native riparian vegetation capable of maintaining river water quality, providing a terrestrial prey base, and maintaining a healthy riparian ecosystem;

(4) Critical habitat does not include manmade structures (such as buildings, railroads, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(5) *Critical habitat map units.* Data layers defining map units were created using the USGS National Hydrography Dataset's flowline data in ArcMap (Environmental Systems Research Institute, Inc.), a computer geographic information system program. The 30-m (98-ft) lateral extent adjacent to each segment's active channel is not displayed in the figures because it is not appropriate at these map scales. Segments were mapped using the NAD 1983 UTM Zone 14 projection. Endpoints of stream segments for each critical habitat subunit are reported as latitude, longitude in decimal degrees. The maps, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's Internet site (*http://www.fws.gov/southwest/es/ArlingtonTexas/*), at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2013–0008, and at the Arlington, Texas, Ecological Services Field Office. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(6) Index map of critical habitat units for the smalleye shiner is provided at paragraph (6) of the entry for the sharpnose shiner in this paragraph (e).

(7) Subunit 1: Upper Brazos River Main Stem from approximately 15 river km (9.3 miles) upstream of the eastern border of Young County where it intersects the upper portion of Possum Kingdom Lake (32.974302, −98.509880) upstream to the confluence of the Double Mountain Fork of the Brazos River and the Salt Fork of the Brazos River where they form the Brazos River main stem (33.268404, −100.010209); Baylor, King, Knox, Stonewall, Throckmorton, and Young Counties, Texas. Map of Upper Brazos River Main Stem Subunit is provided at paragraph (7) of the entry for the sharpnose shiner in this paragraph (e).

(8) Subunit 2: Salt Fork of the Brazos River from its confluence with the Double Mountain Fork of the Brazos River (33.268404, −100.010209) upstream to the McDonald Road crossing (33.356258, −101.345890); Garza, Kent, and Stonewall Counties, Texas. Map of Salt Fork of the Brazos River Subunit is provided at paragraph (8) of the entry for the sharpnose shiner in this paragraph (e).

(9) Subunit 3: White River from its confluence with the Salt Fork of the Brazos River (33.241172, −100.936181) upstream to the White River Lake impoundment (33.457240, −101.084546); Crosby, Garza, and Kent Counties, Texas. Map of White River Subunit is provided at paragraph (9) of the entry for the sharpnose shiner in this paragraph (e).

(10) Subunit 4: Double Mountain Fork of the Brazos River from its confluence with the Salt Fork of the Brazos River (33.268404, −100.010209) upstream to the confluence of the South Fork Double Mountain Fork of the Brazos River and the North Fork Double Mountain Fork of the Brazos River where they form the Double Mountain Fork of the Brazos River (33.100269, −100.999803); Fisher, Haskell, Kent, and Stonewall Counties, Texas. Map of Double Mountain Fork of the Brazos River Subunit is provided at paragraph (10) of the entry for the sharpnose shiner in this paragraph (e).

(11) Subunit 5: North Fork Double Mountain Fork of the Brazos River from its confluence with the South Fork Double Mountain Fork of the Brazos River (33.100269, −100.999803) upstream to the earthen impoundment near Janes-Prentice Lake (33.431515, −101.479610); Crosby, Garza, and Kent Counties, Texas. Map of North Fork Double Mountain Fork of the Brazos River Subunit is provided at paragraph (11) of the entry for the sharpnose shiner in this paragraph (e).

(12) Subunit 6: South Fork Double Mountain Fork of the Brazos River from its confluence with the North Fork Double Mountain Fork of the Brazos River (33.100269, −100.999803) upstream to the John T. Montford Dam of Lake Alan Henry (33.065008, −101.039780); Garza and Kent Counties, Texas. Map of South Fork Double Mountain Fork of the Brazos River Subunit is provided at paragraph (12) of the entry for the sharpnose shiner in this paragraph (e).

* * * * *

Dated: July 18, 2013.

Rachel Jacobson,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2013–18212 Filed 8–5–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 130404330–3330–01]

RIN 0648–BC76

Endangered and Threatened Species; Designation of Critical Habitat for Yelloweye Rockfish, Canary Rockfish and Bocaccio of the Puget Sound/Georgia Basin

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

ACTION: Proposed rule; request for comments.

SUMMARY: We, the National Marine Fisheries Service (NMFS), propose to designate critical habitat for three species of rockfish listed under the Endangered Species Act (ESA), including the threatened Distinct Population Segment (DPS) of yelloweye rockfish (*Sebastes ruberrimus*), the threatened DPS of canary rockfish (*S. pinniger*), and the endangered DPS of bocaccio (*S. paucispinus*) (listed rockfish). The specific areas proposed for designation for canary rockfish and bocaccio include approximately 1,184.75 sq mi (3,068.5 sq km) of marine habitat in Puget Sound, Washington. The specific areas proposed for designation for yelloweye rockfish include approximately 574.75 sq mi (1,488.6 sq km) of marine habitat in Puget Sound, Washington. We propose to exclude some particular areas from designation because the benefits of exclusion outweigh the benefits of inclusion and exclusion of those areas will not result in the extinction of the species.

We are soliciting comments from the public on all aspects of the proposal, including information on the economic, national security, and other relevant impacts of the proposed designations, as well as the benefits to the species from designations. We will consider additional information received prior to making final designations.

DATES: Comments on this proposed rule must be received by 5 p.m. P.S.T. on

November 4, 2013. Requests for public hearings must be made in writing by September 20, 2013.

ADDRESSES: You may submit comments on the proposed rule, identified by FDMS docket number [NOAA–NMFS–2013–0105], by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2013-0105.* click the ''Comment Now'' icon, complete the required fields, and enter or attach your comments.
- *Fax:* 206–526–6426, Attn: Dan Tonnes.
- *Mail:* Chief, Protected Resources Division, Northwest Region, National Marine Fisheries Service, 7600 Sand Point Way NE., Seattle, WA, 98115.

Instructions: You must submit comments by one of the above methods to ensure that we receive, document, and consider them. Comments sent by any other method, to any other address or individual, or received after the end of the comment period may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *http://www.regulations.gov* without change. All personal identifying information (e.g., name, address, etc.) confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. We will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

The proposed rule, list of references and supporting documents (including the Draft Biological Report (NMFS, 2013a), the Draft Economic Analysis (NMFS, 2013b), and the Draft Section 4(b)(2) Report (NMFS, 2013c)) are also available electronically at *http://www.nwr.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Dan Tonnes, NMFS, Northwest Region, Protected Resources Division, at the address above or at 206–526–4643; or Dwayne Meadows, NMFS, Office of Protected Resources, Silver Spring, MD, 301–427–8403.

SUPPLEMENTARY INFORMATION:

Background

On April 28, 2010, we listed the Puget Sound/Georgia Basin Distinct Population Segments (DPSs) of yelloweye rockfish and canary rockfish as threatened under the Endangered Species Act (ESA), and bocaccio as endangered (75 FR 22276). We are responsible for determining whether species, subspecies, or distinct population segments (DPSs) are threatened or endangered and designating their critical habitat under the ESA (16 U.S.C. 1531 *et seq.*). In our proposal to list yelloweye rockfish, canary rockfish, and bocaccio (74 FR 18516, April 23, 2009), we requested information on the identification of specific areas that meet the definition of critical habitat. We also solicited biological and economic information relevant to making a critical habitat designation for each species. We reviewed the comments provided and the best available scientific information, and at the time of listing we concluded that critical habitat was not determinable for each species because sufficient information was not available to: (1) Identify the physical and biological features essential to conservation, and (2) assess the impacts of a designation. In addition to the data gaps identified at the time of listing, sufficient information was not available to fully determine the geographical area occupied by each species. Following promulgation of the final rule to list each species, we continued compiling the best available information necessary to consider a critical habitat designation and additional information is now available for these three DPSs to better inform the designation process.

We considered various alternatives to the proposed critical habitat designation for yelloweye rockfish, canary rockfish, and bocaccio of the Puget Sound/Georgia Basin. The alternative of not designating critical habitat for each species would impose no economic, national security, or other relevant impacts, but would not provide any conservation benefit to the species. This alternative was considered and rejected because it does not meet the legal requirements of the ESA and would not provide for the conservation of each species. The alternative of designating all potential critical habitat areas (i.e., no areas excluded) also was considered and rejected because for some areas the benefits of exclusion outweighed the benefits of inclusion. An alternative to designating all potential critical habitat areas is the designation of critical habitat within a subset of these areas. Under section 4(b)(2) of the ESA, we must consider the economic impacts, impacts on national security, and other relevant impacts of designating any particular area as critical habitat. The Secretary of Commerce (Secretary) has the discretion to exclude an area from designation as critical habitat if the benefits of exclusion (i.e., the impacts that would be avoided if an area were excluded from the designation) outweigh the benefits of designation (i.e., the conservation benefits to these species if an area were designated) so long as exclusion of the area will not result in extinction of the species. We prepared an analysis describing our exercise of discretion, which is contained in our final Section4(b)(2) Report (NMFS, 2013c). Under this alternative we propose to exclude Indian lands as well as several areas under the control of the Department of Defense (DOD). We selected this alternative because it results in a critical habitat designation that provides for the conservation of listed rockfish while avoiding impacts to Indian lands and impacts to national security. This alternative also meets the requirements under the ESA and our joint NMFS–U.S. Fish and Wildlife Service (USFWS) regulations concerning critical habitat.

Yelloweye Rockfish, Canary Rockfish, and Bocaccio Natural History and Habitat Use

Our draft Biological Report (NMFS, 2013a) describes the life histories of yelloweye rockfish, canary rockfish and bocaccio in detail, which are summarized here. Their life histories include pelagic larval and juvenile stages followed by a juvenile stage in shallower waters, and a sub-adult/adult stage. Much of the life history of these three species is similar, with differences noted below.

Rockfish are iteroparous (i.e., have multiple reproductive cycles during their lifetime) and are typically long-lived (Love *et al.,* 2002). Yelloweye rockfish are one of the longest lived of the rockfishes, reaching more than 100 years of age. Yelloweye rockfish reach 50 percent maturity at sizes of 16 to 20 inches (40 to 50 centimeters) and ages of 15 to 20 years (Rosenthal *et al.,* 1982; Yamanaka and Kronlund, 1997). The maximum age of canary rockfish is at least 84 years (Love *et al.* 2002), although 60 to 75 years is more common (Caillet *et al.,* 2000). Canary rockfish reach 50 percent maturity at sizes around 16 inches (40 centimeters) and ages of 7 to 9 years. The maximum age of bocaccio is unknown, but may exceed 50 years. Bocaccio are reproductively mature near age 6 (FishBase, 2010). Mature females of each species produce from several thousand to over a million eggs annually (Love *et al.,* 2002). Being long-lived allows each species to persist through many years of poor reproduction until a good recruitment year occurs.

Rockfish fertilize their eggs internally and the young are extruded as larvae. Upon parturition (birth), larval rockfish can occupy the full water column but generally occur in the upper 80 m (262 feet) (Love *et al.,* 2002; Weis, 2004). Larval rockfish have been documented in Puget Sound (Greene and Godersky, 2012), yet most studies have not identified individual fish to species. There is little information regarding the habitat requirements of rockfish larvae, though other marine fish larvae biologically similar to rockfish larvae are vulnerable to low dissolved oxygen levels and elevated suspended sediment levels that can alter feeding rates and cause abrasion to gills (Boehlert, 1984; Boehlert and Morgan, 1985; Morgan and Levings, 1989). Larvae have also been observed immediately under free-floating algae, seagrass, and detached kelp (Shaffer *et al.,* 1995; Love *et al.,* 2002). Oceanographic conditions within many areas of Puget Sound likely result in the larvae staying within the basin where they are born rather than being more broadly dispersed by tidal action or currents (Drake *et al.,* 2010).

Pelagic juveniles occur throughout the water column (Love *et al.,* 2002; Weis, 2004). When bocaccio and canary rockfish reach sizes of 1 to 3.5 inches (3 to 9 centimeters) or 3 to 6 months old, they settle into shallow, intertidal, nearshore waters in rocky, cobble and sand substrates with or without kelp (Love *et al.,* 1991; Love *et al.,* 2002). This habitat feature offers a beneficial mix of warmer temperatures, food, and refuge from predators (Love *et al.,* 1991). Areas with floating and submerged kelp species support the highest densities of juvenile bocaccio and canary rockfish, as well as many other rockfish species (Carr, 1983; Halderson and Richards, 1987; Matthews, 1989; Love *et al.,* 2002). Unlike bocaccio and canary rockfish, juvenile yelloweye rockfish are not typically found in intertidal waters (Love *et al.* 1991; Studebaker et al. 2009), but are most frequently observed in waters deeper than 98 feet (30 meters) near the upper depth range of adults (Yamanaka *et al.,* 2006).

Depth is generally the most important determinant in the distribution of many rockfish species of the Pacific coast (Chen, 1971; Williams and Ralston, 2002; Anderson and Yoklavich, 2007;Young *et al.,* 2010). Adult yelloweye rockfish, canary rockfish, and bocaccio generally occupy habitats from approximately 30 to 425 m (90 ft to 1,394 ft) (Orr *et al.,* 2000; Love *et al.,* 2002), and in Federal waters off the Pacific coast each species is considered part of the ''shelf rockfish'' assemblage under the authorities of the Magnuson-Stevens Fishery Conservation and Management Act because of their generally similar habitat usages (50 CFR Part 660, Subparts C–G).

Adult yelloweye rockfish, canary rockfish, and bocaccio most readily use habitats within and adjacent to areas that are highly rugose (rough). These are benthic habitats with moderate to extreme steepness; complex bathymetry; and/or substrates consisting of fractured bedrock, rock, and boulder-cobble complexes (Yoklavich *et al.,* 2000; Love *et al.,* 2002; Wang, 2005; Anderson and Yoklavich, 2007). Most of the benthic habitats in Puget Sound consist of unconsolidated materials such as mud, sand, clays, cobbles and boulders, and despite the relative lack of rock, some of these benthic habitats are moderately to highly rugose. More complex marine habitats are generally used by higher numbers of fish species relative to less complex areas (Anderson and Yoklavich, 2007; Young *et al.,* 2010), thus supporting food sources for sub-adult and adult yelloweye rockfish, canary rockfish, and bocaccio. More complex marine habitats also provide refuge from predators and their structure may provide shelter from currents, thus leading to energy conservation (Young *et al.,* 2010).

Though areas near rocky habitats or other complex structure are most readily used by adults of each species, non-rocky benthic habitats are also occupied. In Puget Sound, adult yelloweye rockfish, canary rockfish, and bocaccio have been documented in areas with non-rocky substrates such as sand, mud, and other unconsolidated sediments (Haw and Buckley, 1971; Washington, 1977; Miller and Borton, 1980; Reum, 2006).

Prey

Food sources for yelloweye rockfish, canary rockfish, and bocaccio occur throughout Puget Sound. However, each of the basins has unique biomass and species compositions of fishes and invertebrates, which vary temporally and spatially (Rice, 2007; Rice *et al.,* 2012). Absolute and relative abundance and species richness of most fish species in the Puget Sound/Georgia Basin increase with latitude (Rice, 2007; Rice *et al.,* 2012). Despite these differences, each basin hosts common food sources for yelloweye rockfish, canary rockfish, and bocaccio as described below.

Larval and juvenile rockfish feed on very small organisms such as zooplankton, copepods and phytoplankton, small crustaceans, invertebrate eggs, krill, and other invertebrates (Moser and Boehlert, 1991; Love *et al.,* 1991; Love *et al.,* 2002). Larger juveniles also feed upon small fish (Love *et al.,* 1991). Adult yelloweye rockfish, canary rockfish, and bocaccio have diverse diets that include many species of fishes and invertebrates including but not limited to crabs, various rockfish (*Sebastes spp.*), flatfish (*Pleuronectidae spp.*), juvenile salmon (*Oncorhynchus spp.*), walleye pollock, (*Theragra chalcogramma*), Pacific hake (*Merluccius productus*), Pacific cod (*Gadus macrocephalus*), green sea urchin (*Stongylocentrotus droebachiensis*), lingcod (*Ophiodon elongates*) eggs, various shrimp species (*Pandalus spp.*), and perch (*Rhacochilus spp.*). Common forage fish that are part of their diets include Pacific herring (*Clupea harengus pallasi*), surf smelt (*Hypomesus pretiosus*), and Pacific sand lance (*Ammodytes hexapterus*) (Washington *et al.,* 1978; Lea *et al.,* 1999; Love *et al.,* 2002; Yamanaka *et al.,* 2006).

Statutory and Regulatory Background for Critical Habitat Designations

The ESA defines critical habitat under section 3(5)(A) as: ''(i) The specific areas within the geographical area occupied by the species, at the time it is listed . . . , on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary [of Commerce] that such areas are essential for the conservation of the species.''

Section 4(a) of the ESA precludes military land from designation, where that land is covered by an Integrated Natural Resource Management Plan that the Secretary has found in writing will benefit the listed species.

Section 4(b)(2) of the ESA requires us to designate critical habitat for threatened and endangered species ''on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.'' It grants the Secretary of Commerce (Secretary) discretion to exclude any area from critical habitat if he determines ''the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat.'' In adopting this provision, Congress explained that, ''[t]he consideration and weight given to any particular impact is completely within the Secretary's discretion.'' H.R.

No. 95–1625, at 16–17 (1978). The Secretary's discretion to exclude is limited, as he may not exclude areas that ''will result in the extinction of the species.''

Once critical habitat is designated, section 7 of the ESA requires Federal agencies to ensure they do not fund, authorize, or carry out any actions that will destroy or adversely modify that habitat. This requirement is in addition to the section 7 requirement that Federal agencies ensure their actions do not jeopardize the continued existence of listed species.

Methods and Criteria Used To Identify Specific Areas Eligible for Critical Habitat

In the following sections, we describe the relevant definitions and requirements in the ESA and our implementing regulations and the key methods and criteria used to prepare this proposed critical habitat designation. Discussion of the specific implementation of each item occurs within the species-specific sections. In accordance with section 4(b)(2) of the ESA and our implementing regulations (50 CFR 424.12), this proposed designation is based on the best scientific information available concerning the species' present and historical range, habitat, and biology, as well as threats to their habitat. In preparing this proposed designation, we reviewed and summarized current information on these species, including recent biological surveys and reports, peer-reviewed literature, NMFS status reviews, and the proposed and final rules to list these species. All of the information gathered to create this proposed rule has been collated and analyzed in three supporting documents: A Draft Biological Report (NMFS, 2013a); a Draft Economic Analysis (NMFS, 2013b); and a Draft Section 4(b)(2) Report (NMFS, 2013c). We used these reports to inform the identification of specific areas as critical habitat. We followed a five-step process in order to identify these specific areas: (1) Determine the geographical area occupied by the species at the time of listing, (2) identify physical or biological habitat features essential to the conservation of the species, (3) delineate specific areas within the geographical area occupied by the species on which are found the physical or biological features, (4) determine whether the features in a specific area may require special management considerations or protections, and (5) determine whether any unoccupied areas are essential for conservation. As described later, we did not identify any unoccupied areas that are essential for conservation. Once we have identified specific areas, we then considered the economic impact, impact on national security, and any other relevant impacts. The Secretary has the discretion to exclude an area from designation if he determines the benefits of exclusion (that is, avoiding the impact that would result from designation), outweigh the benefits of designation based on the best available scientific and commercial information. Our evaluation and determinations are described in detail in the following sections, in addition to our consideration of military lands.

Geographical Area Occupied by the Species

In the status review and final ESA listing for each species, we identified a Puget Sound/Georgia Basin DPS for yelloweye rockfish, canary rockfish, and bocaccio (Drake *et al.* 2010; 75 FR 22276, April 28, 2010). Our review of the best available data confirmed that yelloweye rockfish, canary rockfish, and bocaccio occupy each of the major biogeographic basins of the Puget Sound/Georgia Basin (NMFS, 2013a). The range of the DPS includes portions of Canada; however, we cannot designate areas outside U.S. jurisdiction as critical habitat (50 CFR 424.12(h)). Puget Sound and Georgia Basin make up the southern arm of an inland sea located on the Pacific Coast of North America and connected to the Pacific Ocean by the Strait of Juan de Fuca. The term ''Puget Sound proper'' refers to the waters east of and including Admiralty Inlet. Puget Sound is a fjord-like estuary covering 2,331.8 sq mi (6,039.3 sq km) and has 14 major river systems and its benthic areas consist of a series of interconnected basins separated by relatively shallow sills, which are bathymetric shallow areas.

Physical or Biological Features Essential to Conservation

Agency regulations at 50 CFR 424.12(b) interpret the statutory phrase ''physical or biological features essential to the conservation of the species.'' The regulations state that these features include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing of offspring; and habitats that are protected from disturbance or are representative of the historical geographical and ecological distribution of a species. These regulations go on to emphasize that the agency shall focus on ''primary constituent elements'' within the specific areas considered for designation. The regulations state:

> Primary constituent elements may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.

Based on the best available scientific information regarding natural history and habitat needs, we developed a list of physical and biological features essential to the conservation of adult and juvenile yelloweye rockfish, canary rockfish, and bocaccio and relevant to determining whether proposed specific areas are consistent with the above regulations and the ESA section (3)(5)(A) definition of ''critical habitat.'' We do not currently have sufficient information regarding the habitat requirements of larval yelloweye rockfish, canary rockfish, and bocaccio to determine which features are essential for conservation, and thus are not proposing to designate critical habitat specifically for this life-stage. However, we will continue to investigate this issue and seek comment on it as part of this proposed rule. The physical or biological features essential to the conservation of yelloweye rockfish, canary rockfish, and bocaccio fall into major categories reflecting key life history phases:

Physical or Biological Features Essential to the Conservation of Adult Canary Rockfish and Bocaccio, and Adult and Juvenile Yelloweye Rockfish

Benthic habitats or sites deeper than 30m (98ft) that possess or are adjacent to areas of complex bathymetry consisting of rock and or highly rugose habitat are essential to conservation because these features support growth, survival, reproduction, and feeding opportunities by providing the structure for rockfish to avoid predation, seek food and persist for decades. Several attributes of these sites determine the quality of the habitat and are useful in considering the conservation value of the associated feature, and whether the feature may require special management considerations or protection. These attributes are also relevant in the evaluation of the effects of a proposed action in a section 7 consultation if the specific area containing the site is designated as critical habitat. These attributes include: (1) Quantity, quality, and availability of prey species to support individual growth, survival, reproduction, and feeding opportunities, (2) water quality and sufficient levels of dissolved oxygen to

support growth, survival, reproduction, and feeding opportunities, and (3) the type and amount of structure and rugosity that supports feeding opportunities and predator avoidance.

Physical and Biological Features Essential to the Conservation of Juvenile Canary Rockfish and Bocaccio

Juvenile settlement habitats located in the nearshore with substrates such as sand, rock and/or cobble compositions that also support kelp (families Chordaceae, Alariaceae, Lessoniacea, Costariaceae, and Laminaricea) are essential for conservation because these features enable forage opportunities and refuge from predators and enable behavioral and physiological changes needed for juveniles to occupy deeper adult habitats. Several attributes of these sites determine the quality of the area and are useful in considering the conservation value of the associated feature and, in determining whether the feature may require special management considerations or protection. These features also are relevant to evaluating the effects of a proposed action in a section 7 consultation if the specific area containing the site is designated as critical habitat. These attributes include: (1) Quantity, quality, and availability of prey species to support individual growth, survival, reproduction, and feeding opportunities; and (2) water quality and sufficient levels of dissolved oxygen to support growth, survival, reproduction, and feeding opportunities.

Specific Areas Within the Geographical Area Occupied by the Species

After determining the geographical area of the Puget Sound/Georgia Basin occupied by adult and juvenile yelloweye rockfish, canary rockfish, and bocaccio, and the physical and biological features essential to their conservation, we next identified the specific areas within the geographical area occupied by the species that contain the essential features. The U.S. portion of Puget Sound/Georgia Basin that is occupied by yelloweye, canary, and bocaccio can be divided into five biogeographic basins or areas based on the presence and distribution of adult and juvenile rockfish, geographic conditions, and habitat features (Figure 1). These five interconnected areas are: (1) The San Juan/Strait of Juan de Fuca Basin, (2) Main Basin, (3) Whidbey Basin, (4) South Puget Sound, and (5) Hood Canal (Drake *et al.,* 2010, NMFS 2013a). These interconnected basins are separated by relatively shallow sills. The configuration of sills and deep basins results in the partial recirculation of water masses in the Puget Sound and the retention of contaminants, sediment, and biota (Strickland, 1983). The sills largely define the boundaries between the basins and contribute to the generation of relatively fast water currents during portions of the tidal cycle. The sills, in combination with bathymetry, freshwater input, and tidal exchange, influence environmental conditions such as the movement and exchange of biota from one region to the next, water temperatures and water quality, and they also restrict water exchange (Ebbesmeyer *et al.,* 1984; Burns, 1985; Rice, 2007). In addition, each basin differs in biological condition; depth profiles and contours; sub-tidal benthic, intertidal habitats; and shoreline composition and condition (Downing, 1983; Ebbesmeyer *et al.,* 1984; Burns, 1985; Rice, 2007; Drake *et al.,* 2010). These areas also meet the definition of specific areas under ESA section (3)(5)(A) because each one contains the essential physical and biological features for juvenile rearing and/or adult reproduction, sheltering, or feeding for yelloweye rockfish, canary rockfish, and bocaccio. We do not currently have sufficient information regarding the habitat requirements of larval yelloweye rockfish, canary rockfish, and bocaccio to allow us to determine essential features specific to the larval life stage.

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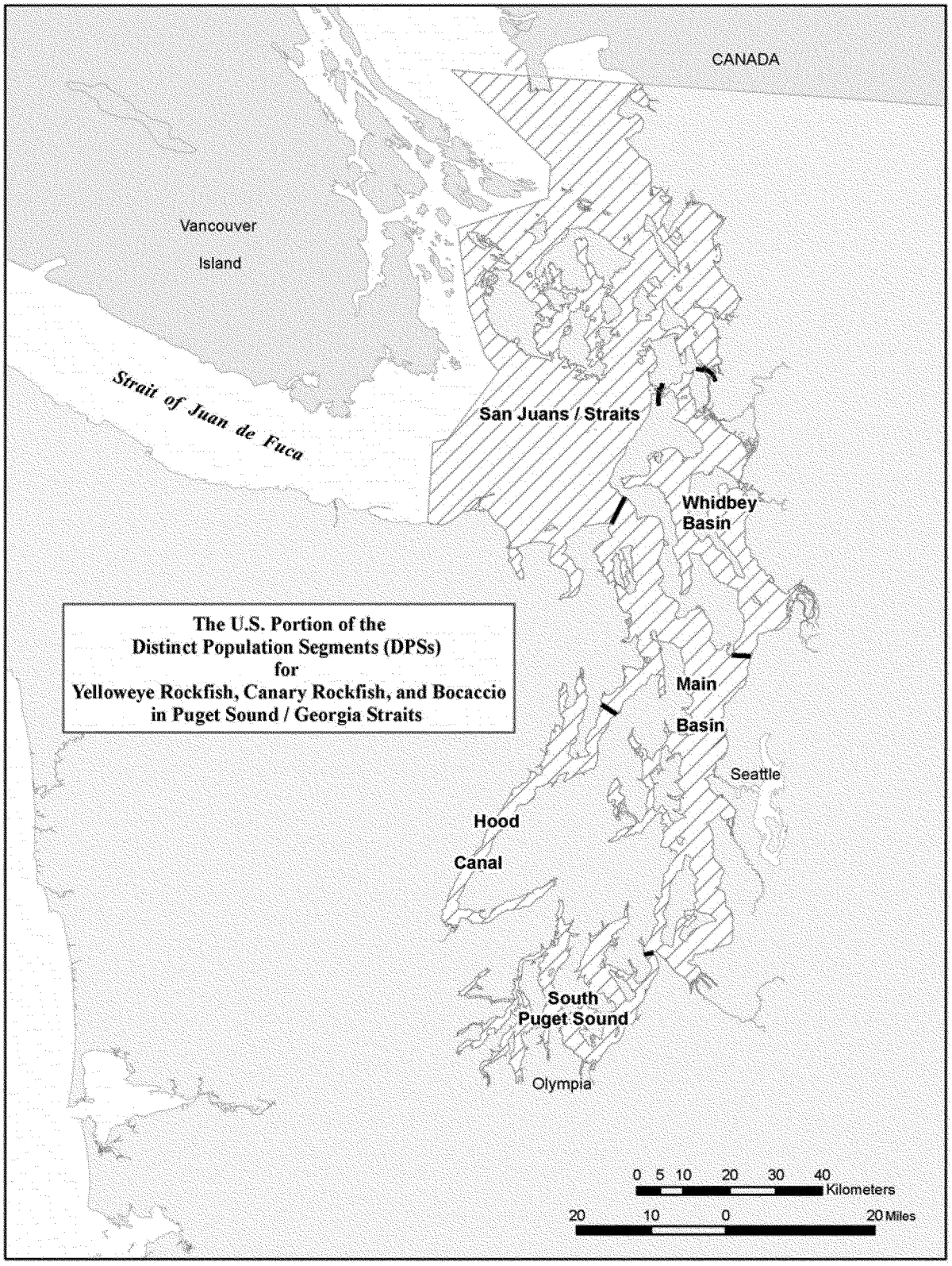


Figure 1. Basins of the U.S. portion rockfish DPS's.

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We considered the distribution of the essential features within these areas. We used available geographic data to

delineate and map the essential features within each of the specific areas.

Delineating and Mapping Areas of Complex Bathymetry Deeper than 30 Meters Containing Features Essential to the Conservation of Adult Canary, Yelloweye and Bocaccio Rockfish and Juvenile Yelloweye

To determine the distribution of essential features of benthic habitats deeper than 30 m (98 ft) with complex bathymetry, we relied on benthic habitat characterizations of each of the five basins of Puget Sound. We used the Benthic Terrain Model (BTM) developed by the NMFS Northwest Fisheries Science Center, which classifies terrain in all five basins (Davies, 2009). We also assessed recent benthic maps in the San Juan Basin (Greene and Barrie, 2011; Greene, 2012). We used these information sources to assess the presence of complex bathymetry in waters deeper than 30 m (98 ft).

The BTM is a collection of ArcGIS-based terrain visualization tools that can be used to examine the deepwater benthic environment using input bathymetric data sets. High resolution bathymetric data, most often obtained through acoustic means such as multibeam sonar mapping instruments, creates a digital representation of seafloor topography. The spatial analysis functions of a geographic information system (GIS) allow for the extraction of several derived products from bathymetric data, such as slope, bathymetric position, and rugosity. The BTM can also be used to classify data based on a combination of slope (a first-order derivative of bathymetry), and broad- and fine-scaled bathymetric position indices (Bathymetric Position Index, second-order derivatives of bathymetry) describing the depth of a specific point relative to the surrounding bathymetry, and produces grid layers of terrain-based zones and structures. The BTM classifies benthic terrain at a 30 m (98 ft) grid scale in several categories that include flats, depressions, crests, shelves, and slopes, but does not delineate benthic substrate type. The BTM also provides a ''rugosity'' value, which is a measurement of variations or amplitude in the height of a surface—in this case, the seafloor (Kvitek *et al.,* 2003; Dunn and Halpin, 2009). Rugosity values range from 0 (i.e., flat habitat) to 5.7 (very complex habitat). We refer to benthic areas with rugosity values of 1.005 or higher as ''high rugosity.'' We selected a rugosity value of 1.005 and higher as representing the presence of this essential feature because the spatial area mapped as proposed critical habitat at that level of rugosity encompassed the vast majority of the documented occurrences with precise spatial data of yelloweye rockfish (90%), canary rockfish (86%), and bocaccio (92%) within the DPSs (NMFS, 2013a). Rugosity values can be used as a surrogate for reef fish diversity when other data on habitats are lacking (Pittman *et al.* 2007). Similarly, areas of high rugosity have been used as an indicator of hard-bottomed habitat (Dunn and Halpin 2009).

In addition to the BTM, we used available benthic maps to assess rockfish habitat in the San Juan Basin. Unlike the rest of the basins of the Puget Sound, comprehensive seafloor characterization and mapping has occurred in most of the San Juan Archipelago and southern Georgia Strait (Greene and Barrie, 2011; Greene, 2012). This mapping was generated by multibeam and backscatter sonar surveys. These habitat maps provide information on the benthic terrain for most of the San Juan area, including specific benthic terrain types (i.e., ''fractured bedrock'' and ''hummocky unconsolidated sediments''), which can be used to identify complex bathymetry.

We analyzed whether the BTM encompassed the rocky habitats of the San Juan Islands mapped by Green and Barrie (2011) and found just over 1 sq mi (1.6 sq km) was composed of rock but not identified as having rugosity values equal to or greater than 1.005 by the BTM. This is just 2 percent of the overall amount of rocky areas mapped by Green and Barrie (2011). This assessment served as verification that the BTM's rugosity values of equal to or greater than 1.005 encompass most rocky terrain in the San Juan Basin. In addition to the areas identified as high rugosity by the BTM, we concluded that the 2 percent of rocky areas in the San Juan Basin not characterized as high rugosity contain the essential features of rockfish critical habitat and were added to the final distribution map for this essential feature (NMFS, 2013a).

Delineating and Mapping Settlement Sites Containing Features Essential to the Conservation of Juvenile Canary and Boccacio Rockfish

In delineating juvenile settlement sites in Puget Sound, we focused on the area contiguous with the shoreline from extreme high water out to a depth no greater than 30 meters relative to mean lower low water because this area coincides with the maximum depth of the photic zone in Puget Sound and thus, with appropriate substrates that can support the growth of kelp and rearing canary rockfish and bocaccio. To determine the distribution of essential features of nearshore habitats for juvenile canary rockfish and bocaccio, we used the Washington State Department of Natural Resources' (DNR) shorezone inventory (Berry, 2001) in combination with the benthic habitat classifications of the BTM related to the locations where moderate and large rivers enter Puget Sound (NMFS, 2013a).

The DNR shorezone habitat classifications are available for all of the shoreline within the ranges of the DPSs. We used the habitat characteristics described in the shorezone inventory to assist in determining if essential features for juvenile canary rockfish and bocaccio occur along particular nearshore areas. The shorezone inventory was conducted by aerial visual surveys between 1994 and 2000 along all of Washington State's shorelines (Berry *et al.,* 2001). The DNR subdivided beaches into units that are sections of beach with similar geomorphic characteristics. Within each unit, the DNR documented the presence of eelgrass or kelp, among other biological parameters. There are 6,856 shoreline segments in the range of the rockfish DPSs, ranging from 0.02 to 14 kilometers (0.01 to 8.7 mi) in length. The DNR delineated 15 different geomorphic shoreline types. The DNR's mapping of aquatic vegetation had limitations, because shoreline segments were observed by aerial surveys during different years and months. Aquatic vegetation growth, including kelp, is variable from month to month and year to year. Some kelp species are annuals, thus surveys that took place during non-growing seasons may have not mapped kelp beds where they actually occur. Non-floating kelp species in particular may have also been underestimated by the DNR survey methods because they were more difficult to document than floating kelp. In particular, all kelp species mapped were usually not visible to their lower depth limit because of poor visibility through the water column. While beds of vegetation may have been visible underwater, often it was not possible to determine what particular type of vegetation was present because of a lack of color characteristics. In addition, because floating kelp occurs in shallow waters, off-shore of the area visible from the aircraft, it was not mapped in many cases. For these reasons, the mapped kelp within the shorezone database represents an underestimation of the total amount of kelp along Puget Sound shorelines.

To determine which shorelines contained the essential features for

juvenile canary rockfish and bocaccio, we reviewed their geomorphic classifications to see if they possessed ''substrates such as sand, rock and/or cobble compositions.'' In addition, we assessed the relative overlap of mapped kelp in these shoreline types. All but the ''Estuary Wetland'' and ''Mud Flat'' type shoreline segments had at least 20 percent of the segment with ''continuous'' or ''sporadic'' kelp mapped by DNR. The Estuary Wetland and Mud Flat type segments had very small portions of kelp (1.5 and 2.6 percent, respectively). We found that the Estuary Wetland and Mud Flat type shoreline segments longer than one-half lineal mile in length lack essential features for canary rockfish and bocaccio.

To assess nearshore estuaries and deltas of moderate and large rivers that enter Puget Sound, we used information from Burns (1983) and Teizeen (2012) to determine the location and annual flows of these rivers. These rivers input various volumes of sediment and fresh water into Puget Sound (Downing, 1983; Burns, 1985; Czuba *et al.,* 2011) and profoundly influence local benthic habitat characteristics, salinity levels, and local biota. The nearshore areas adjacent to moderate-to-large river deltas are characterized by the input of fresh water and fine sediments that create relatively flat habitats (termed ''shelves'' by the BTM) that do not support the growth of kelp (NMFS, 2013a). In addition, the net outward flow of these deltas may prevent post-settlement juvenile canary rockfish or bocaccio from readily using these habitats. For these reasons we found that these nearshore areas do not contain the essential features of rearing sites for canary rockfish or bocaccio (juvenile yelloweye rockfish most commonly occupy waters deeper than the nearshore).

The DNR shorezone survey did not delineate the geomorphic extent of shoreline segments associated with estuaries and deltas. Thus we determined the geographical extent of these estuaries and shelves from the BTM ''shelf'' seafloor designation associated with the particular river because it indicates the geomorphic extension of the tidal and sub-tidal delta where fresh water enters Puget Sound. Not all of the shorelines associated with estuaries and deltas were labeled as ''estuary wetland'' and ''mud flat'' by DNR, thus we delineated juvenile settlement sites located in the nearshore at the border of these deltas at either the geomorphic terminus of the delta at the 30 m (98 ft) contour, and/or at the shoreline segment mapped with kelp by the DNR. By doing this, we eliminated some of the other shorezone geomorphic shoreline types from proposed critical habitat designation because available information did not support the presence of essential features at some specific areas adjacent to moderate to large rivers (see NMFS, 2013a).

Special Management Considerations or Protection

An occupied area cannot be designated as critical habitat unless it contains physical or biological features that ''may require special management considerations or protection.'' Agency regulations at 50 CFR 424.02(j) define ''special management considerations or protection'' to mean ''any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species.'' Many forms of human activities have the potential to affect the essential features of listed rockfish species: (1) Nearshore development and in-water construction (e.g., beach armoring, pier construction, jetty or harbor construction, pile driving construction, residential and commercial construction); (2) dredging and disposal of dredged material; (3) pollution and runoff; (4) underwater construction and operation of alternative energy hydrokinetic projects (tidal or wave energy projects) and cable laying; (5) kelp harvest; (6) fisheries; (7) non-indigenous species introduction and management; (8) artificial habitats; (9) research activities; and (10) aquaculture. All of these activities may have an effect on one or more physical or biological features via their potential alteration of one or more of the following: adult habitats, food resources, juvenile settlement habitat, and water quality. Further detail regarding the biological and ecological effect of these species management considerations is found in the draft Biological Report (NMFS, 2013a).

Descriptions of Essential Features and Special Management Considerations in Each Specific Area

We describe the five basins (the specific areas) of the Puget Sound below in terms of their biological condition and attributes, and full details are found in the biological report supporting this proposed designation (NMFS, 2013a). Each basin has different levels of human impacts related to the sensitivity of the local environment, and degree and type of human-derived impacts. We have also included examples of some of the activities that occur within these basins that affect the essential features such that they may require special management considerations or protection.

The San Juan/Strait of Juan de Fuca Basin—This basin is the northwestern boundary of the U.S. portion of the DPSs. The basin is delimited to the north by the Canadian border and includes Bellingham Bay, to the west by the entrance to the Strait of Juan de Fuca, to the south by the Olympic Peninsula and Admiralty Inlet, and to the east by Whidbey Island and the mainland between Anacortes and Blaine, Washington. The predominant feature of this basin is the Strait of Juan de Fuca, which is 99.4 mi (160 km) long and varies from 13.7 mi (22 km) wide at its western end to over 24.9 mi (40 km) wide at its eastern end (Thomson, 1994). Drake *et al.* (2010) considered the western boundary of the DPSs as the Victoria Sill because it is hypothesized to control larval dispersal for rockfish (and other biota) of the region. Water temperatures are lower and more similar to coastal marine waters than to Puget Sound proper, and circulation in the strait consists of a seaward surface flow of diluted seawater (<30.0 practical salinity units [psu]) in the upper layer and an inshore flow of saline oceanic water (>33.0 psu) at depth (Drake *et al.,* 2010). Water exchange in this basin has not been determined because, unlike the rest of the basins of the DPSs, it is more oceanic in character and water circulation is not nearly as constrained by geography and sills as it is in the other basins.

The San Juan/Strait of Juan de Fuca Basin has the most rocky shoreline and benthic habitats of the U.S. portion of the DPSs. Most of the basin's numerous islands have rocky shorelines with extensive, submerged aquatic vegetation and floating kelp beds necessary for juvenile canary rockfish and bocaccio settlement sites.

This basin also contains abundant sites deeper than 30 meters that possess or are adjacent to areas of complex bathymetry. Approximately 93 percent of the rocky benthic habitats of the U.S. portion of the range of all three DPSs are in this basin (Palsson *et al.,* 2009). Plate tectonic processes and glacial scouring/deposition have produced a complex of fjords, grooved and polished bedrock outcrops, and erratic boulders and moraines along the seafloor of the San Juan Archipelago (Greene, 2012). Banks of till and glacial advance outwash deposits have also formed and contribute to the variety of relief and habitat within the basin. These processes have contributed to the development of benthic areas with complex bathymetry.

Yelloweye rockfish, canary rockfish, and bocaccio have been documented in the San Juan Archipelago, in addition to the southern portion of this basin along the Strait of Juan de Fuca (Washington, 1977; Moulton and Miller, 1987; Pacunski, 2013). The southern portion of this basin has several pinnacles that include Hein, Eastern, Middle, MacArthur, Partridge, and Coyote Banks. Yelloweye rockfish were once commonly caught by anglers along these areas, particularly Middle Bank (Olander, 1991).

As described in more detail in the biological report (NMFS, 2013a), there are several activities that occur in this basin that affect the essential features such that they may require special management considerations. Commercial and recreational fisheries occur here, as well as scientific research. The highest concentration of derelict fishing nets in the DPSs remain here, including over 100 nets in waters deeper than 100 ft (30.5 m) (NRC, 2010), and an estimated 705 nets in waters shallower than 100 ft (30.5 m) (Northwest Straits Initiative, 2011). Because this basin has the most kelp in the DPSs, commercial harvest of kelp could be proposed for the San Juan Islands area. The Ports of Bellingham and Anacortes are located in this basin, and numerous dredging and dredge disposal projects and nearshore development, such as new docks, piers, and bulkheads occur in this basin. These development actions have the potential to alter juvenile settlement sites of canary rockfish and bocaccio. Two open-water dredge disposal sites are located in the basin, one in Rosario Strait and the other northwest of Port Townsend. These are termed dispersive sites because they have higher current velocities; thus, dredged material does not accumulate at the disposal site and settles on benthic environments over a broad area (Army Corps of Engineers, 2010). Sediment disposal activities in this specific area may temporarily alter water quality (dissolved oxygen levels) and feeding opportunities (the ability of juvenile rockfish to seek out prey). There are several areas with contaminated sediments along the eastern portion of this basin, particularly in Bellingham Bay and Guemes Channel near Anacortes.

Whidbey Basin—The Whidbey Basin includes the marine waters east of Whidbey Island and is delimited to the south by a line between Possession Point on Whidbey Island and Meadowdale, south of Mukilteo. The northern boundary is Deception Pass at the northern tip of Whidbey Island. The Skagit, Snohomish, and Stillaguamish Rivers flow into this basin and contribute the largest influx of freshwater inflow to Puget Sound (Burns, 1985). Water retention is approximately 5.4 months due to the geography and sills at Deception Pass (Ebbesmeyer *et al.,* 1984).

Most of the nearshore of the Whidbey Basin consists of bluff-backed beaches with unconsolidated materials ranging from mud and sand to mixes or gravels and cobbles (McBride 2006). Some of these nearshore areas support the growth of kelp. Some of the northern part of this basin is relatively shallow with moderately flat bathymetry near the Skagit, Stillaguamish and Snohomish River deltas and does not support kelp growth because it lacks suitable areas for holdfast attachment, such as rock and cobble.

Benthic areas in this basin contain sites deeper than 30 meters that possess or are adjacent to areas of complex bathymetry. The southern portion of the basin has more complex bathymetry compared to the north, with deeper waters adjacent to Whidbey Island, southern Camano Island, and near the City of Mukilteo.

Yelloweye rockfish, canary rockfish, and bocaccio have been documented in the Whidbey basin, with most occurrences within the southern portion near south Camano Island, Hat (Gedney) Island, and offshore of the City of Mukilteo. It is not known if the southern portion of the Whidbey basin has more attractive rockfish habitat compared to the northern portion, or if most documented occurrences are a reflection of uneven sampling effort over the years.

As described in more detail in the biological report, there are several activities that occur in this basin that affect the essential features such that they may require special management considerations. Activities include commercial and recreational fisheries, scientific research, dredging projects and dredge disposal operations, nearshore development projects, aquaculture and tidal energy projects. An estimated 18 derelict nets remain in waters shallower than 100 ft (30.5 m) in this basin (Northwest Straits Initiative, 2011). A potential tidal energy site is located within the Deception Pass area, at the northern tip of Whidbey Island. Pollution and runoff are also concerns in this basin, mostly near the Port Gardner area. There are several areas with contaminated sediments along the eastern portion of this basin, particularly near the Cities of Mukilteo and Everett.

Main Basin—The 62.1 mi (100 km) long Main Basin is delimited to the north by a line between Point Wilson near Port Townsend and Partridge Point on Whidbey Island, to the south by Tacoma Narrows, and to the east by a line between Possession Point on Whidbey Island and Meadow Point. The sill at the border of Admiralty Inlet and the eastern Straits of Juan de Fuca regulates water exchange of Puget Sound (Burns, 1985). The Main Basin is the largest basin, holding 60 percent of the water in Puget Sound proper. Water retention is estimated to be one month due to the sills at Admiralty Inlet and Deception Pass (Ebbesmeyer *et al.,* 1984).

Approximately 33 percent (439.3 mi (707 km)) of Puget Sound's shoreline occurs within this basin and nearshore habitats consist of bluff-backed beaches with unconsolidated materials ranging from mud and sand to mixes or gravels and cobbles (Drake *et al.,* 2010). Some of these nearshore areas support the growth of kelp. Subtidal surface sediments in Admiralty Inlet tend to consist largely of sand and gravel, whereas sediments just south of the inlet and southwest of Whidbey Island are primarily sand. Areas deeper than 30 meters in the Main Basin have varying amounts of sites that possess or are adjacent to areas of complex bathymetry. Sediments in the deeper areas of the central portion of the Main Basin generally consist of mud or sandy mud (Bailey *et al.,* 1998) and are generally not complex. Possession Point is centrally located within this basin at the southern end of Whidbey Island, and has relatively steep eastern, southern, and western edges and also has some rocky substrates (Squire and Smith, 1977). There are benthic areas deeper than 98 ft (30 m) along Possession Point, Admiralty Inlet and the rims of Puget Sound beyond the nearshore that feature complex bathymetry, with slopes and areas of high rugosity.

Yelloweye rockfish, canary rockfish, and bocaccio have been documented at Possession Point, near the port of Kingston and Apple Cove, and along much of the eastern shoreline of this basin (Washington, 1977; Moulton and Miller, 1987).

As described in more detail in the biological report, there are several activities that occur in this basin that affect the essential features such that they may require special management considerations. Activities include commercial and recreational fisheries, scientific research, dredging projects and dredge disposal operations, nearshore development projects, aquaculture and tidal energy projects. An estimated 75 derelict nets in waters

shallower than 100 ft (30.5 m) remain in this basin (Northwest Straits Initiative, 2011). A planned tidal energy site is located within the Admiralty Inlet area off Whidbey Island. Pollution and runoff are also concerns in this basin because of extensive amounts of impervious surface located on its eastern side. Two open-water dredge disposal sites are located in the basin, one located in Elliot Bay and the other in Commencement Bay. These are non-dispersive disposal sites, which are areas where currents are slow enough that dredged material is deposited on the disposal target area rather than dispersing broadly with prevailing currents (Army Corps of Engineers, 2010). An estimated 36 percent of the shoreline in this area has been modified by human activities (Drake *et al.,* 2010) and bulkhead/pier repair projects and new docks/piers are proposed regularly in this basin. There are several areas with contaminated sediments in this basin, particularly in Elliot Bay, Sinclair Inlet, and Commencement Bay.

South Puget Sound—This basin includes all waterways south of Tacoma Narrows, and is characterized by numerous islands and shallow (generally <65 ft (20 m)) inlets with extensive shoreline areas. The sill at Tacoma Narrows restricts water exchange between the South Puget Sound and the Main Basin and water retention is an estimated 1.9 months (Ebbesmeyer *et al.,* 1984). This restricted water exchange influences environmental characteristics of the South Puget Sound such as nutrient levels and dissolved oxygen, and perhaps its biotic communities (Ebbesmeyer *et al.,* 1984; Rice, 2007).

Wide assortments of sediments are found in the nearshore and intertidal areas of this basin (Bailey *et al.,* 1998). The most common sediments and the percent of the intertidal area they cover (with 95 percent confidence limits) are: Mud, 38.3 ± 29.3 percent; sand, 21.7 ± 23.9 percent; mixed fine, 22.9 ± 16.1 percent; and gravel, 11.1 ± 4.9 percent. Subtidal areas have a similar diversity of surface sediments, with shallower areas consisting of mixtures of mud and sand and deeper areas consisting of mud (Puget Sound Water Quality Authority, 1987). The southern inlets of this basin include Oakland Bay, Totten Inlet, Bud Inlet and Eld Inlet, in addition to the Nisqually River delta. These inlets have relatively muddy habitats that do not support essential nearshore features such as holdfasts for kelp, and rock and cobble areas for rearing juvenile canary rockfish and bocaccio. Despite the prevalence of muddy and sandy substrate in the southern portion of this basin, some of these nearshore areas support the growth of kelp and therefore contain juvenile settlement sites.

With a mean depth of 121 ft (37 m), this basin is the shallowest of the five basins (Burns 1985). Benthic areas deeper than 98 ft (30 m) occur in portions of the Tacoma Narrows and Dana Passage and around the rims of the basin. Sediments in Tacoma Narrows and Dana Passage consist primarily of gravel and sand. The rims of South Puget Sound beyond the nearshore feature complex bathymetry, with slopes and areas of high rugosity.

Yelloweye rockfish, canary rockfish, and bocaccio have been documented within the South Puget Sound (NMFS, 2013a). Canary rockfish may have been historically most abundant in the South Sound (Drake *et al.,* 2010).

As described in more detail in the biological report, there are several activities that occur in this basin that affect the essential features such that they may require special management considerations. Activities include commercial and recreational fisheries, scientific research, dredging and dredge disposal, nearshore development, pollution and runoff, aquaculture operations, and potential tidal energy projects. An estimated 4 derelict nets in waters shallower than 100 ft (30.5 m) remain in this basin (Northwest Straits Initiative, 2011). A non-dispersive dredge disposal site is located off Anderson/Ketron Island (Army Corps of Engineers, 2010). A potential tidal energy site is located in the Tacoma Narrows area. Important point sources of waste include sewage treatment facilities, and about 5 percent of the nutrients (as inorganic nitrogen) entering greater Puget Sound enter this basin through nonpoint sources (Embrey and Inkpen, 1998). An estimated 34 percent of the shoreline in this area has been modified by human activities (Drake *et al.,* 2010), and bulkhead/pier repair projects and new docks/piers are proposed regularly in this basin. The major urban areas, and thus more pollution and runoff into the South Puget Sound, are found in the western portions of Pierce County. Other urban centers in Southern Puget Sound include Olympia and Shelton. There are several areas with contaminated sediments in this basin in Carr Inlet and near Olympia.

Hood Canal—Hood Canal branches off the northwest part of the Main Basin near Admiralty Inlet and is the smallest of the greater Puget Sound basins, being 55.9 mi (90 km) long and 0.6 to 1.2 mi (1 to 2 km) wide (Drake *et al.,* 2010). Water retention is estimated at 9.3 months; exchange in Hood Canal is regulated by a 164-foot (50-meter) deep sill near its entrance that limits the transport of deep marine waters in and out of Hood Canal (Ebbesmeyer *et al.,* 1984; Burns, 1985). The major components of this basin consist of the Hood Canal entrance, Dabob Bay, the central basin, and the Great Bend at the southern end. A combination of relatively little freshwater inflow, the sill at Admiralty Inlet, and bathymetry lead to relatively slow currents; thus, water residence time within Hood Canal is the longest of the biogeographic basins, with net surface flow generally northward (Ebbesmeyer *et al.,* 1984).

The intertidal and nearshore zone consists mostly of mud (53.4 ± 89.3 percent of the intertidal area), with similar amounts of mixed fine sediment and sand (18.0 ± 18.5 percent and 16.7 ± 13.7 percent, respectively) (Bailey *et al.,* 1998). Some of the nearshore areas of Hood Canal have cobble and gravel substrates intermixed with sand that support the growth of kelp. Surface sediments in the subtidal areas also consist primarily of mud and cobbles (Puget Sound Water Quality Authority, 1987). The shallow areas of the Great Bend, Dabob Bay, and the Hamma Hamma, Quilcene, Duckabusch, Dosewallips, Tahuya and Skokomish River deltas feature relatively muddy habitats that lack holdfasts for kelp, such as rock and cobble areas, and thus do not support kelp growth. Such areas thus lack the essential feature of juvenile settlement sites for juvenile canary rockfish and bocaccio.

Benthic areas deeper than 98 ft (30 m) occur along the rim of nearly all of Hood Canal, and these areas feature complex bathymetry, with slopes and areas of high rugosity.

Bocaccio have been documented in Hood Canal (NMFS, 2013a). Yelloweye and canary rockfish have also been documented at several locations and have been caught in relatively low numbers for the past several years (WDFW, 2011).

As described in more detail in the biological report, there are several activities that occur in this basin that affect the essential features such that they may require special management considerations. Activities in Hood Canal include commercial and recreational fisheries, scientific research, nearshore development, non-indigenous species management, aquaculture, and pollution and runoff. An estimated 81 derelict nets in waters shallower than 100 ft (30.5 m) remain in this basin (Northwest Straits Initiative, 2011). The unique bathymetry and low water exchange have led to episodic periods of low dissolved oxygen (Newton *et al.,* 2007),

though the relative role of nutrient input from humans in exacerbating these periods of hypoxia is in doubt (Cope and Roberts, 2012). Dissolved oxygen levels have decreased to levels that cause behavioral changes and kill some rockfish (i.e., below 1.0 mg/L (1 ppm)) (Palsson *et al.,* 2008). An estimated 34 percent of the shoreline in this area has been modified by human activities (Drake *et al.,* 2010), and bulkhead/pier repairs and new docks/piers are regularly proposed in this basin. The non-indigenous tunicate (*Ciona savignyi*) has been document at 86 percent of sites surveyed in Hood Canal (Drake *et al.,* 2010), and may impact benthic habitat function that include rearing and settlement habitat for rockfish.

Depicting Proposed Critical Habitat With Maps

As previously described, we first used available geographic data to identify the locations of benthic sites with or adjacent to complex bathymetry and shoreline sites with sand, rock and/or cobble compositions that also support kelp, as described in more detail in the draft Biological Report (NMFS, 2013a). Once we identified these sites, we aggregated sites located in close proximity through Geographic Information Systems methods described in NMFS (2013a), consistent with the regulatory guidance regarding designation of an inclusive area for habitats in close proximity (50 CFR 424.12(d)).

The specific areas we identified are large and we relied on recent agency rulemaking to refine the designation and provide a critical habitat map that clearly delineates where the essential features are found within the specific areas. The agency recently amended its critical habitat regulations to state that instead of designating critical habitat using lines on a map, we will show critical habitat on a map, with additional information discussed in the preamble of the rulemaking and in agency records (50 CFR 424.12(c)), rather than requiring long textual description in the Code of Federal Regulations (CFR). In adopting this amendment to our regulations, we stated in response to comments:

> [I]n instances where there are areas within a bigger area that do not contain the physical and biological features necessary for the conservation of the species, the Services would have the option of drawing the map to reflect only those parts of the area that do contain those features (77 FR 25611, May 1, 2012).

The maps we developed for the present designation conform to this new regulation. In addition, in agency records, and available on our Web site, we provide the GIS plot points used to create these maps, so interested persons may determine whether any place of interest is within critical habitat boundaries (*http://www.nwr.noaa.gov*).

Unoccupied Areas

Section 3(5)(A)(ii) of the ESA authorizes the designation of ''specific areas outside the geographical area occupied at the time [the species] is listed'' if these areas are essential for the conservation of the species. Regulations at 50 CFR 424.12(e) emphasize that the agency ''shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'' We conducted a review of the documented occurrences of each listed rockfish in the five biogeographic basins of Puget Sound (NMFS, 2013a). We found that each of the basins is currently occupied by listed rockfish and our biological review did not identify any unoccupied areas that are essential to conservation and thus have not identified any unoccupied areas as candidates for critical habitat designation (NMFS, 2013a). However, we will continue to investigate this issue and seek comment on this issue as part of this proposed rule.

Section 3(5)(C) of the ESA provides that ''[e]xcept in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.'' In this case we are proposing to designate all the specific areas that possess essential features that can be mapped (such as complex bathymetry in waters deeper than 30 meters, and nearshore areas such as sand, rock and/or cobble compositions that also support kelp) and as described above, we are only designating those portions of the specific areas that actually contain the essential features. We acknowledge that some listed rockfish have been documented to occur outside of the mapped areas that we propose to designate as critical habitat (NMFS, 2013a) and that larval listed rockfish could occur throughout the specific areas. Therefore, although each specific area contains habitat proposed for designation, we conclude that the proposed designation does not constitute ''the entire geographical area which can be occupied'' by the listed rockfish species.

Identifying Military Lands Ineligible for Designation

Section 4(a)(3) of the ESA precludes the Secretary from designating military lands as critical habitat if those lands are subject to an Integrated Natural Resource Management Plan (INRMP) under the Sikes Act that the Secretary certifies in writing benefits the listed species. We consulted with the DOD and determined that there are several installations with INRMPs which overlap with marine habitats occupied by listed rockfish: (1) Joint base Lewis-McCord: (2) Manchester Fuel Department, (3) Naval Air Station Whidbey Island, (4) Naval Station Everett, and (5) Naval Station Kitsap.

We found that Naval Station Everett does not overlap with essential features for listed rockfish in the nearshore and thus the area covered by the INRMP is not proposed for critical habitat designation. We identified habitat meeting the statutory definition of critical habitat at all of the other installations and reviewed the INRMPs, as well as other information available, regarding the management of these military lands. Our preliminary review indicates that each of these INRMPs addresses listed rockfish habitat, and all contain measures that provide benefits to the listed rockfish DPSs. Examples of the types of benefits include actions that improve shoreline conditions, control erosion and water quality, prevention of and prompt response to chemical and oil spills, and monitoring of listed species and their habitats. As a result, we conclude that the areas identified with INRMPs are not eligible for critical habitat designation (see appendix c of NMFS, 2013c).

Summary of Areas Meeting the Definition for Proposed Critical Habitat Designation

We have determined that approximately 643.7 sq mi (1,665.5 sq km) of nearshore habitat for juvenile canary rockfish and bocaccio, and 610.1 sq mi (1,580.95 sq km) of deepwater habitat for yelloweye rockfish, canary rockfish, and bocaccio meet the definition of proposed critical habitat (Table 1).

TABLE 1—PHYSICAL AND BIOLOGICAL FEATURES AND MANAGEMENT CONSIDERATIONS FOR YELLOWEYE ROCKFISH, CANARY ROCKFISH AND BOCACCIO IN AREAS MEETING THE DEFINITION OF CRITICAL HABITAT

DPS basin	Nearshore sq mi. (for juvenile canary and bocaccio only)	Deepwater sq mi. (for adult and juvenile yelloweye rockfish, adult canary rockfish, and adult bocaccio)	Physical or biological features		Activities
San Juan/Strait of Juan de Fuca.	352.2	298.98	Deepwater sites <30 meters) that support growth survival reproduction and feeding opportunities.	Nearshore juvenile rearing sites with sand, rock and/or cobbles to support forage and refuge.	1, 2, 3, 6, 9, 10
Whidbey Basin	51.44	41.47			1, 2, 3, 4, 6, 9, 10
Main Basin	145.75	179.74			1, 2, 3, 4, 6, 7, 9, 10
South Puget Sound	73.72	40.12			1, 2, 3, 4, 6, 7, 9, 10
Hood Canal	20	50.06			1, 2, 3, 6, 7, 9, 10

Management Considerations Codes: (1) Nearshore development and in-water construction (e.g., beach armoring, pier construction, jetty or harbor construction, pile driving construction, residential and commercial construction); (2) dredging and disposal of dredged material; (3) pollution and runoff; (4) underwater construction and operation of alternative energy hydrokinetic projects (tidal or wave energy projects) and cable laying; (5) kelp harvest; (6) fisheries; (7) non-indigenous species introduction and management; (8) artificial habitats; (9) research; and (10) aquaculture. Commercial kelp harvest does not occur presently, but would probably be concentrated in the San Juan/Georgia Basin. Artificial habitats could be proposed to be placed in each of the basins. Non-indigenous species introduction and management could occur in each basin.

Application of ESA Section 4(b)(2)

The foregoing discussion describes those areas that are eligible for designation as critical habitat—the specific areas that fall within the ESA section 3(5)(A) definition of critical habitat, not including lands owned or controlled by the DOD, or designated for its use, that are covered by an INRMP that the Secretary has determined in writing provides a benefit to the species. Specific areas eligible for designation are not automatically designated as critical habitat. As described above, Section 4(b)(2) of the ESA requires that the Secretary first consider the economic impact, impact on national security, and any other relevant impact. The Secretary has the discretion to exclude an area from designation if he determines the benefits of exclusion (that is, avoiding the impact that would result from designation), outweigh the benefits of designation based on the best available scientific and commercial information. The Secretary may not exclude an area from designation if exclusion will result in the extinction of the species. Because the authority to exclude is wholly discretionary, exclusion is not required for any areas.

The first step in conducting an ESA section 4(b)(2) analysis is to identify the ''particular areas'' to be analyzed. Section 3(5)(A) of the ESA defines critical habitat as ''specific areas,'' while section 4(b)(2) of the ESA requires the agency to consider certain factors before designating any ''particular area.'' Depending on the biology of the species, the characteristics of its habitat, and the nature of the impacts of designation, ''specific'' areas might be different from, or the same as, ''particular'' areas. For this designation, we identified the ''specific'' areas as (1) The San Juan/Strait of Juan de Fuca Basin, (2) Main Basin, (3) Whidbey Basin, (4) South Puget Sound, and (5) Hood Canal. For our economic impact analysis we defined the ''particular'' areas as equivalent to the ''specific'' areas. This approach allowed us to most effectively consider the conservation value of the different areas when balancing conservation benefits of designation against economic benefits of exclusion. However, to assess impacts of designation on national security and Indian lands, we instead used a delineation of ''particular'' areas based on ownership or control of the area. These ''particular'' areas consisted of marine areas that overlap with designated military areas and Indian lands. This approach allowed us to consider impacts and benefits associated with management by the military or land ownership and management by Indian tribes.

Identify and Determining the Impacts of Designation

Section 4(b)(2) of the ESA provides that the Secretary shall consider ''the economic impact, impact on national security, and any other relevant impact of specifying any particular area as critical habitat.'' The primary impact of a critical habitat designation stems from the requirement under section 7(a)(2) of the ESA that Federal agencies ensure their actions are not likely to result in the destruction or adverse modification of critical habitat. Determining this impact is complicated by the fact that section 7(a)(2) contains the overlapping requirement that Federal agencies must ensure their actions are not likely to jeopardize the species' continued existence. The true impact of designation is the extent to which Federal agencies modify their actions to ensure their actions are not likely to destroy or adversely modify the critical habitat of the species, beyond any modifications they would make because of listing and the jeopardy requirement for the species. Additional impacts of designation include state and local protections that may be triggered as a result of the designation.

In determining the impacts of designation, we assessed the incremental change in Federal agency actions as a result of critical habitat designation and the adverse modification prohibition, beyond the changes predicted to occur as a result of listing and the jeopardy provision. In August 2012 the USFWS and NOAA published a proposed rule to amend our joint regulations at 50 CFR 424.19 to

make clear that in considering impacts of designation as required by Section 4(b)(2) we would consider the incremental impacts (77 FR 51503, August 24, 2012). This approach is in contrast to our 2005 critical habitat designations for salmon and steelhead (70 FR 52630, September 2, 2005) where we considered the ''coextensive'' impact of designation. The consideration of co-extensive impacts was in accordance with a Tenth Circuit Court decision (*New Mexico Cattle Growers Association* v. *U.S. Fish and Wildlife Service,* 248 F.3d 1277 (10th Cir. 2001)). More recently, several courts (including the 9th Circuit Court of Appeals) have approved an approach that considers the incremental impact of designation. The **Federal Register** notice (77 FR 5103, August 24, 2012) announcing the proposed policy on considering impacts of designation describes and discusses these court cases: *Arizona Cattlegrowers' Ass'n* v. *Salazar,* 606 F3.d 1160, 1172–74 (9th Cir. 2010), cert. denied, 131 S. Ct. 1471, 179 L. Ed. 2d 300 (2011); *Homebuilders Ass'n* v. *FWS,* 616 F3d 983, 991093j (9th Cir. 2010) cert. denied, 131 S. Ct. 1475, 179 L. Ed. 2d 301 (2011). The notice also discusses a Department of Interior Solicitor's memo (M–3706 The Secretary's Authority to Exclude Areas from Critical Habitat Designation Under 4(b)(2) of the Endangered Species Act (Oct. 3, 2008) (DOI 2008)). In more recent critical habitat designations, both NMFS and the USFWS have considered the incremental impact of critical habitat designation (for example, NMFS' designation of critical habitat for the Southern DPS of green sturgeon (74 FR 52300, October 9, 2009) and the Southern DPS of Pacific eulachon (76 FR 65324, October 20, 2011), and the U.S. Fish and Wildlife's designation of critical habitat for the Oregon chub (75 FR 11031, March 10, 2010)).

Consistent with our proposed regulatory amendments (77 FR 51503, August 24, 2012), the more recent court cases, and more recent agency practice, we estimated the incremental impacts of designation, beyond the impacts that would result from the listing and jeopardy provision. In addition, because these proposed designations almost completely overlap our previous salmonid, killer whale and green sturgeon critical habitat designations in Puget Sound, and the essential features defined for those species in previous designations are similar to those for listed rockfish (NMFS, 2013a), we estimated only the incremental impacts of designation beyond the impacts already imposed by those prior designations.

To determine the impact of designation, we examined what the state of the world would be with and without the designation of critical habitat for listed rockfish. The ''without critical habitat'' scenario represents the baseline for the analysis. It includes process requirements and habitat protections already afforded listed rockfish under their Federal listing or under other Federal, state, and local regulations. Such regulations include protections afforded listed rockfish habitat from other co-occurring ESA listings and critical habitat designations, such as those for Pacific salmon and steelhead (70 FR 52630, September 2, 2005), North American green sturgeon (74 FR 52300, October 9, 2009), Southern Resident Killer Whales (71 FR 69054, November 29, 2006), and bull trout (75 FR 63898, October 18, 2010) (see the Final Economic Analysis for listed rockfish (NMFS, 2013a) for examples of protections for other species that would benefit listed rockfish). The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for listed rockfish. The primary impacts of critical habitat designation we found were: (1) The economic costs associated with additional administrative effort of including a critical habitat analysis in section 7 consultations for these three DPSs, (2) impacts to national security, and (3) the possible harm to our working relationship with Indian tribes and landowners and entities with conservation plans.

Economic Impacts

Our economic analysis sought to determine the impacts on land uses and other activities from the proposed designation of critical habitat, above and beyond—or incremental to—those ''baseline'' impacts due to existing or planned conservation efforts being undertaken due to other Federal, state, and local regulations or guidelines (NMFS, 2013b). Other Federal agencies, as well as state and local governments, may also seek to protect the natural resources under their jurisdiction. If compliance with the Clean Water Act or state environmental quality laws, for example, protects habitat for the species, such protective efforts are considered to be baseline protections and costs associated with these efforts are not quantified as impacts of critical habitat designation.

When critical habitat is designated, section 7 requires Federal agencies to ensure that their actions will not result in the destruction or adverse modification of critical habitat, in addition to ensuring that the actions are not likely to jeopardize the continued existence of the species. The added administrative costs of considering critical habitat in section 7 consultations and the additional impacts of implementing project modifications to protect critical habitat are the direct result of the designation of critical habitat. These costs are not in the baseline, and are considered incremental impacts of the rulemaking.

Incremental economic impacts may include the direct costs associated with additional effort for future consultations, reinitiated consultations, new consultations occurring specifically because of the designation, and additional project modifications that would not have been required to avoid jeopardizing the continued existence of the species. Additionally, incremental economic impacts may include indirect impacts resulting from reaction to the potential designation of critical habitat (e.g., developing habitat conservation plans in an effort to avoid designation of critical habitat), triggering of additional requirements under State or local laws intended to protect sensitive habitat, and uncertainty and perceptional effects on markets.

To evaluate the potential administrative and project modification costs of designating critical habitat we examined our ESA section 7 consultation record for rockfish for the years 2010 and 2011. As further explained in the supporting economic report (NMFS, 2013b), to quantify the economic impact of designation, we employed the following three steps:

(1) Define the geographic study area for the analysis, and identify the units of analysis (the ''particular areas''). In this case, we defined the five biogeographic basins of the Puget Sound/Georgia Basin that encompass occupied marine areas as the particular areas.

(2) Identify potentially affected economic activities and determine how management may increase due to the designation of listed rockfish critical habitat, both in terms of project administration and potential project modification.

(3) Estimate the economic impacts associated with both potential administrative costs and costs from project modifications. In this proposed critical habitat designation we did not identify potential systematic project modification costs (NMFS, 2013b).

We estimated that the additional effort to address adverse modification of critical habitat in a section 7

consultation is equivalent to one third of the effort already devoted to the consultation to consider the species. This is based on estimates of additional U.S. Fish and Wildlife Service effort for bull trout consultations in the Northwest, and which was considered relevant to the current critical habitat designation (NMFS, 2013b). That is, for every three hours spent considering a jeopardy analysis for rockfish, an additional hour would be needed to consider rockfish critical habitat. Based on that assumption, we estimated a total annualized incremental administrative cost of approximately $123,000 (discounted at 7 percent) for designating the five specific areas as listed rockfish critical habitat. The greatest costs are associated with nearshore work, transportation, water quality, and utilities (see NMFS, 2013b for more details). The estimated annual incremental costs across the five biogeographic basins range from $32,100 in the San Juan/Strait of Juan de Fuca Basin to $10,200 in Hood Canal (NMFS, 2013b).

For the second category of impacts, we consider it unlikely there will be incremental costs for project modifications specific to rockfish critical habitat for most individual project types. This is because of the existing high level of protection afforded by previous salmonid, green sturgeon and killer whale critical habitat designations that have generally similar biological features, and the protections already afforded listed rockfish through the separate jeopardy analysis (see NMFS, 2013b for more details). The results of our economic analysis are discussed in greater detail in a separate report that is available for public review and comment (NMFS, 2013b).

Impacts to National Security

During preparations for the proposed designation we sent a letter to the DOD seeking information to better understand their activities taking place in areas owned or controlled by them and the potential impact of designating critical habitat in these areas. We received two letters from the DOD in response to our initial inquiry. A single letter from the U.S. Air Force and U.S. Army stated that these services did not foresee any adverse impacts to their national security or training missions from proposed rockfish critical habitat designations. The second letter, from the U.S. Navy, identified 14 Restricted Areas, Operating Areas and Danger Zones within the range of listed rockfish in each of the five basins of the Puget Sound. The Navy confirmed that it uses all of these areas, and assessed the potential for critical habitat designation to adversely affect operations, testing, training, and other essential military activities. Of the 14 areas identified by the Navy, only one area is already designated as critical habitat for other ESA-listed species (southern resident killer whales). The Navy letter identified several aspects of potential impacts to national security from critical habitat designation and requested that areas owned or controlled by the Navy be excluded from designation. We had several conversations with the Navy subsequent to their letter to further understand their uses of the areas, concerns identified in their response letter, and any related habitat protections resulting from Navy policies and initiatives (NMFS, 2013c).

Other Relevant Impacts—Impacts to Tribal Sovereignty and Self-Governance

During preparations for the proposed designation we sent a letter to Puget Sound Indian tribes, notifying them of our intent to propose critical habitat for listed rockfish. We identified several areas under consideration for critical habitat designation that overlap with Indian lands in each of the specific areas (Figures 2 and 3). The federally recognized tribes with lands potentially affected are the Lummi, Swinomish, Tulalip, Puyallup, Squaxin Island, Skokomish, Port Gamble, and Port Madison. In addition to the economic impacts described above, designating these tribes' Indian lands would have an impact on Federal policies promoting tribal sovereignty and self-governance. The longstanding and distinctive relationship between the Federal and tribal governments is defined by treaties, statutes, executive orders, secretarial orders, judicial decisions, and agreements, which differentiate tribal governments from the other entities that deal with, or are affected by, the U.S. Government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the U.S. toward Indian tribes with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. Pursuant to these authorities, lands have been retained by Indian tribes or have been set aside for tribal use. These lands are managed by Indian tribes in accordance with tribal goals and objectives within the framework of applicable treaties and laws.

Tribal governments have a unique status with respect to salmon, steelhead, and other marine resources in the Pacific Northwest, where they are co-managers of these resources throughout the region. The co-manager relationship crosses tribal, federal, and state boundaries, and addresses all aspects of the species' life cycle. The positive working relationship between the federal government and tribes can be seen in federal-tribal participation within the *U.S.* v. *Oregon* and *U.S.* v. *Washington* framework and the participation of tribes on interstate (Pacific Fisheries Management Council) and international (Pacific Salmon Commission) management bodies. Additionally, there are innumerable local and regional forums and planning efforts in which the tribes are engaged with the federal government, including ESA section 6 species recovery grants to the tribes. While many of these activities currently concentrate on recovery of listed salmon and steelhead in Puget Sound, they nonetheless result in several benefits to habitats used by listed rockfish through the conservation of habitats and prey sources of rockfish (NMFS, 2013c).

Other Relevant Impacts—Impacts to Landowners/Entities With Contractual Commitments to Conservation

Section 10(a)(1)(B) of the ESA authorizes us to issue to non-Federal entities a permit for the incidental take of endangered and threatened species. This permit allows a non-Federal landowner/entity to proceed with an activity that is legal in all other respects, but that results in the incidental taking of a listed species (i.e., take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity). The ESA specifies that an application for an incidental take permit (ITP) must be accompanied by a conservation plan, and specifies the content of such a plan. The purpose of such conservation plans is to describe and ensure that the effects of the permitted action on covered species are adequately minimized and mitigated, and that the action does not appreciably reduce the likelihood of the survival and recovery of the species. Conservation plans that cover habitat actions are common for terrestrial and freshwater species and can benefit species threatened by land use activities. Conservation plans that cover fisheries are less common and can benefit species and habitats threatened by fishing activities.

Conservation agreements with non-Federal landowners and other entities enhance species conservation by extending species' protections beyond those available through section 7 consultations. We have encouraged non-Federal landowners to enter into conservation agreements, based on a

view that we can achieve greater species' conservation on non-Federal land through such partnerships than we can through coercive methods (61 FR 63854, December 2, 1996). In past critical habitat designations we have found there is a benefit to excluding some areas covered by conservation agreements when there was affirmative evidence that the conservation partner considered exclusion beneficial to our relationship and beneficial to implementation of the conservation agreement (e.g., for Pacific salmon 70 FR 52630, September 2, 2005). We considered the benefit of exclusion to be a conservation benefit to the affected species because of the enhanced implementation of the agreement and the incentive for others to enter into conservation agreements with us to further protect the species.

In the case of the listed rockfish species, there are two conservation agreements that partially or wholly overlap with proposed critical habitat. The first is with the Washington Department of Natural Resources (WDNR) and covers geoduck harvest on lands managed by the department. The second is with the Washington Department of Fish and Wildlife (WDFW) and covers fisheries and research in Puget Sound that incidentally takes the listed rockfish and other listed species and may also affect rockfish habitat.

Determine Whether To Exercise the Discretion To Exclude

Benefits of critical habitat designation are those conservation benefits to the species, while benefits of exclusion result from avoiding the impacts of designation identified above. For the present designation, we decided to balance benefits of designation against benefits of exclusion because some impacts of designation implicate competing Federal values, such as national security and tribal sovereignty and self-governance (see NMFS, 2013c).

Benefits of Designation

The principal benefit of designating critical habitat is that ESA section 7 requires every Federal agency to ensure that any action it authorizes funds or carries out is not likely to result in the destruction or adverse modification of designated critical habitat. This complements the Section 7 provision that federal agencies ensure their actions are not likely to jeopardize the continued existence of a listed species. The requirement that agencies avoid adversely modifying critical habitat is in addition to the requirement that they avoid jeopardy to the species, thus the benefit of designating critical habitat is ''incremental'' to the benefit that comes with listing. Another possible benefit is that the designation of critical habitat can serve to educate the public regarding the potential conservation value of an area. Systematic analysis and delineation of important rockfish habitat has not been previously conducted in the Puget Sound, so designating critical habitat may focus and contribute to conservation efforts by clearly delineating areas that are important to species conservation.

Ideally the consideration and balancing of benefits would involve first translating all benefits into a common metric. Executive branch guidance from the Office of Management and Budget (OMB) suggests that benefits should first be monetized—converted into dollars. Benefits that cannot be monetized should be quantified (for example, numbers of fish saved). Where benefits can neither be monetized nor quantified, agencies are to describe the expected benefits (OMB, 2003).

It may be possible to monetize benefits of critical habitat designation for a threatened or endangered species in terms of willingness-to-pay (OMB, 2003). However, we are not aware of any available data at the scale of our designation (the five basins of Puget Sound Sound) that would support such an analysis for listed rockfish. In addition, section 4(b)(2) requires analysis of impacts other than economic impacts that are equally difficult to monetize, such as benefits to national security of excluding areas from critical habitat. In the case of rockfish designations, impacts to Northwest Indian tribes or to our program to promote voluntary conservation agreements are ''other relevant'' impacts that also may be difficult to monetize.

Because we could not monetize or quantify the conservation benefit of designating the particular areas, we qualitatively describe their conservation value to the listed species. The rockfish critical habitat we have identified consists of only five areas. Each area is a biogeographic basin that represents a unique ecological setting with unique habitats and biological communities. This diversity of habitats is important to maintaining long-term viability of the DPSs. Four of the five areas are also relatively spatially isolated in terms of water circulation and exchange of some biota. Although we lack detailed genetic information to confirm that this isolation has led to reproductive isolation among basins, it is likely that there is some degree of reproductive isolation and that the unique habitat conditions in each basin have therefore resulted in important adaptations. The diversity this creates in the population, like the diversity in habitats, is important to long-term viability. These factors suggest that all of the populations and basins are important in maintaining the diversity and spatial structure of each DPS. Though we have not yet developed a recovery plan for these DPSs, it is likely that all five areas are important to recovery of the listed DPSs and therefore have high conservation value (NMFS, 2013a).

Balancing Economic Impacts

In our 2005 final and 2013 proposed critical habitat designations for salmon and steelhead, we balanced conservation benefits of designation against economic benefits of exclusion and excluded particular areas for many of the affected species. Our approach was informed by both biology and policy (78 FR 2725, January 14, 2013; 70 FR 52630, September 2, 2005). In deciding to balance benefits, we noted that salmon and steelhead are widely distributed and their range includes areas that have both high and low conservation value; thus, it may be possible to construct different scenarios for achieving conservation. We also noted Administration policy regarding regulations, as expressed in Executive Order 12866, which directs agencies to select regulatory approaches that ''maximize net benefits,'' and to ''design regulations in the most cost-effective manner to achieve the regulatory objective.''

For the salmon and steelhead designations, we used a cost effectiveness approach in which we identified areas to consider for economic exclusion by balancing relative conservation value against relative economic impact. Where the relative conservation value of an area was lower than the relative economic impact, we considered the area eligible for exclusion. Relying on policies that promote conservation of threatened and endangered species in general and salmon in particular, we did not consider areas for exclusion if exclusion would significantly impede conservation. We concluded that exclusion of high conservation value areas would significantly impede conservation and therefore we did not consider any high conservation value areas for exclusion for salmon and steelhead.

In considering economic exclusions for listed rockfish, we considered the following factors: (1) Section 2 of the ESA provides that a purpose of the act is ''to provide a means whereby the ecosystems upon which endangered

species and threatened species depend may be conserved.''; (2) in listing the three listed rockfish DPSs under the ESA, we concluded that degradation of rocky habitat, loss of eelgrass and kelp, introduction of non-native habitat-modifying species, and degraded water quality were all threats to the species. We also noted that rocky habitats are rare in Puget Sound and have been affected by or are threatened by derelict fishing gear, development, and construction and dredging activities; (3) as described above, there are only five habitat areas and all are of high conservation value; and (4) the economic impacts of designating any particular area are small (the largest impact is $32,100 in the San Juan/Strait of Juan de Fuca Basin), as is the economic impact of designating the entire area ($123,000).

For these reasons, we conclude that the economic benefit of excluding any of these particular areas does not outweigh the conservation benefit of designation. Therefore, none of the areas were eligible for exclusion based on economic impacts.

Balancing Impacts to Tribal Sovereignty and Self-Determination

We balanced the conservation benefits to rockfish of designation against the benefits of exclusion for Indian lands in light of the unique Federal tribal relationship, the unique status of Indian lands, and the Federal policies promoting tribal sovereignty and self-determination, among others. Indian lands potentially affected by a critical habitat designation occur within the range of the listed rockfish and are specific to nearshore juvenile rearing sites for canary rockfish and bocaccio. We are not proposing any nearshore areas of Puget Sound as critical habitat for yelloweye rockfish (NMFS, 2013a). There are eight tribes with Indian lands that overlap the proposed critical habitat in all five basins. Approximately 55.1 lineal miles of shoreline within reservation boundaries overlap with the nearshore component of proposed critical habitat.

The principal benefit of designating critical habitat is section 7's requirement that Federal agencies ensure their actions are not likely to result in adverse modification of that habitat. To understand the benefit of designating critical habitat on Indian lands, we considered the number of miles of shoreline affected, and the types of activities occurring there that would be likely to undergo a section 7 consultation along this relatively small amount of shoreline area. The types of activities occurring in these areas that would be likely to undergo a section 7 consultation include activities associated with: Nearshore development, utilities, dredging, water quality projects, transportation, and other project types.

The benefit of excluding these areas is that Federal agencies acting on behalf of, funding, or issuing permits to the tribes would not need to reinitiate consultation on ongoing activities for which consultation has been completed. Reinitiation of consultation would likely require some commitment of resources on the part of the affected tribe. Moreover, in a reinitiated consultation, or in any future consultation, it is possible that tribes may be required to modify some of their activities to ensure the activities would not be likely to adversely modify the critical habitat (though given the small proportion of shoreline length with essential features, and tribal shoreline management this is unlikely). The benefits of excluding Indian lands from designation include: (1) The furtherance of established national policies, our Federal trust obligations, and our deference to the tribes in management of natural resources on their lands; (2) the maintenance of effective long-term working relationships to promote the conservation of rockfish; (3) the allowance for continued meaningful collaboration and cooperation in scientific work to learn more about the conservation needs of the species; and (4) continued respect for tribal sovereignty over management of natural resources on Indian lands through established tribal natural resource programs. We also considered the degree to which the tribes believe designation will affect their participation in regional management forums and their ability to manage their lands.

Based on our consideration, and given the following factors, we concluded that the benefits to conservation of listed rockfish from full tribal participation in Puget Sound recovery efforts mitigates the potential loss of conservation benefits that could result from designation of tribal lands. With this mitigating conservation benefit in mind, we further concluded that the benefits to tribal governments, with whom the Federal government has a unique trust relationship, particularly with regard to land held by the Federal government in trust for the tribes, outweigh the conservation benefits of designation for listed rockfish (NMFS, 2013c).

The Indian lands specifically proposed for exclusion are those defined in the Secretarial Order 3206, including: (1) Lands held in trust by the United States for the benefit of any Indian tribe; (2) land held in trust by the United States for any Indian tribe or individual subject to restrictions by the United States against alienation; (3) fee lands, either within or outside the reservation boundaries, owned by the tribal government; and, (4) fee lands within the reservation boundaries owned by individual Indians. Our consideration of whether these exclusions would result in extinction of listed rockfish is described below.

Balancing Impacts to Landowners/ Entities With Contractual Commitments to Conservation

Our consideration of the WDNR and the WDFW conservation plans is described in detail in NMFS (2013c). We balanced the conservation benefits to rockfish of proposed critical habitat against the benefits of exclusion (referring to the impacts of designation section above) of the areas covered in each conservation plan. Each plan covers several activities that may take listed species and harm habitats we propose as listed rockfish critical habitat in Puget Sound. Congress added section 10 to the ESA to encourage ''creative partnerships between the private sector and local, state, and Federal agencies for the protection of endangered species and habitat conservation'' (*H.R. Rep. No. 835, 97th Congress, 2nd Session 31; Reprinted in 1982 U.S. Code Congressional and Administrative News 2807, 2831*). If excluding areas from critical habitat designation promotes such conservation partnerships, such exclusions may have conservation benefits that offset the loss of conservation benefit that would have resulted from designation.

The covered areas of the WDNR conservation plan overlap with approximately 30,000 acres of nearshore proposed critical habitat for canary rockfish and bocaccio. The covered areas of the WDFW conservation plan overlap with the entire proposed critical habitat for yelloweye rockfish, canary rockfish, and bocaccio. The WDNR covered activities are geoduck research and harvest management. The WDFW covered activities are the management of recreational bottom fish fishing and commercial shrimp trawls. The types of activities occurring in these areas that would be likely to undergo a section 7 consultation include nearshore development, dredging, aquaculture operations, fisheries management, alternative energy projects and cable laying, and others (NMFS, 2013a).

In general, the benefits of designating the covered areas of each conservation plan is, that once critical habitat is

designated, section 7(a)(2) of the ESA provides that Federal agencies must ensure any actions they authorize, fund, or carry out are not likely to result in the destruction or adverse modification of designated critical habitat. An additional benefit of inclusion is that a systematic analysis and delineation of important rockfish habitat has not been previously conducted in the Puget Sound. Thus, for non-Federal activities occurring in the covered areas, designation may raise public awareness of habitats important to rockfish and encourage additional conservation measures and voluntary conservation agreements within the section 10 program. The benefits of designating areas covered by these two conservation plans may be less than what they would be on areas not covered by conservation plans because of the fact that the permit holder has put conservation measures in place through provisions of the plan. These measures provide protection when actions are allowed that could affect critical habitat (geoduck harvest and management by WDNR, and fisheries by WDFW). However, these conservation plans are unlike other land-based conservation plans in the Northwest (such as forestry conservation plans) because the WDNR and WDFW plans cover a small subset of potential actions that could be affected by future Federal actions in Puget Sound (i.e., Federal permits for nearshore development, fisheries that cause new derelict fishing nets, tidal energy or cable-laying, and others).

The benefits of excluding these covered areas from designation include the potential furtherance of our ongoing relationship with these entities; in particular, the potential that the exclusion of these areas may provide an incentive for other entities to seek conservation plans, and the general promotion of the section 10 conservation program. Conservation agreements on non-federally controlled areas of Puget Sound provide important benefits to listed species. Section 7 applies to only Federal agency actions. Its requirements protect listed fishes only when a Federal permit or funding is involved; thus, its reach is limited. Neither WDNR nor WDFW identified any potential impacts to our relationship or implementation of each conservation plan.

For each rockfish DPS we considered the areas each conservation plan covered and the types of Federal activities in those areas that would likely undergo section 7 consultation. We also considered the degree to which the WDNR and WDFW believe the designation would affect the ongoing relationship that is essential to the continued successful implementation of the conservation plan and the extent to which exclusion provides an incentive to other entities.

Based on our consideration, and given the following factors, we concluded that the benefits of excluding the areas covered by each conservation plan do not outweigh the benefits of designation. We considered the following factors in reaching this conclusion: (1) The WDNR and WDFW did not identify any impacts to our ongoing relationship; (2) the WDNR and WDFW did not identify any impacts to their implementation of the existing conservation plans; and (3) the WDNR and WDFW conservation plans only cover a subset of activities that could affect rockfish critical habitat conducted by other entities such as private landowners, municipalities, and Federal agencies in the covered areas. Thus, designation would not impact our relationship with WDNR and WDFW nor harm the implementation of their conservation plans. In general, designation would benefit rockfish conservation by enabling section 7 consultations for activities not covered by each conservation plan to ensure adverse modification is avoided by Federal activities.

Balancing Impacts to National Security

Based on information provided by the three branches of the military on impacts to national security of potential critical habitat designations described above, we consulted with the DOD to better understand the potential impact of designating critical habitat at these sites. The DOD confirmed that all of the Areas are used by the Navy, and confirmed the potential for critical habitat designation to impact national security by adversely affect their ability to conduct operations, testing, training, and other essential military activities. The Navy letter identified several aspects of potential impacts from critical habitat designation that include the possible prevention, restriction, or delay of training or testing exercises and delayed response time for ship deployments. We had several conversations with the Navy subsequent to their letter to further understand their uses of the Areas, concerns identified in their response letter, and any related habitat protections derived by Navy policies and initiatives. We also had further discussions with the Navy regarding the extent of the proposed designation associated with these sites. The Navy agreed to refine the delineation of offshore areas in Puget Sound where the Navy has established security zones. Similar to the salmonid critical habitat designation (NMFS, 2005) the Navy agreed that the military zone could be delineated in terms of the mean lower low tide without raising national security concerns at all but one site at Dabob Bay. Because many of the activities affecting rockfish in the nearshore zone are land-based, this refinement allowed us to retain most of the conservation benefit of designating nearshore areas as critical habitat while still retaining the benefit to national security of excluding offshore military areas (NMFS, 2013c).

We balanced the conservation benefits of designation to rockfish against the benefits of exclusion for Naval Areas as ultimately defined by the Navy in the Puget Sound/Georgia Basin. The Navy requested that 14 areas be excluded from critical habitat designation, including four in the San Juan/Strait of Juan de Fuca Basin, three in Hood Canal, two in the Whidbey Basin, four in the Main Basin, and one in South Puget Sound based on the impacts to national security. The factors we consider relevant to assessing the impact to national security and the benefits of exclusion include: (1) The percent of the military area that would be designated; and (2) the importance of the area activity to national security and likelihood an activity would need to be changed to avoid adverse modification.

The factors we consider relevant to assessing the benefits of designation to rockfish conservation include: (1) The percent of the nearshore and deepwater critical habitat that would be designated in that basin; (2) uniqueness and conservation role of the habitat in particular DOD area; (3) the likelihood that Navy activities would destroy or adversely modify critical habitat; and (4) the likelihood habitat would be adversely modified by other Federal or non-Federal activities, considering Navy protections (this factor considers the type and frequency of Navy actions that occur in each site and their potential effect on rockfish habitat features, which informs the benefit to conservation that would occur by a section 7 consultation that considers rockfish critical habitat).

All but the quantitative factors were given a qualitative rating of high, medium, or low (NMFS, 2013c). Based on our analysis, we recommend excluding 13 of the 14 areas requested by the Navy. We do not propose to exclude Operating Area R–6713 (Navy 3). This area is a polygon off the western side of Naval Air Station Whidbey Island (appearing on NOAA Chart 18400) which is used in conjunction with the restricted area under 33 CFR

334.1180 for surface vessel training activities. The total proposed excluded areas total approximately 33.1 nearshore sq mi and 35.6 deepwater sq mi of potential critical habitat.

Critical habitat is proposed in a narrow nearshore zone (from the extreme high tide datum down to mean lower low water (MLLW)) within Navy security zone areas that are not subject to an approved INRMP or associated with Department of Defense easements or rights-of-way with the exception of NAS Whidbey Island, Crescent Harbor and a small area of the Hood Canal and Dabob Bay Naval Non-Explosive Torpedo Testing Area. The following Department of Defense areas are proposed for exclusion:

(1) Small Arms Danger Zone off Western Side of Naval Air Station Whidbey Island and additional Accident Potential Zone restricted areas—In the waters located in the San Juan De Fuca Strait beginning on the beach of NAS Whidbey Island, Oak Harbor, Washington at latitude 48°19′20.00″ N, longitude 122°42′6.92″ W; thence southerly, along the mean high water mark, to latitude 48°17′41″ N, longitude 122°43′35″ W; thence southwesterly to latitude 48°17′23″ N, longitude 122°45′14″ W; thence northerly to latitude 48°20′00″ N, longitude 122°44′00″ W; thence easterly, landward to the point of origin. Accident Potential Zone Area No. 1 is bounded by a line commencing at latitude 48°20′57″ N, longitude 122°40′39″ W; thence to latitude 48°20′40″ N, longitude 122°42′59″ W; thence to latitude 48°21′19″ N, longitude 122°43′02″ W; thence to latitude 48°21′13″ N, longitude 122°40′26″ W; and thence along the shore line to the point of beginning. Accident Potential Zone Area No. 2 is bounded by a line commencing at latitude 48°21′53″ N, longitude 122°40′00″ W; thence to latitude 48°23′12″ N, longitude 122°41′17″ W; thence to latitude 48°23′29″ N, longitude 122°40′22″ W; thence to latitude 48°22′21″ N, longitude 122°39′50″ W; and thence along the shore line to the point of beginning.

(2) Strait of Juan de Fuca Naval Air-to-Surface Weapon Range Restricted Area—A circular area immediately west of Smith Island with a radius of 1.25 nautical mi having its center at latitude 48°19′11″ N and longitude 122°54′12″ W.

(3) Hood Canal and Dabob Bay Naval Non-Explosive Torpedo Testing Area—All waters of Hood Canal between latitude 47°46′00″ N and latitude 47°42′00″ W, exclusive of navigation lanes one-fourth nautical mile wide along the west shore and along the east shore south from the town of Bangor (latitude 47°43′28″ N). All waters of Dabob Bay beginning at latitude 47°39′27″ N, longitude 122°52′22″ W; thence northeasterly to latitude 47°40′19″ N, longitude 122°50′10″ W; thence northeasterly to a point on the mean high water line at Takutsko Pt.; thence northerly along the mean high water line to latitude 47°48′00″ N; thence west on latitude 47°48′00″ N to the mean high water line on the Bolton Peninsula; thence southwesterly along the mean high water line of the Bolton Peninsula to a point on longitude 122°51′06″ N; thence south on longitude 122°51′06″ W to the mean high water line at Whitney Pt.; thence along the mean water line to a point on longitude 122°51′15″ W; thence southwesterly to the point of beginning. The nearshore from Tsuktsko Pt. 47°41′30.0″ sec N latitude, 122°49′48″ W longitude to the north at 47°50′0.0″ sec N latitude, 122°47′30″ W longitude.

(4) Admiralty Inlet Naval Restricted Area — This area begins at Point Wilson Light thence southwesterly along the coast line to latitude 48°07′ N; thence northwesterly to a point at latitude 48°15′00″ N longitude 123°00′00″ W; thence due east to Whidbey Island; thence southerly along the coast line to latitude 48°12′30″ N; thence southerly to the point of beginning.

(5) Port Gardner, Everett Naval Base, Naval Restricted Area—The waters of Port Gardner and East Waterway surrounding Naval Station Everett begin at a point near the northwest corner of Naval Station Everett at latitude 47°59′40″ N, longitude 122°13′23.5″ W and thence to latitude 47°59′40″ N, longitude 122°13′30″ W; thence to latitude 47°59′20″ N, longitude 122°13′33″ W; thence to latitude 47°59′13″ N, longitude 122°13′38″ W; thence to latitude 47°59′05.5″ N, longitude 122°13′48.5″ W; thence to latitude 47°58′51″ N, longitude 122°14′04″ W; thence to latitude 47°58′45.5″ N, longitude 122°13′53″ W; thence to latitude 47°58′45.5″ N, longitude 122°13′44″ W; thence to latitude 47°58′48″ N, longitude 122°13′40″ W; thence to latitude 47°58′59″ N, longitude 122°13′30″ W; thence to latitude 47°59′14″ N, longitude 122°13′18″ W (Point 11); thence to latitude 47°59′13″ N, longitude 122°13′12″ W; thence to latitude 47°59′20″ N, longitude 122°13′08″ W; thence to latitude 47°59′20″ N, longitude 122°13′02.5″ W, a point upon the Naval Station's shore in the northeast corner of East Waterway.

(6) Hood Canal, Bangor Naval Restricted Areas—The Naval restricted area described in 33 CFR 334.1220 has two areas. Area No. 1 is bounded by a line commencing on the east shore of Hood Canal in relation to the property boundary and area No. 2 compasses waters of Hood Canal with a 1,000 yard radius diameter from a central point. Area No. 1 is bounded by a line commencing on the east shore of Hood Canal at latitude 47°46′18″ N longitude 122°42′18″ W; thence to latitude 47°46′32″ N, longitude 122°42′20″ W; thence to latitude 47°46′38″ N, longitude 122°42′52″ W; thence to latitude 47°44′15″ N, longitude 122°44′50″ W; thence to latitude 47°43′53″ N, longitude 122°44′58″ W; thence to latitude 47°43′17″ N, longitude 122°44′49″ W. Area 2 is waters of Hood Canal within a circle of 1,000 yards diameter centered on a point located at latitude 47°46′26″ N, longitude 122°42′49″ W.

(7) Port Orchard Naval Restricted Area—The Naval restricted area described in 33 CFR 334.1230 is shoreward of a line beginning at a point on the west shoreline of Port Orchard bearing 90° from stack (at latitude 47°42′01″ N, longitude 122°36′54″ W); thence 90°, approximately 190 yards, to a point 350 yards from stack; thence 165°, 6,000 yards, to a point bearing 179°, 1,280 yards, from Battle Point Light; thence westerly to the shoreline at latitude 47°39′08″ N (approximate location of the Brownsville Pier).

(8) Sinclair Inlet Naval Restricted Areas—The Naval restricted area described in 33 CFR 334.1240 to include: Area No. 1—All the waters of Sinclair Inlet westerly of a line drawn from the Bremerton Ferry Landing at latitude 47°33′48″ N, longitude 122°37′23″ W on the north shore of Sinclair Inlet and latitude 47°32′52″ N, longitude 122°36′58″ W on the south shore of Sinclair Inlet; and Area No. 2—That area of Sinclair Inlet to the north and west of an area bounded by a line commencing at latitude 47°33′43″ N, longitude 122°37′31″ W thence south to latitude 47°33′39″ N, longitude 122°37′27″ W thence southwest to latitude 47°33′23″ N, longitude 122°37′45″ W thence southwest to latitude 47°33′19″ N, longitude 122°38′12″ W thence southwest to latitude 47°33′10″ N, longitude 122°38′19″ W thence southwest to latitude 47°33′07″ N, longitude 122°38′29″ W thence west to latitude 47°33′07″ N, longitude 122°38′58″ W thence southwest to latitude 47°33′04″ N, longitude 122°39′07″ W thence west to the north shore of Sinclair Inlet at latitude 47°33′04.11″ N, longitude 122°39′41.92″ W.

(9) Dabob Bay, Whitney Point Naval Restricted Area—The Naval restricted area described in 33 CFR 334.1260 beginning at the high water line along the westerly shore of Dabob Bay at the Naval Control Building located at latitude 47°45′36″ N and longitude 122°51′00″ W. The western shoreline boundary is 100 yards north and 100 yards south from that point. From the north and south points, go eastward 2,000 yards into Dabob Bay. The eastern boundary is a virtual vertical line between the two points (200 yards in length).

(10) Carr Inlet, Naval Restricted Area—The Naval restricted area described in 33 CFR 334.1250 to include: The area in the Waters of Carr Inlet bounded on the southeast by a line running from Gibson Point on Fox Island to Hyde Point on McNeil Island, on the northwest by a line running from Green Point (at latitude 47°16′54″ N, longitude 122°41′33″ W) to Penrose Point; plus that portion of Pitt Passage extending from Carr Inlet to Pitt Island, and that portion of Hale Passage extending from Carr Inlet southeasterly to a line drawn perpendicular to the channel 500 yards northwesterly of the Fox Island Bridge.

(11) Port Townsend, Indian Island, Walan Point Naval Restricted Area—The Naval restricted area described in 33 CFR 334.1270 to include: The waters of Port Townsend Bay bounded by a line commencing on the north shore of Walan Point at latitude 48°04′42″ N, longitude 122°44′30″ W; thence to latitude 48°04′50″ N, longitude 122°44′38″ W; thence to latitude 48°04′52″ N, longitude 122°44′57″ West; thence to latitude 48°04′44″ N, longitude 122°45′12″ W; thence to latitude 48°04′26″ N, longitude 122°45′21″ W; thence to latitude 48°04′10″ N, longitude 122°45′15″ W; thence to latitude 48°04′07″ N, longitude 122°44′49″ W; thence to a point on the Walan Point shoreline at latitude 48°04′16″ N, longitude 122°44′37″ W.

(12) NAS Whidbey Island, Crescent Harbor—The Navy did not provide a textual description of this Restricted Area.

(13) Puget Sound, Manchester Fuel Depot, Naval Restricted Areas—The waters of Puget

Sound surrounding the Manchester Fuel Depot bounded by a line commencing along the northern shoreline of the Manchester Fuel Depot at latitude 47°33′55″ N, longitude 122°31′55″ W; thence to latitude 47°33′37″ North, longitude 122°31′50″ W; thence to latitude 47°33′32″ N, longitude 122°32′06″ W; thence to latitude 47°33′45.9″ North, longitude 122°32′16.04″ W, a point in Puget Sound on the southern shoreline of the Manchester Fuel Depot then back to the original point.

Exclusion Will Not Result in Extinction of the Species

Section 4(b)(2) of the ESA limits our discretion to exclude areas from designation if exclusion will result in extinction of the species. We do not propose to exclude any habitat areas based on economic impacts or 10(a)(1)(B) permits (conservation plans). We do propose to exclude 55.1 lineal mi (88.7 km) of marine habitat adjacent to Indian lands and a total of approximately 68.7 sq mi of marine habitat area (33.1 sq mi of nearshore, 35.6 sq mi of deepwater) controlled by the Navy as described above. We conclude that excluding Indian lands—and thereby furthering the federal government's policy of promoting respect for tribal sovereignty and self-governance—in addition to several areas controlled by the Navy, will not result in extinction of listed rockfish. Listed rockfish habitat on Indian lands represents a small proportion of total area occupied by these DPSs, and the Tribes are actively engaged in fisheries management, habitat management and Puget Sound ecosystem recovery programs that benefit listed rockfish.

Listed rockfish habitat within areas controlled by the Navy represents approximately 5 percent of the nearshore area and approximately 5 percent of the deepwater area we determined to have essential features. In addition to the small size of these proposed exclusions, the Navy actively seeks to protect actions that would impact their mission and these protections provide ancillary protections to rockfish habitat by restricting actions that may harm the Navy mission and rockfish in the respective area (NMFS, 2013c). Thus the benefit of designating these areas as critical habitat would be reduced.

For the following reasons, we conclude that the exclusions described above, in combination, will not result in the extinction of the yelloweye rockfish, canary rockfish or bocaccio DPSs: (1) The proposed Indian land exclusions involve nearshore habitats that are already managed by the tribes for conservation; (2) The proposed Navy exclusions involve nearshore and deepwater habitats that are already afforded some protections by the Navy, and; (3) The extent of Indian lands exclusions and Navy exclusions are spread amongst each of the five biogeographic basins of Puget Sound, and cumulatively total a fraction of the overall habitats that have essential features for listed rockfish.

Proposed Critical Habitat Designation

In total we propose to designate approximately 610.0 sq mi of nearshore habitat for canary rockfish and bocaccio, and 574.8 sq mi of deepwater habitat for yelloweye rockfish, canary rockfish and bocaccio within the geographical area of the DPSs occupied by each species (Figures 2 and 3). Aside from some deepwater areas proposed as critical habitat for rockfish in Hood Canal, all other proposed critical habitat overlaps with designated critical habitat for other species. Other co-occurring ESA-listed species with designated critical habitat that, collectively, almost completely overlap with proposed rockfish critical habitat include Pacific salmon (70 FR 52630, September 2, 2005), North American green sturgeon (74 FR 52300, October 9, 2009), Southern Resident Killer Whales (71 FR 69054, November 29, 2006), and bull trout (75 FR 63898, October 18, 2010). The areas proposed for designation are all within the geographical area occupied by the species and contain physical and biological features essential to the conservation of the species and that may require special management considerations or protection. No unoccupied areas were identified that are considered essential for the conservation of the species. All of the areas proposed for designation have high conservation value (NMFS, 2013a). As a result of the balancing process for some military areas and tribal lands described above, we are proposing to exclude from the designation small areas listed in Table 2 (see Figures 1 and 2 for locations of tribal lands). As a result of the balancing process for economic impacts described above, we conclude that the economic benefit of excluding any of these particular areas does not outweigh the conservation benefit of designation. Therefore none of the areas were eligible for exclusion based on economic impacts. As a result of the balancing process for areas covered by Conservation Plans we concluded that the benefits of excluding the areas covered by each conservation plan do not outweigh the benefits of designation (NMFS, 2013c). As a result of the balancing process for tribal areas we concluded that the benefits of excluding these areas outweigh the benefits of designation (NMFS, 2013c).

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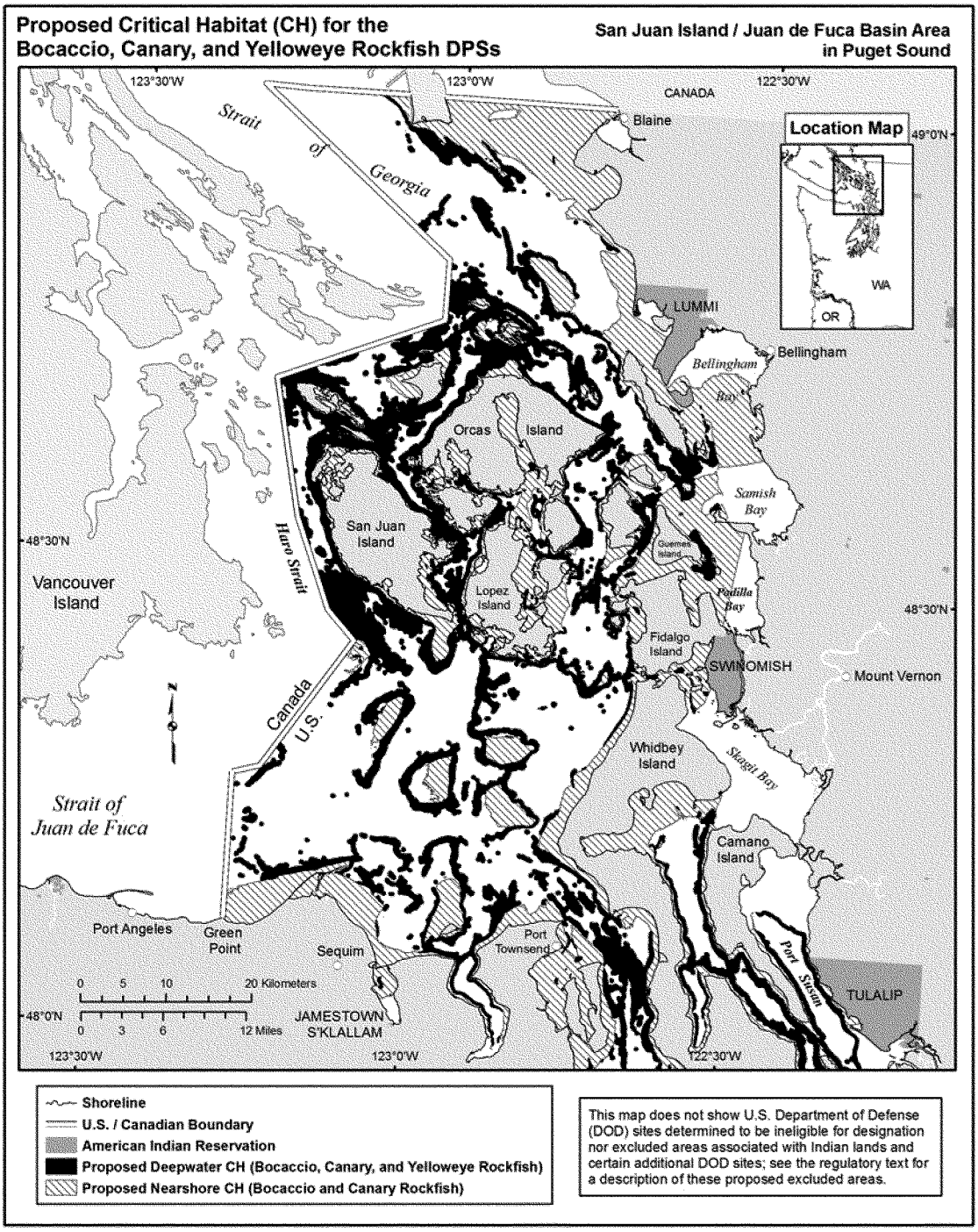


Figure 2. Proposed Critical Habitat for ESA-listed rockfish in the northern portion of the Puget Sound area.

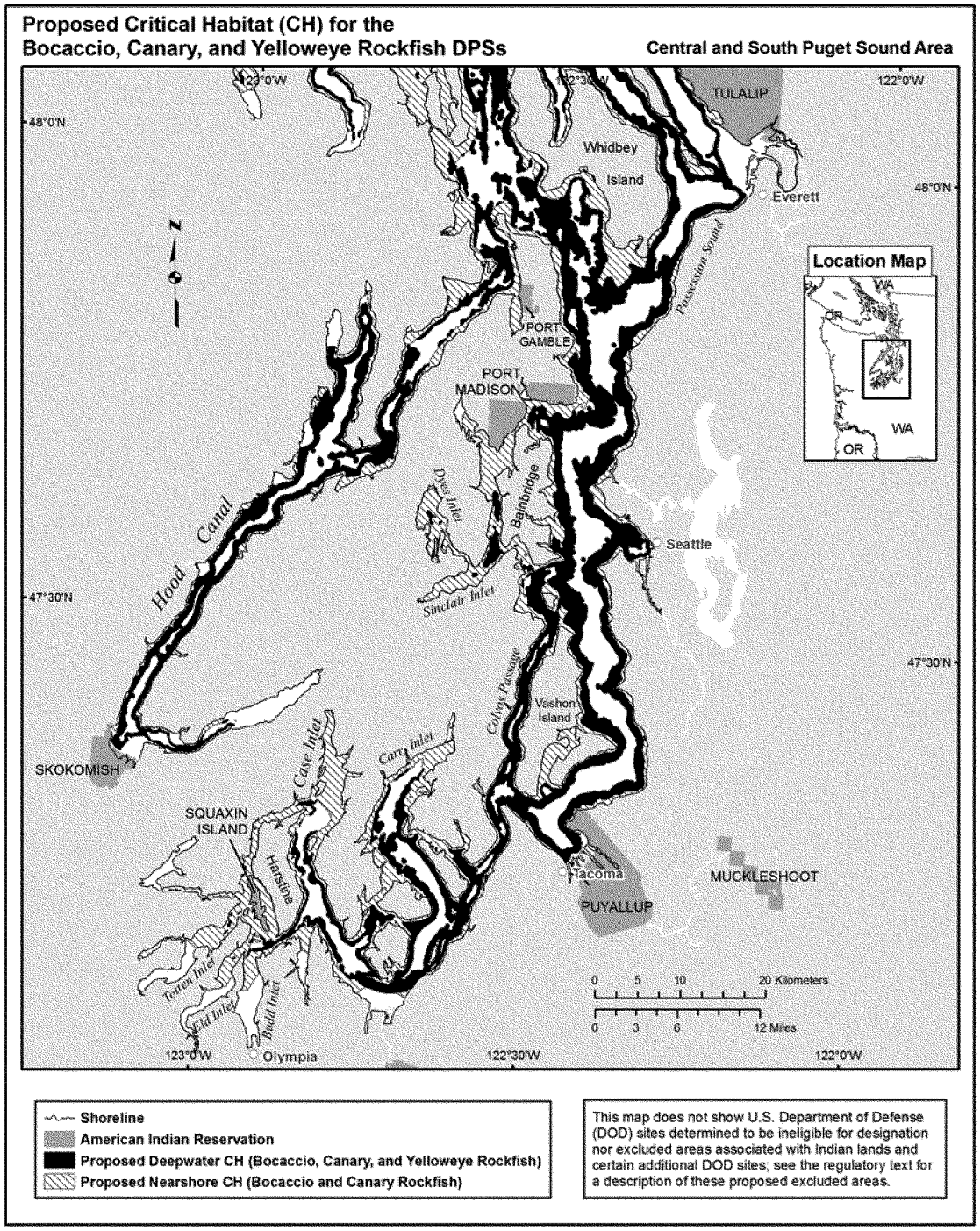


Figure 3. Proposed Critical Habitat for ESA-listed rockfish in the sorthern portion of the Puget Sound area.

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On May 1, 2012, NMFS and the USFWS revised the critical habitat implementing regulations to eliminate the requirement to publish textual

descriptions of proposed (NMFS only) and final (NMFS and USFWS) critical habitat boundaries in the Regulation Promulgation section of the **Federal Register** for codification and printing in the CFR (77 FR 25611, May 1, 2012). The regulations instead provide that the map(s), as clarified or refined by any textual language within the preamble of the proposed or final rule, constitutes the definition of the boundaries of a critical habitat (50 CFR 17.94(b), 226.101, 424.12(c), 424.16(b) and (c)(1)(ii), and 424.18(a)). The revised regulations provide that the boundaries of critical habitat as mapped or otherwise described in the Regulation Promulgation section of a rulemaking published in the **Federal Register** will be the official delineation of the designation (50 CFR 424.12). In this proposed designation we include some latitude-longitude coordinates (to delineate certain Department of Defense controlled boundaries) to provide clarity on the location of DOD areas proposed for exclusion but also rely on the maps to depict critical habitat for yelloweye rockfish, canary rockfish and bocaccio. The Geographical Information System data that the maps have been generated from are included in the administrative record located on our Web site.

Section 3(5)(A)(ii) of the ESA authorizes the designation of ''specific areas outside the geographical area occupied at the time [the species] is listed'' if these areas are essential for the conservation of the species. Regulations at 50 CFR 424.12(e) emphasize that the agency ''shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'' We conducted a review of the documented occurrences of each listed rockfish in the five biogeographic basins (NMFS, 2013a). We found that each of the basins is currently occupied by yelloweye rockfish, canary rockfish, and bocaccio. We have not identified any unoccupied areas as candidates for critical habitat designation.

TABLE 2—HABITAT AREAS WITHIN THE GEOGRAPHICAL RANGE OF FOR YELLOWEYE ROCKFISH, CANARY ROCKFISH AND BOCACCIO PROPOSED FOR EXCLUSION FROM CRITICAL HABITAT

Specific area	Conservation value	Total annualized estimated economic impacts (7%)	Economic exclusions	DOD areas proposed exclusion from critical habitat	Indian lands exclusions proposed by ''particular areas''	Exclusions for conservation plan permit holders proposed
San Juan/Straits of Juan de Fuca.	High	$32,100	No	Yes	Yes	No.
Whidbey Basin	High	30,100	No	Yes	Yes	No.
Main Basin	High	29,000	No	Yes	Yes	No.
Hood Canal	High	10,200	No	Yes	Yes	No.
South Puget Sound	High	21,200	No	Yes	Yes	No.
Totals	na	123,000	na	35.6 sq mi deepwater 33.1 sq mi nearshore	55.1 lineal mi	na.

Effects of Critical Habitat Designation

Section 7(a)(2) of the ESA requires Federal agencies to ensure that any action authorized, funded, or carried out by the agency (agency action) does not jeopardize the continued existence of any threatened or endangered species or destroy or adversely modify designated critical habitat. Federal agencies are also required to confer with us regarding any actions likely to jeopardize a species proposed for listing under the ESA, or likely to destroy or adversely modify proposed critical habitat, pursuant to section 7(a)(4). A conference involves informal discussions in which we may recommend conservation measures to minimize or avoid adverse effects. The discussions and conservation recommendations are to be documented in a conference report provided to the Federal agency. If requested by the Federal agency, a formal conference report may be issued (including a biological opinion prepared according to 50 CFR 402.14). A formal conference report may be adopted as the biological opinion when the species is listed or critical habitat designated, if no significant new information or changes to the action alter the content of the opinion.

When a species is listed or critical habitat is designated, Federal agencies must consult with NMFS on any agency actions to be conducted in an area where the species is present or that may affect the species or its critical habitat. During the consultation, we would evaluate the agency action to determine whether the action may adversely affect listed species or critical habitat and issue our findings in a biological opinion or concurrence letter. If we conclude in the biological opinion that the agency action would likely result in the destruction or adverse modification of critical habitat, we would also recommend any reasonable and prudent alternatives to the action. Reasonable and prudent alternatives (defined in 50 CFR 402.02) are alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that would avoid the destruction or adverse modification of critical habitat.

Regulations at 50 CFR 402.16 require Federal agencies that have retained discretionary involvement or control over an action, or where such discretionary involvement or control is authorized by law, to reinitiate consultation on previously reviewed actions in instances where: (1) Critical habitat is subsequently designated; or (2) new information or changes to the action may result in effects to critical habitat not previously considered in the biological opinion. Consequently, some Federal agencies may request reinitiation of a consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat or adversely modify or destroy proposed critical habitat.

Activities subject to the ESA section 7 consultation process include activities on Federal lands and activities on private or state lands requiring a permit from a Federal agency (e.g., a Clean Water Act, Section 404 dredge or fill permit from U.S. Army Corps of Engineers) or some other Federal action,

including funding (e.g., Federal Highway Administration funding for transportation projects). ESA section 7 consultation would not be required for Federal actions that do not affect listed species or critical habitat and for actions on non-Federal and private lands that are not Federally funded, authorized, or carried out.

Activities Affected by Critical Habitat Designation

ESA section 4(b)(8) requires in any proposed or final regulation to designate critical habitat an evaluation and brief description of those activities (whether public or private) that may adversely modify such habitat or that may be affected by such designation. A wide variety of activities may affect the proposed critical habitat and may be subject to the ESA section 7 consultation process when carried out, funded, or authorized by a Federal agency. These include water and land management actions of Federal agencies (e.g., the Department of Defense, U.S. Army Corps of Engineers (USACE), the Department of Defense, the Federal Energy Regulatory Commission, and the Environmental Protection Agency and related or similar federally regulated projects). Other actions of concern include dredging and filling, and bank stabilization activities authorized or conducted by the USACE, and approval of water quality standards and pesticide labeling and use restrictions administered by the EPA.

Private or non-Federal entities may also be affected by these proposed critical habitat designations if a Federal permit is required, if Federal funding is received or the entity is involved in or receives benefits from a Federal project. For example, private entities may need Federal permits to build or repair a bulkhead, or install an artificial reef. These activities will need to be evaluated with respect to their potential to destroy or adversely modify critical habitat for yelloweye rockfish, canary rockfish, or bocaccio of the Puget Sound/Georgia Basin.

Questions regarding whether specific activities will constitute destruction or adverse modification of critical habitat should be directed to NMFS (see **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT**).

Public Comments Solicited

We solicit comments or suggestions from the public, other concerned governments and agencies, the scientific community, industry, non-governmental organizations, or any other interested party concerning the proposed designations and exclusions as well as the documents supporting this proposed rulemaking. We are particularly interested in comments and information in the following areas: (1) Information describing the abundance, distribution, and habitat use of yelloweye rockfish, canary rockfish, and bocaccio of the Puget Sound/Georgia Basin, including any unoccupied areas and habitats used by larval rockfish; (2) information on the identification, location, and the quality of physical or biological features that may be essential to the conservation of the species; (3) information regarding potential benefits of designating any particular area as critical habitat, including information on the types of Federal actions that may affect the area's physical and biological features; (4) information regarding potential impacts of designating any particular area, including the types of Federal actions that may trigger an ESA section 7 consultation and the possible modifications that may be required of those activities; (5) current or planned activities in the areas proposed as critical habitat and costs of potential modifications to those activities due to critical habitat designation; and (6) any foreseeable economic, national security, or other relevant impact resulting from the proposed designations.

You may submit your comments and materials concerning this proposal by any one of several methods (see **ADDRESSES**). Copies of the proposed rule and supporting documentation can be found on the NMFS Web site *http://www.nwr.noaa.gov.* In preparing the final rule, we will consider all comments pertaining to these designations received during the comment period; comments must be received by November 4, 2013. Accordingly, the final decision may differ from this proposed rule.

Public Hearings

Agency regulations at 50 CFR 424.16(c)(3) require the Secretary to promptly hold at least one public hearing if any person requests one within 45 days of publication of a proposed rule to designate critical habitat. Public hearings provide the opportunity for interested individuals and parties to give comments, exchange information and opinions, and engage in a constructive dialogue concerning this proposed rule. We encourage the public's involvement in such ESA matters. Requests for a public hearing(s) must be made in writing (see **ADDRESSES**) by September 20, 2013.

Information Quality Act and Peer Review

The data and analyses supporting this proposed action have undergone a pre-dissemination review and have been determined to be in compliance with applicable information quality guidelines implementing the Information Quality Act (IQA) (Section 515 of Pub. L. 106–554). In December 2004, OMB issued a Final Information Quality Bulletin for Peer Review pursuant to the IQA. The Bulletin was published in the **Federal Register** on January 14, 2005 (70 FR 2664). The Bulletin established minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation with regard to certain types of information disseminated by the Federal Government. The peer review requirements of the OMB Bulletin apply to influential or highly influential scientific information disseminated on or after June 16, 2005. Two documents supporting these critical habitat proposals are considered influential scientific information and subject to peer review. These documents are the draft Biological Report (NMFS, 2013a) and draft Economic Analysis (NMFS, 2013b). We distributed the draft Biological Report for pre-dissemination peer review pursuant to Section 515 of Public Law 106–554, and will distribute the Economic Analysis for peer review. The peer review report is available on our Web site at *http://www.nwr.noaa.gov.* We will distribute the economic report for independent peer review and will address comments received in developing the final drafts of the two reports. Both documents are available on our Web site at *http://www.nwr.noaa.gov,* on the Federal eRulemaking Web site at *http://www.regulations.gov, www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2013-0105,* or upon request (see **ADDRESSES**). We will announce the availability of comments received from peer reviewers (for the economic report) and the public and make them available via our Web site as soon as practicable during the comment period and in advance of a final rule.

Classification

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996), whenever an agency publishes a notice of rulemaking for any proposed or final rule, it must

prepare and make available for public comment a regulatory flexibility analysis describing the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). We have prepared an initial regulatory flexibility analysis, which is part of the draft economic analysis (NMFS, 2013b). This document is available upon request (see **ADDRESSES**), via our Web site at *http://nwr.noaa.gov,* or via the Federal eRulemaking Web site at *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2013-0105.* The results of the initial regulatory flexibility analysis are summarized below.

The impacts to small businesses were assessed for the following broad categories of activities: Utilities, nearshore work, transportation, water quality and other activities. Small entities were defined by the Small Business Administration size standards for each activity type. We did not forecast any costs to small entities related to utilities projects because the only consultation associated with utilities are pre-consultation/technical assistance and programmatic consultations, which do not include any cost to third parties; therefore, we do not expect any impacts to small entities related to utilities.

We estimated the annualized costs associated with ESA section 7 consultations incurred per small business under a scenario intended to provide a measure of uncertainty regarding the number of small entities that may be affected by the designations for each project category (NMFS, 2013c). It is uncertain whether small entities will be project proponents for these types of consultations, so the analysis conservatively assumes that all consultations will be undertaken by small entities, and that all such consultation will be formal. Under these assumptions, the costs to entities engaged in nearshore work are an estimated $27,000 annually, or $1,900 per entity. This cost represents less that 0.1 percent of annual revenues in this sector. The costs to entities engaged in transportation projects are an estimated $46,000 annually, or $7,700 for entities in this sector. This cost represents 0.29 percent of annual revenues. The costs to entities engaged in water quality projects is an estimated $23,000 annually, or $9,100 per entity. This cost represents 1.3 percent of annual revenues for entities in this sector. The costs for other entities, including fishing would be approximately $18,000 annually, or $2,600 per entity. This cost represents 1.1 percent of annual revenues for entities in this sector.

In accordance with the requirements of the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act of 1996) this analysis considered various alternatives to the critical habitat designations for these DPSs. The alternative of not designating critical habitat for these DPSs was considered and rejected because such an approach does not meet the legal requirements of the ESA.

Executive Order 12866

At the guidance of OMB and in compliance with Executive Order 12866, ''Regulatory Planning and Review,'' Federal agencies measure changes in economic efficiency in order to understand how society, as a whole, will be affected by a regulatory action. Our draft analysis of economic impacts can be found in NMFS (2013b), and this proposed rule has been determined to be not significant under Executive Order 12866.

Executive Order 13211

On May 18, 2001, the President issued an executive order on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking any action that promulgates or is expected to lead to the promulgation of a final rule or regulation that (1) is a significant regulatory action under Executive Order 12866 and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy.

We have considered the potential impacts of this action on the supply, distribution, or use of energy and find the designation of critical habitat will not have impacts that exceed the thresholds identified above (NMFS, 2013b).

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act, NMFS makes the following findings:

(a) This proposed rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute or regulation that would impose an enforceable duty upon state, local, tribal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to state, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding'' and the state, local, or tribal governments ''lack authority'' to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.)

''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.'' The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the ESA, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities which receive Federal funding, assistance, permits or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above to state governments.

(b) Due to the existing protection afforded to the proposed critical habitat from existing critical habitat for salmon (70 FR 52630, September 2, 2005), Southern DPS of green sturgeon (74 FR 52300, October 9, 2009), bull trout (70 FR 56212, September 26, 2005), and the

southern resident killer whale (71 FR 69054, November 29, 2006), we do not anticipate that this proposed rule will significantly or uniquely affect small governments. As such, a Small Government Agency Plan is not required

Takings

Under Executive Order 12630, Federal agencies must consider the effects of their actions on constitutionally protected private property rights and avoid unnecessary takings of property. A taking of property includes actions that result in physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use. In accordance with Executive Order 12630, this proposed rule does not have significant takings implications. A takings implication assessment is not required. The designation of critical habitat affects only Federal agency actions. We do not expect the proposed critical habitat designations will impose additional burdens on land use or affect property values. Additionally, the proposed critical habitat designations do not preclude the development of Conservation Plans and issuance of incidental take permits for non-Federal actions. Owners of areas included within the proposed critical habitat designations would continue to have the opportunity to use their property in ways consistent with the survival of listed rockfish.

Federalism

In accordance with Executive Order 13132, we determined that this proposed rule does not have significant Federalism effects and that a Federalism assessment is not required. In keeping with Department of Commerce policies, we request information from, and will coordinate development of these proposed critical habitat designations with, appropriate state resource agencies in Washington. The proposed designations may have some benefit to state and local resource agencies in that the areas essential to the conservation of the species are more clearly defined, and the essential features of the habitat necessary for the survival of the subject DPSs are specifically identified. It may also assist local governments in long-range planning (rather than waiting for case-by-case ESA section 7 consultations to occur).

Government-to-Government Relationship With Tribes

Pursuant to Executive Order 13175 and Secretarial Order 3206, we contacted the affected Indian Tribes when considering the designation of critical habitat in an area that may impact tribal trust resources, tribally owned fee lands or the exercise of tribal rights. The responding tribes expressed concern about the intrusion into tribal sovereignty that critical habitat designation represents. These concerns are consistent with previous responses from tribes when we developed critical habitat designations for salmon and steelhead in 2005 (70 FR 52630, September 2, 2005). The Secretarial Order defines Indian lands as ''any lands title to which is either: (1) Held in trust by the United States for the benefit of any Indian tribe or (2) held by an Indian Tribe or individual subject to restrictions by the United States against alienation.'' Our conversations with the tribes indicate that they view the designation of Indian lands as an unwanted intrusion into tribal self-governance, compromising the government-to-government relationship that is essential to achieving our mutual goal of conserving threatened and endangered salmonids.

For the general reasons described in the Impacts to Tribal Sovereignty and Self-Governance section above, the draft ESA 4(b)(2) analysis has led us to propose the exclusion of all Indian lands in our proposed designations for yelloweye rockfish, canary rockfish, and bocaccio. Consistent with other proposed exclusions, any exclusion in the final rule will be made only after consideration of all comments received.

Civil Justice Reform

The Department of Commerce has determined that this proposed rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of Executive Order 12988. We are proposing to designate critical habitat in accordance with the provisions of the ESA. This proposed rule uses standard property descriptions and identifies the essential features within the designated areas to assist the public in understanding the habitat needs of yelloweye rockfish, canary rockfish, and bocaccio of the Puget Sound/Georgia Basin.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This proposed rule does not contain new or revised information collection requirements for which OMB approval is required under the Paperwork Reduction Act (PRA). This proposed rule will not impose recordkeeping or reporting requirements on state or local governments, individuals, businesses, or organizations. Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

National Environmental Policy Act of 1969 (NEPA)

We have determined that an environmental analysis as provided for under NEPA is not required for critical habitat designations made pursuant to the ESA. See *Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied, 116 S. Ct. 698 (1996).

Coastal Zone Management Act

Section 307(c)(1) of the Federal Coastal Zone Management Act of 1972 (16 U.S.C. 1456) requires that all Federal activities that affect the land or water use or natural resource of the coastal zone be consistent with approved state coastal zone management programs to the maximum extent practicable. We have determined that these proposed designations of critical habitat are consistent to the maximum extent practicable with the enforceable policies of approved Coastal Zone Management Programs of Washington. The determination will be submitted for review by the responsible state agency.

References Cited

A complete list of all references cited in this proposed rulemaking can be found on our Web site at *http://www.nwr.noaa.gov/* and is available upon request from the NMFS office in Seattle, Washington (see **ADDRESSES**).

List of Subjects in 50 CFR Part 226

Endangered and threatened species.

Dated: July 30, 2013.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, Performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, we propose to amend part 226, title 50 of the Code of Federal Regulations as set forth below:

PART 226—DESIGNATED CRITICAL HABITAT

■ 1. The authority citation for part 226 continues to read as follows:

Authority: 16 U.S.C. 1533.

■ 2. Add § 226.2124 to read as follows:

§ 226.2124 Critical habitat for the Puget Sound/Georgia Basin DPS of yelloweye rockfish (Sebastes ruberrimus), canary rockfish (S. pinniger), and bocaccio (S. paucispinus).

Critical habitat is designated in the following states and counties for the following DPSs as depicted in the maps below and described in paragraphs (a) through (d) of this section. The maps can be viewed or obtained with greater resolution (*http://www.nwr.noaa.gov/*) to enable a more precise inspection of proposed critical habitat for yelloweye rockfish, canary rockfish and bocaccio.

(a) Critical habitat is designated for the following DPSs in the following state and counties:

DPS	State—Counties
Yelloweye rockfish	Wa—San Juan, Whatcom, Skagit, Island, Clallam, Jefferson Snohomish, King, Pierce, Kitsap, Thurston, Mason.
Canary rockfish	Wa—San Juan, Whatcom, Skagit, Island, Clallam, Jefferson Snohomish, King, Pierce, Kitsap, Thurston, Mason.
Bocaccio	Wa—San Juan, Whatcom, Skagit, Island, Clallam, Jefferson Snohomish, King, Pierce, Kitsap, Thurston, Mason.

(b) *Critical habitat boundaries.* In delineating nearshore (shallower than 30 m (98 ft)) areas in Puget Sound, we define proposed critical habitat for canary rockfish and bocaccio, as depicted in the maps below, as occurring from the shoreline from extreme high water out to a depth no greater than 30 m (98 ft) relative to mean lower low water. Deepwater proposed critical habitat for yelloweye rockfish, canary rockfish and bocaccio occurs in some areas, as depicted in the maps below, from depths greater than 30 m (98ft).

(c) *Essential features for juvenile canary rockfish and bocaccio.* Juvenile settlement habitats located in the nearshore with substrates such as sand, rock and/or cobble compositions that also support kelp are essential for conservation because these features enable forage opportunities and refuge from predators and enable behavioral and physiological changes needed for juveniles to occupy deeper adult habitats. Several attributes of these sites determine the quality of the area and are useful in considering the conservation value of the associated feature and, in determining whether the feature may require special management considerations or protection. These features also are relevant to evaluating the effects of a proposed action in a section 7 consultation if the specific area containing the site is designated as critical habitat. These attributes include quantity, quality, and availability of prey species to support individual growth, survival, reproduction, and feeding opportunities; and water quality and sufficient levels of dissolved oxygen to support growth, survival, reproduction, and feeding opportunities. Nearshore areas are contiguous with the shoreline from the line of extreme high water out to a depth no greater than 30 meters (98 ft) relative to mean lower low water.

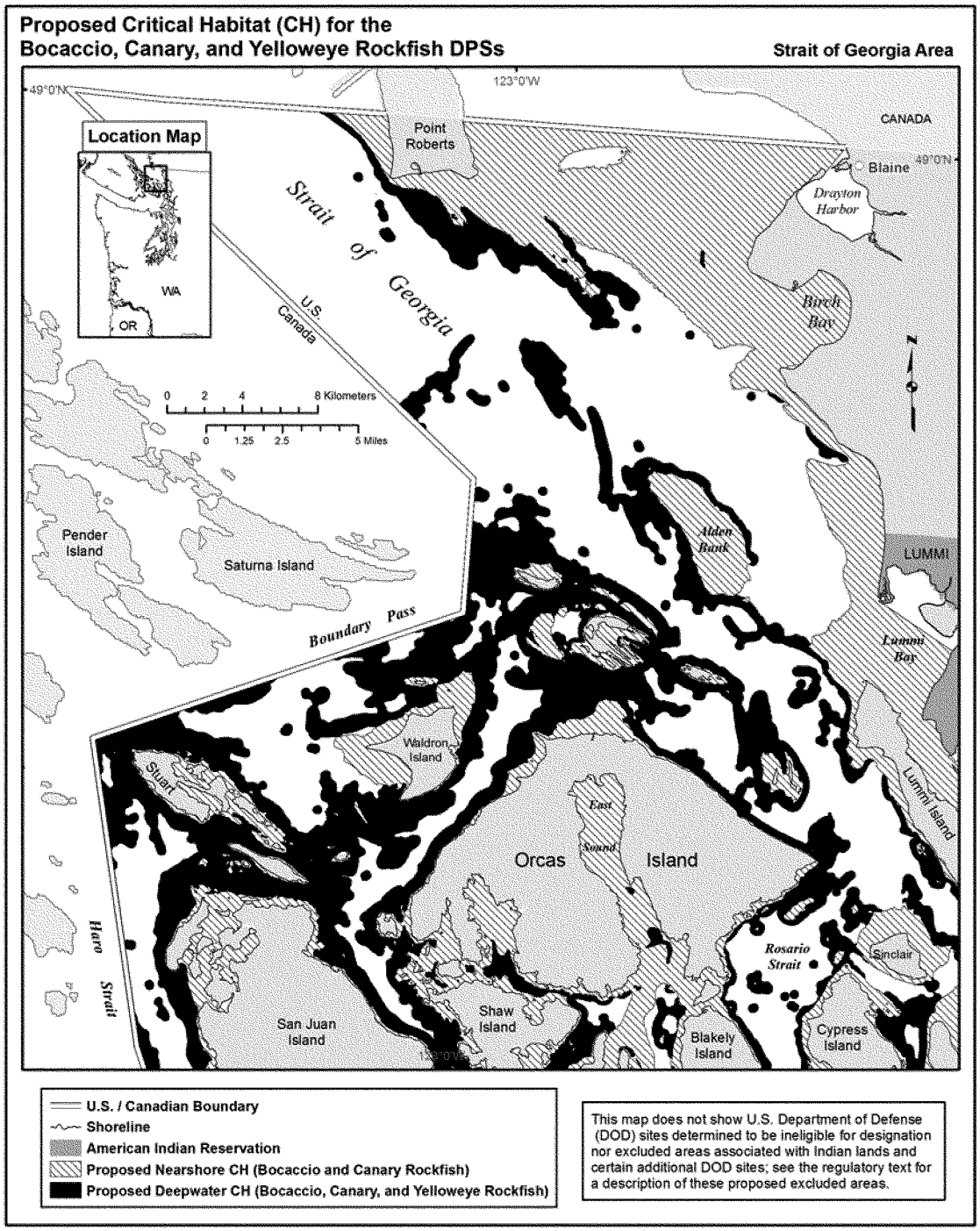
(d) *Essential features for adult canary rockfish and bocaccio, and adult and juvenile yelloweye rockfish.* Benthic habitats or sites deeper than 30m (98ft) that possess or are adjacent to areas of complex bathymetry consisting of rock and or highly rugose habitat are essential to conservation because these features support growth, survival, reproduction, and feeding opportunities by providing the structure for rockfish to avoid predation, seek food and persist for decades. Several attributes of these sites determine the quality of the habitat and are useful in considering the conservation value of the associated feature, and whether the feature may require special management considerations or protection. These attributes are also relevant in the evaluation of the effects of a proposed action in a section 7 consultation if the specific area containing the site is designated as critical habitat. These attributes include:

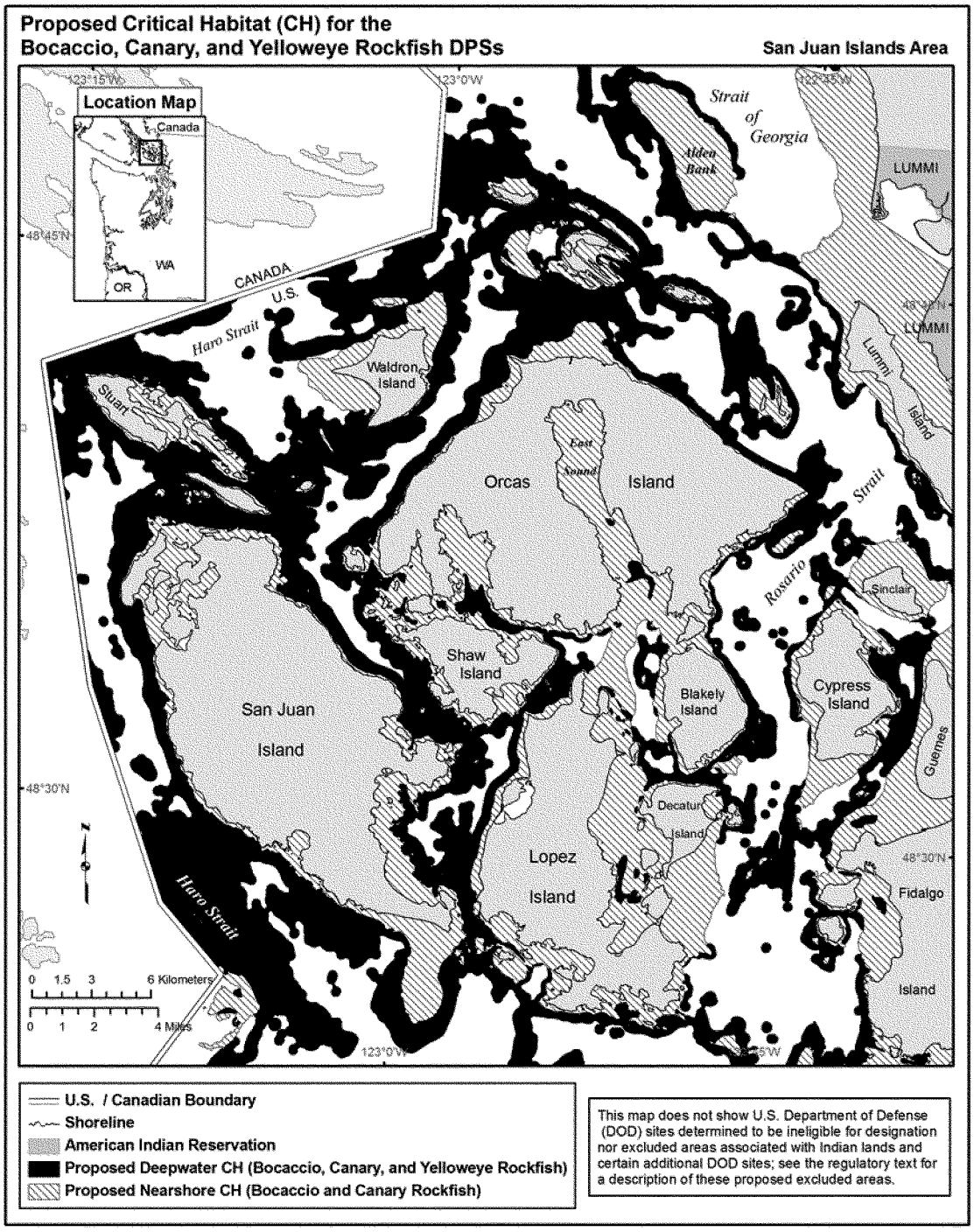
(1) Quantity, quality, and availability of prey species to support individual growth, survival, reproduction, and feeding opportunities,

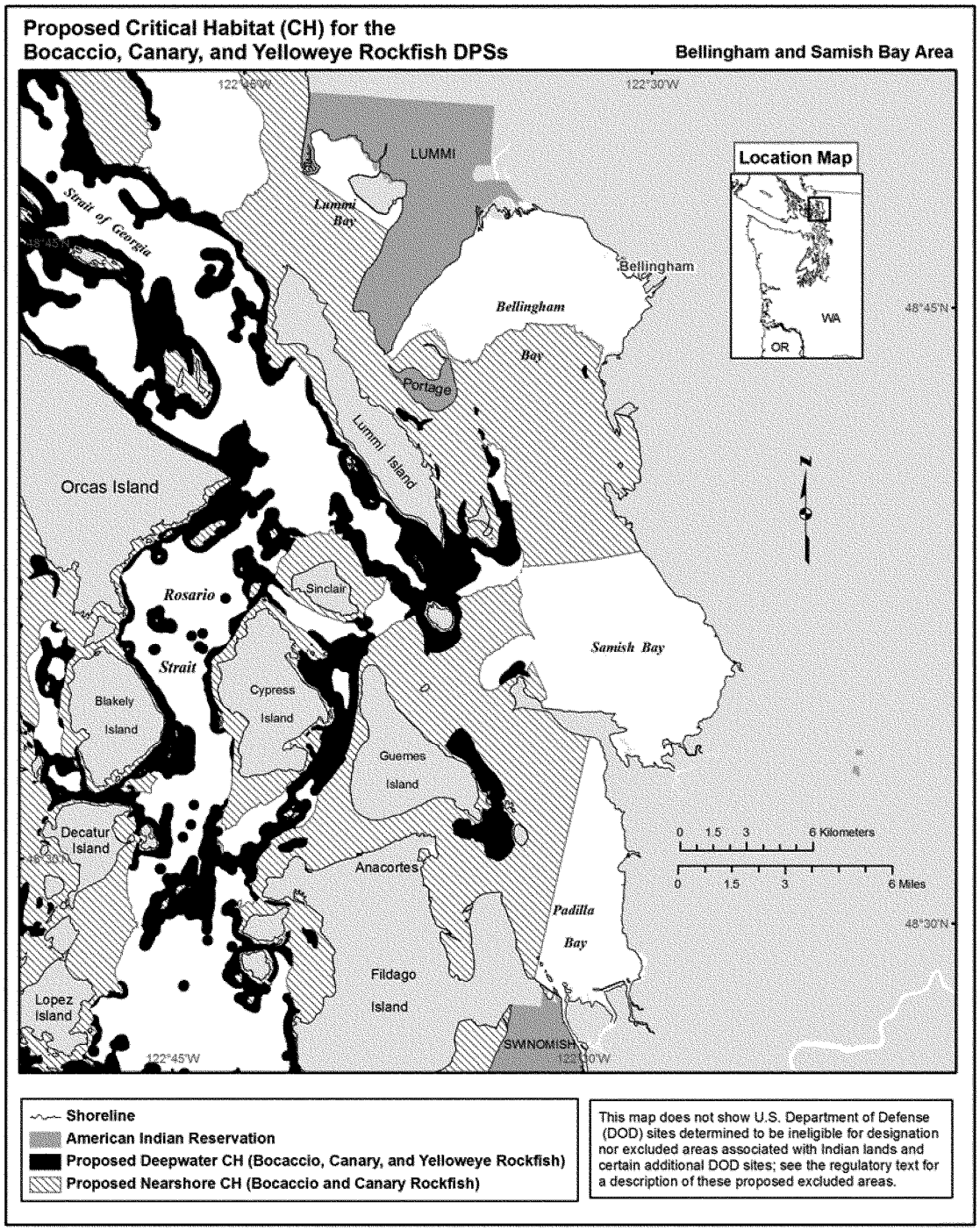
(2) water quality and sufficient levels of dissolved oxygen to support growth, survival, reproduction, and feeding opportunities, and

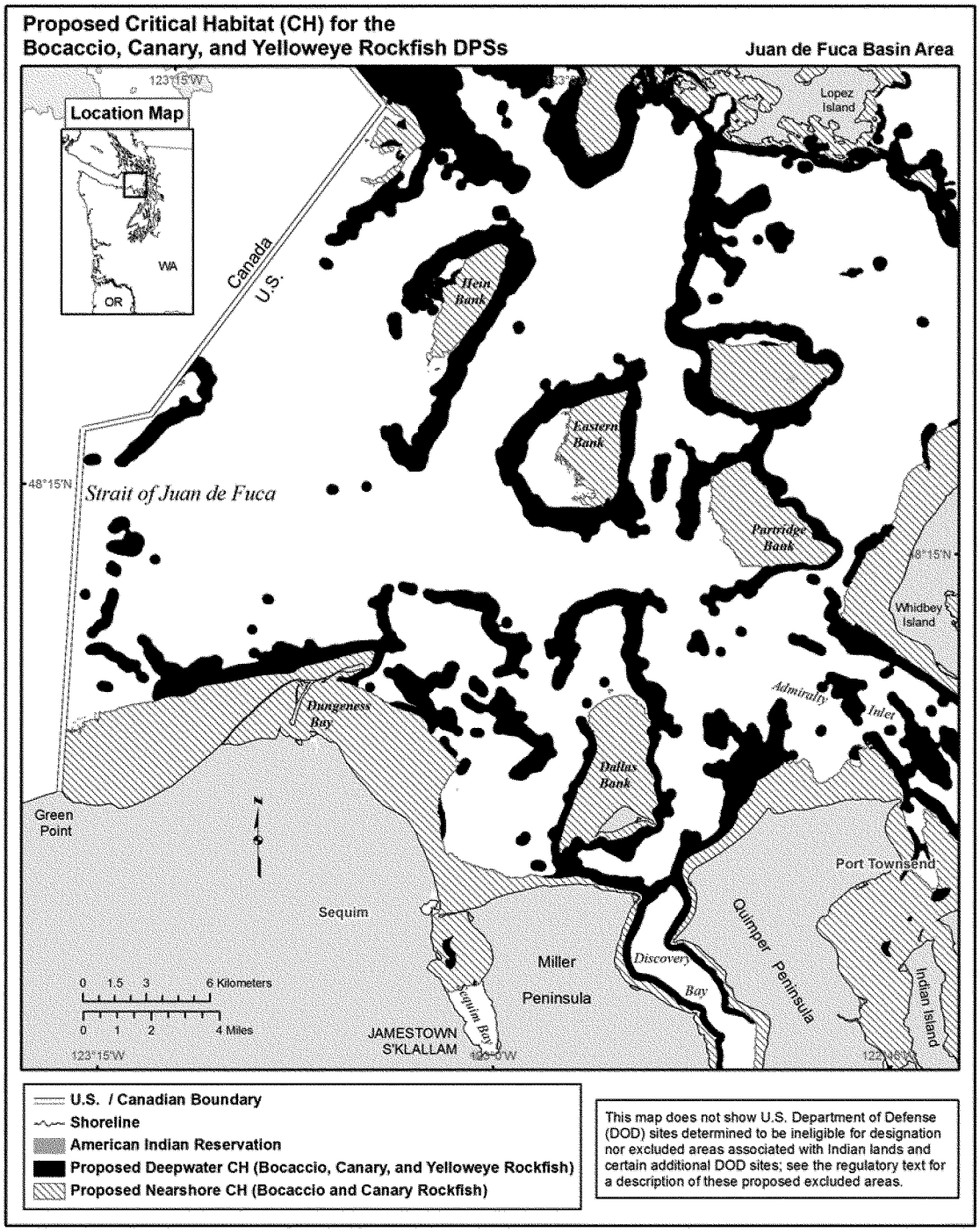
(3) the type and amount of structure and rugosity that supports feeding opportunities and predator avoidance.

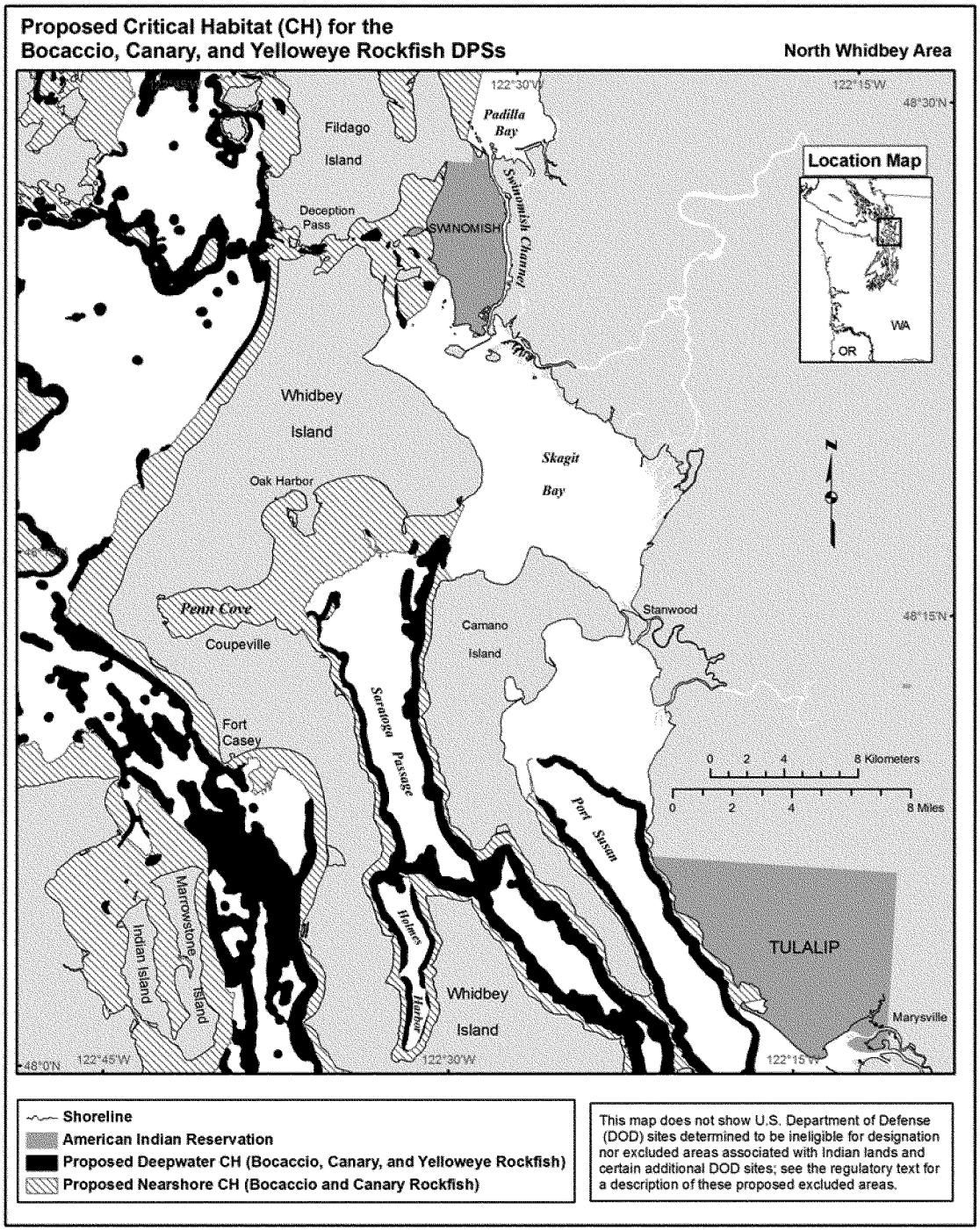
BILLING CODE 3510–22–P

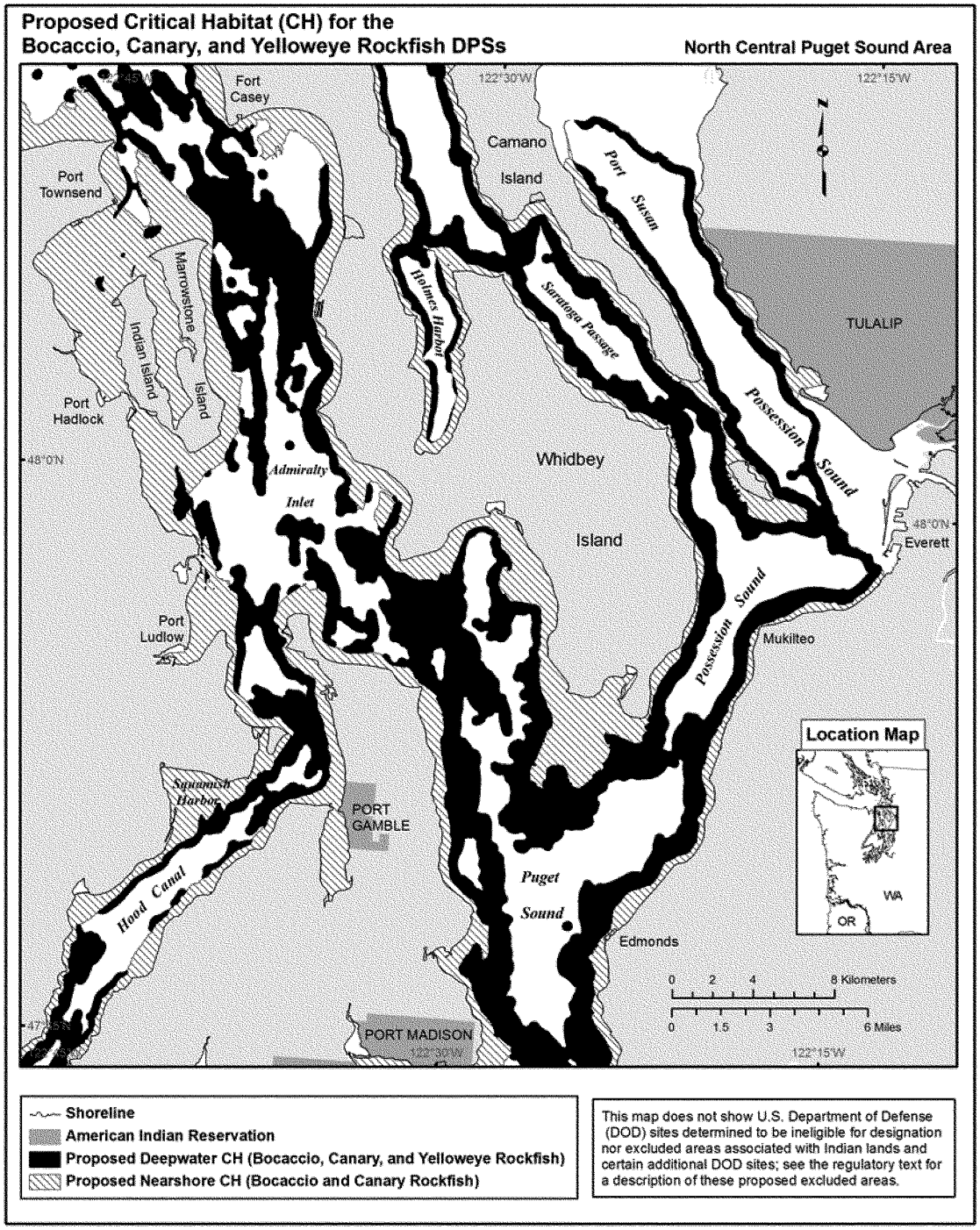

Proposed Critical Habitat (CH) for the
Bocaccio, Canary, and Yelloweye Rockfish DPSs
Strait of Georgia Area
49°0'N
123°0'W
Location Map
WA
OR
Point Roberts
CANADA
Blaine
Drayton Harbor
Birch Bay
Strait of Georgia
U.S. Canada
0 2 4 8 Kilometers
0 1.25 2.5 5 Miles
Pender Island
Saturna Island
Boundary Pass
Alden Bank
LUMMI
Lummi Bay
Waldron Island
Stuart
East Sound
Orcas Island
Lummi Island
Haro Strait
Rosario Strait
Sinclair
San Juan Island
Shaw Island
Blakely Island
Cypress Island
U.S. / Canadian Boundary
Shoreline
American Indian Reservation
Proposed Nearshore CH (Bocaccio and Canary Rockfish)
Proposed Deepwater CH (Bocaccio, Canary, and Yelloweye Rockfish)
This map does not show U.S. Department of Defense (DOD) sites determined to be ineligible for designation nor excluded areas associated with Indian lands and certain additional DOD sites; see the regulatory text for a description of these proposed excluded areas.

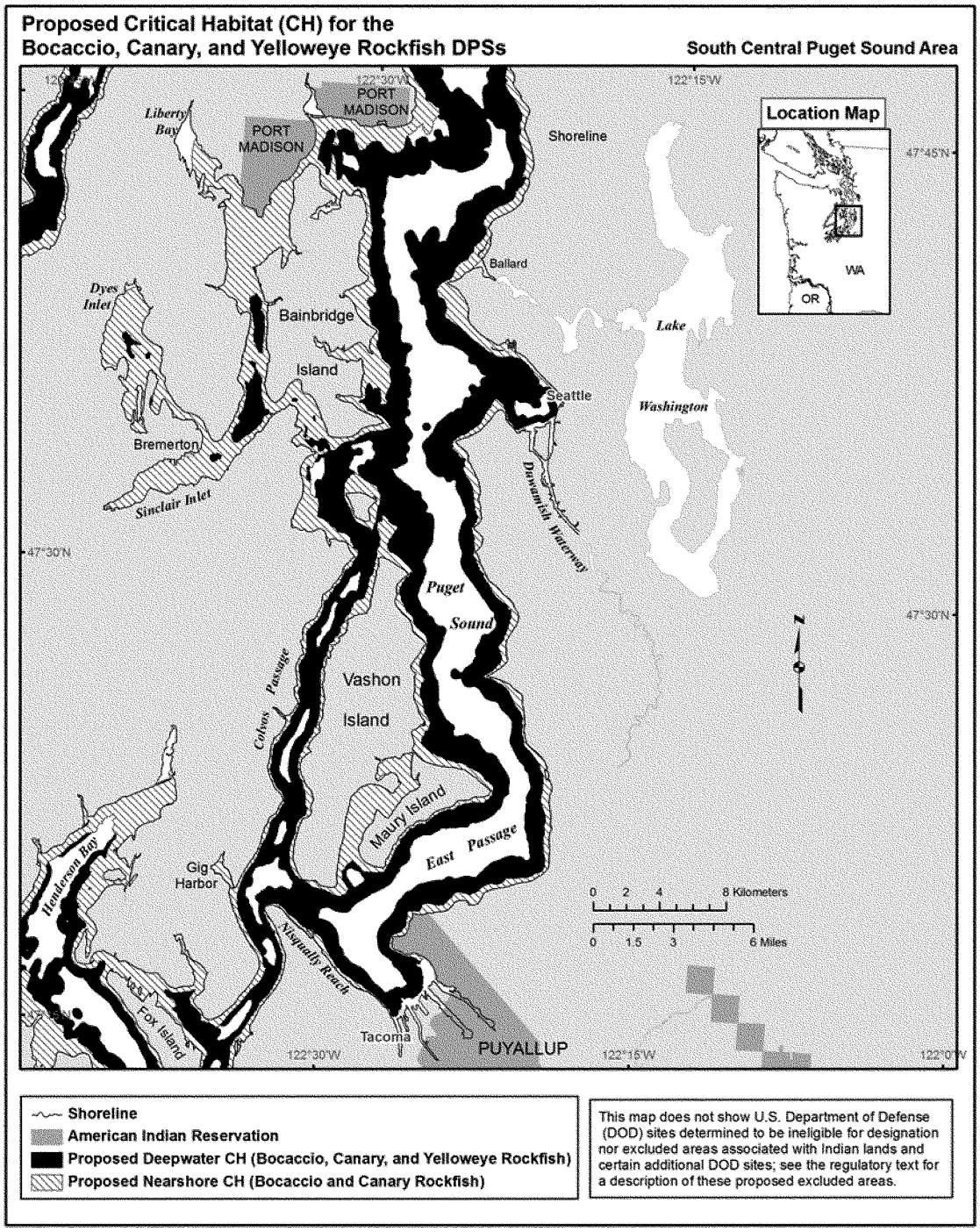

Proposed Critical Habitat (CH) for the
Bocaccio, Canary, and Yelloweye Rockfish DPSs
San Juan Islands Area
Location Map
Canada
WA
OR
CANADA
U.S.
Haro Strait
Strait of Georgia
Alden Bank
LUMMI
Waldron Island
Stuart
Orcas Island
East Sound
Lummi Island
Strait
Rosario
Sinclair
Shaw Island
San Juan Island
Blakely Island
Cypress Island
Guemes
Decatur Island
Lopez Island
Fidalgo Island
48°45'N
48°30'N
123°15'W
123°0'W
122°35'W
0 1.5 3 6 Kilometers
0 1 2 4 Miles
U.S. / Canadian Boundary
Shoreline
American Indian Reservation
Proposed Deepwater CH (Bocaccio, Canary, and Yelloweye Rockfish)
Proposed Nearshore CH (Bocaccio and Canary Rockfish)
This map does not show U.S. Department of Defense (DOD) sites determined to be ineligible for designation nor excluded areas associated with Indian lands and certain additional DOD sites; see the regulatory text for a description of these proposed excluded areas.

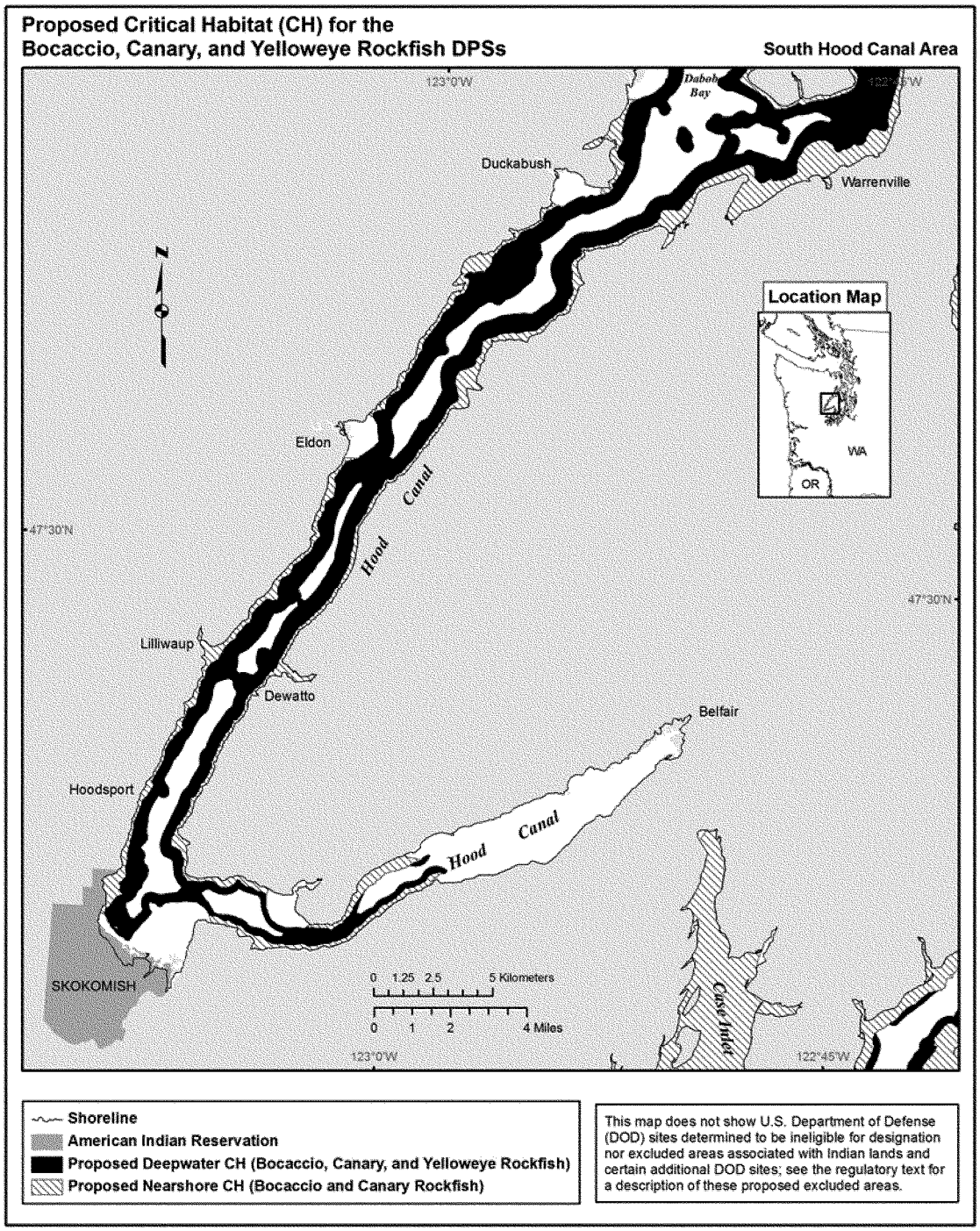

Proposed Critical Habitat (CH) for the
Bocaccio, Canary, and Yelloweye Rockfish DPSs
Bellingham and Samish Bay Area
122°45'W
122°30'W
LUMMI
Location Map
Strait of Georgia
Lummi Bay
48°45'N
Bellingham
Bellingham Bay
WA
OR
Portage
Lummi Island
Orcas Island
Rosario Strait
Sinclair
Samish Bay
Blakely Island
Cypress Island
Guemes Island
Decatur Island
48°30'N
Anacortes
Padilla Bay
Fildago Island
Lopez Island
SWINOMISH
0 1.5 3 6 Kilometers
0 1.5 3 6 Miles
Shoreline
American Indian Reservation
Proposed Deepwater CH (Bocaccio, Canary, and Yelloweye Rockfish)
Proposed Nearshore CH (Bocaccio and Canary Rockfish)
This map does not show U.S. Department of Defense (DOD) sites determined to be ineligible for designation nor excluded areas associated with Indian lands and certain additional DOD sites; see the regulatory text for a description of these proposed excluded areas.

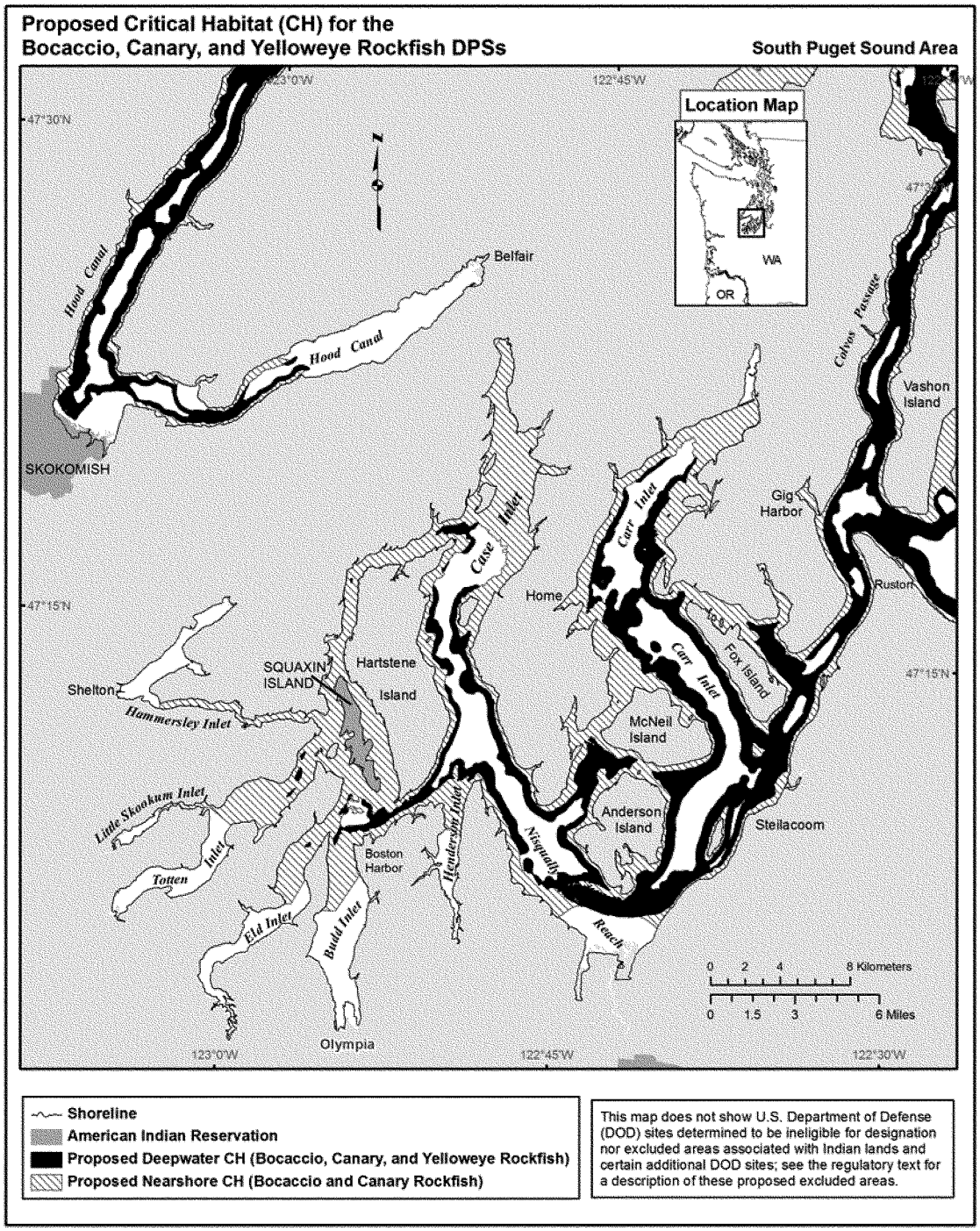

Proposed Critical Habitat (CH) for the
Bocaccio, Canary, and Yelloweye Rockfish DPSs
Juan de Fuca Basin Area
Location Map
WA
OR
123°15'W
Canada
U.S.
Hein Bank
Eastern Bank
Strait of Juan de Fuca
48°15'N
Partridge Bank
Lopez Island
Whidbey Island
Admiralty Inlet
Dungeness Bay
Dallas Bank
Green Point
Sequim
Miller Peninsula
Discovery Bay
Quimper Peninsula
Port Townsend
Indian Island
Sequim Bay
JAMESTOWN S'KLALLAM
0 1.5 3 6 Kilometers
0 1 2 4 Miles
U.S. / Canadian Boundary
Shoreline
American Indian Reservation
Proposed Deepwater CH (Bocaccio, Canary, and Yelloweye Rockfish)
Proposed Nearshore CH (Bocaccio and Canary Rockfish)
This map does not show U.S. Department of Defense (DOD) sites determined to be ineligible for designation nor excluded areas associated with Indian lands and certain additional DOD sites; see the regulatory text for a description of these proposed excluded areas.


Proposed Critical Habitat (CH) for the
Bocaccio, Canary, and Yelloweye Rockfish DPSs
North Whidbey Area
Location Map
WA
OR
Padilla Bay
Fidalgo Island
Deception Pass
SWINOMISH
Swinomish Channel
Whidbey Island
Oak Harbor
Skagit Bay
Penn Cove
Coupeville
Camano Island
Stanwood
Fort Casey
Saratoga Passage
Port Susan
Holmes Harbor
Marrowstone Island
Indian Island
TULALIP
Marysville
0 2 4 8 Kilometers
0 2 4 8 Miles
122°30'W
122°15'W
48°30'N
48°15'N
48°0'N
122°45'W
Shoreline
American Indian Reservation
Proposed Deepwater CH (Bocaccio, Canary, and Yelloweye Rockfish)
Proposed Nearshore CH (Bocaccio and Canary Rockfish)
This map does not show U.S. Department of Defense (DOD) sites determined to be ineligible for designation nor excluded areas associated with Indian lands and certain additional DOD sites; see the regulatory text for a description of these proposed excluded areas.


Proposed Critical Habitat (CH) for the
Bocaccio, Canary, and Yelloweye Rockfish DPSs
North Central Puget Sound Area
122°45'W
122°30'W
122°15'W
48°0'N
47°45'N
Fort Casey
Port Townsend
Marrowstone Island
Indian Island
Port Hadlock
Camano Island
Port Susan
Holmes Harbor
Saratoga Passage
TULALIP
Possession Sound
Whidbey Island
Admiralty Inlet
Everett
Port Ludlow
Mukilteo
Squamish Harbor
PORT GAMBLE
Hood Canal
Puget Sound
Edmonds
PORT MADISON
Location Map
WA
OR
0 2 4 8 Kilometers
0 1.5 3 6 Miles
Shoreline
American Indian Reservation
Proposed Deepwater CH (Bocaccio, Canary, and Yelloweye Rockfish)
Proposed Nearshore CH (Bocaccio and Canary Rockfish)
This map does not show U.S. Department of Defense (DOD) sites determined to be ineligible for designation nor excluded areas associated with Indian lands and certain additional DOD sites; see the regulatory text for a description of these proposed excluded areas.


Proposed Critical Habitat (CH) for the
Bocaccio, Canary, and Yelloweye Rockfish DPSs
South Central Puget Sound Area
Location Map
WA
OR
PORT MADISON
Liberty Bay
Shoreline
Ballard
Dyes Inlet
Bainbridge Island
Lake Washington
Seattle
Bremerton
Sinclair Inlet
Duwamish Waterway
Puget Sound
Vashon Island
Colvos Passage
Maury Island
East Passage
Gig Harbor
Henderson Bay
Nisqually Reach
Fox Island
Tacoma
PUYALLUP
47°45'N
47°30'N
122°30'W
122°15'W
122°0'W
0 2 4 8 Kilometers
0 1.5 3 6 Miles
Shoreline
American Indian Reservation
Proposed Deepwater CH (Bocaccio, Canary, and Yelloweye Rockfish)
Proposed Nearshore CH (Bocaccio and Canary Rockfish)
This map does not show U.S. Department of Defense (DOD) sites determined to be ineligible for designation nor excluded areas associated with Indian lands and certain additional DOD sites; see the regulatory text for a description of these proposed excluded areas.


Proposed Critical Habitat (CH) for the
Bocaccio, Canary, and Yelloweye Rockfish DPSs
South Hood Canal Area
123°0'W
Dabob Bay
Duckabush
Warrenville
N
Location Map
WA
OR
Eldon
Hood Canal
47°30'N
Lilliwaup
Dewatto
Belfair
Hoodsport
Hood Canal
SKOKOMISH
0 1.25 2.5 5 Kilometers
0 1 2 4 Miles
Case Inlet
122°45'W
Shoreline
American Indian Reservation
Proposed Deepwater CH (Bocaccio, Canary, and Yelloweye Rockfish)
Proposed Nearshore CH (Bocaccio and Canary Rockfish)
This map does not show U.S. Department of Defense (DOD) sites determined to be ineligible for designation nor excluded areas associated with Indian lands and certain additional DOD sites; see the regulatory text for a description of these proposed excluded areas.



[FR Doc. 2013–18832 Filed 8–5–13; 8:45 am]
BILLING CODE 3510–22–C

Notices

Federal Register
Vol. 78, No. 151
Tuesday, August 6, 2013

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.

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Oregon Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act (FACA) that the Oregon Advisory Committee (Committee) will meet on Thursday, August 22, 2013. The meeting will convene at 2:00 p.m. and adjourn at approximately 4:00 p.m. The meeting will be held at the Hillsdale Library, 1525 SW Sunset Boulevard, Portland, OR 97329. The purpose of the meeting is for the Committee to plan future activities.

The meeting is open to the public, and members of the public are entitled to submit written comments. Written comments may be mailed to the Western Regional Office, U.S. Commission on Civil Rights, 300 N Los Angeles St., Suite 2010, Los Angeles, CA, 90012. They may also be faxed to the Commission at (213) 894–0507 or emailed to the Commission at *atrevino@usccr.gov.* Submitted comments must be received by September 30, 2013. Persons who desire additional information may contact the Western Regional Office at (213) 894–3437.

Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Western Regional Office at least ten (10) working days before the scheduled date of the meeting.

Records generated from this meeting may be inspected and reproduced at the Western Regional Office, as they become available, both before and after the meeting. Persons interested in the work of this Committee are directed to the Commission's Web site, *http://www.usccr.gov,* or may contact the Western Regional Office at the above email or street address.

The meeting will be conducted pursuant to the rules and regulations of the Commission and FACA.

Dated in Chicago, IL, July 31, 2013.

David Mussatt,

Acting Chief, Regional Programs Coordination Unit.

[FR Doc. 2013–18836 Filed 8–5–13; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Alaska American Fisheries Act (AFA): Permits.

OMB Control Number: 0648–0393.

Form Number(s): NA.

Type of Request: Regular submission (revision and extension of a current information collection).

Number of Respondents: 27.

Average Hours per Response: Application for AFA Permit for Replacement Vessel, 30 minutes; Application for AFA Cooperative Permit, 2 hours; Vessel Contract Fishing Notification, 4 hours; Approval as an Entity Eligible to Receive Transferable Chinook Salmon Prohibited Species Quota (PSC) Allocation, 8 hours; Application to Transfer Bering Sea Chinook Salmon PSC Allocation, 15 minutes.

Burden Hours: 112.

Needs and Uses: This request is for revision and extension of a currently approved information collection.

In response to the American Fisheries Act (AFA), NMFS developed a management program for Bering Sea and Aleutian Islands Management Area (BSAI) pollock to include a set of AFA permanent permits for AFA catcher/processors, AFA catcher vessels, AFA inshore processors, and AFA motherships. All vessels and processors participating in the non-Community Development Quota (CDQ) BSAI pollock fishery are required to have valid AFA permits on board the vessel or on site at the processing plant.

With the exceptions of the inshore vessel cooperatives, replacement vessel, and inshore vessel contract fishing applications, the AFA permit program had a one-time application deadline of December 1, 2000. All permitted participants in the AFA pollock fishery are already established and are issued with an indefinite expiration date.

In a previous revision to this collection, a PSC limit of Chinook salmon was established for the pollock industry participants in an industry-developed contractual arrangement, called an incentive plan agreement (IPA) that establishes an incentive program to minimize bycatch at all levels of Chinook salmon abundance. NMFS issues transferable Chinook salmon PSC allocations to eligible entities representing the catcher/processor sector, the mothership sector, inshore cooperatives, and CDQ groups. Transferable allocations provide the pollock fleet the flexibility to maximize the harvest of pollock while maintaining Chinook salmon bycatch at or below the PSC limit.

Revision: The notary signature requirements have been removed from the Application for Replacement Vessel and the Application for Inshore Catcher Vessel Cooperative Permit.

Affected Public: Business or other for-profit organizations.

Frequency: Annually and on occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: OIRA_Submission@omb.eop.gov.

Copies of the above information collection proposal can be obtained by calling or writing Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov.*

Dated: August 1, 2013.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2013–18932 Filed 8–5–13; 8:45 am]

BILLING CODE 3510–22 –P

DEPARTMENT OF COMMERCE

Bureau of Economic Analysis

Proposed Information Collection; Comment Request; Benchmark Survey of Insurance Transactions by U.S. Insurance Companies with Foreign Persons

AGENCY: Bureau of Economic Analysis, Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before October 7, 2013.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230, or via email at *jjessup@doc.gov*.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information or copies of the survey and instructions to Mark Xu, Chief, Special Surveys Branch, Balance of Payments Division, (BE–50), Bureau of Economic Analysis, U.S. Department of Commerce, Washington, DC 20230; phone: (202) 606–9826; fax: (202) 606–5318; or via email at *mark.xu@bea.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

Form BE–140, Benchmark Survey of Insurance Transactions by U.S. Insurance Companies with Foreign Persons, obtains annual data from all U.S. insurance companies that engage in the following international insurance transactions: (1) Premiums earned on reinsurance assumed from insurance companies resident abroad; (2) losses incurred on reinsurance assumed from insurance companies resident abroad; (3) premiums earned on primary insurance sold to foreign persons; (4) losses incurred on primary insurance sold to foreign persons; (5) premiums incurred on reinsurance ceded to insurance companies resident abroad; (6) losses recovered on reinsurance ceded to insurance companies resident abroad; (7) receipts for auxiliary insurance services; and (8) payments for auxiliary insurance services. In addition, insurance companies with transactions in at least one of the eight categories listed above that exceed $2 million must supply country specific data on the amount of their insurance transactions for each category.

The data are needed to monitor U.S. international trade in insurance services, analyze its impact on the U.S. economy and foreign economies, compile and improve the U.S. economic accounts, support U.S. commercial policy on insurance services, conduct trade promotion, and improve the ability of U.S. businesses to identify and evaluate market opportunities.

This survey is conducted at five year intervals; it was last conducted for 2008 and will be conducted again for 2013. The 2013 survey will be sent to respondents on March 30, 2014 and reports are due by June 30, 2014.

Two changes are proposed to the 2013 BE–140 form: (1) drop questions on finite reinsurance because finite reinsurance is a dated concept that is no longer relevant, and (2) add questions to identify the transaction code, size, type and nature of large and irregular transactions, defined as those contracts with premiums ceded or assumed in excess of $1 billion and that are at least three times the size of a reporter's average regular contract. The new information will allow BEA to measure more accurately insurance services on an accrual basis and to exclude transactions that are not related to insurance services.

II. Method of Collection

The surveys are sent to the respondents by U.S. mail and are also available from the BEA Web site. Respondents may return the surveys one of four ways: U.S. mail, electronically using BEA's electronic collection system (eFile), fax, or email.

III. Data

OMB Control Number: 0608–0073.

Form Number: BE–140.

Type of Review: Regular submission.

Affected Public: Businesses or other for-profit organizations.

Estimated Number of Responses: 1,700 total responses every five years.

Estimated Time per Response: 8 hours.

Estimated Total Annual Burden Hours: 13,600 hours.

Estimated Total Annual Cost to Public: $0.

Respondent's Obligation: Mandatory.

Authority: The International Investment and Trade in Services Survey Act, 22 U.S.C. 3101–3108, as amended.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) the accuracy of the Agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: July 30, 2013.

Glenna Mickelson,

Management Analyst, Office of Chief Information Officer.

[FR Doc. 2013–18879 Filed 8–5–13; 8:45 am]

BILLING CODE 3510–06–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–836, A–489–815, A–570–914, A–580–859]

Final Results of Expedited Sunset Reviews of Antidumping Duty Orders: Light-Walled Rectangular Pipe and Tube From Mexico, Turkey, the People's Republic of China, and the Republic of Korea

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On April 2, 2013, the Department of Commerce (the Department) initiated the first sunset reviews of the antidumping duty orders on light-walled rectangular pipe and tube (light-walled pipe and tube) from the Mexico, Turkey, the People's Republic of China (PRC), and the Republic of Korea (Korea) [1] (collectively,

[1] *See Light-Walled Rectangular Pipe and Tube from Mexico, the People's Republic of China, and the Republic of Korea: Antidumping Duty Orders; Light-Walled Rectangular Pipe and Tube from the Republic of Korea: Notice of Amended Final Determination of Sales at Less Than Fair Value,* 73 FR 45403, 45405 (August 5, 2008); *Notice of*

Continued

the *Orders*) pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[2] On the basis of a notice of intent to participate, and an adequate substantive response filed on behalf of domestic interested parties, as well as a lack of response from respondent interested parties, the Department conducted expedited (120-day) sunset reviews of the *Orders* pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(A) and (C)(2). As a result of these sunset reviews, the Department finds that revocation of the *Orders* would likely lead to continuation or recurrence of dumping at the levels indicated in the ''Final Results of Review'' section of this notice.

DATES: Effective Date: August 6, 2013.

FOR FURTHER INFORMATION CONTACT: Patrick Edwards or Angelica Mendoza, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: 202–482–8029 or 202–482–3019, respectively.

SUPPLEMENTARY INFORMATION:

Background

On April 2, 2013, the Department initiated sunset reviews of the *Orders* pursuant to section 751(c) of the Act.[3] On April 12, 2013, the Department received notices of intent to participate from the following domestic interested parties: Bull Moose Tube Company, California Steel and Tube, Hannibal Industries, JMC Steel Group, Maruichi American Corporation, Searing Industries, Southland Tube, and Western Tube and Conduit (collectively, the domestic interested parties), within the deadline specified in 19 CFR 351.218(d)(1)(i).[4] The domestic interested parties claimed interested party status under section 771(9)(c) of the Act, as U.S. manufacturers of light-walled pipe and tube. On May 1, 2013, the Department received adequate substantive responses from the domestic interested parties within the 30-day deadline specified in 19 CFR 351.218(d)(3)(i).[5] The Department received no responses from producers or exporters of light-walled pipe and tube from any of the countries subject to these sunset reviews. While the Department received general comments from the Government of Turkey (GOT) concerning the Turkish market for, and the production and exportation of, light-walled pipe and tube products, the Department previously had informed the GOT that such comments, while permitted, would not constitute substantive responses from Turkish producers, because these sunset reviews concern the antidumping duty order (and not a countervailing duty order under 19 CFR 351.218(e)(1)(ii)(B)).[6]

Based on the submissions received and pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), these sunset reviews were conducted on an expedited basis.

Scope of Orders

The merchandise subject to the *Orders* is certain welded carbon-quality light-walled steel pipe and tube. The product is currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7306.61.50.00 and 7306.61.70.60. While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the *Orders* is dispositive.[7]

Analysis of Comments Received

All issues raised in this review are addressed in the Issues and Decision Memorandum, including the likelihood of a continuation or recurrence of dumping in the event of revocation, as well as the magnitude of dumping margins likely to prevail upon revocation. A complete discussion of the issues raised is available in the Issues and Decision Memorandum, which is a public document on file in the Central Records Unit (CRU), room 7046 of the main Department of Commerce building, as well as electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). IA ACCESS is available to registered users at *http://iaaccess.trade.gov,* and available to all parties in the CRU. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the Internet at *http://ia.ita.doc.gov/frn.* The signed and electronic versions of the Issues and Decision Memorandum are identical in content.

Final Results of Review

The Department determines that revocation of the *Orders* would be likely to lead to a continuation or recurrence of dumping, with the following dumping margin magnitudes likely to prevail:

	Rate (percent)
Turkey (A–489–815):	
Producer/Exporter:	
Guven Boru Profil Sanayii ve Ticaret Limited Sirketi	41.71
MMZ Onur Boru Profil Uretim San. ve Tic. A.S.	41.71
Anadolu Boru	41.71
Ayata Metal Industry	41.71

Antidumping Duty Order: Light-Walled Rectangular Pipe and Tube From Turkey, 73 FR 31065 (May 30, 2008).

[2] *See Initiation of Five-Year (''Sunset'') Review,* 78 FR 19647 (April 2, 2013) (*Initiation*).

[3] *See Initiation.*

[4] *See* Letters of Intent to Participate from the domestic interested parties, to Acting Secretary Rebecca Blank, titled ''Light Walled Rectangular Pipe and Tube from Mexico, First Review,'' ''Light Walled Rectangular Pipe and Tube from Turkey, First Review,'' ''Light Walled Rectangular Pipe and Tube from the People's Republic of China, First Review,'' and ''Light Walled Rectangular Pipe and Tube from Korea, First Review,'' all dated April 12, 2013.

[5] *See* Letters from domestic interested parties, to Acting Secretary Rebecca Blank, titled ''Light-Walled Rectangular Pipe and Tube from Mexico, First Review: Substantive Response to Notice of Initiation;'' ''Light-Walled Rectangular Pipe and Tube from Turkey, First Review: Substantive Response to Notice of Initiation;'' ''Light-Walled Rectangular Pipe and Tube from China, First Review: Substantive Response to Notice of Initiation;'' and ''Light-Walled Rectangular Pipe and Tube from Korea, First Review: Substantive Response to Notice of Initiation,'' all dated May 1, 2013.

[6] *See* Letter from the Directorate of Exports, Ministry of Economy, Republic of Turkey, to the Secretary of Commerce, titled ''Substantive Response of the Government of Turkey in the Antidumping Duty 1st Sunset Review Involving Light-Walled Rectangular Pipe and Tube from Turkey,'' dated April 30, 2013; *see also* Letter from Angelica Mendoza, Program Manager, to Tarik Sönmez, General Director, Directorate General for Exports, Ministry of Economy, titled ''First Sunset Review of the Antidumping Duty Order on Light-Walled Rectangular Pipe and Tube (LWRPT) from Turkey: Time Extension Request for Substantive Responses,'' dated April 25, 2013.

[7] *See* Memorandum from Christian Marsh, to Paul Piquado, ''Final Results of the Expedited First Five-Year (Sunset) Reviews of the Antidumping Duty Orders on Light-Walled Rectangular Pipe and Tube from Mexico, Turkey, the People's Republic of China, and the Republic of South Korea'' (July 31, 2013) (Issues and Decision Memorandum), dated concurrent with and adopted by this notice for a complete description of the Scope of the *Orders.*

	Rate (percent)
Goktas Tube/Goktas Metal	41.71
Kalibre Boru Sanayi ve Ticaret A.S.	41.71
Kerim Celik Mamulleri Imalat ve Ticaret	41.71
Ozgur Boru	41.71
Ozmak Makina ve Elektrik Sanayi	41.71
Seamless Steel Tube and Pipe Co. (Celbor)	41.71
Umran Steel Pipe Inc.	41.71
Yusan Industries, Ltd.	41.71
Borusan Mannesmann Boru	27.04
Erbosan Erciyas Boru Sanayii ve Ticaret A.S.	27.04
Noksel Steel Pipe Co.	27.04
Ozborsan Boru San. ve Tic. A.S.	27.04
Ozdemir Boru Sanayi ve Ticaret Ltd. Sti.	27.04
Toselik Profil ve Sac End. A.S.	27.04
Yucel Boru ve Profil Endustrisi A.S.	27.04
All Others	27.04
Mexico (A–291–836):	
Producer/Exporter:	
Maquilacero S.A. de C.V.	2.40
Productos Laminados de Monterrey S.A. de C.V.	5.12
Arco Metal S.A. de C.V.	3.76
Hylsa S.A. de C.V.	3.76
Internacional de Aceros S.A. de C.V.	3.76
Perfiles y Herrajes LM, S.A. de C.V.	3.76
Regiomontana de Perfiles y Tubos	3.76
Talleres Acero Rey S.A. de C.V.	3.76
Tuberia Laguna S.A. de C.V.	3.76
Industrias Monterrey S.A. de C.V.	11.50
Nacional de Acero S.A. de C.V.	11.50
PEASA-Productos Especializados de Acero	11.50
Tuberias Aspe	11.50
Tuberias y Derivados S.A. de C.V.	11.50
All Others	3.76
People's Republic of China (A–570–914):	
Exporter:	
Zhangjiagang Zhongyuan Pipe-Making Co., Ltd.	255.07
Kunshan Lets Win Steel Machinery Co., Ltd.	247.90
Wuxi Baishun Steel Pipe Co., Ltd.	247.90
Guangdong Walsall Steel Pipe Industrial Co., Ltd.	247.90
Wuxi Worldunion Trading Co., Ltd.	247.90
Weifang East Steel Pipe Co., Ltd.	247.90
Jiangyin Jianye Metal Products Co., Ltd.	247.90
PRC-wide entity	255.07
Republic of Korea (A–580–859):	
Producer/Exporter:	
Dong-A Steel Pipe Co. Ltd.	30.66
HiSteel Co. Ltd.	30.66
Jinbang Steel Co. Ltd.	30.66
Joong Won	30.66
Miju Steel Mfg. Co., Ltd.	30.66
Yujin Steel Industry Co.	30.66
Ahshin Pipe & Tube	30.66
Han Gyu Rae Steel Co., Ltd.	30.66
Kukje Steel Co., Ltd.	30.66
SeAH Steel Corporation, Ltd.	15.79
All Others [8]	15.79

Administrative Protective Order

This notice also serves as the only reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

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

Dated: July 30, 2013.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2013–18973 Filed 8–5–13; 8:45 am]

BILLING CODE 3510–DS–P

[8] Nexteel Co., Ltd. has been excluded from the Korean order.

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Judges Panel of the Malcolm Baldrige National Quality Award

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of closed meeting.

SUMMARY: The Judges Panel of the Malcolm Baldrige National Quality Award (Award) will meet in closed session on Wednesday, August 28, 2013, 9:00 a.m. to 3:30 p.m., Eastern time. The purpose of this meeting is to review the results of examiners' scoring of written applications. Panel members will vote on which applicants merit site visits by examiners to verify the accuracy of quality improvements claimed by applicants.

DATES: The meeting will convene on Wednesday, August 28, 2013, 9:00 a.m. to 3:30 p.m., Eastern time. The entire meeting will be closed to the public.

ADDRESSES: The meeting will be held at the National Institute of Standards and Technology, 100 Bureau Drive, Gaithersburg, Maryland 20899.

FOR FURTHER INFORMATION CONTACT: Robert Fangmeyer, Acting Director, Baldrige Performance Excellence Program, National Institute of Standards and Technology, Gaithersburg, Maryland 20899, telephone number (301) 975–4781, email *robert.fangmeyer@nist.gov.*

SUPPLEMENTARY INFORMATION:

Authority: 15 U.S.C. 3711a(d)(1) and the Federal Advisory Committee Act, as amended, 5 U.S.C. App.

Pursuant to the Federal Advisory Committee Act, as amended, 5 U.S.C. App., notice is hereby given that the Judges Panel of the Malcolm Baldrige National Quality Award will meet on Wednesday, August 28, 2013, 9:00 a.m. to 3:30 p.m., Eastern time. The Judges Panel is composed of twelve members, appointed by the Secretary of Commerce, chosen for their familiarity with quality improvement operations and competitiveness issues of manufacturing companies, services companies, small businesses, health care providers, and educational institutions. Members are also chosen who have broad experience in for-profit and nonprofit areas. The purpose of this meeting is to review the results of examiners' scoring of written applications. Panel members will vote on which applicants merit site visits by examiners to verify the accuracy of quality improvements claimed by applicants.

The Senior Advisor to the Deputy Secretary performing the non-exclusive duties of the Chief Financial Officer and Assistant Secretary for Administration, with the concurrence of the General Counsel, formally determined on March 19, 2013, pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended by Section 5(c) of the Government in Sunshine Act, Public Law 94–409, that the meeting of the Judges Panel may be closed in accordance with 5 U.S.C. 552b(c)(4) because the meeting is likely to disclose trade secrets and commercial or financial information obtained from a person which is privileged or confidential; and, 5 U.S.C. 552b(c)(9)(B) because for a government agency the meeting is likely to disclose information that could significantly frustrate implementation of a proposed agency action. The meeting, which involves examination of Award applicant data from U.S. companies and other organizations and a discussion of these data as compared to the Award criteria in order to select applicants for site visit review, conducted prior to recommending Award recipients, will be closed to the public.

Dated: July 30, 2013.

Phillip Singerman,

Associate Director for Innovation & Industry Services.

[FR Doc. 2013–18938 Filed 8–5–13; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Genome in a Bottle Consortium—Progress and Planning Workshop

AGENCY: National Institute of Standards & Technology (NIST), Commerce.

ACTION: Notice of public workshop.

SUMMARY: NIST announces the Genome in a Bottle Consortium meeting to be held on Thursday and Friday, August 15 and 16, 2013. The Genome in a Bottle Consortium is developing the reference materials, reference methods, and reference data needed to assess confidence in human whole genome variant calls. A principal motivation for this consortium is to enable performance assessment of sequencing and science-based regulatory oversight of clinical sequencing. The purpose of this meeting is to update participants about progress of the consortium work, continue to get broad input from individual stakeholders to update or refine the consortium work plan, continue to broadly solicit consortium membership from interested stakeholders, and invite members to participate in work plan implementation.

DATES: The Genome in a Bottle Consortium meeting will be held on Thursday, August 15, 2013 from 9:30 a.m. to 5:30 p.m. Eastern Time and Friday, August 16, 2013 from 9:00 a.m. to 3:00 p.m. Eastern Time. Attendees must register by 5:00 p.m. Eastern Time on Thursday, August 8, 2013.

ADDRESSES: The meeting will be held at the National Institute of Standards and Technology, 100 Bureau Drive, Gaithersburg, MD 20899 in Room C103–C106, Building 215. Please note admittance instructions under the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: For further information contact Justin Zook by email at *jzook@nist.gov* or by phone at (301) 975–4133 or Marc Salit by email at salit@nist.gov or by phone at (650) 350–2338. To register, go to: *https://www-s.nist.gov/CRS/.*

SUPPLEMENTARY INFORMATION: Clinical application of ultra high throughput sequencing (UHTS) for hereditary genetic diseases and oncology is rapidly growing. At present, there are no widely accepted genomic standards or quantitative performance metrics for confidence in variant calling. These standards and quantitative performance metrics are needed to achieve the confidence in measurement results expected for sound, reproducible research and regulated applications in the clinic. On April 13, 2012, NIST convened the workshop ''Genome in a Bottle'' to initiate a consortium to develop the reference materials, reference methods, and reference data needed to assess confidence in human whole genome variant calls. On August 16–17, 2012, NIST hosted the first large public meeting of the Genome in a Bottle Consortium, with about 100 participants from government, academic, and industry. A principal motivation for this consortium is to enable science-based regulatory oversight of clinical sequencing.

At the August 2012 meeting, the consortium established work plans for four technical working groups with the following responsibilities:

(1) Reference Material (RM) Selection and Design: select appropriate sources for whole genome RMs and identify or design synthetic DNA constructs that could be spiked-in to samples for measurement assurance.

(2) Measurements for Reference Material Characterization: design and carry out experiments to characterize the RMs using multiple sequencing methods, other methods, and validation of selected variants using orthogonal technologies.

(3) Bioinformatics, Data Integration, and Data Representation: develop methods to analyze and integrate the data for each RM, as well as select appropriate formats to represent the data.

(4) Performance Metrics and Figures of Merit: develop useful performance metrics and figures of merit that can be obtained through measurement of the RMs.

The products of these technical working groups will be a set of well-characterized whole genome and synthetic DNA RMs along with the methods (documentary standards) and reference data necessary for use of the RMs. These products will be designed to help enable translation of whole genome sequencing to regulated clinical applications.

There is no cost for participating in the consortium. No proprietary information will be shared as part of the consortium, and all research results will be in the public domain.

All visitors to the NIST site are required to pre-register to be admitted and present appropriate government-issued photo ID to gain entry to NIST. Anyone wishing to attend this meeting must pre-register at *https://www-s.nist.gov/CRS/* by 5:00 p.m. Eastern Time on Thursday, August 8, 2013, in order to attend.

Dated: July 29, 2013.

Willie E. May,

Associate Director of Laboratory Programs.

[FR Doc. 2013–18934 Filed 8–5–13; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC794

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 Groundfish Electronic Monitoring Committee and Ad Hoc Trawl Groundfish Electronic Monitoring Technical Advisory Committee (GEM Committees) will hold a work session, which is open to the public.

DATES: The meeting will be held August 20 and 21, 2013, from 8 a.m. until the earlier of 5 p.m. or when business for each day has been completed.

ADDRESSES: The meeting will be held at the Holiday Inn Portland Airport, Salon C Room, 8439 NE., Columbia Blvd. Portland, OR, 97220, telephone: 503–256–5000.

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

FOR FURTHER INFORMATION CONTACT: Mr. Brett Wiedoff, Staff Officer, Pacific Council: (503) 820–2280.

SUPPLEMENTARY INFORMATION: The primary purpose of the meeting is to discuss and develop potential alternatives for electronic monitoring (EM) for vessels participating in the West Coast groundfish trawl catch share program for consideration by the Pacific Council and to develop other recommendations as needed to further the Pacific Council process for considering EM. The GEM Committees were established by the Pacific Council at the June 2013 meeting in Garden Grove, California. No management actions will be decided at this meeting. The meeting will include review of the 2013 Trawl Catch Share Program EM Workshop Report and other reports to guide discussions. Although nonemergency issues not contained in the meeting agenda may come before the GEM committees for discussion, those issues may not be the subject of formal action during this meeting. The meeting will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the GEM committees' intent to take final action to address the emergency. A meeting report will be prepared by Pacific Council staff for consideration by the Pacific Council at its September 2013 meeting in Boise, Idaho.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt at (503) 820–2280 at least five days prior to the meeting date.

Dated: August 1, 2013.

Tracey L. Thompson,

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

[FR Doc. 2013–18941 Filed 8–5–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Meeting of the National Commission on the Structure of the Air Force; Cancellation of August 6, 2013 Meeting

AGENCY: Director of Administration and Management, DoD.

ACTION: Notice of Advisory Committee Meeting; cancellation.

SUMMARY: On Wednesday, July 31, 2013 (78 FR 46329), the Department of Defense published a notice announcing an August 6, 2013 meeting of the National Commission on the Structure of the Air Force. Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), and the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), this notice announces that the National Commission on the Structure of the Air Force meeting scheduled for Tuesday, August 6, 2013 is hereby cancelled. Due to unforeseen circumstances arising from the furlough on civilian employee hours, the Chairman has re-evaluated the schedule to complete the Commission's report by February 1, 2014. A more efficient agenda is planned, whereby the Chairman will combine the August 6, 2013 meeting with a future meeting.

FOR FURTHER INFORMATION CONTACT: Mrs. Marcia Moore, Designated Federal Officer, National Commission on the Structure of the Air Force, 1950 Defense Pentagon Room 3A874, Washington, DC 20301–1950. Email: *dfoafstrucomm@osd.mil.* Desk (703) 545–9113. Facsimile (703) 692–5625.

Dated: August 1, 2013.

Aaron Siegel,

Alternate OSD **Federal Register** *Liaison Officer, Department of Defense.*

[FR Doc. 2013–18937 Filed 8–5–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2013–ICCD–0100]

Agency Information Collection Activities; Comment Request; National Professional Development Program: Grantee Performance Report

AGENCY: Office of English Language Acquisition (OLEA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing an extension of an existing information collection of a previously approved information collection.

DATES: Interested persons are invited to submit comments on or before October 7, 2013.

ADDRESSES: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2013–ICCD–0100 or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E115, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: Electronically mail *ICDocketMgr@ed.gov.* Please do not send comments here.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: National Professional Development Program: Grantee Performance Report.

OMB Control Number: 1885–0555.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: State, Local, or Tribal Governments.

Total Estimated Number of Annual Responses: 138.

Total Estimated Number of Annual Burden Hours: 6,900.

Abstract: The National Professional Development (NPD) program provides professional development activities intended to improve instruction for students with limited English proficiency and assists education personnel working with such children to meet high professional standards. The NPD program office is submitting this application to request approval to collect information from NPD grantees. This data collection serves two purposes; the data are necessary to assess the performance of the NPD program on Government Performance Results Act measures, also, budget information and data on project-specific performance measures are collected from NPD grantees for project-monitoring information.

Dated: July 31, 2013.

Tomakie Washington,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services Office of Management.

[FR Doc. 2013–18873 Filed 8–5–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2013–ICCD–0101]

Agency Information Collection Activities; Comment Request; Credit Enhancement for Charter School Facilities Program Performance Report

AGENCY: Office of Innovation and Improvement (OII), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before October 7, 2013.

ADDRESSES: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2013–ICCD–0101 or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E115, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: Electronically mail *ICDocketMgr@ed.gov.* Please do not send comments here.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Credit Enhancement for Charter School Facilities Program Performance Report.

OMB Control Number: 1855–0010.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: State, Local, or Tribal Governments.

Total Estimated Number of Annual Responses: 34.

Total Estimated Number of Annual Burden Hours: 850.

Abstract: The Credit Enhancement for Charter School Facilities Program and its virtually identical antecedent program, the Charter Schools Facilities Financing Demonstration Program, authorized as part of the reauthorization of the Elementary and Secondary Education Act, to have a statutory mandate for an annual report (respectively, Section 5227 and Section 10227). This reporting is a requirement in order to obtain or retain benefits according to section 5527 part b of the Elementary and Secondary Education Act of 1965. ED will use the information through this report to monitor and evaluate competitive grants. These grants are made to private, non-profits; governmental entities; and consortia of these organizations. These organizations will use the funds to leverage private capital to help charter schools construct, acquire, and renovate school facilities.

Dated: July 31, 2013.

Tomakie Washington,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2013–18880 Filed 8–5–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Basic Energy Sciences Advisory Committee

AGENCY: Office of Science, Department of Energy.

ACTION: Notice of renewal.

SUMMARY: Pursuant to Section 14(a)(2)(A) of the Federal Advisory Committee Act, App. 2, and Section 102–3.65(a), Title 41, Code of Federal Regulations, and following consultation with the Committee Management Secretariat, General Services Administration, notice is hereby given that the Basic Energy Sciences Advisory Committee's (BESAC) charter will be renewed for a two-year period.

The Committee will provide advice and recommendations to the Office of Science on the Basic Energy Sciences program.

Additionally, the renewal of the BESAC has been determined to be essential to conduct business of the Department of Energy's and to be the in the public interest in connection with the performance of duties imposed upon the Department of Energy, by law and agreement. The Committee will continue to operate in accordance with the provisions of the Federal Advisory Committee Act, the rules and regulations in implementation of that Act.

FOR FURTHER INFORMATION CONTACT: Ms. Harriet Kung at (301) 903–3081.

Issued in Washington DC on July 29, 2013.

Carol A. Matthews,

Committee Management Officer.

[FR Doc. 2013–18802 Filed 8–5–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Docket No. EERE–2013–BT–BC–0036]

DOE Activities and Methodology for Assessing Compliance With Building Energy Codes

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Request for information (RFI).

SUMMARY: The U.S. Department of Energy (DOE) is soliciting public input on the methodology developed by DOE to assist in assessing compliance with building energy codes at the local, state, and national levels. To provide technical assistance for states implementing building energy codes, DOE developed and piloted a compliance methodology across several U.S. states. The experiences of those participating in these pilot studies have led to a number of recommendations and potential changes to the DOE methodology. DOE is interested in receiving broad public input on not only this methodology, but also on fundamental assumptions and approaches to measuring compliance with building energy codes. This notice identifies several areas in which DOE is particularly interested in receiving information; however, any input and suggestions considered relevant to the topic are welcome.

DATES: Written comments and information are requested on or before September 5, 2013.

ADDRESSES: Interested persons are encouraged to submit comments electronically. However, comments may be submitted by any of the following methods:

- *Email to the following address: ST CodeCompliance2013BC0036@ee.doe.gov.* Include docket number EERE–2013–BT–BC–0036 in the subject line of the message.
- *Federal eRulemaking Portal:* www.regulations.gov. *Follow the instructions for submitting comments.*
- *Postal Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Office, Mailstop EE–2J, Request for Information for Methodology for Energy Code Compliance Evaluation, Docket No. EERE–2013–BT–BC–0036, 1000 Independence Avenue SW., Washington, DC 20585–0121. Phone (202) 586–2945. Please submit one signed paper original.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Office, 6th Floor, 950 L'Enfant Plaza SW., Washington, DC 20024. Phone: (202) 586–2945. Please submit one signed paper original.

Instructions: All submissions received must include the agency name and docket number.

Docket: The docket is available for review at *www.regulations.gov.* All documents in the docket are listed in the index. A link to the docket Web page can be found at *http://www.regulations.gov/#!docketDetail;D=EERE–2013–BT–BC–0036.* The Regulations.gov Web site contains instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT:

Ms. Kym Carey, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue SW., Washington, DC, 20585, Telephone: (202) 287–1775, Email: *Kym.Carey@ee.doe.gov.*

Ms. Kavita Vaidyanathan, U.S. Department of Energy, Office of the General Counsel, Forrestal Building, Mailstop GC–71, 1000 Independence Ave, SW., Washington, DC, 20585, Telephone: (202) 586–0669, Email: *Kavita.Vaidyanathan@hq.doe.gov.*

For information on how to submit or review public comments or view the docket, contact Ms. Brenda Edwards, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, Mailstop EE–2J, 1000 Independence Avenue SW., Washington, DC 20585. Telephone: (202) 586–2945, Email: *Brenda.Edwards@ee.doe.gov.*

SUPPLEMENTARY INFORMATION:

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I. Statutory Background
II. Evaluating Compliance with Building

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III. Request for Information and Comments

I. Statutory Background

DOE is directed to provide technical assistance to states to support implementation of state residential and commercial building energy efficiency codes (42 U.S.C. 6833(d)).

II. Evaluating Compliance with Building Energy Codes

Building energy codes are commonly utilized to establish minimum levels of energy conservation in residential and commercial buildings, and greater compliance with code requirements ensures the intended efficiency measures are achieved. To assist states in their efforts, DOE developed a methodology that states could use to evaluate and measure compliance (See *http://www.energycodes.gov/sites/default/files/documents/MeasuringStateCompliance.pdf*). At the highest level, the evaluation methodology for code compliance entails 4 steps:

(1) Identify building sample

(2) Gather input from local jurisdictions

(3) Evaluate via plan review and on-site inspections

(4) Compile results and generate compliance rates.

For each of these four steps, DOE provided guidance, as well as supplemental tools and resources (See *http://www.energycodes.gov/compliance/evaluation*). In 2010 and 2011, the methodology was tested in a series of eight pilot studies funded by DOE. Individual studies were conducted in the states of Georgia, Iowa, Massachusetts, Montana, Utah, and Wisconsin. The remaining two studies were conducted in a group of Northwest states (Washington, Oregon, Idaho, and Montana). The studies were conducted over a 10-month period, with final reports from individual pilots submitted in June 2011. A number of recommendations for changes to the methodology resulted from these pilot studies, as well as were expressed by additional states conducting their own compliance evaluation activities.

One common observation from states that participated in the pilot studies was that the methodology can be costly and time-consuming. More specifically, the methodology required significant effort to secure a valid building sample, numerous visits to each building, and extensive verification of individual code requirements. Revisions suggested to DOE in order to reduce state cost and time burden include the following examples:

(1) Make the building sample selection process easier and/or less time consuming.

(2) Reduce the number of site visits that must be made to each building.

(3) Reduce the number of checklist items that must be evaluated at each building.

(4) Reduce the number of buildings evaluated.

However, each of these could have a potentially negative impact on the statistical significance of the results of the code compliance evaluation.

Supporting energy code compliance is core to the DOE mission; providing technical assistance to states to implement building energy codes (42 U.S.C. 6833), including verifying and increasing compliance to ensure consumer benefits. As such, DOE seeks stakeholder input on fundamental questions related to how compliance should be defined, evaluated, and implemented, and has issued this Request for Information (RFI). This RFI seeks public input not only on the DOE methodology, but also on a number of questions related to general energy code compliance. DOE will consider these comments as it seeks to revise its approach to energy code compliance evaluation and guide future programmatic efforts.

Summary of the DOE Compliance Evaluation Methodology

DOE has developed a number of resources for states to use to evaluate compliance with building energy codes. These resources may be found at the DOE Building Energy Codes Program Compliance Evaluation page (See *http://www.energycodes.gov/compliance/evaluation*). A Step-By-Step Companion Guide (See *http://www.energycodes.gov/sites/default/files/documents/Step_by_Step_Companion_Guide.pdf*) to the compliance process summarizes the steps in effective evaluation. The document *Measuring State Energy Code Compliance* (''methodology report'') (See *http://www.energycodes.gov/sites/default/files/documents/MeasuringStateCompliance.pdf),* contains a detailed methodology for states to determine an overall state metric for building energy code compliance. Interested parties should consult the full text of the methodology report, however, for convenience the key points of the methodology are listed below with the relevant section numbers from that document noted in parentheses:

- Evaluate buildings using second-party evaluators for self-assessments (a second-party evaluation would be performed by local code officials) (4.1)
- Evaluate buildings using third-party evaluators for formal evaluations (a third-party evaluation would be performed by a party that has no direct relationship to the buildings being evaluated) (4.1)
- Evaluate buildings using the DOE-developed checklists for the 2009 IECC (residential) and ASHRAE Standard 90.1–2007 (commercial)(For checklists, see *http://www.energycodes.gov/compliance/evaluation/checklists*).
  - States which have adopted the 2009 IECC for commercial buildings should use the ASHRAE 90.1–2007 checklists to determine compliance. (2.1)
  - Low-rise multifamily buildings are to be evaluated against the 2009 IECC Chapter 4 requirements instead of the commercial code. (2.3)
- Generate a statistically valid sample across four distinct market segments (populations): new residential construction, new commercial construction, residential renovations, and commercial renovations.
  - A statistically valid sample size was determined to be approximately 44 buildings in each population. (5.2.1)
  - The compliance results for the four populations should not be combined for the overall state compliance score and rather should be reported separately. (5.1)
  - It is recommended that a formal evaluation of a given population be completed within a 1-year time period. (5.1)
  - New commercial buildings are further separated into the following size strata definitions: (5.2.1.2, 5.2.1.3)
    - *Small:* 1–2 stories, single zone, up to 25,000 ft^2 in conditioned floor area
    - *Medium:* Larger than 25,000 ft^2 and up to 60,000 ft^2
    - *Large:* Larger than 60,000 ft^2 and up to 250,000 ft^2
    - *X-Large:* Larger than 250,000 ft^2 and up to 400,000 ft^2
    - *XX-Large:* Larger than 400,000 ft^2.
  - The sample size derivation for commercial buildings assumes that 44 samples will be drawn from small, medium, and large, but this sample size may increase for states with X-large and XX-large buildings, and may decrease for states with less new commercial construction. (5.2.2.1)
  - For all four categories, if a state has multiple climate zones, distribute the sample across climate zones based on the average number of building starts over the previous 3 years. (5.2.2.2)
  - Vary the building samples to include a mix of use type, size, complexity, etc. For example, include mixed use residential/commercial buildings; townhouses and multifamily structures three stories or less above

grade (residential); and vary sample by building type, size, ownership, etc. (commercial). (5.1, 5.2)

To assist states in generating a statistically significant sample, DOE provided the State Sample Generator tool (See *https://energycode.pnl.gov/SampleGen*). This tool contains building permit data for the years 2008 through 2010 from McGraw Hill Dodge (''Dodge'') construction dataset for new commercial construction and renovations (See *http://www.dodgeprojects.construction.com*), and building permit data from the U.S. Census Bureau (''Census'') for new residential construction (See *http://www.census.gov/construction/nrc*). Residential renovation data is not included in the Sample Generator, as there is no known significant nationwide source of data available. The sample generator can be used to identify which counties should be sampled within each climate zone within a particular state, and in what proportion to generate statistically significant samples for each market segment population (i.e., new residential construction, new commercial construction, and commercial renovations). Note that if no commercial renovations permits were identified in a state, for example, then no commercial renovation sample can be determined using the Sample Generator tool. Examples of the use of the State Sample Generator may be found in Section 5.2.2.2 of the methodology report.

The methodology report describes the structure of the compliance evaluation checklists. Residential and commercial checklist items are each assigned to one of three tiers in an effort to emphasize the most important code requirements. Each tier is given a different weight in determining the overall building metric. Tier 1 requirements are worth 3 points. Tier 2 requirements are worth 2 points. Tier 3 requirements are worth 1 point. (5.3.2)

The methodology report also explains that while the checklists are based on the prescriptive requirements found in the designated codes and standards, the checklists can also be used for buildings that demonstrated compliance using a trade-off approach or whole-building performance approach, as long as the appropriate documentation is available at the time of plan review and inspection. (6.1) The checklist items are grouped into sections corresponding to the phase of construction where the checklist item is typically inspected.

While it is not explicitly stated in the methodology, a single building is ideally used to complete a compliance evaluation checklist. However, the methodology also allows for multiple buildings to represent a single evaluation by compiling partial checklists for similar buildings into a single representative building. Different buildings can be used for different phases of construction; this is referred to as the ''construction phases approach'' in the methodology. (6.3) The ''primary'' building approach can be used as an alternative to evaluate observable checklist items, with a separate (but similar) building used for items that were not observable in the primary building (e.g., due to timing of the evaluation within the construction process). (6.4)

- If multiple buildings are used, they must be from the same jurisdiction and type.
- If multiple commercial buildings are used, they must also fall in the same size stratum.

The checklists can also be used to gather data during different stages of construction on different buildings that have the same general attributes in order to yield a resulting single composite building in lieu of evaluating a single building throughout construction. For example, several houses in a new subdivision where there are homes in various stages of construction might be evaluated. The same cautions regarding multiple buildings as noted for the ''primary'' building applies to this approach as well. (6.3)

DOE developed the Score + Store tool (See *https://energycode.pnl.gov/ScoreStore/login*) to help states and local jurisdictions determine and report compliance rates for both individual buildings and at the state-level in order to meet compliance and efficiency goals. A compliance rating of 0–100% for each evaluated building is assigned based on the proportion of code requirements met applying the tiered weighting system. Scores are then averaged within a state to derive an overall compliance metric.

- The overall state compliance metric for residential new construction is derived by taking a simple average of all individual building scores within the population. (5.4.1)
- For the overall state compliance metric for commercial new construction, weighted individual scores for new commercial construction are used to estimate average compliance rates for each building size stratum within the state. These average compliance rates are then rated according to the proportion of total square footage constructed within each stratum. (5.4.1)
- Overall state compliance metrics for residential and commercial renovations are derived by taking the total number of weighted checklist items evaluated for all buildings in the sample as the divisor and the number of those weighted items that are in compliance as the numerator, multiplied by 100. This does not result in an individual metric being assigned to each building, but does provide a state-wide metric that takes into account the varied number of code requirements against which each observed renovation is evaluated. (5.4.2)

The methodology report also describes a number of pre-evaluation information gathering and training activities that could be undertaken by a state before it attempts to determine the state compliance rate. These activities include (3.1):

(1) Establish a compliance working group to help plan the code evaluation process and to improve communications between stakeholders.

(2) Perform self-assessments using building department staff to evaluate buildings.

(3) Evaluate results of self-assessments to identify potential code compliance issues.

(4) Train and educate stakeholders to address identified code compliance issues and barriers.

(5) Launch third-party compliance evaluation only after the previous activities.

The methodology also suggests two other possible activities prior to full compliance evaluation:

(1) Survey the jurisdictions regarding local energy code plan review, inspection, and administration to assess the policies and processes that are currently established. DOE has provided a Jurisdictional Survey (See *https://www.energycodes.gov/compliance/evaluation*) that may be used as a sample. (3.2)

(2) Conduct ''spot checks'' of code requirements considered problematic to ensure that those requirements are being met. (3.3)

Summary of findings from the Compliance Pilot Study conducted by DOE

The DOE methodology was pilot tested in nine U.S. states through eight distinct studies funded by DOE under the Recovery Act. In addition, three other states utilized parts of the methodology in separate, but concurrent, efforts, and are also discussed in the *90% Compliance Pilot Studies* final report (''pilot study report'') (See http://www.energycodes.gov/compliance-pilot-studies-final-report). The primary purpose of these pilot studies was to assess the effectiveness of the DOE

guidelines and tools developed under the Recovery Act, and to provide suggestions for their improvement. The pilot studies should not be interpreted to represent national or state compliance rates.

The pilot study report summarizes observations and comments received by the participants regarding code compliance evaluations. Some of the observations and comments were the following:

- State compliance measurement studies can be costly and may require multiple visits to the building while under construction. Post-construction evaluations were implemented in one study in an effort to reduce these costs, but many code requirements cannot be evaluated post-construction.
- Data sources for generating sample sets of buildings to be evaluated are not always accurate and, in some cases, are not available (e.g., residential renovations). Generating valid sample sets was further complicated by the economic climate and the fact that new housing starts were significantly lower than past data predicted.
- Timing onsite visits to observe all code requirements is difficult for third-party evaluators.
- Access to buildings under construction is a barrier in some locations.
- Consistency is difficult to obtain across studies and among individual evaluators.

States may choose to address these issues by engaging in alternative, less costly measurement activities, some of which are discussed in Section 10 of the pilot study report. Despite problems in accurately measuring compliance, the pilot studies provided several insights into where states might focus their efforts in increasing compliance rates, including the following observations:

- The top barrier to compliance continues to be lack of training, followed by lack of resources and lack of compliance information on plan submissions. While training is an ongoing effort, and lack of resources may be difficult to address, states can work with local enforcement jurisdictions to ensure adequate documentation is received and to provide training.
- Buildings that demonstrated compliance using software tools showed a strong correlation with higher compliance rates. Software reports provide additional documentation of compliance, which might partially account for the correlation with higher compliance rates.

Other Recent DOE Activity Related to Energy Code Compliance

Since the methodology was published in 2010, DOE has taken steps to improve not only the methodology, but also the supplemental resources to assist states in raising compliance levels. These include the pilot studies, as well as enhancements to DOE code compliance software tools to make the process of code compliance and evaluation more seamless. DOE is currently adding functionality to the RES*check* (See *http://www.energycodes.gov/rescheck*) and COM*check* (See *http://www.energycodes.gov/comcheck*) software to augment compliance information pertaining to a specific building:

- A Requirements Screen was added to capture information about code requirements not currently addressed in RES*check* and COM*check.*
- Checklists for specific RES*check* and COM*check* buildings are being incorporated into the software compliance reports and include the information gathered in the Requirements Screen.

DOE is also providing a way for the Score + Store tool to generate checklists that are customized for specific buildings based on RES*check* and COM*check* projects. These custom checklists will include information entered into RES*check* and COM*check,* and remove code requirements that do not apply to that specific building. They can be used to evaluate a specific building's compliance rate in the same way that the generic checklists have been used in previous studies. Such changes serve to improve interoperability between the DOE compliance software tools and associated resources.

III. Request for Information and Comments

DOE has also revisited the methodology for measuring compliance in light of the pilot studies with the goal of identifying potential enhancements. DOE has received comments from various interested parties. Based on feedback already received, potential enhancements are incorporated into the list of questions for which DOE is seeking input in this Request for Information.

DOE is particularly interested in receiving information on the following questions. The questions are sorted into five categories: Defining and Achieving Compliance, Costs and Benefits, Compliance Targets, Evaluating Compliance, and DOE Compliance Evaluation Resources and Actions.

Defining and Achieving Compliance

- How should DOE define compliance with energy codes?
- What are the barriers to achieving compliance?
- How can those barriers to achieving compliance be overcome?

Costs and Benefits

- What state and national policy benefits are related to compliance?
- What consumer benefits are related to compliance?
- What are the most cost-effective compliance mechanisms?
- What methodology or assessment provides the highest energy savings in the market?
- What is the minimum cost to do a valid compliance study?

Compliance Targets

- How should compliance be measured (i.e., methodology)?
- Should DOE emphasize achieving a particular rate of compliance (e.g., 90%) similar to what was specified in ARRA?
- How frequently should compliance be evaluated?
- Should compliance be measured as documentation of energy savings associated with energy codes?
- What metric should be used for measuring compliance?
- How should progress be tracked and at what level (i.e., national, regional, state, local)?

Evaluating Compliance

- Who should evaluate compliance? (e.g., local building department, state building code authority, State Energy Office, contractors hired by the state/locality, etc.)
- What are the barriers to evaluating energy code compliance?
- How can those barriers to evaluating compliance be overcome?
- Are there other approaches to energy code compliance measurement (different from the existing DOE methodology) that have been used successfully?
- How much emphasis should DOE put on statistical significance of compliance evaluation results?
- Do residential and commercial compliance evaluation studies require fundamentally different sampling plans and research methodologies?
- Are there ways to encourage owners and developers of poorer performing buildings to participate in compliance evaluation studies?
- How should DOE address buildings that are better than or above code in compliance evaluation?
- Are there other approaches to energy code compliance that have

involved public utility commissions and public utilities?

• What roles do public/private utilities have or could take in improving energy code compliance? Can evaluation of energy code compliance could be considered similarly to evaluation of utility ''above code'' programs.

• Are there approaches to energy code compliance that have the potential to be financially self-sustaining (i.e., approaches to energy code compliance that do not require direct government funding)?

• What is the proper way to attribute energy savings from compliance programs to various stakeholders?

DOE Compliance Evaluation Resources and Actions

• Should DOE provide resources for compliance evaluation, such as software tools, methodologies, checklists, training templates, etc.?

• Are there additional resources DOE should be providing for energy code compliance that are not currently available?

• How could incentive funding be used to facilitate states to increase energy code adoption and compliance efforts?

• Is there a role DOE could play to support third-party evaluators?

• What other suggestions would you have for DOE to consider, in working with states, municipalities, and the construction community to better understand, track, and assist with energy code compliance?

Issued in Washington, DC, on July 31, 2013.

Roland Risser,

Director, Building Technologies Office, Energy Efficiency and Renewable Energy.

[FR Doc. 2013–18952 Filed 8–5–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. CAC–041]

Notice of Petition for Waiver of ECR (ECR) International, Inc. From the Department of Energy Residential Central Air Conditioners and Heat Pumps Test Procedure, and Grant of Interim Waiver

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of petition for waiver, notice of grant of interim waiver, and request for comments.

SUMMARY: This notice announces receipt of and publishes a petition for waiver and application for interim waiver (''petition'') from ECR International, Inc. (ECR) regarding specified portions of the U.S. Department of Energy (DOE) test procedure for determining the energy consumption of residential central air conditioners and heat pumps. In its petition, ECR provides an alternate test procedure specific to EMI multi-zone unitary small air conditioners and heat pumps. DOE solicits comments, data, and information concerning ECR's petition and the suggested alternate test procedure. Today's notice also grants ECR an interim waiver from the existing DOE test procedures for the subject EMI (Enviromaster International) multi-zone unitary small air conditioners and heat pumps.

DATES: DOE will accept comments, data, and information with respect to the ECR Petition until, but no later than September 5, 2013.

ADDRESSES: You may submit comments, identified by case number ''CAC–041,'' by any of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *Email: AS_Waiver_Requests@ee.doe.gov* Include the case number [Case No. CAC–041] in the subject line of the message.

• *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J/1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–2945. Please submit one signed original paper copy.

• *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza SW., Suite 600, Washington, DC 20024. Please submit one signed original paper copy.

Docket: For access to the docket to review the background documents relevant to this matter, you may visit the U.S. Department of Energy, 950 L'Enfant Plaza SW., Washington, DC, 20024; (202) 586–2945, between 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays. Available documents include the following items: (1) this notice; (2) public comments received; (3) the petition for waiver and application for interim waiver; and (4) prior DOE waivers and rulemakings regarding similar refrigerator-freezer products. Please call Ms. Brenda Edwards at the above telephone number for additional information.

FOR FURTHER INFORMATION CONTACT: Mr. Bryan Berringer, U.S. Department of Energy, Building Technologies Program, Mail Stop EE–2J, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–0371. Email: *Bryan.Berringer@ee.doe.gov.*

Ms. Jennifer Tiedeman, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–71, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0103. Telephone: (202) 287–6111. Email: *mailto:Jennifer.Tiedeman@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Authority

Title III, Part B of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163 (42 U.S.C. 6291–6309, as codified), added by Public Law 95–619, Title IV, § 441(a), established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances, which includes the residential central air conditioners and heat pumps that are the focus of this notice.[1] Part B includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part B authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results which measure the energy efficiency, energy use, or estimated annual operating costs of a covered product, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The test procedure for residential central air conditioners and heat pumps is contained in 10 CFR part 430, subpart B, appendix M (referred to in this notice as ''Appendix M'').

The regulations set forth in 10 CFR 430.27 contain provisions that enable a person to seek a waiver from the test procedure requirements for covered products. The Assistant Secretary for Energy Efficiency and Renewable Energy (the Assistant Secretary) will grant a waiver if it is determined that the basic model for which the petition for waiver was submitted contains one or more design characteristics that prevents testing of the basic model according to the prescribed test procedures, or if the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially

[1] For editorial reasons, upon codification in the U.S. Code, Part B was re-designated Part A.

inaccurate comparative data. 10 CFR 430.27(l). A petitioner must include in its petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption. The Assistant Secretary may grant the waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(l). Waivers remain in effect pursuant to the provisions of 10 CFR 430.27(m).

The waiver process also allows the Assistant Secretary to grant an interim waiver from test procedure requirements to manufacturers that have petitioned DOE for a waiver of such prescribed test procedures. 10 CFR 430.27(g). An interim waiver remains in effect for 180 days or until DOE issues its determination on the petition for waiver, whichever occurs earlier. DOE may extend an interim waiver for an additional 180 days. 10 CFR 430.27(h).

II. Petition for Waiver of Test Procedure and Application for Interim Waiver

On March 26, 2013, ECR submitted a petition for waiver and application for interim waiver (''petition'') from the test procedure applicable to residential central air conditioners and heat pumps set forth in 10 CFR part 430, subpart B, appendix M. ECR seeks a waiver from the applicable test procedure because, ECR asserts that the prescribed test procedures yield results that are unrepresentative of actual energy consumption for ECR's Enviromaster International (''EMI'') line of multi-zone unitary small air conditioners and heat pumps. In its petition, ECR asserts that the DOE test procedures currently applicable to these products do not sufficiently address the unique configuration of those products, and therefore do not produce results that are (1) representative of their energy consumption characteristics or (2) consistent, accurate and repeatable. In order to be assured that it is correctly calculating the energy consumption of the product, that it meets the minimum energy requirements for its product class, and is properly labeled, ECR proposes to use an alternate test procedure for testing its models.

ECR also requests an interim waiver from the existing DOE test procedure. An interim waiver may be granted if it is determined that the applicant will experience economic hardship if the application for interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination of the petition for waiver. 10 CFR 430.27(g).

DOE has determined that ECR's application for interim waiver does not provide sufficient market, equipment price, shipments and other manufacturer impact information to permit DOE to evaluate the economic hardship ECR might experience absent a favorable determination on its application for interim waiver. However, DOE has determined based upon a technical evaluation of ECR's proposed alternate test method and the characteristics of the products addressed by the petition, that it is likely ECR's petition will be granted, and that it is desirable for public policy reasons to grant ECR relief pending a determination on the petition. DOE has determined that it is desirable to have similar basic models tested in a consistent manner.

For the reasons stated above, DOE grants ECR's application for interim waiver from testing of its multi-zone unitary small air conditioners and heat pumps product line. Therefore, *it is ordered that:*

The application for interim waiver filed by ECR is hereby granted for the specified ECR multi-zone unitary small air conditioners and heat pumps basic models, subject to the specifications and conditions below. ECR shall be required to test or rate the specified multi-zone unitary small air conditioners and heat pumps products according to the alternate test procedure as set forth in section III, ''Alternate Test Procedure.''

The interim waiver applies to the following basic model groups:

S2CG2200D, S2CG9200D, S2CG9900D, T2CG2400D, T2CG4400D, T2CG8800D, T2CG9800D, T3CG2220D, T3CG2240D, T3CG9920D, T3CG9980D, T3CG9990D, T4CG2222D, T4CG9922D, T4CG9992D, T4CG9999D, S2HH2200D, S2HH9200D, S2HH9900D, T2HG2400D, T2HG4400D, T2HG8800D, T2HG9800D, T3HG2220D, T3HG2240D, T3HG9920D, T3HG9980D, T3HG9990D, T4HG2222D, T4HG9922D, T4HG9992D, T4HG9999D

DOE makes decisions on waivers and interim waivers for only those models specifically set out in the petition, not future models that may be manufactured by the petitioner. ECR may submit a subsequent petition for waiver and request for grant of interim waiver, as appropriate, for additional models of its multi-zone unitary small air conditioners and heat pumps for which it seeks a waiver from the DOE test procedure. In addition, DOE notes that a grant of an interim waiver or waiver does not release a petitioner from the certification requirements set forth at 10 CFR part 429.

Further, this interim waiver is conditioned upon the presumed validity of statements, representations, and documents provided by the petitioner. DOE may revoke or modify this interim waiver at any time upon a determination that the factual basis underlying the petition for waiver is incorrect, or upon a determination that the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics.

III. Alternate Test Procedure

EPCA requires that manufacturers use DOE test procedures to make representations about the energy consumption and energy consumption costs of products covered by the statute. (42 U.S.C. 6293(c)) Consistent representations are important for manufacturers to use in making representations about the energy efficiency of their products and to demonstrate compliance with applicable DOE energy conservation standards. Pursuant to its regulations applicable to waivers and interim waivers from applicable test procedures at 10 CFR 430.27, DOE will consider setting an alternate test procedure for ECR in a subsequent Decision and Order.

In its petition, ECR states that for its multi-zone unitary small air conditioners and heat pumps models, tests using the DOE test procedure for residential central air conditioners and heat pumps at 10 CFR part 430, subpart B, appendix M (''Appendix M'') is inapplicable to their products and would result in measurements of energy use that are not representative of these models' actual energy use. Thus, during the period of the interim waiver granted in this notice, ECR shall test its multi-zone unitary small air conditioners and heat pump basic models according to the existing DOE test procedure at 10 CFR part 430, subpart B, appendix M with the modifications set forth below.

1. Section 3.1.4.1.2 is replaced with the following:

3.1.4.1.2 Cooling Full-load Air Volume Rate for Non-ducted Units. For non-ducted units, run the unit in a free air state (i.e., without the plenum, duct work, and air sampling apparatus attached to the outlet of the indoor unit) at the A test conditions. After condensate has dripped from the coil for no less than 10 minutes and air entering

the indoor unit meets the specified test conditions, measure and record the blower motor RPM, current, and power consumption for each indoor unit. For all tests that require the Cooling Full-load Air Volume Rate, adjust the air flow until the blower motor has the same RPM, current, and power consumption as measured when operating in a free air state.

2. Section 3.1.4.4.4 is replaced with the following:

3.1.4.4.4 Non-ducted heat pumps, including non-ducted heating-only heat pumps. For non-ducted heat pumps, run the heat pump in a free air state (i.e., without the plenum, duct work, and air sampling apparatus attached to the outlet of the indoor unit) at the H1 test conditions. After the unit has operated for 30 minutes and the air entering the indoor unit meets the specified test conditioners, measure and record the blower motor RPM, current, and power consumption for each indoor unit. For all tests that require the Heating Full-load Air Volume Rate, adjust the air flow until the blower motor has the same RPM, current, and power consumption as measured when operating in a free air state.

3. In performance of section 3.1.7 when testing a non-ducted air conditioner, establish the Cooling Full-load Air Volume Rate first according to section 3.1.4.1.2 prior to conducting the A, B, C, or D tests. When testing a non-ducted heat pump establish the Heating Full-load Air Volume Rate first according to section 3.1.4.4.4. When conducting an optional cyclic test, always conduct it immediately after the steady-state test that requires the same test conditions. For variable-speed systems, the first test using the Cooling Minimum Air Volume Rate should precede the EV Test if one expects to adjust the indoor fan control options when preparing for the first Minimum Air Volume Rate test. Under the same circumstances, the first test using the Heating Minimum Air Volume Rate should precede the H2V Test. When testing multi-split systems where each indoor unit operates independently and has an independent refrigeration circuit, conduct a set of cooling and/or heating tests, if applicable, for each indoor unit individually, but run all units during each test. To measure the cooling capacity conduct the tests specified in section 3.2.1 for each indoor unit. To measure the heating performance, conduct the tests specified in section 3.6.1 for each indoor unit.

4. In section 3.3, perform the pretest interval in paragraph (a) as written, except for non-ducted units use the exhaust fan or the airflow measuring apparatus to obtain and then maintain the blower motor RPM, current, and power consumption as measured when operating in a free air state, according to section 3.1.4.1.2. Locate the pressure tap for each air handler first at the prescribed ASHRAE 41.2 distance of 2*SQRT(A*B) and then adjust the position by moving the installation point closer or further away from the air handler until the 0.0 inch of water column point is located.

For multi-split systems where each indoor unit operates independently and has an independent refrigeration circuit, sum the average total space cooling capacity of each individual indoor unit test and assign to Qc(T), and take the mean of the average electrical power consumption for each individual indoor unit test assign to Ec(T). Replace the ''T'' with the nominal outdoor temperature at which the test was conducted.

5. In performance of section 3.4, for multi-split systems where each indoor unit operates independently and has an independent refrigeration circuit, sum the total space cooling capacity of each individual indoor unit test and assign to Qss,dry, and take the mean of the average electrical power consumption for each individual indoor unit test and assign to Ess,dry.

6. In performance of section 3.5, for multi-split systems where each indoor unit operates independently and has an independent refrigeration circuit, sum the total space cooling of each individual indoor unit test and assign to $q_{cyc,dry}$, and take the mean of the electrical energy consumption of each indoor unit test and assign to $e_{cyc,dry}$.

7. In performance of section 3.5.3, for multi-split systems where each indoor unit operates independently and has an independent refrigeration circuit, take the average of the result from the cooling load factor calculation performed for each individual indoor unit test and assign to CLF.

8. In performance of section 3.7, the pretest interval of paragraph (a) shall be performed as written, except use the exhaust fan or the airflow measuring apparatus to obtain and then maintain the blower motor RPM, current, and power consumption as measured when operating in a free air state, according to section 3.1.4.4.4. Locate the pressure tap for each air handler first at the prescribed ASHRAE 41.2 distance of 2*SQRT(A*B) and then adjust the position by moving the installation point closer or further away from the air handler until the 0.0 inch of water column point is located.

To calculate the overall result of the section 3.7 tests for multi-split systems where each indoor unit operates independently and has an independent refrigeration circuit, sum the average space heating capacity of each individual indoor unit test and assign to $Q_h(T)$, and take the average of the electrical power consumption of each individual indoor unit test and assign to $E_h(T)$. Replace the ''T'' with the nominal outdoor temperature at which the test was conducted.

9. In performance of section 3.8, for multi-split systems where each indoor unit operates independently and has an independent refrigeration circuit, sum the total space heating of each individual indoor unit test and assign to q_{cyc}, and take the average of the electrical energy consumption of each individual indoor unit test and assign to e_{cyc}.

10. In performance of section 3.8.1, for multi-split systems where each indoor unit operates independently and has an independent refrigeration circuit, take the mean of the result from the heating load factor calculation performed for each individual indoor unit test and assign to HLF.

11. In performance of section 3.9.1, for multi-split systems where each indoor unit operates independently and has an independent refrigeration circuit, perform the calculations specified in section 3.9.1a though section 3.9.1d, as needed, for each indoor unit and assign to $Q_h^k(35)$ the sum of the capacity results and assign to to $E_h^k(35)$ the average of the power results.

12. In performance of section 3.9.2, for multi-split systems where each indoor unit operates independently and has an independent refrigeration circuit, determine the demand defrost credit for each indoor unit and assign the average of the result to $F_{def.}$

13. In performance of section 3.10, for multi-split systems where each indoor unit operates independently and has an independent refrigeration circuit, sum the average space heating capacity of each individual indoor unit test and assign to $Q_h^k(17)$, and take the mean of the electrical power consumption of each indoor unit and assign to $E_h^k(17)$.

IV. Summary and Request for Comments

Through today's notice, DOE announces receipt of ECR's petition for waiver from the test procedures applicable to residential central air conditioners and heat pumps, and grants an interim waiver to ECR. As part of this notice, DOE is publishing ECR's petition for waiver in its entirety pursuant to 10 CFR 431.401(b)(1)(iv). Confidential business information has been redacted from the petition. The

petition includes a suggested alternate test procedure to measure the energy consumption of central air conditioners and heat pumps basic models. Furthermore, today's notice includes an alternate test procedure that ECR is required to follow as a condition of its interim waiver. ECR would be required to use this modified version of the Appendix M for testing and rating its products in accordance with the testing and certification requirements of 10 CFR part 429.

DOE solicits comments from interested parties on all aspects of the petition. Any person submitting written comments to DOE must also send a copy of such comments to the petitioner. 10 CFR 430.27(d). The contact information for the petitioner is: Ronald J. Passafaro, President and Chief Executive Officer, ECR International, Inc., 2201 Dwyer Ave., Utica, NY 13501. All submissions received must include the agency name and case number for this proceeding. Submit electronic comments in WordPerfect, Microsoft Word, Portable Document Format (PDF), or text (American Standard Code for Information Interchange (ASCII)) file format and avoid the use of special characters or any form of encryption. Wherever possible, include the electronic signature of the author. DOE does not accept telefacsimiles (faxes).

According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies to DOE: one copy of the document including all the information believed to be confidential, and one copy of the document with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Issued in Washington, DC, on July 31, 2013.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

BILLING CODE 6450–01–P

ECR
2201 Dwyer Ave.
Utica, NY 13501
Ph: 315-797-1310
Fax: 315-797-3762
E-Mail: info@ecrinternational.com
Web: www.ecrinternational.com

March 26, 2013

U.S. Department of Energy
Building Technologies Program
Test Procedure Waiver
1000 Independence Avenue, SW, Mailstop EE-2J
Washington, DC 20585-0121

Dr. David Danielson
Assistant Secretary for Conservation and Renewable Energy
U.S. Department of Energy
Forrestal Building
1000 Independence Avenue, SW
Washington, DC 20585-0121

Re: Petition for Waiver and Application for Interim Waiver, ECR International, Inc.: Multi-Zone Unitary Small Air Conditioners and Heat Pumps

Dear Dr. Danielson:

ECR International, Inc. ("ECR") respectfully submits this petition for waiver and application for interim waiver of the Department of Energy ("Department") test procedures defined in 10 CFR 430, Subpart B, Appendix M, which incorporate by reference the following third party standards: AHRI 210/240-2008, AHRI 1230-2010, and ASHRAE 41.2, on the grounds that the prescribed test procedures yield results that are unrepresentative of actual energy consumption for ECR's Enviromaster International ("EMI") line of multi-zone unitary small air conditioners and heat pumps.

Company Background

ECR, with headquarters in Utica, New York, is a full-service provider of American engineered and manufactured boilers, water heaters, hydronic and forced air products at its facilities in Utica and Dunkirk, NY. ECR and its predecessor companies have been located in New York State since 1928 and employ a full-time workforce of [redacted]. As a full-service provider of American engineered-and-manufactured hydronic and forced air products, ECR is recognized for its innovation, quality, performance and reliability, and is the only North American company to make and market all of these products under one corporate roof. Our products are sold under

multiple brands in addition to EMI, including Airco, Argo, Dunkirk, Olsen, Pennco, RetroAire, and Utica.

The Affected Products

The affected line of products—condensers serving the EMI brand of fixed speed multi-zone systems--subject to this petition and application are listed herein at Appendix A. The company's unitary product line is AHRI-certified under both Unitary Small Air Conditioning (USAC) and Unitary Small Heat Pumps (USHP) programs. The multi-zone products use the same models of compressors, indoor air handlers, reversing valves, accumulators, line sets, thermostats, tubing diameters, expansion valves, and indoor air handlers as the single-zone fixed-speed 13 SEER systems manufactured by ECR. While the multi-zone outdoor coil is physically different than the single-zone outdoor coil, it is comparable in performance per zone to its single-zone capacity counterpart. As such, the system/circuit performance was expected to be near identical to the single-zone performance. This belief was confirmed in ECR's own psychrometric laboratory, i.e. that the multi-zone circuit-to-circuit metrics were nearly identical to the single-zone metrics. This relationship between the two systems, however, is not borne out through AHRI certification tests, where tests have rated the product as low as [redacted].

Overview

The test procedures currently being applied to the affected line of products are in fact inapplicable to those products, and therefore unrepresentative of the energy consumption characteristics of the products at issue, in the following ways: (1) they do not appropriately classify the applicable systems manufactured by ECR; (2) there is no authoritative standard that can be accurately applied to ECR's products; (3) as a result of these factors, the current testing procedures do not produce consistent, accurate and repeatable data. ECR herein provides an alternative testing procedure for the affected products.

1. The test procedures do not appropriately classify the applicable systems manufactured by ECR.

ECR's fixed speed multi-zone systems are comprised of multiple independent refrigeration circuits sharing a single outdoor fan and defrost logic. Each circuit has a single fixed speed compressor, a single air handler, a single control circuit, with individual expansion, without any mixing of refrigerant between the zones. Each fully independent circuit can have different loading, cycle on and off independent of the other zones, as well as operate in different modes (heat/cool) simultaneously. The design is merely a collection of single-zone systems built into a common chassis to reduce the condenser footprint. As stated above, the multi-zone and single-zone systems manufactured by ECR utilize many of the same components.

The current certification testing does not measure the loading of each individual circuit of the system. Under current test procedures, a multi-zone system consisting of 4 equal capacity circuits with 4 identical air handlers is logically expected to evenly distribute the total capacity at 25% per zone. While this logic is valid for VRF- based multi-zone systems running all refrigerant through a single compressor, it is not applicable when evaluating multiple

independent circuits. The test procedures do not verify the individual circuit performance, and instead only record the total. This results in an averaging of the individual circuits' performance, whereas a summation of the individual circuits would be more representative of the true system performance. Without each circuit having individual performance data collected, it is impossible to assess the true performance of the test series after the fact, due to the lack of collected data. If the current test logic is not applicable to the simple 4 equal capacity circuit system, its use with the more complex unequal capacity circuitry system is even less so.

ECR proposes that a fixed speed multi-zone system have data collected and reduced for each individual circuit, then perform a summation of the individual circuits to arrive at the total system performance. This method would require the collection of the data required to independently verify the system's performance. The existing method of only recording the combined performance of the system doesn't record the values needed to determine that all zones are operating within acceptable limits. The absence of the required detail data prevents any analysis regarding what wasn't correct in either the set-up of the equipment or the operation of the equipment itself.

2. As a result of the differences between standards authorities discussed below, there are no approved standard procedures that apply to the product line of ECR at issue.

ASHRAE 41.2, "Standard Methods for Laboratory Airflow Measurement", does not address the measurement of multiple zero static airflow. Section 7.4 of same states that "each plenum shall have an adjustable restrictor (damper) located in the plane where the plenums enter the common duct section for the purpose of equalizing the static pressures in each plenum." This ASHRAE requirement conflicts with the requirements in 10 CFR Part 430 Subpart B Appendix M § 3.5.2 which states, "Do not use air dampers when conducting cyclic tests on non-ducted units."

Furthermore, the diagrams in ASHRAE 41.2, at figures 8A and 8B, do not consistently result in accurate static pressure values when applied to zero static equipment. The AHRI Ductless Equipment Section Engineering Committee recently voted to allow multiple zero static air handlers to discharge into a large cubic plenum without any gradual transitions, contradicting ASHRAE 41.2 figure 9, which shows a 15° converging transition and a 7° diverging transition.

3. As a result of the lack of classification for ECR's product and lack of standardization in testing for that product, ECR is subject to arbitrary and inconsistent testing practices for its product line.

There are many "best practice" procedures available amongst the myriad of test laboratories, and these procedures have been implemented without input from ECR. Typically, these procedures are not published for peer review, and are inconsistent in the accuracy of results. The existing published procedures do not yield consistent, accurate, and repeatable data between different psychrometric laboratories.

The primary error occurs when the laboratory tries to analogize the performance within a duct to the performance of a free discharge zero static blower and a second air handler is combined into a common enthalpy tunnel. When attempting to join multiple air handlers into a common duct, each air handler has an influence on the other air handler's performance. Ideally, each air handler should have blower motor voltage, current, and angular velocity measured prior to the connection of a duct or transition piece. Upon connection of the duct, those same values should be attained as verification that the air moving device is working in a similar manner with the duct as it did without the duct. At that point, the location of the 0.0 inWC pressure tap can be located, starting at the ASHRAE 41.2 recommended standard (2*SQRT(A*B)). Different air handlers will have different locations for the zero static pressure point due to the differing air velocities at the discharge grill of the air handler. It is only by matching the motor's electrical current draw and revolutions per minute between the free air delivery and ducted delivery that equivalent performance can be verified. An iterative approach is required in order to achieve an accurate, balanced air flow measurement.

4. The following alternate procedures are proposed:

A. Air Flow Measurement

1) With laboratory rooms at conditions for capacity tests, refrigeration circuits in operation, and free air operation (without ducts), measure and record the blower motor RPM, current, and power consumed by each indoor air handler running with a wet evaporator independently.
2) Connect the duct between a single air handler and enthalpy tunnel. Restart the entire system and adjust the air flow until the now ducted blower motor has same RPM and current draw as seen in step 1. The static pressure tap can now be applied to that point on the duct that is actually operating at zero static via empirical methods. The point along the duct operating at zero static will vary proportionally with the discharge velocity of the air handler.
3) Air flow should be measured only when the RPM and power of the blower while connected to a duct matches that of the motor when running without a duct. This ensures that the zero static air mover is acting equivalently to free discharge. The location of the pressure tap can be found for each air handler by locating the "0.0 inch water column" pressure along the duct, starting at the prescribed ASHRAE 41.2 distance of 2*SQRT(A*B) and then moving closer or further away from the air handler until the 0.0 inch of water column point is located. Each type and capacity air handler will be slightly different due to the differences in discharge air velocity.
4) Tangential wheel blowers do not generate static pressure well. The more common centrifugal blower can generate static pressures within a duct to damp the variations in the discharged air flow, while the tangential wheel can only vary the speed of the discharged air in response to ambient parameters. Or stated another way, Bernoulli's equation has both the gravitational and pressure terms equal to zero in a zero static environment, leaving only the velocity term with a non-zero value and a very sensitive flow system. Any changes in static pressure must come from a change in air velocity, there is no other mechanism available.

B. Establishment of actual system performance

1) Due to this condenser design being a collection of independent refrigeration circuits, the test methodology should evaluate individual systems and then sum the results of circuits to arrive at accurate performance metrics, instead of averaging the results without knowing the performance of each individual circuit.
2) ECR's proposed procedure would run all zones during the test, but measure the performance of each individual zone, one at a time. This method minimizes the errors of multiple combined zero static air handlers by ensuring that each circuit is operating properly prior to the collection of data and calculation of DOE metrics. The data recording and reduction shall not occur until there is certainty that each independent zone is operating at its correct individual performance.

It should be noted that this product line has received waivers from the Department of Energy in the past, specifically for Limited Range Multi-Zone Heat Pumps. However, these waivers were rescinded due to the published test procedures becoming applicable to all unitary products. These waivers designated the condensers as "limited range" heat pumps to allow for their inability to defrost discrete zones. Controls were modified so as to allow individual zones to call for a defrost cycle thereby negating the need for a waiver.

Interim Waiver

ECR also requests that the Department provide immediate relief by grant of an interim waiver, for the following reasons:

1. The petition for the waiver is likely to be granted. The Department has, as discussed above, granted waivers for the multi-zone product line, albeit with a result towards test procedures being granted for unitary products which cannot be easily analogized to the multi-zone product of ECR. ECR's process furthers the goal of the Energy Conservation Policy Act, 42 U.S.C. §6291 *et seq.*, to provide consumers with accurate information regarding the energy conservation attributes of the product.

2. Substantial economic harm and competitive disadvantage will result absent a favorable determination on this application. ECR sells [redacted] multi-zone systems per year and has realized on average $[redacted] in sales per year. However, it should be noted that multi-zone systems are usually a minor percentage of a larger order, used to solve limited condenser footprint challenges on site. The resulting economic impact is therefore closer to $[redacted], or nearly [redacted] of total sales, in overall lost sales when an individual sale is contingent on multi-zone availability. Furthermore, sales of ECR's remaining product lines will suffer without a multi-zone offering. As discussed above, ECR has a considerable history and economic impact in the communities in which it is located; Upstate New York, and Central and Western New York in particular, have suffered from decades of decline in the manufacturing sector.

The specific sales information in this section (2) should be exempt from mandatory public disclosure under the Freedom of Information Act, specifically 5 U.S.C.§552(b)(4). This information has not been made publicly available by ECR nor is it publicly available through alternative sources, and is typically proprietary to ECR and its competitors. Disclosure of this information would result in a substantial advantage to ECR's competitors and therefore substantial harm to ECR's competitive position.

Conclusion

ECR requests that the Department grant both the waiver and interim waiver from the existing testing procedures as defined in 10 CFR 430, Subpart B, Appendix M and the third-party standards incorporated by reference in that regulation, and that the alternative testing procedures discussed above be adopted and approved as a representative test procedure for ECR.

ECR would be pleased to discuss this waiver request with the Department and shall provide additional information as needed to the Department.

ECR International shall file a statement with the Department certifying the names and address of each person to whom the notice of Petition for Waiver and Application for Interim Waiver has been sent.

Very truly yours,
Ronald J. Passafaro
President and Chief Executive Officer
ECR International, Inc.

Of counsel:
Donald T. Ross
Phillips Lytle LLP
30 South Pearl Street, Suite P1
Albany, New York 12207
Phone: 518-472-1224
Fax: 518-472-1227
dross@phillipslytle.com

APPENDIX A

The following condenser basic model numbers comprise the scope of this Petition for Waiver and Application for Interim Waiver, where each of the individual circuits of a multi-zone condenser can have one of three air handlers combined with it to obtain over 270 unique, complete systems.
S2CG2200D, S2CG9200D, S2CG9900D, T2CG2400D, T2CG4400D, T2CG8800D, T2CG9800D, T3CG2220D, T3CG2240D, T3CG9920D, T3CG9980D, T3CG9990D, T4CG2222D, T4CG9922D, T4CG9992D, T4CG9999D, S2HH2200D, S2HH9200D, S2HH9900D, T2HG2400D, T2HG4400D, T2HG8800D, T2HG9800D, T3HG2220D, T3HG2240D, T3HG9920D, T3HG9980D, T3HG9990D, T4HG2222D, T4HG9922D, T4HG9992D, T4HG9999D

[FR Doc. 2013–18950 Filed 8–5–13; 8:45 am]
BILLING CODE 6450–01–C

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP13–504–000]

UGI, Inc.; Notice of Intent to Prepare an Environmental Assessment for the Proposed Temple LNG Liquefaction Upgrade and Request for Comments on Environmental Issues

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Temple LNG Liquefaction Upgrade involving construction and operation of facilities by UGI, Inc. (UGI) at its Temple liquefied natural gas (LNG) facility (Temple Facility) in Berks County, Pennsylvania. This EA will be used by the Commission in its decision-making process to determine whether the project is in the public interest.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies on the project. Your input will help the Commission staff determine what issues need to be evaluated in the EA. Comments may be submitted in written form or verbally. Further details on how to submit written comments are provided in the Public Participation section of this notice. Please note that the scoping period will close on August 30, 2013.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives are asked to notify their constituents of this proposed project and encourage them to comment on their areas of concern.

Summary of the Proposed Project

UGI plans to construct and operate facilities to increase the liquefaction capacity at its Temple Facility up to a new maximum of 10,000 dekatherms per day. According to UGI, the project would improve the efficiency of the Temple Facility and ensure the reliability of LNG supply for UGI's customers.

The new facilities would consist of a 2000-horsepower nitrogen recycle compressor, a vacuum insulated cold box, a nitrogen compander, and associated auxiliary equipment.

The general project location is shown in appendix 1.[1]

Land Requirements for Construction

UGI plans to construct the facilities using approximately one-half-acre of an already disturbed area within its Temple Facility. No additional landowners would be crossed.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers an authorization of a project. NEPA also requires us [2] to discover and address concerns the public may have about proposals. This process is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. We will consider all filed comments during the preparation of the EA.

In the EA we will discuss impacts that could occur as a result of the construction and operation of the proposed project under the general headings of land use, air quality, noise, and public safety. We do not expect other resource areas to be impacted by the proposed upgrade, which would take place entirely within an existing industrial-use facility.

We will also evaluate reasonable alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

The EA will present our independent analysis of the issues. It will be available in the public record through eLibrary. Depending on the comments received during the scoping process, we may also publish and distribute the EA to the public for an allotted comment period. We will consider all comments on the EA before making our recommendations to the Commission. To ensure we have the opportunity to consider and address your comments, please carefully follow the instructions in the Public Participation section below.

With this notice, we are asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues of this project to formally cooperate with us in the preparation of the EA [3]. Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send your comments so that the Commission receives them in Washington, DC on or before August 30, 2013.

For your convenience, there are three methods you can use to submit your comments to the Commission. In all instances, please reference the project docket number (CP13–504–000) with your submission. The Commission encourages electronic filing of comments and has expert eFiling staff available to assist you at (202) 502–8258 or *efiling@ferc.gov*.

(1) You can file your comments electronically using the eComment feature on the Commission's Web site at *www.ferc.gov* under the link to Documents and Filings. This is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You can file your comments electronically by using the eFiling feature on the Commission's Web site at *www.ferc.gov* under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to at the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory

[1] The appendices referenced in this notice will not appear in the **Federal Register**. Copies of appendices were sent to all those receiving this notice in the mail and are available at www.ferc.gov using the link called ''eLibrary'' or from the Commission's Public Reference Room, 888 First Street NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the ''Additional Information'' section at the end of this notice.

[2] ''We,'' ''us,'' and ''our'' refer to the environmental staff of the Commission's Office of Energy Projects.

[3] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, § 1501.6.

Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project.

If we publish and distribute the EA, copies of it will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the CD version or would like to remove your name from the mailing list, please return the attached Information Request (appendix 2).

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an ''intervenor'' which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are in the User's Guide under the ''e-filing'' link on the Commission's Web site.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site (*www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter the project docket number, excluding the last three digits in the Docket Number field (i.e., CP13–504). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/esubscribenow.htm*.

Finally, public meetings or site visits will be posted on the Commission's calendar located at *www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

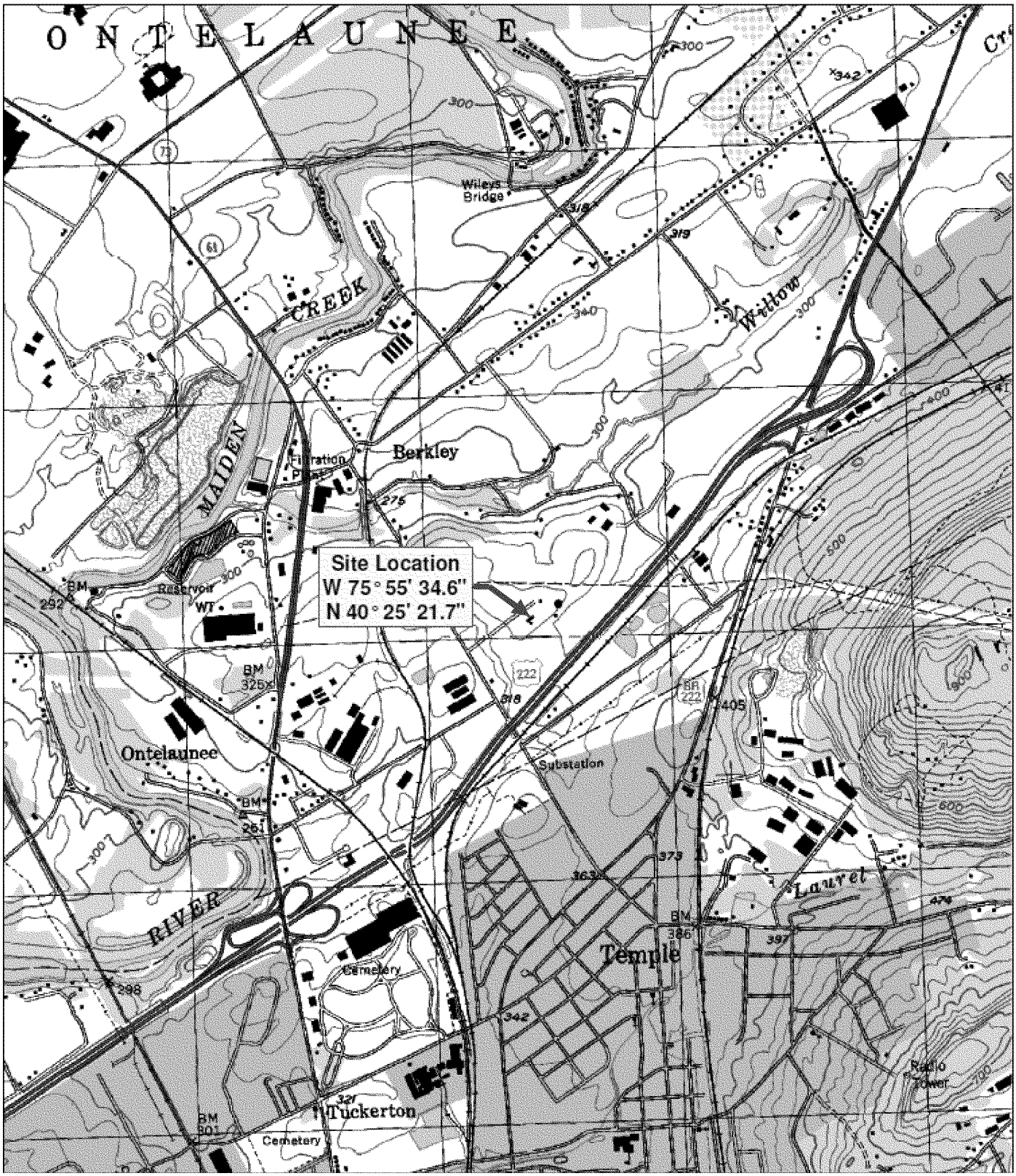
Dated: July 30, 2013.

Kimberly D. Bose,

Secretary.

BILLING CODE 6717–01–P

Appendix 1


ONTELAUNEE
Wileys Bridge
CREEK
MAIDEN
Willow
Berkley
Filtration Plant
Site Location
W 75° 55' 34.6"
N 40° 25' 21.7"
Reservoir
WT
BM 292
BM 325
Ontelaunee
BM 261
RIVER
Cemetery
Tuckerton
BM 301
Cemetery
Substation
Temple
Laurel
Radio Tower
BR 222
222
61
300
340
342
379
386
397
405
474

Appendix 2

INFORMATION REQUEST

Temple LNG Liquefaction Upgrade

Name_____

Agency_____

Address_____

City_____ **State**_____ **Zip Code**_____

☐ **Please send me a paper copy of the published NEPA document**

☐ **Please remove my name from the mailing list**

FROM_____

_____

_____

_____

ATTN: OEP - Gas 1, PJ - 11.1

Federal Energy Regulatory Commission

888 First Street NE

Washington, DC 20426

(Docket No. CP13-504-000 Temple LNG Liquefaction Upgrade)

Staple or Tape Here

[FR Doc. 2013–18901 Filed 8–5–13; 8:45 am]
BILLING CODE 6717–01–C

DEPARTMENT OF ENERGY

Southwestern Power Administration

Sam Rayburn Dam Power Rate

AGENCY: Southwestern Power Administration, DOE.

ACTION: Notice of public review and comment.

SUMMARY: The current Sam Rayburn Dam Project rate was approved by the Federal Energy Regulatory Commission (FERC) on March 30, 2009, Docket No. EF09–4021–000, 126 FERC ¶ 62,224. These rates became effective for the period January 1, 2009, through September 30, 2012. The rate was extended by the Deputy Secretary of Energy for the period October 1, 2012 through September 30, 2013 (77 FR 67813, November. 14, 2012). The Administrator, Southwestern Power Administration (Southwestern), has prepared Current and Revised 2013 Power Repayment Studies which show the need for an increase in annual revenues of $280,248 (7.1 percent) to meet cost recovery criteria. Such increased revenues are needed primarily to recover cost increases to investments and replacements in the hydroelectric generating facilities and small increases to annual operations and maintenance costs by the U.S. Army Corps of Engineers. The Administrator of Southwestern has developed a proposed Sam Rayburn Dam rate to recover the required revenues. The Revised 2013 Study indicates that the proposed rates would increase annual system revenues approximately 7.1 percent, from $3,949,872 to $4,230,120, effective

October 1, 2013 through September 30, 2017.

DATES: The consultation and comment period will begin on the date of publication of this **Federal Register** notice and will end on September 5, 2013. If requested, a combined Public Information and Comment Forum (Forum) will be held in Tulsa, Oklahoma at 9:00 a.m. on August 27, 2013. Persons desiring the Forum to be held must send a written request for such Forum to Mr. James K. McDonald (see **FOR FURTHER INFORMATION CONTACT**) by August 13, 2013. If no request is received, the Forum will not be held.

ADDRESSES: Requests for the Forum to be held may be sent by letter, email or facsimile transmission to: Mr. James K. McDonald (see **FOR FURTHER INFORMATION CONTACT**). If requested, the Forum will be held in Southwestern's offices, Room 1460, Williams Center Tower I, One West Third Street, Tulsa, Oklahoma 74103.

FOR FURTHER INFORMATION CONTACT: Mr. James K. McDonald, Vice President for Corporate Operations/Chief Operating Officer, Southwestern Power Administration, U.S. Department of Energy, One West Third Street, Tulsa, Oklahoma 74103, (918) 595–6690 (office), 918–595–6656 (fax), *jim.mcdonald@swpa.gov.*

SUPPLEMENTARY INFORMATION: Originally established by Secretarial Order No. 1865, dated August 31, 1943, Southwestern is an agency within the U.S. Department of Energy created by the Department of Energy Organization Act, Public Law 95–91, dated August 4, 1977. Guidelines for preparation of power repayment studies are included in DOE Order No. RA 6120.2 entitled Power Marketing Administration Financial Reporting. Procedures for public participation in power and transmission rate adjustments of the Power Marketing Administrations are found at title 10, part 903, subpart A of the Code of Federal Regulations (10 CFR 903). Procedures for the confirmation and approval of rates for the Federal Power Marketing Administrations are found at title 18, subchapter L, part 300, of the Code of Federal Regulations (18 CFR 300).

Southwestern markets power from 24 multi-purpose reservoir projects, with hydroelectric power facilities constructed and operated by the U.S. Army Corps of Engineers. These projects are located in the states of Arkansas, Missouri, Oklahoma, and Texas. Southwestern's marketing area includes these states plus Kansas and Louisiana. The costs associated with the hydropower facilities of 22 of the 24 projects are repaid via revenues received under the Integrated System rates, as are Southwestern's transmission facilities that consist of 1,380 miles of high-voltage transmission lines, 25 substations, and 46 microwave and VHF radio sites. Costs associated with the Sam Rayburn and Robert D. Willis Dams, two projects that are isolated hydraulically, electrically, and financially from the Integrated System, are repaid by separate rate schedules.

Following Department of Energy guidelines, Southwestern prepared a 2013 Current Power Repayment Study using the existing Sam Rayburn Dam rate. This study indicates that Southwestern's legal requirement to repay the investment in the power generating facility for power and energy marketed by Southwestern will not be met without an increase in revenues. The need for increased revenues is primarily due to increases in U.S. Army Corps of Engineers' replacement investment in the hydroelectric generating facilities and small increases to operations and maintenance expenses at the project. The 2013 Revised Power Repayment Study shows that an increase in annual revenue of $280,248 (7.1 percent), beginning October 1, 2013, is needed to satisfy repayment criteria.

Southwestern customers and other interested parties may receive copies of the Sam Rayburn Dam Power Repayment Studies and the proposed rate schedule. If you desire a copy of the Sam Rayburn Dam Power Repayment Data Package with the proposed Rate Schedule, submit your request to Mr. James K. McDonald (see **FOR FURTHER INFORMATION CONTACT**).

A Public Information and Comment Forum (Forum) is tentatively scheduled to be held on August 27, 2013 to explain to customers and interested parties the proposed rate and supporting studies and to allow for comment. A chairman, who will be responsible for orderly procedure, will conduct the Forum if a Forum is requested. Questions concerning the rate, studies, and information presented at the Forum will be answered, to the extent possible, at the Forum. Questions not answered at the Forum will be answered in writing. Questions involving voluminous data contained in Southwestern's records may best be answered by consultation and review of pertinent records at Southwestern's offices.

Persons requesting a Forum be held should indicate in writing to Mr. James K. McDonald (see **FOR FURTHER INFORMATION CONTACT**) by letter, email, or facsimile transmission by August 13, 2013, their request for such a Forum. If no request is received, the Forum will not be held.

Persons interested in speaking at the Forum, if held, should submit a request to Mr. James K. McDonald (see **FOR FURTHER INFORMATION CONTACT**), at least seven (7) calendar days prior to the Forum so that a list of speakers can be developed. The chairman may allow others to speak if time permits.

A transcript of the Forum, if held, will be made. Copies of the transcript and all documents introduced will be available for review at Southwestern's offices (see **ADDRESSES**) during normal business hours. Copies of the transcript and all documents introduced may be obtained, for a fee, directly from the transcribing service.

All written comments on the proposed Sam Rayburn Dam Rate are due on or before September 5, 2013. Comments should be submitted to Mr. James K. McDonald (see **FOR FURTHER INFORMATION CONTACT**).

Following review of the oral and written comments and the information gathered during the course of the proceedings, the Administrator will submit the final Sam Rayburn Dam Rate Proposal and power repayment studies in support of the proposed rate to the Deputy Secretary of Energy for confirmation and approval on an interim basis, and subsequently to the FERC for confirmation and approval on a final basis. The FERC will allow the public an opportunity to provide written comments on the proposed rate increase before making a final decision.

Dated: July 30, 2013.

Christopher M. Turner,

Administrator.

[FR Doc. 2013–18953 Filed 8–5–13; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9843–6]

National Environmental Justice Advisory Council; Notification of Public Meeting and Public Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; public meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act (FACA), the U.S. Environmental Protection Agency (EPA) hereby provides notice that the National Environmental Justice Advisory Council (NEJAC) will meet on the dates and times described below. All meetings are open to the public. Members of the public are encouraged

to provide comments relevant to the specific issues being considered by the NEJAC. For additional information about registering for public comment, please see **SUPPLEMENTARY INFORMATION**. Due to limited space, seating at the NEJAC meeting will be on a first-come, first-served basis.

DATES: The NEJAC meeting will convene Wednesday, September 11, 2013, from 9:00 a.m. until 3:45 p.m.; and will reconvene on Thursday, September 12, 2013, from 9:00 a.m. to 5:00 p.m. All noted times are Eastern Time.

One public comment period relevant to the specific issues being considered by the NEJAC (see ''SUPPLEMENTARY INFORMATION'') is scheduled for Wednesday, September 11, 2013, from 4:00 p.m. Eastern Time. Members of the public who wish to participate during the public comment period are highly encouraged to pre-register by Noon Eastern Time on Wednesday, August 28, 2013.

ADDRESSES: The NEJAC meeting will be held at the Sam Nunn Atlanta Federal Center, located at 61 Forsyth Street, Atlanta, Georgia.

FOR FURTHER INFORMATION CONTACT: Questions concerning the meeting should be directed to Mr. Aaron Bell, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW (MC2201A), Washington, DC, 20460; by telephone at 202–564–1044, via email at Bell.Aaron@epa.gov; or by FAX at 202–501–0936. Additional information about the meeting is available at the following Web site address: *http://www.epa.gov/environmentaljustice/nejac/meetings.html*

Registration is required for all participants. Pre-registration by Noon Eastern Time, Wednesday, August 28, 2013, for all attendees is highly recommended. Because this NEJAC meeting will be held in a government space, we strongly encourage you to register early. Space limitations may not allow us to accommodate everyone who is interested in attending. Priority admission will be given to pre-registered participants. To register online, visit the Web site address above. Alternatively, registration forms should be faxed to Ms. Estela Rosas, EPA Contractor, APEX Direct, Inc., at 877–773–0779, or emailed to *NEJACSep2013Mtg@AlwaysPursuingExcellence.com.* Please state whether you would like to be put on the list to provide oral public comment. Please specify whether you are submitting written comments before the August 28, 2013, deadline. Non-English speaking attendees wishing to arrange for a foreign language interpreter may make appropriate arrangements in writing using the above email address or by calling the above telephone number.

SUPPLEMENTARY INFORMATION: The Charter of the NEJAC states that the advisory committee shall provide independent advice to the EPA Administrator about areas that may include, among other things, ''advice about broad, cross-cutting issues related to environmental justice, including environment-related strategic, scientific, technological, regulatory, and economic issues related to environmental justice.''

The meeting shall be used to receive comments, and discuss and/or provide recommendations regarding these primary areas: (1) Updates on EPA's Plan EJ 2014; (2) Updates from NEJAC work groups on Science and Research, Community Resiliency, and Indigenous Peoples; and (3) EPA's draft technical guidance on incorporating environmental justice in rulemaking; and (4) environmental justice in permitting. In addition, the Council will recognize the 20th Anniversary of the NEJAC.

A. Public Comment: Individuals or groups making oral presentations during the public comment periods will be limited to a total time of five minutes. To accommodate the large number of people who want to address the NEJAC, only one representative of an organization or group will be allowed to speak. If time permits, multiple representatives from the same organization can provide comment at the end of the session. In addition, those who did not sign up in advance to give public comment can sign up on site. The suggested format for written public comments is as follows: Name of Speaker; Name of Organization/Community; City and State; Email address; and a brief description of the concern and what you want the NEJAC to advise EPA to do. Written comments received by Noon Eastern Time, Wednesday, August 28, 2013, will be included in the materials distributed to the members of the NEJAC. Written comments received after that date and time will be provided to the NEJAC as time allows. All information should be sent to the mailing address, email address, or fax number listed in the **FOR FURTHER INFORMATION CONTACT** section above.

B. Information About Services for Individuals With Disabilities: For information about access or services for individuals with disabilities, please contact Ms. Estela Rosas, EPA Contractor, APEX Direct, Inc., at 877–773–0779 or *NEJACSep2013Mtg@AlwaysPursuingExcellence.com.* To request special accommodations for a disability, please contact Ms. Rosas at least seven (7) working days prior to the meeting, to give EPA sufficient time to process your request. All other requests specifically related to the meeting should be sent to the mailing address, email address, or fax number listed in the ''**FOR FURTHER INFORMATION CONTACT**'' section above.

Dated: July 30, 2013.

Victoria J. Robinson,

Designated Federal Officer, National Environmental Justice Advisory Council.

[FR Doc. 2013–18989 Filed 8–5–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9844–1]

Public Water System Supervision Program Revision for the State of Louisiana

AGENCY: United States Environmental Protection Agency (EPA).

ACTION: Notice of tentative approval.

SUMMARY: Notice is hereby given that the State of Louisiana is revising its approved Public Water System Supervision Program. Louisiana has adopted three EPA drinking water rules, namely the: 1) Long Term 2 Enhanced Surface Water Treatment Rule (LT2), 2) the Stage 2 Disinfectants and Disinfection Byproducts Rule (DBP2), and 3) the Lead and Copper Rule Short-Term Revisions and Clarifications (LCR). EPA has determined that the proposed LT2, DBP2, and the LCR submitted by Louisiana are no less stringent than the corresponding federal regulations. Therefore, EPA intends to approve this program revision.

DATES: All interested parties may request a public hearing. A request for a public hearing must be submitted by September 5, 2013 to the Regional Administrator at the EPA Region 6 address shown below. Frivolous or insubstantial requests for a hearing may be denied by the Regional Administrator. However, if a substantial request for a public hearing is made by September 5, 2013, a public hearing will be held. If no timely and appropriate request for a hearing is received and the Regional Administrator does not elect to hold a hearing on his own motion, this determination shall become final and effective on September 5, 2013. Any request for a public hearing shall include the following information: The name, address, and telephone number of

the individual, organization, or other entity requesting a hearing; a brief statement of the requesting person's interest in the Regional Administrator's determination and a brief statement of the information that the requesting person intends to submit at such hearing; and the signature of the individual making the request, or, if the request is made on behalf of an organization or other entity, the signature of a responsible official of the organization or other entity.

ADDRESSES: All documents relating to this determination are available for inspection between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, at the following offices: Louisiana Department of Health and Hospitals, Office of Public Health, Bienville Building, 628 4th Street, Baton Rouge, LA 70821; and United States Environmental Protection Agency, Region 6, Drinking Water Section (6WQ–SD), 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202.

FOR FURTHER INFORMATION CONTACT: Amy Camacho, EPA Region 6, Drinking Water Section at the Dallas address given above, or by telephone at (214) 665–7175, or by email at *camacho.amy@epa.gov.*

Authority: Section 1413 of the Safe Drinking Water Act, as amended (1996), and 40 CFR part 142 of the National Primary Drinking Water Regulations.

Dated: July 19, 2013.

Ron Curry,

Regional Administrator.

[FR Doc. 2013–18945 Filed 8–5–13; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice to all Interested Parties of the Termination of the Receivership of 10183, 1st American State Bank of Minnesota Hancock, MN

Notice is hereby given that the Federal Deposit Insurance Corporation (''FDIC'') as Receiver for 1st American State Bank of Minnesota, Hancock, Minnesota (''the Receiver'') intends to terminate its receivership for said institution. The FDIC was appointed receiver of 1st American State Bank of Minnesota on February 05, 2010. The liquidation of the receivership assets has been completed. To the extent permitted by available funds and in accordance with law, the Receiver will be making a final dividend payment to proven creditors.

Based upon the foregoing, the Receiver has determined that the continued existence of the receivership will serve no useful purpose. Consequently, notice is given that the receivership shall be terminated, to be effective no sooner than thirty days after the date of this Notice. If any person wishes to comment concerning the termination of the receivership, such comment must be made in writing and sent within thirty days of the date of this Notice to: Federal Deposit Insurance Corporation, Division of Resolutions and Receiverships, Attention: Receivership Oversight Department 32.1, 1601 Bryan Street, Dallas, TX 75201.

No comments concerning the termination of this receivership will be considered which are not sent within this time frame.

Dated: August 1, 2013.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2013–18913 Filed 8–5–13; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

[Docket No. AS13–19]

Appraisal Subcommittee Notice of Meeting

AGENCY: Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

ACTION: Notice of meeting.

Description: In accordance with Section 1104 (b) of Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended, notice is hereby given that the Appraisal Subcommittee (ASC) will meet in closed session:

LOCATION: OCC—400 7th Street SW., Washington, DC 20024.

DATE: August 14, 2013.

TIME: Immediately following the ASC open session.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

July 10, 2013 minutes—Closed Session.

Preliminary discussion of State Compliance Reviews.

Dated: August 1, 2013.

James R. Park,

Executive Director.

[FR Doc. 2013–18988 Filed 8–5–13; 8:45 am]

BILLING CODE P

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

[Docket No. AS13–18]

Appraisal Subcommittee Notice of Meeting

AGENCY: Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

ACTION: Notice of meeting.

DESCRIPTION: In accordance with Section 1104 (b) of Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended, notice is hereby given that the Appraisal Subcommittee (ASC) will meet in open session for its regular meeting:

LOCATION: OCC—400 7th Street SW., Washington, DC 20024.

DATE: August 14, 2013.

TIME: 10:30 a.m.

STATUS: Open.

MATTERS TO BE CONSIDERED:

Summary Agenda

July 10, 2013 minutes—Open Session

(No substantive discussion of the above items is anticipated. These matters will be resolved with a single vote unless a member of the ASC requests that an item be moved to the discussion agenda.)

Discussion Agenda:

ASC 2014–18 Strategic Plan

Delaware Compliance Review

District of Columbia Compliance Review

Update on the Implementation of the Policy Statements

How to Attend and Observe an ASC Meeting

Email your name, organization and contact information to *meetings@asc.gov.* You may also send a written request via U.S. Mail, fax or commercial carrier to the Executive Director of the ASC, 1401 H Street NW., Ste 760, Washington, DC 20005. The fax number is 202–289–4101. Your request must be received no later than 4:30 p.m., ET, on the Monday prior to the meeting. Attendees must have a valid government-issued photo ID and must agree to submit to reasonable security measures. The meeting space is intended to accommodate public attendees. However, if the space will not accommodate all requests, the ASC may refuse attendance on that reasonable basis. The use of any video or audio tape recording device, photographing device, or any other electronic or mechanical device designed for similar purposes is prohibited at ASC meetings.

Dated: August 1, 2013.

James R. Park,

Executive Director.

[FR Doc. 2013–18987 Filed 8–5–13; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

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

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than August 30, 2013.

A. Federal Reserve Bank of San Francisco (Gerald C. Tsai, Director, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

1. *People's Utah Bancorp,* American Fork, Utah; to acquire 100 percent of the voting shares of Lewiston Bancorp, and thereby indirectly acquire voting shares of Lewiston State Bank, both in Lewiston, Utah.

Board of Governors of the Federal Reserve System, July 31, 2013.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2013–18857 Filed 8–5–13; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Research Misconduct

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Office of Research Integrity (ORI) has taken final action in the following case:

Pratima Karnik, Ph.D., Case Western Reserve University: Based on the admission of the Respondent, ORI found that Dr. Pratima Karnik, Assistant Professor, Department of Dermatology, Case Western Reserve University (CWRU), engaged in research misconduct in research submitted to the National Institute of Arthritis and Musculoskeletal and Skin Diseases (NIAMS), National Institutes of Health (NIH), in grant application R01 AR062378.

ORI found that the Respondent engaged in research misconduct by plagiarizing significant portions from research grant application R21 AR061881 that she had reviewed for NIAMS, NIH, and inserting that text into her submitted grant application R01 AR062378–01. Respondent also plagiarized significant portions of text from the following scientific articles and one U.S. patent application available on the Internet:

- *BMC Med Genomics* 4:8, 2011
- *J Am Col. Cardiol* 52:117–123, 2008
- *Nature* 457:910–914, 2009
- *J Autoimmun* 29:310–318, 2007
- U.S. Patent Application No. 20090047269 (published Feb. 19, 2009)
- *Toxicol Pathol* 35:952–957, 2007
- *BMC Med Genomics* 1:10, 2008
- *Open Systems Biology Journal* 1:1–8, 2008
- *Endocrinology* 146:4189–4191, 2005.
-

Dr. Karnik has entered into a Voluntary Settlement Agreement and has voluntarily agreed for a period of two (2) years, beginning on July 22, 2013:

(1) To have her research supervised; Respondent agreed that prior to the submission of an application for U.S. Public Health Service (PHS) support for a research project on which her participation is proposed and prior to her participation in any capacity on PHS-supported research, Respondent shall ensure that a plan for supervision of her duties is submitted to ORI for approval; the supervision plan must be designed to ensure the scientific integrity of her research contribution; she agreed that she shall not participate in any PHS-supported research until such a supervision plan is submitted to and approved by ORI; Respondent agreed to maintain responsibility for compliance with the agreed upon supervision plan;

(2) That any institution employing her shall submit in conjunction with each application for PHS funds, or report, manuscript, or abstract involving PHS-supported research in which Respondent is involved, a certification to ORI that the content is free of plagiarized material, data provided by Respondent are based on actual experiments or are otherwise legitimately derived, and that the data, procedures, and methodology are accurately reported in the application, report, manuscript, or abstract; and

(3) To exclude herself voluntarily from serving in any advisory capacity to PHS including, but not limited to, service on any PHS advisory committee, board, and/or peer review committee, or as a consultant.

FOR FURTHER INFORMATION CONTACT: Director, Office of Research Integrity, 1101 Wootton Parkway, Suite 750, Rockville, MD 20852, (240) 453–8200.

David E. Wright,

Director, Office of Research Integrity.

[FR Doc. 2013–18979 Filed 8–5–13; 8:45 am]

BILLING CODE 4150–31–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30 Day-13–13IF]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call (404) 639–7570 or send an email to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Pilot Project to Evaluate the Use of Exposure Control Plans for Bloodborne Pathogens in Private Dental Practices –New- National Institute for

Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Centers for Disease Control and Prevention (CDC) estimates that healthcare workers sustain nearly 600,000 percutaneous injuries annually involving contaminated sharps. In response to both the continued concern over such exposures and the technological developments which can increase employee protection, Congress passed the Needlestick Safety and Prevention Act directing the Occupational Safety and Health Administration (OSHA) to revise the Bloodborne Pathogens (BBP) Standard to establish requirements that employers identify and make use of effective and safer medical devices. That revision was published on Jan. 18, 2001, and became effective April 18, 2001.

The revision to OSHA's BBP Standard added new requirements for employers, including additions to the exposure control plan and maintenance of a sharps injury log. OSHA has determined that compliance with these standards significantly reduces the risk that workers will contract a bloodborne disease in the course of their work. However, exposure control plans for bloodborne pathogens, policies, and standards for healthcare workers are based primarily on hospital data.

Approximately one-half of the 11 million healthcare workers in the U.S. are employed in non-hospital settings, including physician offices, home healthcare agencies, correctional facilities, and dental offices and clinics. Little information is known about the risk management practices in these non-hospital settings. In a small study, the National Institute for Occupational Safety and Health (NIOSH) found that although seven of the eight correctional healthcare facilities visited had written exposure control plans, only two were reviewed and updated annually as required by the OSHA BBP Standard. One reason postulated for non-compliance was that hospital-based standards, policies, and programs may not be appropriate to non-hospital settings. It is important to identify effective methods for using exposure control plans in non-hospital settings and to verify whether the specificity and relevance of bloodborne pathogen training and educational materials for non-hospital facilities can positively impact compliance in dental settings. The purposes of this proposal are to insure that bloodborne pathogens exposure control plans are effectively implemented in private dental practices, an important segment of the non-hospital based healthcare system; and to understand how effective implementation strategies may be applied to other healthcare settings. The proposed work will draw on research-to-practice principles and will be assisted by a strong network of dental professional groups, trade associations, and government agencies. Specific objectives are to:

(1) Inventory existing exposure control plans in private dental practices;

(2) determine whether the exposure control plan or other resource is actively used to prevent occupational exposures;

(3) determine available resources and barriers to use such as relevant educational materials, knowledge, costs, availability; and

(4) develop strategies to overcome key barriers to compliance.

The Organization for Safety, Asepsis and Prevention (OSAP) is a unique group of dental educators and consultants, researchers, clinicians, industry representatives, and other interested persons with a collective mission to be the world's leading advocate for the safe and infection-free delivery of oral care. OSAP supports this commitment to dental workers and the public through quality education and information dissemination. OSAP's unique membership includes the variety of partners critical to gather the data on compliance with the OSHA bloodborne pathogens standard, to identify barriers and to develop strategies to overcome barriers to compliance.

OSAP will be conducting a web survey of private dental practices in the United States. Information collected will include: The use of existing exposure control plans; whether the plan or other resources actively used to prevent occupation exposure to bloodborne pathogens; availability of resources such as relevant education materials, and barriers to use such as knowledge, costs, and availability. OSAP is working with a publishing partner that has an email distribution list of 49,172 private practice dentists representing general dentists and specialists. This sampling frame represents nearly 30% of the total population of U.S. private practice dentists. The survey sample, totaling 40,575 dentists, will include general dentists, oral and maxillofacial surgeons, pediatric dentists and periodonists. The targeted number of completed questionnaires is estimated at about 20,287 (50% participation rate). The survey is estimated to take about 15 minutes for respondents to complete. There is no cost to respondents other than their time. The total estimated annualized burden hours are 5,072.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Avgerage Burden per response (in hrs)
Private Practice Dentists	BBP Exposure Control Plan Survey	20,287	1	15/60

Ron A. Otten,

Director, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2013–18909 Filed 8–5–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0879]

Agency Information Collection Activities; Proposed Collection; Comment Request; Procedures for the Safe and Sanitary Processing and Importing of Fish and Fishery Products

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing an opportunity for public comment on our proposed collection of certain information. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies must publish a notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and allow 60 days for public comment. This notice invites comments on the information collection provisions of our regulations requiring reporting and recordkeeping for processors and importers of fish and fishery products.

DATES: Submit either electronic or written comments on the collection of information by October 7, 2013.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov.* Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Domini Bean, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400T, Rockville, MD 20850, *domini.bean@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the 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. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, we are publishing this notice of the proposed collection of information set forth in this document.

With respect to the following collection of information we invite comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of our functions, including whether the information will have practical utility; (2) the accuracy of our estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Procedures for the Safe and Sanitary Processing and Importing of Fish and Fishery Products—21 CFR Part 123 (OMB Control Number 0910–0354)—Extension

FDA regulations in part 123 (21 CFR part 123) mandate the application of hazard analysis and critical control point (HACCP) principles to the processing of seafood. HACCP is a preventive system of hazard control designed to help ensure the safety of foods. The regulations were issued under FDA's statutory authority to regulate food safety, including section 402(a)(1) and (a)(4) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 342(a)(1) and (a)(4)).

Certain provisions in part 123 require that processors and importers of seafood collect and record information. The HACCP records compiled and maintained by a seafood processor primarily consist of the periodic observations recorded at selected monitoring points during processing and packaging operations, as called for in a processor's HACCP plan (e.g., the values for processing times, temperatures, acidity, etc., as observed at critical control points). The primary purpose of HACCP records is to permit a processor to verify that products have been produced within carefully established processing parameters (critical limits) that ensure that hazards have been avoided.

HACCP records are normally reviewed by appropriately trained employees at the end of a production lot or at the end of a day or week of production to verify that control limits have been maintained, or that appropriate corrective actions were taken if the critical limits were not maintained. Such verification activities are essential to ensure that the HACCP system is working as planned. A review of these records during the conduct of periodic plant inspections also permits FDA to determine whether the products have been consistently processed in conformance with appropriate HACCP food safety controls.

Section 123.12 requires that importers of seafood products take affirmative steps and maintain records that verify that the fish and fishery products they offer for import into the United States were processed in accordance with the HACCP and sanitation provisions set forth in part 123. These records are also to be made available for review by FDA as provided in § 123.12(c).

The time and costs of these recordkeeping activities will vary considerably among processors and importers of fish and fishery products, depending on the type and number of products involved, and on the nature of the equipment or instruments required to monitor critical control points. The burden estimate in table 1 of this document includes only those collections of information under the seafood HACCP regulations that are not already required under other statutes and regulations. The estimate also does not include collections of information that are a usual and customary part of businesses' normal activities. For example, the tagging and labeling of molluscan shellfish (21 CFR 1240.60) is a customary and usual practice among seafood processors. Consequently, the estimates in table 1 account only for information collection and recording requirements attributable to part 123.

Description of respondents: Respondents to this collection of information include processors and importers of seafood.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

21 CFR Section [2]	Number of recordkeepers	Number of records per recordkeeper [3]	Total annual records	Average burden per recordkeeping [4]	Total hours
123.6(a),(b), and (c); Prepare hazard analysis and HACCP plan.	50	1	50	16	800
123.6(c)(5); Undertake and prepare records of corrective actions.	15,000	4	60,000	0.30 (18 minutes)	18,000
123.8(a)(1) and (c); Reassess hazard analysis and HACCP plan.	15,000	1	15,000	4	60,000
123.12(a)(2)(ii); Verify compliance of imports and prepare records of verification activities.	4,100	80	328,000	0.20 (12 minutes)	65,600
123.6(c)(7); Document monitoring of critical control points.	15,000	280	4,200,000	0.30 (18 minutes)	1,260,000
123.7(d); Undertake and prepare records of corrective actions due to a deviation from a critical limit.	6,000	4	24,000	0.10 (6 minutes)	2,400
123.8(d); Maintain records of the calibration of process-monitoring instruments and the performing of any periodic end-product and in-process testing.	15,000	47	705,000	0.10 (6 minutes)	70,500
123.11(c); Maintain sanitation control records	15,000	280	4,200,000	0.10 (6 minutes)	420,000
123.12(c); Maintain records that verify that the fish and fishery products they offer for import into the United States were processed in accordance with the HACCP and sanitation provisions set forth in part 123.	4,100	80	328,000	0.10 (6 minutes)	32,800
123.12(a)(2); Prepare new written verification procedures to verify compliance of imports.	41	1	41	4	164
Total					1,930,264

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] These estimates include the information collection requirements in the following sections:
§ 123.16—Smoked Fish—process controls (see § 123.6(b));
§ 123.28(a)—Source Controls—molluscan shellfish (see § 123.6(b));
§ 123.28(c) and (d)—Records—molluscan shellfish (see § 123.6(c)(7)).
[3] Based on an estimated 280 working days per year.
[4] Estimated average time per 8-hour work day unless one-time response.

We base this hour burden estimate on its experience with the application of HACCP principles in food processing. Further, the burdens have been estimated using typical small seafood processing firms as a model because these firms represent a significant proportion of the industry. The hour burden of HACCP recordkeeping activities will vary considerably among processors and importers of fish and fishery products, depending on the size of the facility and complexity of the HACCP control scheme (i.e., the number of products and the number of hazards controlled); the daily frequency that control points are monitored and values recorded; and also on the extent that data recording time and cost are minimized by the use of automated data logging technology. The burden estimate does not include burden hours for activities that are a usual and customary part of businesses' normal activities. For example, the tagging and labeling of molluscan shellfish (21 CFR 1240.60) is a customary and usual practice among seafood processors.

Based on our records, we estimate that there are 15,000 processors and 4,100 importers. We estimate that 50 processors will undertake the initial preparation of a hazard analysis and HACCP plan (§ 123.6(a), (b), and (c)). We estimate the burden for the initial preparation of a hazard analysis and HACCP plan to be 16 hours per processor for a total burden of 800 hours. We estimate that all processors (15,000 processors) will undertake and keep records of four corrective action plans (§ 123.6(c)(5)) for a total of 60,000 records. We estimate the burden for the preparation of each record to be 0.30 hours for a total burden of 18,000 hours.

We estimate that all processors (15,000 processors) will annually reassess their hazard analysis and HACCP plan (§ 123.8(a)(1) and (c)). We estimate the burden for the reassessment of the hazard analysis and HAACP plan to be 4 hours per processor for a total burden of 60,000 hours.

We estimate that all importers (4,100 importers) will take affirmative steps to verify compliance of imports and prepare 80 records of their verification activities (§ 123.12(a)(2)(ii)) for a total of 328,000 records. We estimate the burden for the preparation of each record to be 0.20 hours for a total burden of 65,600 hours.

We estimate that all processors (15,000 processors) will document the monitoring of critical control points (§ 123.6(c)(7)) at 280 records per processor for a total of 4,200,000 records. We estimate the burden for the preparation of each record to be 0.30 hours for a total burden of 1,260,000 hours.

We estimate that 40 percent of all processors (6,000 processors) will maintain records of any corrective actions taken due to a deviation from a critical limit (§ 123.7(d) at four records per processor for a total of 24,000 records. We estimate the burden for the preparation of each record to be 0.10 hours for a total burden of 2,400 hours.

We estimate that all processors (15,000 processors) will maintain records of the calibration of process-monitoring instruments and the performing of any periodic end-product and in-process testing (§ 123.8(d)) at 47 records per processor for a total of 705,000 records. We estimate the burden for the preparation of each record to be 0.10 hours for a total burden of 70,500 hours.

We estimate that all processors (15,000 processors) will maintain

sanitation control records (§ 123.11(c)) at 280 records per processor for a total of 4,200,000 records. We estimate the burden for the preparation of each record to be 0.10 hours for a total burden of 420,000 hours.

We estimate that all importers (4,100 importers) will maintain records that verify that the fish and fishery products they offer for import into the United States were processed in accordance with the HACCP and sanitation provisions set forth in § 123.12(c). FDA estimates that 80 records will be prepared per importer for a total of 328,000 records. FDA estimates the burden for the preparation of each record to be 0.10 hours for a total burden of 32,800 hours.

We estimate that 1 percent of all importers (41 importers) will require new written verification procedures to verify compliance of imports (§ 123.12(a)(2)). We estimate the burden for preparing the new procedures to be 4 hours per importer for a total burden of 164 hours.

Dated: July 31, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–18837 Filed 8–5–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2004–N–0451] (formerly 2004N–0226)

Food and Drug Administration Modernization Act of 1997: Modifications to the List of Recognized Standards, Recognition List Number: 031

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing a publication containing modifications the Agency is making to the list of standards FDA recognizes for use in premarket reviews (FDA recognized consensus standards). This publication, entitled ''Modifications to the List of Recognized Standards, Recognition List Number: 031'' (Recognition List Number: 031), will assist manufacturers who elect to declare conformity with consensus standards to meet certain requirements for medical devices.

DATES: Submit written or electronic comments concerning this document at any time. See section VII for the effective date of the recognition of standards announced in this document.

ADDRESSES: Submit written requests for single copies of ''Modifications to the List of Recognized Standards, Recognition List Number: 031'' to the Division of Small Manufacturers, International and Consumer Assistance, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Silver Spring, MD 20993. Send two self-addressed adhesive labels to assist that office in processing your requests, or fax your request to 301–847–8149. Submit written comments concerning this document, or recommendations for additional standards for recognition, to the contact person (see **FOR FURTHER INFORMATION CONTACT**). Submit electronic comments by email: *standards@cdrh.fda.gov.* This document may also be accessed on FDA's Internet site at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Standards/ucm123792.htm.* See section VI for electronic access to the searchable database for the current list of FDA recognized consensus standards, including Recognition List Number: 031 modifications and other standards related information.

FOR FURTHER INFORMATION CONTACT: Scott A. Colburn, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave. Bldg. 66, Rm. 3632, Silver Spring, MD 20993, 301–796–6287.

SUPPLEMENTARY INFORMATION:

I. Background

Section 204 of the Food and Drug Administration Modernization Act of 1997 (FDAMA) (Pub. L. 105–115) amended section 514 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360d). Amended section 514 allows FDA to recognize consensus standards developed by international and national organizations for use in satisfying portions of device premarket review submissions or other requirements.

In a notice published in the **Federal Register** of February 25, 1998 (63 FR 9561), FDA announced the availability of a guidance entitled ''Recognition and Use of Consensus Standards.'' The notice described how FDA would implement its standard recognition program and provided the initial list of recognized standards.

Modifications to the initial list of recognized standards, as published in the **Federal Register**, can be accessed at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Standards/ucm123792.htm.*

These notices describe the addition, withdrawal, and revision of certain standards recognized by FDA. The Agency maintains ''hypertext markup language (HTML)'' and ''portable document format (PDF)'' versions of the list of ''FDA Recognized Consensus Standards.'' Both versions are publicly accessible at the Agency's Internet site. See section VI for electronic access information. Interested persons should review the supplementary information sheet for the standard to understand fully the extent to which FDA recognizes the standard.

II. Modifications to the List of Recognized Standards, Recognition List Number: 031

FDA is announcing the addition, withdrawal, correction, and revision of certain consensus standards the Agency will recognize for use in premarket submissions and other requirements for devices. FDA will incorporate these modifications in the list of FDA Recognized Consensus Standards in the Agency's searchable database. FDA will use the term ''Recognition List Number: 031'' to identify these current modifications.

In table 1, FDA describes the following modifications: (1) The withdrawal of standards and their replacement by others, if applicable; (2) the correction of errors made by FDA in listing previously recognized standards; and (3) the changes to the supplementary information sheets of recognized standards that describe revisions to the applicability of the standards.

In section III, FDA lists modifications the Agency is making that involve the initial addition of standards not previously recognized by FDA.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
		A. Anesthesia	
1–74	1–91	ISO 5360 Third edition 2012–01–15 Anaesthetic vaporizers—Agent-specific filling systems.	Withdrawn and replaced with newer version.
1–35	1–93	ISO 5361 Second edition 2012–10–01 Anaesthetic and respiratory equipment—Tracheal tubes and connectors.	Withdrawn and replaced with newer version.
1–82		IEC 60601–2–13 Edition 3.1 2009–08 Medical electrical equipment—Part 2–13: Particular requirements for the safety and essential performance of anaesthetic systems.	Transition period extended.
1–88		ISO 80601–2–12 Medical electrical equipment—Part 2–12: Particular requirements for the safety of lung ventilators—Critical care ventilators.	Transition period extended.
		B. Biocompatibility	
2–119		ASTM F813–07 (Reapproved 2012) Standard Practice for Direct Contact Cell Culture Evaluation of Materials for Medical Devices.	Reaffirmation.
2–122		ASTM F719–81 (Reapproved 2012) Standard Practice for Testing Biomaterials in Rabbits for Primary Skin Irritation.	Reaffirmation.
2–123		ASTM F720–81 (Reapproved 2012) Standard Practice for Testing Guinea Pigs for Contact Allergens: Guinea Pig Maximization Test.	Reaffirmation.
2–124		ASTM F750–87 (Reapproved 2012) Standard Practice for Evaluating Materials Extracts by Systemic Injection in the Mouse.	Reaffirmation.
2–125	2–197	ASTM F749–13 Standard Practice for Evaluating Material Extracts by Intracutaneous Injection in the Rabbit.	Withdrawn and replaced with newer version.
2–135	2–198	ANSI/AAMI/ISO 10993–12:2012 Biological evaluation of medical devices—Part 12:Sample preparation and reference materials.	Withdrawn and replaced with newer version.
2–146		ASTM F2148–07 (Reapproved 2012) Standard Practice for Evaluation of Delayed Contact Hypersensitivity Using the Murine Local Lymph Node Assay (LLNA).	Reaffirmation.
2–152		ISO 10993–10:2002/Amd.1:2006(E) Biological evaluation of medical devices—Part 10: Tests for irritation and delayed-type hypersensitivity AMENDMENT 1.	Withdrawn, see 2–174.
2–192	2–199	USP 36–NF31:2013 <87> Biological Reactivity Test, In Vitro—Direct Contact Test.	Withdrawn and replaced with newer version.
2–193	2–200	USP 36–NF31:2013Biological Tests <87> Biological Reactivity Tests, In Vitro—Elution Test.	Withdrawn and replaced with newer version.
2–194	2–201	USP 36–NF31:2013 Biological Tests <88> Biological Reactivity Tests, In Vivo Procedure Preparation of Sample.	Withdrawn and replaced with newer version.
2–195	2–202	USP 36–NF31:2013 Biological Tests <88> Biological Reactivity Tests, In Vitro Classification of Plastics—Intracutaneous Test.	Withdrawn and replaced with newer version.
2–196	2–203	USP 36–NF31:2013 Biological Tests <88> Biological Reactivity Tests, In Vivo Classification of Plastics—Systemic Injection Test.	Withdrawn and replaced with newer version.
		C. Cardiovascular	
3–38	3–115	IEC 60601–2–34 Edition 3.0 2011–05 Medical Electrical Equipment—Part 2–34: Particular Requirements for the Basic Safety and Essential Performance of Invasive Blood Pressure Monitoring Equipment.	Newer version with transition period.
3–55		ASTM F1830–97 (Reapproved 2013) Standard Practice for Selection of Blood for In Vitro Evaluation of Blood Pumps.	Reaffirmation.
3–56		ASTM F1841–97 (Reapproved 2013) Standard Practice for Assessment of Hemolysis in Continuous Flow Blood Pumps.	Reaffirmation.
3–66		ASTM F2081–06 (Reapproved 2013) Standard Guide for Characterization and Presentation of the Dimensional Attributes of Vascular Stents.	Reaffirmation.
3–79		ASTM F2079–09 (Reapproved 2013) Standard Test Method for Measuring Intrinsic Elastic Recoil of Balloon-Expandable Stents.	Reaffirmation.
3–86		ASTM F2394–07 (Reapproved 2013) Standard Guide for Measuring Securement of Balloon Expandable Vascular Stent Mounted on Delivery System.	Reaffirmation.
3–87		ASTM F2477–07 (Reapproved 2013) Standard Test Methods for in vitro Pulsatile Durability.	Reaffirmation.
3–81	3–117	ANSI/AAMI/ISO 81060–2 Second edition 2013–05–01, Non-Invasive Sphygmomanometers—Part 2: Clinical Validation of Automated Measurement Type.	Withdrawn and replaced with newer version.
3–94	3–116	ISO 25539–2 Second edition 2012–12–01 Cardiovascular Implants—Endovascular Devices—Part 2: Vascular Stents Part 2: Vascular Stent.	Withdrawn and replaced with newer version.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
		D. Dental/ENT	
4–75		ISO 7785–1 Second edition 1997–08–01 Dental Handpieces—Part 1: High-Speed Air Turbine Handpieces.	Withdrawn, see 4–206.
4–76		ISO 7785–2 Second edition 1995–08–0 Dental Handpieces—Part 2: Straight and Geared Angle Handpieces.	Withdrawn, see 4–206.
4–83		ISO 11498 First edition 1997–02–15 Dental Handpieces: Dental Low-Voltage Electrical Motors.	Withdrawn, see 4–206.
4–84		ISO 13294 First edition 1997–05–01 Dental Handpieces—Dental Air-Motors.	Withdrawn, see 4–206.
4–90		ANSI S3.39:1987 (Reaffirmed by ANSI June 15, 2012) American National Standard Specifications for Instruments to Measure Aural Acoustic Impedance and Admittance (Aural Acoustic Immittance).	Reaffirmation.
4–119		ANSI/ADA Specification No. 82:1998/ISO 13716:1999 Reaffirmed by ANSI: January 2009 Dental Reversible/Irreversible Hydrocolloid Impression Material Systems.	Reaffirmation.
4–123	4–203	ANSI/ASA S3.6–2010 (Revision of ANSI S3.6–2004) Specification for Audiometers.	Withdrawn and replaced with newer version.
4–167		ANSI/ASA S3.21–2004 (R2009) Methods for Manual Pure-Tone Threshold Audiometry.	Reaffirmation.
4–172	4–204	ANSI/ASA S3.42–2012/Part 2/IEC 60118–15:2012 American National Standard Testing Hearing Aids—Part 2: Methods for characterizing signal processing in hearing aids with a speech-like signal (a nationally adopted international standard).	Withdrawn and replaced with newer version.
4–187		IEC 60601–2–18 Edition 3.0 2009–08 Medical electrical equipment—Part 2–18: Particular requirements for the basic safety and essential performance of endoscopic equipment.	Transition period extended.
		E. General	
5–53		IEC 60601–1–2 Edition 3.0 2007–03 Medical electrical equipment—Part 1–2: General requirements for basic safety and essential performance—Collateral standard: Electromagnetic compatibility—Requirements and tests.	Transition period extended.
5–54		ANSI/AAMI/IEC 60601–1–2:2007/(R)2012 Medical electrical equipment—Part 1–2: General requirements for basic safety and essential performance—Collateral standard: Electromagnetic compatibility—Requirements and tests.	Reaffirmation and transition period extended.
5–55	5–76	IEC 60601–1–8 Edition 2.1 2012–11 Medical electrical equipment—Part 1–8: General requirements for basic safety and essential performance—Collateral standard: General requirements, tests, and guidance for alarm systems in medical electrical equipment and medical electrical systems.	Withdrawn and replaced with newer version. Transition period extended.
5–71	5–77	ANSI/AAMI ES60601–1:2005/(R)2012 and A1:2012, C1:2009/(R)2012 and A2:2010/(R)2012 (Consolidated Text), Medical electrical equipment—Part 1: General requirements for basic safety and essential performance (IEC 60601–1:2005, MOD).	Withdrawn and replaced with new version.
5–74	5–77	ANSI/AAMI ES60601–1:2005/(R)2012 and A1:2012, C1:2009/(R)2012 and A2:2010/(R)2012 (Consolidated Text), Medical electrical equipment—Part 1: General requirements for basic safety and essential performance (IEC 60601–1:2005, MOD).	Withdrawn and replaced with new version.
		F. General Hospital/General Plastic Surgery	
6–9	6–300	IEC 60601–2–21 Edition 2.0 2009–02 Medical electrical equipment—Part 2–21: Particular requirements for the basic safety and essential performance of infant radiant warmers.	Newer version with transition period.
6–29	6–298	IEC 60601–2–19 Edition 2.0 2009–02 Medical electrical equipment—Part 2–19: Particulars for the basic safety and essential performance of infant incubators.	Newer version with transition period.
6–32	6–299	IEC 60601–2–20 Edition 2.0 2009–02 Medical electrical equipment—Part 2–20: Particular requirements for the basic safety and essential performance of infant radiant warmers.	Newer version with transition period.
6–116	6–294	ISO 11608–3 Second edition 2012–10–01 Needle-based injection systems for medical use—Requirements and test methods—Part 3: Finished containers.	Withdrawn and replaced with newer version.
6–119	6–295	ANSI/AAMI BF7:2012 Blood transfusion microfilters	Withdrawn and replaced with newer version.
6–147		ASTM D6978—05 (Reapproved 2013) Standard Practice for Assessment of Resistance of Medical Gloves to Permeation by Chemotherapy Drugs.	Reaffirmation.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
6–174		ISO 11608–4 First edition 2006–03–15 Pen-injectors for medical use—Part 4: Requirements and test methods for electronic and electromechanical pen-injectors.	Contact person.
6–179		ISO 21649 First edition 2006–06–01, Needle-free injectors for medical use—Requirements and test methods.	Contact person.
6–112	6–296	ANSI/AAMI PB70:2012 Liquid barrier performance and classification of protective apparel and drapes intended for use in health care facilities.	Withdrawn and replaced with newer version.
6–214		ASTM D6355—07 (Reapproved 2012) Standard Test Method for Human Repeat Insult Patch Testing of Medical Gloves.	Reaffirmation.
6–216		ISO 8536–7 Third edition 2009–01–15 Infusion equipment for medical use—Part 7: Caps made of aluminium-plastics combinations for infusion bottles.	Contact person.
6–227		ANSI/AAMI/IEC 60601–2–21:2009, Medical electrical equipment—Part 2–21: Particular requirements for the basic safety and essential performance of infant radiant warmers.	Transition period extended.
6–228		IEC 60601–2–2 Edition 5.0 2009–02, Medical Electrical Equipment—Part 2–2: Particular requirements for the basic safety and essential performance of high frequency surgical equipment and high frequency surgical accessories.	Transition period extended.
6–229		ANSI/AAMI/IEC 60601–2–2:2009, Medical electrical equipment—Part 2–2: Particular requirements for the basic safety and essential performance of high frequency surgery equipment and high frequency surgical accessories.	Transition period extended.
6–230		ANSI/AAMI/IEC 60601–2–19:2009, Medical Electrical Equipment—Part 2–19: Particular requirements for the basic safety and essential performance of infant incubators.	Transition period extended.
6–231		ANSI/AAMI/IEC 60601–2–20:2009, Medical Electrical Equipment—Part 2–20: Particular requirements for the basic safety and essential performance of infant transport incubators.	Transition period extended.
6–233		IEC 60601–2–52 Edition 1.0 2009–12 Medical electrical equipment—Part 2–52: Particular requirements for basic safety and essential performance of medical beds.	Transition period extended.
6–234		IEC 60601–2–50 Edition 2.0 2009–03 Medical electrical equipment—Part 2–50: Particular requirements for the basic safety and essential performance of infant phototherapy equipment.	Contact person.
6–235		ANSI/AAMI/IEC 60601–2–50:2009 Medical Electrical Equipment—Part 2–50: Particular requirements for the basic safety and essential performance of infant phototherapy equipment.	Contact person.
6–239		ISO 8536–6 Second edition 2009–11–15 Infusion equipment for medical use—Part 6: Freeze drying closures for infusion bottles.	Contact person.
6–240		ISO 8536–3 Third edition 2009–06–01 Infusion equipment for medical use—Part 3: Aluminum caps for infusion bottles.	Contact person.
6–241	6–297	ISO 1135–4 Fifth edition 2012–03–01 Transfusion equipment for medical use—Part 4: Transfusion sets for single use.	Withdrawn and replaced with newer version.
6–274		ISO 11608–1 Second edition 2012–04–01 Needle-based injection systems for medical use—Requirements and test methods—Part 1: Needle-based injection systems.	Contact person.
6–275		ISO 11608–2 Second edition 2012–04–01 Needle-based injection systems for medical use—Requirements and test methods—Part 2: Needles.	Contact person.
6–276		ISO 8536–1 Fourth edition 2011–09–01 Infusion equipment for medical use—Part 1: Infusion glass bottles.	Contact person.
		G. In Vitro Diagnostics	
7–3		CLSI/NCCLS GP10–A 1995, Assessment of the Clinical Accuracy of Laboratory Tests Using Receiver Operating Characteristic (ROC) Plots; Approved Guideline.	Withdrawn, see 7–234.
7–4		CLSI/NCCLS GP14–A 1996, Labeling of Home-Use In Vitro Testing Products; Approved Guideline.	Withdrawn.
7–37		NCCLS I/LA6–A, Detection and Quantitation of Rubella IgG Antibody: Evaluation and Performance Criteria for Multiple Component Test Products, Specimen Handling, and Use of Test Products in the Clinical Laboratory; Approved Guideline.	Withdrawn.
7–41		NCCLS I/LA19–A, Primary Reference Preparations Used to Standardize Calibration of Immunochemical Assays for Serum Prostate Specific Antigen (PSA); Approved Guideline (1997).	Withdrawn.
7–154		CLSI MM02–A2, Immunoglobulin and T-Cell Receptor Gene Rearrangement Assays.	Withdrawn.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
7–171		CLSI M38–A2, Reference Method for Broth Dilution Antifungal Susceptibility Testing of Filamentous Fungi; Approved Standard—Second Edition.	Extent of recognition, process affected, and contact person.
7–178		CLSI M22–A3, Quality Control for Commercially Prepared Microbiological Culture Media; Approved Standard—Third Edition.	Extent of recognition, process affected, and contact person.
7–179	7–240	CLSI M27–S4, Reference Method for Broth Dilution Antifungal Susceptibility Testing of Yeasts; Fourth Informational Supplement.	Withdrawn and replaced with newer version.
7–200		CLSI M48–A, Laboratory Detection and Identification of Mycobacteria; Approved Guideline.	Extent of recognition, type of standard, and process affected.
7–206		CLSI I/LA 20–A2 Analytical Performance Characteristics and Clinical Utility of Immunological Assays for Human Immunoglobulin E (IgE) Antibodies and Defined Allergen Specificities; Approved Guideline—Second Edition.	Relevant guidance.
7–215		CLSI M44–A2, Method for Antifungal Disk Diffusion Susceptibility Testing of Yeast; Approved Guideline—Second Edition..	Extent of recognition, process affected, and contact person.
7–217		CLSI M44–S3, Zone Diameter Interpretive Standards, Corresponding Minimal Inhibitory Concentration (MIC) Interpretive Breakpoints, and Quality Control Limits for Antifungal Disk Diffusion Susceptibility Testing of Yeasts; Third Informational Supplement.	Extent of recognition, process affected, and contact person.
7–218		CLSI M45–A2, Methods for Antimicrobial Dilution and Disk Susceptibility Testing of Infrequently Isolated or Fastidious Bacteria; Approved Guideline—Second Edition.	Extent of recognition and process affected.
7–222		CLSI M24–A2, Susceptibility Testing of Mycobacteria, Nocardiae and other Aerobic Actinomycetes; Approved Standards—Second Edition.	Extent of recognition, process affected, contact person, and title and type of standard.
7–228		CLSI M11–A8, Methods for Antimicrobial Susceptibility Testing of Anaerobic Bacteria; Approved Standard—Eighth Edition.	Extent of recognition, process affected, and contact person.
7–229		CLSI M02–A11, Performance Standards for Antimicrobial Disk Susceptibility Tests; Approved Standard—Eleventh Edition.	Extent of recognition, process affected, and contact person.
7–230		CLSI M07–A9, Methods for Dilution Antimicrobial Susceptibility Tests for Bacteria That Grow Aerobically; Approved Standard—Ninth Edition.	Extent of recognition, process affected, and contact person.
7–231	7–241	CLSI M100–S23, Performance Standards for Antimicrobial Susceptibility Testing; Twenty-Third Informational Supplement.	Withdrawn and replaced with newer version.
7–234		CLSI EP24–A2, Assessment of the Diagnostic Accuracy of Laboratory Tests Using Receiver Operating Characteristic Curves; Approved Guideline—Second Edition.	Extent of recognition.
		H. Materials	
8–122	8–335	ASTM F2063–12 Standard Specification for Wrought Nickel-Titanium Shape Memory Alloys for Medical Devices and Surgical Implants.	Withdrawn and replaced with newer version.
8–147	8–336	ASTM F562–13 Standard Specification for Wrought 35Cobalt-35Nickel-20Chromium-10Molybdenum Alloy for Surgical Implant Applications (UNS R30035).	Withdrawn and replaced with newer version.
8–153		ASTM F2119–07 (Reapproved 2013) Standard Test Method for Evaluation of MR Image Artifacts from Passive Implants.	Reaffirmation.
8–154	8–337	ASTM F621–12 Standard Specification for Stainless Steel Forgings for Surgical Implants.	Withdrawn and replaced with newer version.
8–156	8–338	ASTM F139–12 Standard Specification for Wrought 18Chromium-14Nickel-2.5Molybdenum Stainless Steel Sheet and Strip for Surgical Implants (UNS S31673).	Withdrawn and replaced with newer version.
8–158		ASTM F1713–08 (Reapproved 2013) Standard Specification for Wrought Titanium-13Niobium-13 Zirconium Alloy for Surgical Implant Applications (UNS R58130).	Reaffirmation.
8–166	8–339	ASTM F1091–12 Standard Specification for Wrought Cobalt-20Chromium-15Tungsten-10Nickel Alloy Surgical Fixation Wire (UNS R30605).	Withdrawn and replaced with newer version.
8–203	8–340	ASTM F2026–12 Standard Specification for Polyetheretherketone (PEEK) Polymers for Surgical Implant Applications.	Withdrawn and replaced with newer version.
8–219	8–341	ASTM F136–12a Standard Specification for Wrought Titanium-6Aluminum-4Vanadium ELI (Extra Low Interstitial) Alloy for Surgical Implant Applications (UNS R56401).	Withdrawn and replaced with newer version.
8–222	8–342	ASTM F1537–11 Standard Specification for Wrought Cobalt-28Chromium-6Molybdenum Alloys for Surgical Implants (UNS R31537, UNS R31538, and UNS R31539).	Withdrawn and replaced with newer version.
8–332	8–343	ASTM F899–12b Standard Specification for Wrought Stainless Steels for Surgical Instruments.	Withdrawn and replaced with newer version.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
		I. OB–GYN/Gastroenterology	
9–31		ANSI/AAMI ID54:1996/(R)2012 Enteral feeding set adapters and connectors.	Reaffirmation.
9–60		IEC 60601–2–16 Edition 3.0 2008–04 Medical electrical equipment—Part 2–16: Particular requirements for basic safety and essential performance of haemodialysis, haemodiafiltration and haemofiltration.	Withdrawn, see 9–80.
9–61		IEC 60601–2–18 Edition 3.0 2009–08 Medical electrical equipment—Part 2–18: Particular requirements for the basic safety and essential performance of endoscopic equipment.	Transition period extended.
9–72	9–81	ANSI/AAMI/IEC 60601–2–16:2012 Medical electrical equipment—Part 2–16: Particular requirements for basic safety and essential performance of hemodialysis, hemodiafiltration and hemofiltration equipment.	Newer version with transition period.
9–62		IEC 60601–2–2 Edition 5.0 2009–02 Medical electrical equipment—Part 2–2: Particular requirements for the basic safety and essential performance of frequency surgical equipment and high frequency surgical accessories.	Transition period extended.
9–63		IEC 60601–2–16 (Third edition—2008), Medical electrical equipment—Part 2–16: Particular requirements for basic safety and essential performance of haemodialysis, haemodiafiltration and haemofiltration equipment CORRIGENDUM 1.	Withdrawn, see 9–80.
9–64		ANSI/AAMI/IEC 60601–2–2:2009 Medical electrical equipment—Part 2–2: Particular requirements for the basic safety and essential performance of high frequency surgery equipment and high frequency surgical accessories.	Transition period extended.
9–80		IEC 60601–2–16 Edition 4.0 2012–03 Medical electrical equipment—Part 2–16: Particular requirements for the basic safety and essential performance of haemodialysis, haemodiafiltration and haemofiltration equipment.	Transition period extended.
		J. Ophthalmic	
10–15	10–77	ISO 9394 Third edition 2012–10–01 Ophthalmic optics—Contact lenses and contact lens care products—Determination of biocompatibility by ocular study with rabbit eyes.	Withdrawn and replaced with newer version.
10–36	10–78	ISO 11979–3 Third edition 2012–12–01 Ophthalmic implants—Intraocular lenses—Part 3: Mechanical properties and test methods.	Withdrawn and replaced with newer version.
10–40	10–79	ISO 11979–1 Third edition 2012–09–15 Ophthalmic implants—Intraocular lenses—Part 1: Vocabulary.	Withdrawn and replaced with newer version.
10–45	10–80	ISO 18369–2 Second edition 2012–12–01 Ophthalmic optics—Contact lenses—Part 2: Tolerances.	Withdrawn and replaced with newer version.
10–56		ANSI Z80.12–2007 (R2012) American National Standard for Ophthalmics—Multifocal Intraocular Lenses.	Reaffirmation.
10–57		ANSI Z80.13–2007 (R2012) American National Standard for Ophthalmics—Phakic Intraocular Lenses.	Reaffirmation.
10–76		ISO 11979–8 Second edition 2006–07–01 AMENDMENT 1 2011–05–15 Ophthalmic implants—Intraocular lenses—Part 8: Fundamental requirements.	Withdrawn.
		K. Orthopedics	
11–73	11–252	ISO 5838–1 Third edition 2013–03–01 Implants for surgery—Metallic skeletal pins and wires—Part 1: General requirements.	Withdrawn and replaced with a newer version.
11–206	11–253	ASTM F1800–12 Standard Practice for Cyclic Fatigue Testing of Metal Tibial Tray Components of Total Knee Joint Replacements.	Withdrawn and replaced with a newer version.
11–208	11–254	ISO 14630 Fourth edition 2012–12–01 Non-active surgical implants—General requirements.	Withdrawn and replaced with a newer version.
11–213		ASTM F1223–08 (Reapproved 2012) Standard Test Method for Determination of Total Knee Replacement Constraint.	Reaffirmation.
11–215		ASTM F897–02 (Reapproved 2013) Standard Test Method for Measuring Fretting Corrosion of Osteosynthesis Plates and Screws.	Reaffirmation.
11–242		ASTM F1839–08 (Reapproved 2012) Standard Specification for Rigid Polyurethane Foam for Use as a Standard Material for Testing Orthopaedic Devices and Instruments.	Reaffirmation.
11–246	11–255	ASTM F1717–13 Standard Test Methods for Spinal Implant Constructs in a Vertebrectomy Model.	Withdrawn and replaced with a newer version.
		L. Physical Medicine	
16–24	16–190	ISO 7176–11 Second edition 2012–12–01 Wheelchairs—Part 11: Test dummies.	Withdrawn and replaced with a newer version.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
16–28	16–191	ISO 7176–16 Second edition 2012–12–01 Wheelchairs—Part 16: Resistance to ignition of postural support devices.	Withdrawn and replaced with a newer version.
16–50	16–192	ISO 7176–3 Third edition 2012–12–15 Wheelchairs—Part 3: Determination of effectiveness of brakes.	Withdrawn and replaced with a newer version.
		M. Radiology	
12–34	12–201	IEC 60601–2–54 Edition 1.0 2009–06 Medical electrical equipment—Part 2–54: Particular requirements for the basic safety and essential performance of X-ray equipment for radiography and radioscopy.	Newer version with transition period.
12–54	12–254	IEC 60601–2–8 Edition 2.0 2010–11 Medical electrical equipment—Part 2–8: Particular requirements for the basic safety and essential performance of therapeutic X-ray equipment operating in the range 10 kV to 1 MV.	Newer version with extended transition period.
12–127	12–201	IEC 60601–2–54 Edition 1.0 2009–06 Medical electrical equipment—Part 2–54: Particular requirements for the basic safety and essential performance of X-ray equipment for radiography and radioscopy.	Newer version with transition period.
12–133	12–255	IEC 60601–2–11 Edition 3.0 2013–01 Medical electrical equipment—Part 2–11: Particular requirements for the basic safety and essential performance of gamma beam therapy equipment.	Newer version with transition period.
12–202		IEC 60601–2–43 Edition 2.0 2010–03 Medical electrical equipment—Part 2–43: Particular requirements for the basic safety and essential performance of X-ray equipment for interventional procedures.	Transition period extended.
12–203	12–256	IEC 60601–2–44 Edition 3.1 2012–09 Medical electrical equipment—Part 2–44: Particular requirements for the basic safety and essential performance of X-ray equipment for computed tomography.	Newer version with extended transition period.
12–204		IEC 60601–2–28 Edition 2.0 2010–03 Medical electrical equipment—Part 2–28: Particular requirements for the basic safety and essential performance of X-ray tube assemblies for medical diagnosis.	Transition period extended.
12–205		IEC 60601–2–5 Edition 3.0 2009–07 Medical electrical equipment—Part 2–5: Particular requirements for the basic safety and essential performance of ultrasonic physiotherapy equipment.	Transition period extended.
12–206		IEC 60601–2–1 Edition 3.0 2009–10 Medical electrical equipment—Part 2–1: Particular requirements for the basic safety and essential performance of electron accelerators in the range 1 MeV to 50 MeV.	Transition period extended.
12–207		IEC 60601–2–33 Edition 3.0 2010–03 Medical electrical equipment—Part 2–33: Particular requirements for the basic safety and essential performance of magnetic resonance equipment for medical diagnostic.	Transition period extended.
12–208		IEC 60601–2–22 Third Edition 2007–05 Medical electrical equipment—Part 2–22: Particular requirements for basic safety and essential performance of surgical, cosmetic, therapeutic and diagnostic laser equipment.	Transition period extended.
12–209		IEC 60601–2–37 Edition 2.0 2007–08 Medical electrical equipment—Part 2–37: Particular requirements for the basic safety and essential performance of ultrasonic medical diagnostic and monitoring equipment.	Transition period extended.
12–210		IEC 60601–1–3 Edition 2.0 2008–01 Medical electrical equipment—Part 1–3: General requirements for basic safety and essential performance—Collateral Standard: Radiation protection in diagnostic X-ray equipment.	Transition period extended.
12–211		IEC 60601–2–29 Edition 3.0 2008–06 Medical electrical equipment Part 2–29: Particular requirements for the basic safety and essential performance of radiotherapy simulators.	Transition period extended.
12–224		IEC 60601–2–44 (Third edition -2009) Medical electrical equipment—Part 2–44: Particular requirements for the basic safety and essential performance of X-ray equipment for computed tomography CORRIGENDUM 1.	Withdrawn, see 12–256.
12–236		IEC 60601–2–45 Edition 3.0 2011–02 Medical electrical equipment—Part 2–45: Particular requirements for the safety and essential performance of mammographic X-ray equipment and mammographic stereotactic devices.	Transition period extended.
12–250		IEC 60601–2–44 Edition 3.0 2012–08 Amendment 1 Medical electrical equipment—Part 2–44: Particular requirements for the basic safety and essential performance of X-ray equipment for computed tomography.	Withdrawn, see 12–256.
		N. Sterility	
14–64	14–378	ASTM F1929–12 Standard Test Method for Detecting Seal Leaks in Porous Medical Packaging by Dye Penetration.	Withdrawn and replaced with newer version.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
14–230		ASTM F2203–02 (Reapproved 2012) Standard Test Method for Linear Measurement Using Precision Steel Rule.	Reaffirmation.
14–231		ASTM F2217–02 (Reapproved 2012) Standard Practice for Coating/Adhesive Weight Determination.	Reaffirmation.
14–235		ASTM F1140 -07 (Reapproved 2012) Standard Test Methods for Internal Pressurization Failure Resistance of Unrestrained Packages.	Reaffirmation.
14–236		ASTM F2054–07 (Reapproved 2012) Standard Test Method for Burst Testing of Flexible Package Seals Using Internal Air Pressurization Within Restraining Plates.	Reaffirmation.
14–244	14–379	ISO 14644–8 Second edition 2013–02–15 Cleanrooms and associated controlled environments—Part 8: Classification of air cleanliness by chemical concentration (ACC).	Withdrawn and replaced with newer version.
14–264		ANSI/AAMI ST8:2008 Hospital steam sterilizers	Contact person.
14–275		ANSI/AAMI ST41:2008/(R)2012 Ethylene oxide sterilization in health care facilities: Safety and effectiveness.	Reaffirmation.
14–281	14–380	ASTM F17–12 Standard Terminology Relating to Flexible Barrier Packaging.	Withdrawn and replaced with newer version.
14–295		ANSI/AAMI ST81:2004/(R)2010 Sterilization of medical devices—Information to be provided by the manufacturer for the processing of resterilizable medical devices.	Relevant guidance.
14–311		ANSI/AAMI ST55:2010 Table-top steam sterilizers	Contact person
14–312	14–394	ANSI/AAMI ST79:2010 & A1:2010 & A2:2011 & A3:2012 (Consolidated Text) Comprehensive guide to steam sterilization and sterility assurance in health care facilities.	Withdrawn and replaced with newer version.
14–341		ASTM E2303–11 €[1] Standard Guide for Absorbed-Dose Mapping in Radiation Processing Facilities.	Editorial change.
14–345	14–381	ISO/ASTM 51261 Second edition 2013–04–15 Practice for calibration of routine dosimetry systems for radiation processing.	Withdrawn and replaced with newer version.
14–346	14–382	ISO/ASTM 51276 Third edition 2012–07–15 Practice for use of a polymethylmethacrylate dosimetry system.	Withdrawn and replaced with newer version.
14–347	14–383	ISO/ASTM 51702 Third edition 2013–04–15 Practice for dosimetry in a gamma facility for radiation processing.	Withdrawn and replaced with newer version.
14–349		ANSI/AAMI/ISO 13408–3:2006/(R)2012 Aseptic processing of health care products—Part 3: Lyophilization.	Reaffirmation.
14–350		ANSI/AAMI/ISO 13408–4:2005/(R)2012 Aseptic processing of health care products—Part 4: Clean-in-place technologies.	Reaffirmation.
14–351		ANSI/AAMI/ISO 13408–5:2006/(R)2012 Aseptic processing of health care products—Part 5: Sterilization in place.	Reaffirmation.
		O. Tissue Engineering	
15–5	15–37	ASTM F2347—11 Standard Guide for Characterization and Testing of Hyaluronan as Starting Materials Intended for Use in Biomedical and Tissue Engineered Medical Product Applications.	Withdrawn and replaced with newer version.
15–14		ASTM F2603 −06 (Reapproved 2012) Standard Guide for Interpreting Images of Polymeric Tissue Scaffolds.	Reaffirmation.
15–29		ASTM F2259 −10 (Reapproved 2012) €[1] Standard Test Method for Determining the Chemical Composition and Sequence in Alginate by Proton Nuclear Magnetic Resonance (^{1}H NMR) Spectroscopy.	Reaffirmation.
15–32		ASTM F2260 −03 (Reapproved 2012) €[1] Standard Test Method for Determining Degree of Deacetylation in Chitosan Salts by Proton Nuclear Magnetic Resonance (^{1}H NMR) Spectroscopy.	Reaffirmation.

[1] All standard titles in this table conform to the style requirements of the respective organizations.

III. Listing of New Entries

In table 2, FDA provides the listing of new entries and consensus standards added as modifications to the list of recognized standards under Recognition List Number: 031.

TABLE 2—NEW ENTRIES TO THE LIST OF RECOGNIZED STANDARDS

Recognition No.	Title of standard [1]	Reference No. and Date
	A. Anesthesia	
1–90	Oxygen concentrators for medical use—Safety requirements	ISO 8359 Second edition 1996–12–15 Amendment 1 2012–07–01

TABLE 2—NEW ENTRIES TO THE LIST OF RECOGNIZED STANDARDS—Continued

Recognition No.	Title of standard [1]	Reference No. and Date
1–92	Sleep apnoea breathing therapy—Part 2: Masks and application accessories	ISO 17510–2 Second edition 2007–10–01
	B. Dental/ENT	
4–205	Dentistry—Handpieces and motors	ISO 14457 First edition 2012–09–15
	C. General	
5–75	Medical devices—Symbols to be used with medical device labels, labeling, and information to be supplied—Part 1: General requirements.	ANSI/AAMI/ISO 15223–1 2012
	D. In Vitro Diagnostics	
7–242	Hemolysis, Icterus, and Lipemia/Turbidity Indices as Indicators of Interference in Clinical Laboratory Analysis; Approved Guideline.	CLSI C56–A
7–243	Method for Antifungal Disk Diffusion Susceptibility Testing of Nondermatophyte Filamentous Fungi; Approved Guideline.	CLSI M51–A
	E. Neurology	
17–11	Medical electrical equipment—Part 2–10: Particular requirements for the basic safety and essential performance of nerve and muscle stimulators.	IEC 60601–2–10 Edition 2.0 2012–06
	F. Radiology	
12–251	Medical electrical equipment—Part 2–63: Particular requirements for the basic safety and essential performance of dental extra-oral X-ray equipment.	IEC 60601–2–63 Edition 1.0 2012–09
12–252	Medical electrical equipment—Part 2–65: Particular requirements for the basic safety and essential performance of dental intra-oral X-ray equipment.	IEC 60601–2–65 Edition 1.0 2012–09
12–253	Medical electrical equipment—Medical electron accelerators—Functional performance characteristics.	IEC 60976 Edition 2.0 2007–10
	G. Software/Informatics	
13–37	Laboratory Automation: Data Content for Specimen Identification; Approved Standard	NCCLS AUTO7–A
	H. Sterility	
14–384	Biological evaluation of medical devices—Part 7: Ethylene oxide sterilization residuals	ISO 10993–7:2008 TECHNICAL CORRIGENDUM 1 Published 2009–11–15
14–385	Aseptic processing of health care products—Part 1: General requirements	ANSI/AAMI/ISO 13408–1:2008/(R2011)
14–386	Aseptic processing of health care products—Part 1: General requirements	ISO 13408–1 Second edition 2008–06–15
14–387	Aseptic processing of health care products—Part 7: Alternate processes for medical devices and combination products.	ANSI/AAMI/ISO 13408–7:2012
14–388	Aseptic processing of health care products—Part 7: Alternate processes for medical devices and combination products.	ISO 13408–7 First edition 2012–08–01
14–389	Cleanrooms and associated controlled environments—Part 9: Classification of surface cleanliness by particle concentration.	ISO 14644–9 First edition 2012–08–15
14–390	Cleanrooms and associated controlled environments—Part 10: Classification of surface cleanliness by chemical concentration.	ISO 14644–10 First edition 2013–03–01
14–391	Practice for dosimetry in an X-ray (bremsstrahlung) facility for radiation processing	ISO/ASTM 51608 Second edition 2005–05–15
14–392	Practice for dosimetry in an electron beam facility for radiation processing at energies between 300 keV and 25 MeV.	ISO/ASTM 51649 Second edition 2005–05–15
14–393	Practice for dosimetry in an electron beam facility for radiation processing at energies between 80 and 300 keV.	ISO/ASTM 51818 Second edition 2009–06–15
	I. Tissue Engineering	
15–38	Standard Guide for Characterization of Ceramic and Mineral Based Scaffolds used for Tissue-Engineered Medical Products (TEMPs) and as Device for Surgical Implant Applications.	ATSM F2883—11

[1] All standard titles in this table conform to the style requirements of the respective organizations.

IV. List of Recognized Standards

FDA maintains the Agency's current list of FDA recognized consensus standards in a searchable database that may be accessed directly at FDA's Internet site at *http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfStandards/search.cfm*. FDA will incorporate the modifications and revisions described in this notice into the database and, upon publication in the **Federal Register**, this recognition of consensus standards will be effective. FDA will announce additional modifications and revisions to the list of

recognized consensus standards, as needed, in the **Federal Register** once a year, or more often, if necessary. Beginning with Recognition List Number: 033, FDA will no longer be announcing minor revisions to the list of recognized consensus standards such as technical contact person, relevant guidance, processes affected, CFR citations, and product codes.

V. Recommendation of Standards for Recognition by FDA

Any person may recommend consensus standards as candidates for recognition under section 514 of the FD&C Act by submitting such recommendations, with reasons for the recommendation, to the contact person (see **FOR FURTHER INFORMATION CONTACT**). To be properly considered, such recommendations should contain, at a minimum, the following information: (1) Title of the standard; (2) any reference number and date; (3) name and address of the national or international standards development organization; (4) a proposed list of devices for which a declaration of conformity to this standard should routinely apply; and (5) a brief identification of the testing or performance or other characteristics of the device(s) that would be addressed by a declaration of conformity.

VI. Electronic Access

You may obtain a copy of ''Guidance on the Recognition and Use of Consensus Standards'' by using the Internet. The Center for Devices and Radiological Health (CDRH) maintains a site on the Internet for easy access to information including text, graphics, and files that you may download to a personal computer with access to the Internet. Updated on a regular basis, the CDRH home page includes the guidance as well as the current list of recognized standards and other standards-related documents. After publication in the **Federal Register**, this notice announcing ''Modification to the List of Recognized Standards, Recognition List Number: 031'' will be available on the CDRH home page. You may access the CDRH home page at *http://www.fda.gov/MedicalDevices.*

You may access ''Guidance on the Recognition and Use of Consensus Standards,'' and the searchable database for ''FDA Recognized Consensus Standards'' at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Standards.*

This **Federal Register** document on modifications in FDA's recognition of consensus standards is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Standards/ucm123792.htm.*

VII. Submission of Comments and Effective Date

Interested persons may submit to the contact person (see **FOR FURTHER INFORMATION CONTACT**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. Comments are to be identified with the docket number found in brackets in the heading of this document. FDA will consider any comments received in determining whether to amend the current listing of modifications to the list of recognized standards, Recognition List Number: 031. These modifications to the list of recognized standards are effective upon publication of this notice in the **Federal Register**.

Dated: July 31, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–19019 Filed 8–5–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2004–N–0451] (formerly 2004N–0226)

Food and Drug Administration Modernization Act of 1997: Modifications to the List of Recognized Standards, Recognition List Number: 032

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing a publication containing modifications the Agency is making to the list of standards FDA recognizes for use in premarket reviews (FDA recognized consensus standards). Specifically, this publication announces the addition of a list of recognized standards that are relevant to interoperability of medical devices. This publication, entitled ''Modifications to the List of Recognized Standards, Recognition List Number: 032'' (Recognition List Number: 032), will assist manufacturers who elect to declare conformity with consensus standards to meet certain requirements for medical devices.

DATES: Submit written or electronic comments concerning this document at any time. See section VII for the effective date of the recognition of standards announced in this document.

ADDRESSES: Submit written requests for single copies of ''Modifications to the List of Recognized Standards, Recognition List Number: 032'' to the Division of Small Manufacturers, International and Consumer Assistance, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Silver Spring, MD 20993. Send two self-addressed adhesive labels to assist that office in processing your requests, or fax your request to 301–847–8149. Submit written comments concerning this document, or recommendations for additional standards for recognition, to the contact person (see **FOR FURTHER INFORMATION CONTACT**). Submit electronic comments by email: *standards@cdrh.fda.gov*. This document may also be accessed on FDA's Internet site at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Standards/ucm123792.htm*. See section VI for electronic access to the searchable database for the current list of FDA recognized consensus standards, including Recognition List Number: 032 modifications and other standards related information.

FOR FURTHER INFORMATION CONTACT: Scott A. Colburn, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 3632, Silver Spring, MD 20993, 301–796–6287.

SUPPLEMENTARY INFORMATION:

I. Background

Section 204 of the Food and Drug Administration Modernization Act of 1997 (FDAMA) (Pub. L. 105–115) amended section 514 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360d). Amended section 514 allows FDA to recognize consensus standards developed by international and national organizations for use in satisfying portions of device premarket review submissions or other requirements.

In a notice published in the **Federal Register** of February 25, 1998 (63 FR 9561), FDA announced the availability of a guidance entitled ''Recognition and Use of Consensus Standards.'' The notice described how FDA would implement its standard recognition program and provided the initial list of recognized standards.

Modifications to the initial list of recognized standards, as published in the **Federal Register,** can be accessed at *http://www.fda.gov/MedicalDevices/*

DeviceRegulationandGuidance/Standards/ucm123792.htm.

These notices describe the addition, withdrawal, and revision of certain standards recognized by FDA. The Agency maintains ''hypertext markup language (HTML)'' and ''portable document format (PDF)'' versions of the list of ''FDA Recognized Consensus Standards.'' Both versions are publicly accessible at the Agency's Internet site. See section VI for electronic access information. Interested persons should review the supplementary information sheet for the standard to understand fully the extent to which FDA recognizes the standard.

II. Modifications to the List of Recognized Standards, Recognition List Number: 032

FDA is announcing the addition, withdrawal, correction, and revision of certain consensus standards the Agency will recognize for use in premarket submissions and other requirements for devices. FDA will incorporate these modifications in the list of FDA Recognized Consensus Standards in the Agency's searchable database. FDA will use the term ''Recognition List Number: 032'' to identify these current modifications.

In section III, FDA lists modifications the Agency is making that involve the initial addition of standards not previously recognized by FDA.

III. Listing of New Entries

In table 1, FDA provides the listing of new entries and consensus standards added as modifications to the list of recognized standards under Recognition List Number: 032.

TABLE 1—NEW ENTRIES TO THE LIST OF RECOGNIZED STANDARDS

Recognition No.	Title of standard [1]	Reference No. and date
	Software/Informatics	
13–38	Application of risk management for IT networks incorporating medical devices—Part 1: Roles, responsibilities and activities.	IEC 80001–1 Edition 1.0 2010–10
13–39	Application of risk management for IT networks incorporating medical devices—Part 1: Roles, responsibilities and activities.	ANSI/AAMI/IEC 80001–1:2010
13–40	Application of risk management for IT networks incorporating medical devices—Part 2–1: Step-by-step risk management of medical IT networks—Practical applications and examples.	IEC/TR 80001–2–1 Edition 1.0 2012–07
13–41	Application of risk management for IT networks incorporating medical devices—Part 2–1: Step by step risk management of medical IT networks; Practical applications and examples.	ANSI/AAMI/IEC TIR80001–2–1:2012
13–42	Application of risk management for IT networks incorporating medical devices—Part 2–2: Guidance for the disclosure and communication of medical device security needs, risks and controls.	IEC/TR 80001–2–2 Edition 1.0 2012–07
13–43	Application of risk management for IT networks incorporating medical devices—Part 2–2: Guidance for the disclosure and communication of medical device security needs, risks and controls.	ANSI/AAMI/IEC TIR80001–2–2:2012
13–44	Application of risk management for IT networks incorporating medical devices—Part 2–3: Guidance for wireless networks.	IEC/TR 80001–2–3 Edition 1.0 2012–07
13–45	Application of risk management for IT networks incorporating medical devices—Part 2–3: Guidance for wireless networks.	ANSI/AAMI/IEC TIR80001–2–3:2012
13–46	Medical Devices and Medical Systems—Essential safety requirements for equipment comprising the patient-centric integrated clinical environment (ICE)—Part 1: General requirements and conceptual model.	ASTM F2761–09
13–47	Health informatics—Point-of-care medical device communication—Part 10101: Nomenclature.	ISO/IEEE 11073–10101 First edition 2004–12–15
13–48	Health informatics—Point-of-care medical device communication—Part 10201: Domain information model.	ISO/IEEE 11073–10201 First edition 2004–12–15
13–49	Health informatics—Point-of-care medical device communication—Part 20101: Application Profiles—Base Standard.	ISO/IEEE 11073–20101 First edition 2004–12–15
13–50	Health informatics—Personal health device communication—Part 20601: Application profile—Optimized exchange protocol.	ISO/IEEE 11073–20601 First edition 2010–05–01
13–51	Health informatics—Personal health device communication—Part 20601: Application profile—Optimized Exchange Protocol Amendment 1.	IEEE Std 11073–20601a-2010
13–52	Health informatics—Point-of-care medical device communication—Part 10408: Device specialization—Thermometer.	ISO/IEEE 11073–10408 First edition 2010–05–01
13–53	Health informatics—Point-of-care medical device communication—Part 10415: Device specialization—Weighing scale.	ISO/IEEE 11073–10415 First edition 2010–05–01
13–54	Health informatics—Personal health device communication—Part 10404: Device specialization—Pulse oximeter.	ISO/IEEE 11073–10404 First edition 2010–05–01
13–55	Health informatics—Personal health device communication—Part 10421: Device specialization—Peak expiratory flow monitor (peak flow).	IEEE Std 11073–10421–2010
13–56	Health informatics—Personal health device communication—Part 10406: Device specialization—Basic electrocardiograph (ECG) (1- to 3-lead ECG).	IEEE Std 11073–10406–2011
13–57	Health informatics—Personal health device communication—Part 10407: Device specialization—Blood pressure monitor.	ISO/IEEE 11073–10407 First edition 2010–05–01
13–58	Health informatics—Personal health device communication—Part 10417: Device specialization—Glucose meter.	ISO/IEEE 11073–10417 First edition 2010–05–01
13–59	Systems and software engineering—Systems and software assurance—Part 4: Assurance in the life cycle.	ISO/IEC 15026–4 First edition 2012–10–01
13–60	Industrial communication networks—Network and system security—Part 1–1: Terminology, concepts and models.	IEC/TS 62443–1–1 Edition 1.0 2009–07

TABLE 1—NEW ENTRIES TO THE LIST OF RECOGNIZED STANDARDS—Continued

Recognition No.	Title of standard [1]	Reference No. and date
13–61	Industrial communication networks—Network and system security—Part 2–1: Establishing an industrial automation and control system security program.	IEC 62443–2–1 Edition 1.0 2010–11
13–62	Industrial communication networks—Network and system security—Part 3–1: Security technologies for industrial automation and control systems.	IEC/TR 62443–3–1 Edition 1.0 2009–07

[1] All standard titles in this table conform to the style requirements of the respective organizations.

IV. List of Recognized Standards

FDA maintains the Agency's current list of FDA recognized consensus standards in a searchable database that may be accessed directly at FDA's Internet site at *http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfStandards/search.cfm.* FDA will incorporate the modifications and revisions described into the database and, upon publication in the **Federal Register**, this recognition of consensus standards will be effective. FDA will announce additional modifications and revisions to the list of recognized consensus standards, as needed, in the **Federal Register** once a year, or more often, if necessary. Beginning with Recognition List Number: 033, FDA will no longer be announcing minor revisions to the list of recognized consensus standards such as technical contact person, relevant guidance, processes affected, CFR citations, and product codes.

V. Recommendation of Standards for Recognition by FDA

Any person may recommend consensus standards as candidates for recognition under section 514 of the FD&C Act by submitting such recommendations, with reasons for the recommendation, to the contact person (see **FOR FURTHER INFORMATION CONTACT**). To be properly considered, such recommendations should contain, at a minimum, the following information: (1) Title of the standard; (2) any reference number and date; (3) name and address of the national or international standards development organization; (4) a proposed list of devices for which a declaration of conformity to this standard should routinely apply; and (5) a brief identification of the testing or performance or other characteristics of the device(s) that would be addressed by a declaration of conformity.

VI. Electronic Access

You may obtain a copy of ''Guidance on the Recognition and Use of Consensus Standards'' by using the Internet. The Center for Devices and Radiological Health (CDRH) maintains a site on the Internet for easy access to information including text, graphics, and files that you may download to a personal computer with access to the Internet. Updated on a regular basis, the CDRH home page includes the guidance as well as the current list of recognized standards and other standards-related documents. After publication in the **Federal Register**, this notice announcing ''Modification to the List of Recognized Standards, Recognition List Number: 032'' will be available on the CDRH home page. You may access the CDRH home page at *http://www.fda.gov/MedicalDevices.*

You may access ''Guidance on the Recognition and Use of Consensus Standards,'' and the searchable database for ''FDA Recognized Consensus Standards'' at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Standards.*

This **Federal Register** document on modifications in FDA's recognition of consensus standards is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Standards/ucm123792.htm.*

VII. Submission of Comments and Effective Date

Interested persons may submit to the contact person (see **FOR FURTHER INFORMATION CONTACT**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. Comments are to be identified with the docket number found in brackets in the heading of this document. FDA will consider any comments received in determining whether to amend the current listing of modifications to the list of recognized standards, Recognition List Number: 032. These modifications to the list of recognized standards are effective upon publication of this notice in the **Federal Register**.

Dated: July 31, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–19020 Filed 8–5–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Council on Blood Stem Cell Transplantation; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given of the following meeting:

Name: Advisory Council on Blood Stem Cell Transplantation.

Date and Time: September 13, 2013, 10:00 a.m. to 4:00 p.m. (Eastern Standard Time).

Place: The meeting will be via audio conference call and Adobe Connect Pro.

Status: The meeting will be open to the public.

Purpose: Pursuant to Public Law 109–129, 42 U.S.C. 274k (section 379 of the Public Health Service Act, as amended), the Advisory Council on Blood Stem Cell Transplantation (ACBSCT) advises the Secretary of the Department of Health and Human Services and the Administrator, Health Resources and Services Administration on matters related to the activities of the C.W. Bill Young Cell Transplantation Program (Program) and the National Cord Blood Inventory Program.

Agenda: The Council will hear reports from ACBSCT Work Groups including: Cord Blood Thawing and Washing; Access to Transplantation; and Advancing Hematopoietic Stem Cell Transplantation for Hemoglobinopathies. The Council also will hear presentations and discussions on topics including: Accreditation; Adverse Event Reporting; and Unmet Need. Agenda items are subject to change as priorities indicate.

After Council discussions, members of the public will have an opportunity to provide comments. Because of the Council's full agenda and the time frame in which to cover the agenda topics, public comment will be limited. All public comments will be included in the record of the ACBSCT meeting. Meeting summary notes will be posted on the HRSA's Program Web site at

http://bloodcell.transplant.hrsa.gov/ABOUT/Advisory_Council/index.html.

The draft meeting agenda will be posted on *http://www.acbsctmeeting.com.* Those participating in this meeting should register by visiting *http://www.acbsctmeeting.com.* The deadline to register for this meeting is Wednesday, September 11, 2013. For all logistical questions and concerns, please contact Deborah Jones, Meeting Planner, by calling (301) 585–1261 or by sending an email to *Deborah.Jones@luxcg.com.*

The public can join the meeting by:

1. (Audio Portion) Calling the conference number at 800–857–9638 and providing the Participant Code 75841, AND

2. (Visual Portion) Connecting to the ACBSCT Adobe Connect Pro Meeting using the following URL and entering as GUEST: *https://hrsa.connectsolutions.com/acbsct_advisory/* (copy and paste the link into your browser if it does not work directly, and enter as a guest).

Participants should call and connect 15 minutes prior to the meeting in order for logistics to be set up. If you have never attended an Adobe Connect meeting, please test your connection using the following URL: *https://hrsa.connectsolutions.com/common/help/en/support/meeting_test.htm* and get a quick overview by following URL: *http://www.adobe.com/go/connectpro_overview.*

Call (301) 443–0437 or send an email to *ptongele@hrsa.gov* if you are having trouble connecting to the meeting site.

Public Comment: It is preferred that persons interested in providing an oral presentation submit a written request, along with a copy of their presentation to: Passy Tongele, MBA, Division of Transplantation, Healthcare Systems Bureau, Health Resources and Services Administration, Room 12C–06, 5600 Fishers Lane, Rockville, Maryland 20857 or email at *ptongele@hrsa.gov.* Requests should contain the name, address, telephone number, email address, and any business or professional affiliation of the person desiring to make an oral presentation. Groups having similar interests are requested to combine their comments and present them through a single representative.

The allocation of time may be adjusted to accommodate the level of expressed interest. Persons who do not file an advance request for a presentation, but desire to make an oral statement, may request it at the time of the public comment period. Public participation and ability to comment will be limited to time as it permits.

For Further Information Contact: Patricia Stroup, MBA, MPA, Executive Secretary, Healthcare Systems Bureau, Health Resources and Services Administration, 5600 Fishers Lane, Room 12C–06, Rockville, Maryland 20857; telephone (301) 443–1127.

Dated: July 30, 2013.

Bahar Niakan,

Director, Division of Policy and Information Coordination.

[FR Doc. 2013–18825 Filed 8–5–13; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Human Genome Research Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Inherited Disease Research Access Committee

Date: September 12, 2013.

Time: 9:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Room 509, 5635 Fishers Lane, Bethesda, MD 20892.

Contact Person: Camilla E. Day, Ph.D., Scientific Review Officer, CIDR, National Human Genome Research Institute, National Institutes of Health, 5635 Fishers Lane, Suite 4075, Bethesda, MD 20892, 301–402–8837, *camilla.day@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research,

National Institutes of Health, HHS)

Dated: July 31, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–18896 Filed 8–5–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Environmental Health Sciences Review Committee, July 24, 2013, 08:00 a.m. to July 26, 2013, 02:00 p.m., Double Tree by Hilton, 4810 Page Creek Lane, Ball Room, Durham, NC, 27703 which was published in the **Federal Register** on July 02, 2013, 2013–15770.

The date of this meeting changed from July 24–26, 2013 to September 18–19, 2013. The meeting is closed to the public.

Dated: July 31, 2013.

Carolyn Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–18895 Filed 8–5–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Human Genome Research Institute; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Council for Human Genome Research.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The 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 Advisory Council for Human Genome Research.

Date: September 9–10, 2013.

Closed: September 09, 2013, 8:30 a.m. to 10:00 a.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, Terrace Level Conference Room, 5635 Fishers Lane, Rockville, MD 20892.

Open: September 09, 2013, 10:00 a.m. to 4:00 p.m.

Agenda: To discuss matters of program relevance.

Place: National Institutes of Health, Terrace Level Conference Room, 5635 Fishers Lane, Rockville, MD 20892.

Closed: September 10, 2013, 8:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: Smithsonian National Museum of Natural History, 10th Street & Constitution Avenue NW., Washington, DC 20560.

Contact Person: Comfort Browne, Program Assistant, Division of Extramural Research, National Human Genome Research Institute, 5635 Fishers Lane, Room 4076, Rockville, MD 20892–9305, 301–496–7531, *cbrowne@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.

Information is also available on the Institute's/Center's home page: *http://www.genome.gov/11509849,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research, National Institutes of Health, HHS)

Dated: July 31, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–18894 Filed 8–5–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2012–1066]

Final Guidance Regarding Voluntary Inspection of Vessels for Compliance With the Maritime Labour Convention, 2006

AGENCY: Coast Guard, DHS.

ACTION: Notice of availability .

SUMMARY: The Coast Guard announces the availability of Navigation and Vessel Inspection Circular (NVIC) 02–13, that sets forth the Coast Guard's policies and procedures regarding the inspection of U.S. vessels for voluntary compliance with the Maritime Labour Convention, 2006 (MLC or Convention). The Convention enters into force on August 20, 2013. The purpose of NVIC 02–13 is to provide guidance to the maritime industry, Coast Guard marine inspectors, and other affected parties on how the Coast Guard intends to implement the new voluntary inspection program. The Coast Guard finalized NVIC 02–13 after considering public comments received in response to our publication of a draft version of NVIC 02–13 in the **Federal Register** on February 11, 2013.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or email Lieutenant Commander Christopher Gagnon, Coast Guard at *cg-cvc-1@uscg.mil;* telephone 202–372–1224. If you have questions on viewing material in the docket, call Barbara Hairston, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMETARY INFORMATION:

A. Viewing the NVIC and Public Comment Matrix

To view the NVIC, public comment matrix, and comments mentioned in this notice as being available in the docket, please go to *http://www.regulations.gov,* and follow the instructions on that Web site. If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

B. Background and Purpose

The 94th (Maritime) session of the International Labour Conference (Geneva, February 2006) adopted the MLC, a new international agreement that consolidates almost all of the 70 existing International Labour Organization maritime labour instruments into a single, modern, globally applicable legal instrument. The Convention establishes comprehensive minimum requirements for working conditions of seafarers, including, among other things, conditions of employment, hours of work and rest, accommodations, recreational facilities, food and catering, health protection, medical care, welfare, and social security protection. It combines rights and principles with specific standards and detailed guidance on how to implement these standards at the national level. The Convention is comprised of three different, but related parts: the Articles, the Regulations, and the Code. The Articles and Regulations set out the core rights and principles, and the basic obligations of members ratifying the Convention. The Code is comprised of a Part A (mandatory standards) and a Part B (non-mandatory guidelines).

To date, the U.S. Government has not ratified the Convention. Unless and until the U.S. Government ratifies the Convention, the Coast Guard cannot enforce Convention requirements on U.S. vessels or foreign vessels while on the navigable waters of the U.S. Article V, paragraph 7 of the Convention contains a ''no more favorable treatment clause,'' which requires the governments of ratifying nations to impose Convention requirements on vessels from non-ratifying nations. As a result, a U.S. vessel that is not able to demonstrate voluntary compliance with the standards of the Convention may be at risk for Port State Control actions (including detention) when operating in a port of a ratifying nation.

To assist owners and operators of U.S. vessels in avoiding these risks, NVIC 02–13 sets forth guidance on a voluntary inspection program for vessel owners/operators who wish to document compliance with the standards of the MLC. U.S. commercial vessels that operate on international routes, meaning those vessels that will enter the ports of countries that are parties to the MLC, are encouraged to participate. Those vessels not engaging on international voyages are not affected.

In finalizing NVIC 02–13, the Coast Guard utilized measures identified in the MLC, including determinations that vessels will be deemed compliant with the MLC based on evidence of their compliance with substantially equivalent U.S. laws, regulations and other measures. The Coast Guard's use of such equivalencies is intended to help vessels streamline their compliance efforts so that, where appropriate, a vessel's compliance with domestic requirements also meets the standards of the MLC.

Should the U.S. Government ratify the MLC, its applicability may cover a broader population of vessel owners/operators than that addressed in NVIC 02–13. At that time, the Coast Guard would consider whether new or revised guidance is necessary.

C. Final NVIC and Response To Comments

On February 11, 2013, the Coast Guard published a notice in the **Federal Register** announcing the availability of a draft NVIC 02–13 and requesting public comments. (*See* 78 FR 9709).

We received 29 comment letters in response to the February 11, 2013 **Federal Register** notice. These comment letters contained a total of approximately 200 recommendations, suggestions, and other comments. We have created a document that provides a summary of each comment and the corresponding Coast Guard response. A copy of this public comment matrix is available for viewing in the public docket for this notice. You may access the docket by going to *http://www.regulations.gov,* using ''USCG–2012–1066'' as your search term, and following the instructions in the **ADDRESSES** section above.

The basic ideas and principles encompassed in draft NVIC 02–13 remain. The Coast Guard has made some changes from the draft NVIC to the final version based on public comments. A brief discussion of the most important changes is included below. For a more in-depth discussion of the individual comments submitted, please visit the docket for this notice to view submitted comments and the public comment matrix.

(1) We received several comments urging us to incorporate ''substantial equivalencies'' so that vessels can demonstrate that they meet the requirements of the MLC via their compliance with equivalent U.S. laws, regulations and other measures. The Coast Guard agrees that the Convention authorizes the use of national laws or other measures conforming to the MLC requirements to demonstrate compliance with the standards of the Convention. We have amended the NVIC, where applicable, to include such equivalencies.

(2) Several commenters mentioned that the MLC definition of the term ''seafarer'' is very broad and can be unclear to a ship operator. For example, they stated that in the offshore mineral/energy sector, vessels host many types of personnel that are neither credentialed nor traditional mariners, and therefore, should not be covered by the MLC requirements. In response, we have added a separate definitions enclosure to NVIC 02–13, which provides guidance on the term ''seafarer'' consistent with ILO Resolution VII, *Concerning Information on Occupational Groups.*

(3) A number of commenters requested either clarification or deletion of the Job Aid enclosure we included with draft NVIC 02–13. Specifically, these commenters stated that the Job Aid unnecessarily duplicated other parts of the NVIC and did not adequately address equivalencies to meet MLC standards. After considering these comments, we have removed the Job Aid from NVIC 02–13.

(4) One commenter was concerned that the draft NVIC did not provide adequate guidance on how to meet the MLC standards for ships cook competency. To address this concern, we have provided a separate enclosure to the NVIC that clarifies MLC guidance on this issue.

(5) Commenters also raised concerns that the draft NVIC did not provide enough guidance regarding two issues: on board complaint procedures; and how to determine what types of activities would be considered hazardous to seafarers under the age of 18. To address these concerns, we have added separate enclosures that provide additional guidance on these issues.

NVIC 02–13 contains a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (PRA). This collection of information has been submitted to the Office of Management and Budget (OMB) for review in accordance with the PRA. An agency may not conduct a collection of information unless the collection of information displays a valid control number assigned by OMB. You do not need to respond to a collection of information unless it displays a currently valid control number from OMB. Before the Coast Guard could enforce the collection of information referenced in this notice, OMB would need to approve the Coast Guard's pending request to collect this information.

Authority

This notice is issued under authority of 33 U.S.C. 1221(c)(3) and 5 U.S.C. 552(a).

Dated: July 30, 2013.

Joseph A. Servidio,

Rear Admiral, U.S. Coast Guard, Assistant Commandant, Prevention Policy.

[FR Doc. 2013–18897 Filed 8–5–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5720–N–01]

The Violence Against Women Reauthorization Act of 2013: Overview of Applicability to HUD Programs

AGENCY: Office of the Secretary, HUD.

ACTION: Notice.

SUMMARY: This notice provides an overview of the applicability to HUD programs of the recently enacted Violence Against Women Reauthorization Act of 2013. The 2013 law expands the number of HUD programs subject to the statute's protections beyond HUD's public housing and section 8 tenant-based and project-based programs. This notice highlights the key changes made by this statute, lists the HUD programs now covered by this statute, provides an overview of key provisions applicable to HUD programs, and advises of HUD's plans to issue rules or guidance on this new law. This notice is not program guidance for any individual HUD program covered by the new law. HUD will issue guidance and/or rules, as may be applicable, for covered programs at a later date. This notice is issued to provide an overview of the Violence Against Women Reauthorization Act of 2013, and alert HUD's program participants to the provisions applicable to HUD programs.

In addition to providing an overview, this notice seeks comment from HUD program participants and other interested members of the public on certain issues. Comments received in response to this solicitation will aid HUD in developing additional guidance and regulations.

DATES: *Comment Due Date:* October 7, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this notice to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the docket number and title above.

1. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500.

2. Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at *www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *www.regulations.gov* Web site can be viewed by other commenters and

interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the document.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an appointment to review the public comments must be scheduled in advance by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800–877–8339. Copies of all comments submitted are available for inspection and downloading at *www.regulations.gov.*

FOR FURTHER INFORMATION: For information about: HUD's Public Housing program, contact Becky Primeaux, Director, Public Housing Management and Operations Division, Office of Public and Indian Housing, Room 4210, telephone number 202–402–6050; HUD's Housing Choice Voucher program (Section 8) contact Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public and Indian Housing, Room 4216, telephone number 202–402–2425; HUD's Multifamily Housing programs, contact Catherine M. Brennan, Director, Housing Assistance Policy Division, Office of Housing, telephone number 202–708–3000; HUD's HOME Investment Partnerships program, contact Virginia Sardone, Deputy Director, Office of Affordable Housing Programs, Office of Community Planning and Development, Room 7164, telephone number 202–708–2684; HUD's Housing Opportunities for Persons With Aids (HOPWA) program, please contact William Rudy, Deputy Director, Office of HIV/AIDS Housing, Office of Community Planning and Development, telephone number 202–708–1934; and HUD's Homeless programs, contact Ann Marie Oliva, Director, Office of Special Needs Assistance, Office of Community Planning and Development, telephone number 202–708–4300. The address for all offices is the Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410. The telephone numbers listed above are not toll-free numbers. Persons with hearing or speech impairments may access these numbers through TTY by calling the toll-free Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Introduction

On March 7, 2013, President Obama signed into law the Violence Against Women Reauthorization Act of 2013 (Pub. L. 113–4, 127 Stat. 54) (VAWA 2013). VAWA 2013 reauthorizes and amends the Violence Against Women Act of 1994, as previously amended, (title IV, sec. 40001–40703 of Pub. L. 103–322, 42 U.S.C. 13925 *et seq.*) [1] VAWA 2013, among other things, enhances judicial and law enforcement tools to combat violence against women; improves services for victims; enhances services, protection, and justice for young victims of violence; strengthens the health care system's response to violence against women; and expands protections for Native American women and immigrants. The provisions of VAWA 2013 that are applicable to HUD programs are found in title VI of VAWA 2013, which is entitled ''Safe Homes for Victims of Domestic Violence, Dating Violence, Sexual Assault, and Stalking.'' Section 601 of VAWA 2013 amends subtitle N of VAWA (42 U.S.C. 14043e *et seq.*) to add a new chapter entitled ''Housing Rights.''

Section 4 of VAWA 2013, entitled ''Effective Date,'' provides that ''Except as otherwise specifically provided in this Act, the provisions of titles I, II, III, IV, VII, and sections 3, 602, 901, and 902 of this Act shall not take effect until the beginning of the fiscal year following the date of enactment of this Act.'' Section 601 of title VI, which addresses HUD programs, does not have a one-year delayed effective date. (Section 602 of title VI addresses a housing grants program administered by the Department of Justice.) While the provisions of section 601 are effective upon enactment, this does not mean that these provisions are self-executing (self-executing means no implementing or interpreting regulation is necessary to enable the regulated parties to comply with the new provisions). VAWA 2005 was largely self-executing because VAWA 2005 amended the authorizing statutes for HUD's public housing and tenant-based and project-based section 8 programs and, by working within the framework of those statutes, VAWA 2005 facilitated the ability for participants in HUD's public housing and section 8 programs to immediately comply with the VAWA 2005 provisions. VAWA 2013 did not amend the authorizing statutes for the newly covered HUD programs, and therefore additional guidance and rulemaking will be required to enable and facilitate compliance with the VAWA 2013 provisions.

HUD Statutes and Programs Affected by VAWA 2013. In addition to HUD's public housing and section 8 tenant-based and project-based rental assistance programs that were subject to VAWA, VAWA 2013 makes the following HUD programs subject to the VAWA protections:

- Section 202 Supportive Housing for the Elderly (12 U.S.C. 1701q) [2];
- Section 811 Supportive Housing for Persons with Disabilities (42 U.S.C. 8013) [3];
- Housing Opportunities for Persons With AIDS (HOPWA) program (42 U.S.C. 12901 *et seq.*);
- HOME Investment Partnerships (HOME) program (42 U.S.C. 12741 *et seq.*); Homeless programs under title IV of the McKinney-Vento Homeless

[1] In this notice, the Violence Against Women Act of 1994, as amended over the years, is referred to solely as VAWA unless it is necessary or appropriate to refer to a specific reauthorization of VAWA. VAWA, established in 1994 as title IV of the Violent Crime Control and Law Enforcement Act of 1994, (Pub. L. 103–322, approved September 13, 1994), has been reauthorized in 2000 through Division B of the Victims of Trafficking and Violence Protection Act of 2000 (Pub. L. 106–386) and in 2005 through The Violence Against Women Act and Department of Justice Reauthorization Act of 2005 (Pub. L. 109–162) (VAWA 2005). The references to ''VAWA'' in this notice include the amendments in 2000 and 2005, unless explicitly noted otherwise. The full text of the new law in pdf and plain text versions can be found, respectively, at *http://www.gpo.gov/fdsys/pkg/PLAW–113publ4/pdf/PLAW-113publ4.pdf,* and *http://www.gpo.gov/fdsys/pkg/PLAW-113publ4/html/PLAW 113publ4.htm.*

[2] It is HUD's view that VAWA 2013 does not cover Section 202 Direct Loan projects that are without project-based section 8 assistance. The statutory definition to ''covered housing program'' cites to the current section 202 (capital advance) authority. In cases where Congress seeks to make requirements applicable to the Section 202 Direct Loan projects, Congress would include language such as ''section 202 of the Housing Act of 1959 as in effect before the enactment of the Cranston-Gonzalez National Affordable Housing Act of 1990,'' as seen in the American Homeownership Economic Opportunity Act of 2000 (AHEO), as amended by the Section 202 Supportive Housing for the Elderly Act of 2010. Such language was not included in VAWA 2013. VAWA 2013 is also not applicable to section 202 when such assistance is coupled with Section 162 Assistance (Project Assistance Contracts). Additionally, VAWA 2013 is not applicable to the new Senior Preservation Rental Assistance Contracts.

[3] This includes the Capital Advance Program, as well as the section 811 Rental Assistance Program, as authorized under the Frank Melville Supportive Housing Investment Act.

Assistance Act (McKinney-Vento) (42 U.S.C. 11360 *et seq.*) [4];

• Federal Housing Administration (FHA) mortgage insurance for multifamily rental housing, under section 221(d)(3) of the National Housing Act (12 U.S.C. 17151(d)) with a below-market interest rate pursuant to section 221(d)(5) (such housing is eligible for FHA mortgage insurance for single-room occupancy pursuant to section 223(g) of the National Housing Act);

• FHA mortgage insurance for multifamily rental housing under section 236 of the National Housing Act (12 U.S.C. 1715z-1); and

• HUD programs assisted under the United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*), specifically, public housing under section 6 of the 1937 Act (42 U.S.C. 1437d) and tenant-based and project-based rental assistance under section 8 of the 1937 Act (42 U.S.C. 1437f).

These HUD programs, together with rural housing assistance under certain sections of the Housing Act of 1949 and the low-income housing tax credit program under section 42 of the Internal Revenue Code, are referred to collectively in this notice, as ''covered housing programs.'' In this notice, HUD refers to the HUD programs included in the covered housing programs as ''HUD covered programs.'' Housing made available under the HUD covered programs will be referred to as ''assisted housing'' in this notice.

While VAWA 2013 provides protections for individuals on tribal lands, VAWA 2013 does not list housing assisted under HUD's Indian Housing programs in the list of HUD covered programs.

II. Pre-VAWA 2013 Requirements Compared to VAWA 2013 Requirements

Regulations pertaining to VAWA protections and rights and responsibilities are already in place, in 24 CFR part 5, subpart L, for HUD's public housing and section 8 tenant-based and project-based rental assistance (collectively, the section 8 program). VAWA 2005 [5] made VAWA protections applicable to HUD's public housing and section 8 programs. The VAWA 2013 amendments to sections 6 and 8 of the 1937 Act remove from these two sections of the 1937 Act certain provisions relating to admission, occupancy, and termination of assistance policies and rights and responsibilities of PHAs, owners, and managers as such policies and responsibilities relate to domestic violence, dating violence, and stalking; the documentation of these acts and confidentiality; and related definitions. These provisions are removed from the 1937 Act because, as discussed in more detail below, VAWA 2013 relocates these provisions to section 41441 of VAWA, which makes these provisions applicable to the programs added by VAWA 2013, and continues to make these provisions applicable to sections 6 and 8 of the 1937 Act. VAWA 2013 expands VAWA protections beyond sections 6 and 8 of the 1937 Act, but does not amend the authorizing statutes for the HUD covered programs. For purposes of clarity in this notice, the statutory requirements that were previously in place for sections 6 and 8 of the Housing Act of 1937 are referred to as ''pre-VAWA 2013'' requirements throughout this notice.

The following section provides a review of the pre-VAWA 2013 requirements and highlights the changes made by VAWA 2013. While rulemaking will be needed to conform HUD's existing VAWA regulations to the VAWA 2013 requirements and to establish VAWA regulations for the HUD programs newly covered by VAWA 2013, the following also identifies specific issues for which HUD seeks comment to inform HUD in the development of regulations or guidance, or both, as may be applicable.

A. Coverage for Victims of Sexual Assault

Pre-VAWA 2013: Absence of reference to victims of sexual assault in HUD covered programs. Although VAWA 2005 contained provisions for protection of victims of sexual assault (*see* 42 U.S.C. 14043e–1), reference to protection of victims of sexual assault was not part of the VAWA 2005 requirements applicable to HUD programs; that is, reference to victims of sexual assault was not included in the amendments to sections 6 and 8 of the 1937 Act. (See 42 U.S.C. 1437d(3) and 1437f(9) prior to amendment by VAWA 2013.) ''Sexual assault'' is defined as ''any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent'' (42 U.S.C. 13925(a)).

VAWA 2013: Coverage of victims of sexual assault in HUD covered programs. VAWA 2013 extends these protections to victims of sexual assault participating in HUD covered programs.

B. Admission, Occupancy, and Termination of Assistance Policies

Pre-VAWA 2013: The pre-VAWA 2013 requirements provided the following protections relating to admission, occupancy, and termination of assistance policies. The regulatory citation in parentheses that follows each protection provides where this protection, as applies to HUD's public housing and section 8 programs, is currently codified in HUD regulations:

• Being a victim of domestic violence, dating violence, or stalking, as these terms are defined in the law, is not a basis for denial of assistance or admission to assisted housing if the applicant otherwise qualifies for assistance or admission (addressed in 24 CFR 5.2005(b));

• Incidents or threats of domestic violence, dating violence, or stalking will not be construed as serious or repeated violations of the lease or as ''good cause'' for termination of the assistance, tenancy, or occupancy rights of the victim (addressed in 24 CFR 5.2005(c)(1)); and

• Criminal activity directly relating to domestic violence, dating violence, or stalking, engaged in by a member of a tenant's household or any guest or other person under the tenant's control, shall not be cause for termination of assistance, tenancy, or occupancy rights if the tenant or an immediate family member of the tenant is the victim (addressed in 24 CFR 5.2005(c)(2)).

VAWA 2013: The protections described above are also included in VAWA 2013 and apply to all HUD covered programs. In each of the protections described above, VAWA 2013 also adds sexual assault whenever the pre-VAWA 2013 language references ''domestic violence, dating violence, or stalking.''

Criminal activity. VAWA 2013 also expands protections relating to the prohibition of terminating assistance because of criminal activity directly relating to domestic violence, dating violence, sexual assault, or stalking by replacing the term ''immediate family member'' with ''affiliated individual.'' VAWA 2013 provides that criminal activity directly relating to domestic violence, dating violence, sexual assault, or stalking that is engaged in by a member of a tenant's household or any guest or other person under the tenant's control shall not be cause for termination of assistance, tenancy, or

[4] VAWA 2013 states that ''the program under subtitle A of title IV of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11360 *et seq.*)'' is a VAWA covered housing program. However, subtitle A of title IV does not include a program. Therefore, HUD submits that it was Congress's intent to include the programs found elsewhere in title IV, which include the Emergency Solutions Grants program, the Continuum of Care program, and the Rural Housing Assistance Stability program.

[5] See footnote 1.

occupancy rights if the tenant or an *affiliated individual* of the tenant is the victim or threatened victim of the domestic violence, dating violence, sexual assault, or stalking (emphasis added).

Affiliated individual. VAWA 2013 defines an ''affiliated individual,'' with respect to an individual, as a spouse, parent, brother, sister, or child of that individual, or an individual to whom that individual stands in loco parentis, or any individual, tenant, or lawful occupant living in the household of that individual.

The 2011 Senate legislation for reauthorization of VAWA, the VAWA Reauthorization Act of 2011 (S. 1925), introduced the term ''affiliated individual.'' The Senate Report accompanying that legislation (Senate Rpt. 112–153, March 12, 2012) explained the reason for the introduction of that term. The report stated in relevant part as follows: ''[T]o better reflect the terminology used by the housing industry, the bill replaces the term 'immediate family member' with 'affiliated individual' in referring to other victims associated with the tenant who are protected under this provision.'' (Senate Rpt. 112–153, at page 13.[6])

C. Rights and Responsibilities of PHAs, Owners, and Managers

Pre-VAWA 2013: Noninterference with rights and responsibilities of PHAs, Owners, and Managers. Pre-VAWA 2013 requirements provided that the policies governing admission, occupancy, and termination of assistance are not to interfere with certain rights and responsibilities of public housing agencies (PHAs), owners, or managers [7] regarding criminal activity or acts of violence against family members or others.

Option to bifurcate lease. Specifically, pre-VAWA 2013 requirements provided that notwithstanding the restrictions placed on admission, occupancy, and termination of occupancy or assistance as discussed in preceding section B of this notice, or any Federal, State, or local law to the contrary, a PHA, owner, or manager of assisted housing may bifurcate a lease for housing in order to evict, remove, or terminate assistance to any individual who is a tenant or lawful occupant of the housing who engages in criminal acts of physical violence against family members or others without evicting, removing, terminating the assistance to, or otherwise penalizing a victim of such violence, who is a tenant or lawful occupant (addressed in 24 CFR 5.2009(a)).

VAWA 2013: Bifurcation of lease and opportunity to establish eligibility for remaining tenants. VAWA 2013 continues to allow for lease bifurcation, but changes the language regarding the violent acts (''criminal acts of physical violence against family members or others'' becomes ''criminal activity directly relating to domestic violence, dating violence, sexual assault, or stalking against an affiliated individual or other individual''), and mandates that if such bifurcation occurs, and the removed tenant or lawful occupant was the sole tenant eligible to receive assistance under a covered housing program, the PHA, owner, or manager shall provide any remaining tenant the opportunity to establish eligibility for the covered housing program.

If the remaining tenant cannot establish eligibility, the PHA, owner, or manager is required to provide the tenant a reasonable time to find new housing or to establish eligibility under another covered housing program. VAWA 2013 provides that the appropriate agency, in this case HUD, with respect to HUD covered programs, is to determine what constitutes a reasonable time.

HUD will provide through rulemaking or guidance, as may be applicable, what constitutes a reasonable time for remaining tenants to find new housing or establish eligibility under another HUD covered housing program.

Specific request for comment. HUD specifically solicits comment from HUD participants in HUD covered programs on that period that would be reasonable to find new housing or establish eligibility under another HUD covered housing program.

Pre-VAWA 2013: Restrictions on implementing VAWA protections. Pre-VAWA 2013 requirements also provided restrictions that the law places on implementing the VAWA protections, and carrying out the rights and responsibilities under VAWA, as discussed in section B. The regulatory citation in parentheses, which follows each limitation, provides where this limitation, as applies to HUD's public housing and section 8 programs, is currently codified in HUD regulations. Pre-VAWA 2013 requirements provided that VAWA:

- May not be construed to limit a PHA, owner, or manager from honoring various court orders issued to either protect the victim or address the distribution of property in case a household breaks up (addressed in 24 CFR 5.2009(b));
- Does not limit any otherwise available authority of a PHA, owner, or manager to terminate assistance or evict due to any lease violation unrelated to domestic violence, dating violence, or stalking, provided that the owner or manager does not subject a tenant to a more demanding standard than other tenants in determining whether to evict or terminate assistance (addressed in 24 CFR 5.2005(d)(1));
- May not be construed to limit the authority of a PHA, owner, or manager to terminate the assistance of, or evict, any occupant who can be demonstrated to pose an actual and imminent threat to other tenants or the property's employees (addressed in 24 CFR 5.2005(d)(2)); and
- Shall not be construed to supersede any provisions of Federal, State, or local laws that provide greater protection for victims of domestic violence, dating violence, or stalking (addressed in 24 CFR 5.2011).

VAWA 2013: VAWA 2013 extends these restrictions to all HUD covered programs. Additionally, PHAs, owners, and managers must immediately include victims of sexual assault in the provision currently described at 24 CFR 5.2005(d)(1). HUD notes that VAWA 2013 does not include victims of sexual assault in this provision, but as this is inconsistent with other changes in the law, HUD believes that the absence of sexual assault in this provision was an oversight in the drafting of the statute, rather than congressional intent to exclude victims of sexual assault from this provision.

D. Documentation of Domestic Violence, Dating Violence, Sexual Assault, or Stalking, and Confidentiality

Pre-VAWA 2013: Documentation requirements. Pre-VAWA 2013 requirements allowed a PHA, owner, or manager of assisted housing to request documentation that an applicant or tenant is a victim of domestic violence, dating violence, or stalking if the applicant or tenant seeks and requests the protections of VAWA previously discussed in this notice (addressed in 24 CFR 5.2007(a)). However, VAWA did not require a PHA, owner, or manager of assisted housing to request this information (addressed in 24 CFR 5.2007(d)). If a tenant or applicant does not provide this documentation after it is requested by the PHA, owner, or manager, then the PHA, owner, or manager may evict or terminate assistance of the tenant or a family member, for violations of the lease or family obligations that otherwise would

[6] See *http://www.gpo.gov/fdsys/pkg/CRPT-112srpt153/pdf/CRPT-112srpt153.pdf.*

[7] Please note that in HUD's housing programs the term ''manager'' as used in VAWA 2013 is synonymous with the phrase ''management agent.''

constitute good cause to evict or grounds for termination (addressed in 24 CFR 5.2007(c)).

Acceptable forms of documentation include the following (the regulatory citation in parentheses that follows each form of documentation, as applies to HUD's public housing and section 8 programs, provides where this documentation is currently codified in HUD regulations):

- A certification form approved by HUD that states that an applicant or tenant is a victim of domestic violence, dating violence, or stalking, the incident of domestic violence, dating violence, sexual assault, or stalking that requires protection, and the name of the perpetrator (addressed in 24 CFR 5.2007(b)(1) and the HUD-approved forms are HUD–50066 and HUD–91066 [8]);
- A document that is signed by the applicant or tenant and an employee, agent, or volunteer of a victim service provider, an attorney, or a medical professional, from whom the applicant or tenant has sought assistance relating to domestic violence, dating violence, or stalking, or the effects of abuse, in which the professional states, under penalty of perjury, that he or she believes that the abuse meets the requirements found in VAWA (addressed in 24 CFR 5.2007(b)(3));
- A Federal, State, tribal, territorial, or local police report or court record (addressed in 24 CFR 5.2007(b)(2)); or
- A statement or other evidence provided by an applicant or tenant, at the discretion of the PHA, owner, or manager (addressed in 24 CFR 5.2007(d)).

The applicant or tenant must provide the documentation within 14 business days after the date that the applicant or tenant receives a request in writing for such documentation, though the PHA, owner, or manager of assisted housing may extend the 14-day deadline at his or her discretion (addressed in 24 CFR 5.2007(a)).

Confidentiality requirements. Pre-VAWA 2013 requirements mandated that any information submitted to a PHA, owner, or manager regarding domestic violence, dating violence, or stalking, including the fact that the individual is a victim of such abuse, be kept confidential and may not be entered into any shared database or disclosed to any other entity or individual, except to the extent that the disclosure is requested or consented to by the individual in writing, required for use in an eviction proceeding, or otherwise required by applicable law (addressed in 24 CFR 5.2007(b)(4)). If a PHA, manager, or owner receives documentation that contains conflicting information, the PHA, owner, or manager may require an applicant or tenant to submit third-party documentation (addressed in 24 CFR 5.2007(e)).

VAWA 2013: Documentation and confidentiality requirements. VAWA 2013 extends the documentation and confidentiality provisions found in the existing VAWA requirements to all HUD covered programs. VAWA 2013, as did VAWA, requires a certification form approved by the appropriate agency, which is HUD for the HUD covered programs.

Development of forms for new HUD covered programs. HUD will develop forms, similar to forms HUD–50066 and HUD–91066 for the newly covered HUD programs.

Specific request for comment. HUD specifically solicits comment on how these forms may be adapted for the newly covered HUD programs.

Increased confidentiality and statement of mental health professional. Changes made by VAWA 2013 to the documentation and confidentiality requirements currently reflected at 24 CFR, part 5, subpart L are as follows:

- Sexual assault is added to the list of domestic violence, dating violence, or stalking;
- The victim of domestic violence, dating violence, sexual assault, or stalking is required to provide the name of the perpetrator on the HUD-approved certification form only if the name of the perpetrator is safe to provide and is known to the victim;
- An acceptable form of documentation includes a document that is signed by the applicant or tenant and a mental health professional from whom the applicant or tenant has sought assistance relating to domestic violence, dating violence, sexual assault, or stalking, or the effects of such actions, and states, under penalty of perjury, that the mental health professional believes that the domestic violence, dating violence, sexual assault, or stalking meets the requirements found in VAWA 2013; and
- An acceptable form of documentation includes a record of an administrative agency.

Modification to existing forms. HUD will modify its existing forms, HUD–50066 and HUD–91066, to ensure that the forms reflect an obligation on the part of the victim to provide the name of the perpetrator only if it is safe to provide and if it is known to the victim. HUD will also modify its existing forms to reflect the additional acceptable forms of documentation that the victim may submit; for example, a document signed by the tenant, or a mental health professional or an administrative agency record. In addition, HUD will modify its forms to cover victims of sexual assault.

E. No superseding of greater protections

Pre-VAWA 2013: VAWA provides that protections provided by VAWA do not supersede any provision of any Federal, State, or local law that provides greater protection for victims of domestic violence, dating violence, or stalking (addressed in 24 CFR 5.2011).

VAWA 2013: VAWA 2013 expands this provision to all covered housing programs and adds sexual assault to the list of domestic violence, dating violence, or stalking.

F. Notification

Pre-VAWA 2013: Notification of VAWA protections. Pre-VAWA 2013 requirements obligated each PHA, owner, and manager of assisted housing to provide notice to tenants of their VAWA rights, including the right to confidentiality and the limits thereof (addressed in 24 CFR 5.2005(a))(1) and 5.2005(a)(3)). Additionally, pre-VAWA 2013 requirements obligated each PHA to provide notice to owners and managers of assisted housing of their rights and obligations under VAWA (addressed in 24 CFR 5.2005(a)(2)).

VAWA 2013: Enhanced notification of VAWA protections. VAWA 2013 extends the requirements addressed at 24 CFR 5.2005(a)(1) and 5.2005(a)(3) to all covered HUD programs, but requires that HUD, as opposed to the individual housing provider, develop the notice outlining the applicant or tenant's rights. VAWA 2013 removes the statutory requirement addressed at 24 CFR 5.2005(a)(2), but this requirement is still in effect (via HUD's regulation) for the section 8 program. Additionally, VAWA 2013 requires that the notice be provided together with the certification form discussed in section D of this notice. VAWA 2013 also requires notice to be provided at the time the applicant is denied residency in a dwelling unit, at the time the individual is admitted to a dwelling unit, with any notification of eviction or notification of termination of assistance, and in multiple languages, consistent with guidance issued by the Secretary of Housing and Urban

[8] The HUD-approved certification form, HUD–50066, is used by the HUD covered programs administered by HUD's Office of Public and Indian Housing. The HUD-approved certification form, HUD–91066, is used by the HUD covered programs administered by HUD's Office of Multifamily Housing, Office of Housing. These forms are available at: *http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/forms/.*

Development in accordance with Executive Order 13166.

Development of Notice of Rights. HUD is developing the notice of rights, which will be issued first for comment under the Paperwork Reduction Act.

Specific request for comment. HUD specifically solicits comment, in advance of issuance of a notice for comment under the Paperwork Reduction Act, on the content of the notice of tenant's rights.

G. Emergency Transfers—New Provisions in VAWA 2013

VAWA 2013 adds increased protection for victims of abuse by requiring HUD to adopt a model emergency transfer plan for use by PHAs, owners, managers or other housing providers participating in HUD covered programs. The model plan must allow tenants who are victims of domestic violence, dating violence, sexual assault, or stalking to transfer to another available and safe dwelling under a covered housing program and must incorporate reasonable confidentiality measures to ensure that the public housing agency or owner or manager does not disclose the location of the new dwelling unit of a tenant to a person that commits an act of domestic violence, dating violence, sexual assault, or stalking against the tenant. The tenant can be granted a transfer only if the tenant requests a transfer, and either the tenant reasonably believes he or she is threatened with imminent harm from further violence if he or she remains in the unit or, if the tenant is a sexual assault victim, the sexual assault occurred on the premises during the 90-day period preceding the transfer request. Any transfer is subject to the availability of other assisted housing and subject to all other HUD requirements being met.

In addition, VAWA 2013 requires HUD to establish policies and procedures under which victims of abuse requesting an emergency transfer may receive, subject to the availability of tenant protection vouchers, assistance through the tenant-based section 8 program.

Specific Request for Comment. HUD specifically requests comments on the content of the model emergency transfer plan and the implementation of the tenant protection vouchers provision.

III. Complying with VAWA 2013 Requirements

As noted earlier in this notice, HUD will undertake rulemaking to conform its existing VAWA regulations, currently applicable to public housing and section 8 programs, to the new statutory language and requirements, and to put in place VAWA regulations for all the HUD covered programs.

HUD's Public Housing and Section 8 Programs. Since HUD's public housing and section 8 programs already have VAWA regulations in place, compliance with the VAWA 2013 requirements will be easier for PHAs, owners, and managers participating in these programs. With the exception of emergency transfer plans and the determination of what is a ''reasonable time'' for a victim to find new housing or establish eligibility for another HUD program after the abuser (a person that commits an act of domestic violence, dating violence, sexual assault, or stalking) has been removed from the program, PHAs, owners, or managers administering public or section 8 housing will continue to provide VAWA protections as provided in 24 CFR part 5, subpart L, as those protections are enhanced by VAWA 2013. Before such time that HUD develops the model Emergency Transfer Plan, PHAs, owners, or managers may continue to implement any transfer plan at that property/program as described in an agency's admissions and occupancy plan or administrative plan.

New HUD Covered Programs. For those HUD covered programs that were not previously required to offer VAWA protections, HUD recognizes that full compliance with VAWA 2013 may be challenging at this time. Although all housing providers in HUD covered programs are concerned with the safety of their tenants and strive to ensure that tenants feel safe in their housing and the neighborhood in which the housing is located, HUD recognizes the challenge for maintaining safety that is presented by domestic violence since the threat to safety is generally in the tenant's own household, and the overall shortage of available affordable housing can complicate the ability to immediately transfer victims of domestic violence to other housing. The complications may be eased somewhat as a result of protections for victims of domestic violence provided by State and local laws.[9] Having these types of laws in place across the Nation may help to facilitate compliance with VAWA 2013.

Guidance to be issued for new HUD covered programs. Recognizing the challenges facing participants in the new HUD covered programs that are now subject to VAWA requirements, HUD will be issuing administrative guidance to help programs comply with VAWA 2013, in addition to promulgating regulations.

IV. Solicitation of Comment

In this notice, HUD has highlighted certain issues for which comment is specifically sought, but welcomes comment on any aspect of this notice.

Dated: July 31, 2013.

Shaun Donovan,

Secretary.

[FR Doc. 2013–18920 Filed 8–5–13; 8:45 am]

BILLING CODE 4210–67–P

[9] See compendium of State and local laws that affect domestic violence survivors' housing rights compiled by the National Housing Law Project at *http://nhlp.org/files/Domestic%20violence%20housing%20compendium%20FINAL7.pdf.*

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–ES–2013–N162; FXES11130400000C2–134–FF040E00000]

Endangered and Threatened Wildlife and Plants; Recovery Plan for Alabama Sturgeon

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We, the Fish and Wildlife Service, announce the availability of the final recovery plan for the endangered Alabama sturgeon. The final plan includes specific recovery objectives and criteria to be met in order to downlist the species to threatened under the Endangered Species Act of 1973, as amended (Act).

ADDRESSES: You may obtain a copy of the recovery plan by contacting Jeff Powell at the Daphne Field Office, by U.S. mail at U.S. Fish and Wildlife Service, Alabama Field Office, 1208–B Main Street, Daphne, AL 36532, or by telephone at 251–441–5858. Alternatively, you may visit the Fish and Wildlife Service's recovery plan Web site at *http://endangered.fws.gov/recovery/index.html#plans* or the Daphne Field Office Web site at *http://www.fws.gov/daphne/* to obtain a copy.

FOR FURTHER INFORMATION CONTACT: Jeff Powell, at the above addresses or by telephone at 251–441–5858.

SUPPLEMENTARY INFORMATION:

Background

We listed the Alabama sturgeon (*Scaphirhyncus suttkusi*) as an endangered species under the Act (16 U.S.C. 1531 *et seq.*) on May 5, 2000 (65 FR 26438) and designated critical habitat for the species on June 2, 2009 (74 FR 26488). The species' historic range encompassed all major rivers in the Mobile Basin, below the Fall Line,

including the Alabama, Tombigbee, and Cahaba River systems. Recent collections of the species have been restricted to the lower Alabama River below R.F. Henry Lock and Dam to the confluence of the Tombigbee River, as well as to the lower Cahaba River near its confluence with the Alabama River; however, incidents of such collections are extremely rare. The last capture of an Alabama sturgeon was on April 3, 2007, by biologists at the Alabama Department of Conservation and Natural Resources (ADCNR). The species was last observed on April 23, 2009, by ADCNR biologists. The Alabama sturgeon is one of the rarest species of fish in the nation and may be close to extinction.

Restoring an endangered or threatened animal or plant to the point where it is again a secure, self-sustaining member of its ecosystem is a primary goal of our endangered species program. To help guide the recovery effort, we prepare recovery plans for most listed species. Recovery plans describe actions considered necessary for conservation of the species, establish criteria for downlisting or delisting, and estimate time and cost for implementing recovery measures.

The Act requires the development of recovery plans for listed species, unless such a plan would not promote the conservation of a particular species. Section 4(f) of the Act requires us to provide a public notice and an opportunity for public review and comment during recovery plan development. The draft of this recovery plan was available for public comment from April 12 through June 11, 2012 (77 FR 21993). We considered the information received via public comments as well as from peer reviewers in our preparation and approval of this final recovery plan. We also edited some sections of the draft recovery plan to reflect these comments; however, no substantial changes were made to the draft plan.

Recovery Plan Components

The objective of this plan is to provide a framework for the recovery of the Alabama sturgeon so that protection under the Act is no longer necessary. Delisting of the species is not currently foreseeable due to extreme curtailment of range and extensive modification to the riverine habitats. Therefore, this recovery plan establishes criteria for downlisting the Alabama sturgeon from endangered to threatened.

Downlisting of the Alabama sturgeon may be considered when the following criteria are met: (1) A population consisting of approximately 500 sexually mature Alabama sturgeon is shown to be surviving and naturally reproducing in the Alabama/Cahaba Rivers; (2) population studies show that the Alabama sturgeon population is naturally recruiting (consisting of multiple age classes), sustainable over a period of 20 years (2–3 generations), and no longer requires hatchery augmentation; and (3) an agreement is in place that ensures adequate flows are being delivered down the Alabama River for successful development of sturgeon larvae and passage of the fish both upstream and downstream at dams on the Alabama River.

Authority

The authority for this action is section 4(f) of the Endangered Species Act, 16 U.S.C. 1533 (f).

Dated: July 8, 2013.

Leopoldo Miranda,

Acting Regional Director, Southeast Region.

[FR Doc. 2013–18914 Filed 8–5–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLMTC 00900.L16100000.DP0000]

Notice of Public Meeting, Eastern Montana Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Public Meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Eastern Montana Resource Advisory Council (RAC) will meet as indicated below.

DATES: The next regular meeting of the Eastern Montana RAC will be held on September 5, 2013 in Billings, Montana. The meeting will start at 8:00 a.m. and the public comment period will start at 11:00 a.m. and run for one hour. The meeting will adjourn at around 3:30 p.m.

ADDRESSES: The meeting location will be announced in a news release.

FOR FURTHER INFORMATION CONTACT: Mark Jacobsen, Public Affairs Specialist, BLM Eastern Montana/Dakotas District, 111 Garryowen Road, Miles City, Montana, 59301, (406) 233–2831, *mark_jacobsen@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–677–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The 15-member council advises the Secretary of the Interior through the BLM on a variety of planning and management issues associated with public land management in Montana. At these meetings, topics will include: Eastern Montana—Dakotas District, Miles City and Billings Field Office manager updates, Field Office Resource Management Planning updates, individual council member briefings and other topics that the council may raise. All meetings are open to the public and the public may present written comments to the council. Each formal RAC meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation, or other reasonable accommodations should contact the BLM as provided above.

Dated: July 24, 2013.

Diane M. Friez,

Eastern Montana—Dakotas District Manager.

[FR Doc. 2013–18915 Filed 8–5–13; 8:45 am]

BILLING CODE 4310–DN–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[OMB Control Number 1010–0106; MMAA104000]

Information Collection: Forms for Oil Spill Financial Responsibility for Offshore Facilities; Proposed Collection for OMB Review; Comment Request

ACTION: 60-day notice.

SUMMARY: To comply with the Paperwork Reduction Act of 1995 (PRA), the Bureau of Ocean Energy Management (BOEM) is inviting comments on the proposed revision of forms associated with a collection of information that we will submit to the Office of Management and Budget (OMB) for review and approval. The information collection request (ICR) concerns the forms used for paperwork requirements under 30 CFR 553, Oil Spill Financial Responsibility for Offshore Facilities.

DATES: Submit written comments by October 7, 2013.

ADDRESSES: Please send your comments on this ICR to the BOEM Information Collection Clearance Officer, Arlene Bajusz, Bureau of Ocean Energy Management, 381 Elden Street, HM–3127, Herndon, Virginia 20170 (mail); or *arlene.bajusz@boem.gov* (email); or 703–787–1209 (fax). Please reference ICR 1010–0106 in your comment and include your name and return address.

FOR FURTHER INFORMATION CONTACT: Arlene Bajusz, Office of Policy, Regulations, and Analysis at (703) 787–1025. The revised forms are printed at the end of this notice.

SUPPLEMENTARY INFORMATION: *OMB Control Number:* 1010–0106.

Title: 30 CFR 553, Oil Spill Financial Responsibility for Offshore Facilities.

Forms: BOEM–1016 through 1023 and BOEM–1025.

Abstract: On May 1, 2013, BOEM released a notice inviting public comment on the information collection renewal of requirements for BOEM's Oil Spill Financial Responsibility (OSFR) regulations under 30 CFR 553 (78 FR 25472). The BOEM uses the information collected under these regulations to verify compliance with section 1016 of the Oil Pollution Act of 1990, as amended (OPA), and to confirm that applicants can pay for cleanup and damages resulting from oil spills and other hydrocarbon discharges that originate from Covered Offshore Facilities (COFs). Since May, BOEM has proposed revising the forms used with this collection and is providing the 60-day public comment period for the revisions with this notice.

BOEM is splitting the function of some forms and revising others to clarify the responsibilities and financial obligations of responsible parties and applicants, as described in the Outer Continental Shelf Lands Act, and to better align the terminology and liability with the provisions of OPA. These revisions will better protect the Federal Government from potential disputes and litigation by clarifying that the primary relationship is between the responsible party and guarantor and that the designated applicant/operator is intended to function primarily in an administrative capacity. The revisions will also better align BOEM's process with that of the U.S. Coast Guard's National Pollution Fund Center, thereby reducing the burden on industry in complying with potentially conflicting guidance on oil spill responsibility, particularly with respect to offshore facilities that also function as vessels.

Below is a description of each affected form, as well as any change in the burden. The revised forms are also printed at the end of this notice. Until OMB approves these revisions, the current forms remain in use and can be located at *http://www.boem.gov/About-BOEM/Procurement-Business-Opportunities/BOEM-OCS-Operation-Forms/BOEM-OCS-Operation-Forms.aspx.*

Form BOEM–1016, Designated Applicant Information Certification. This form remains essentially the same except for updating the choices of forms and clarifying the administrative role of the designated applicant. No change in the 1-hour burden is expected.

Form BOEM–1017, Appointment of Designated Applicant. This form remains essentially the same except for changing the title, clarifying the administrative role of the designated applicant, and adding a column to record depth ranges, when applicable. No change in the 9-hour burden is expected.

Form BOEM–1018, Self-Insurance Information. The original form posed potential confusion because it served two purposes, both to provide evidence of self-insurance (for responsible parties) and as an indemnity (executed by persons other than the responsible party). Thus, the form has been split into two forms (BOEM–1018 and BOEM–1023). BOEM–1018 focuses on self-insurance only and is reworded to more closely align with the requirements of OPA, adding an agreement to update/renew expiring or terminated instruments and a signature section. No change in the 1-hour burden is expected.

Form BOEM–1019, Insurance Certificate. The language and agreements in this form have been reworded for compliance with OPA, to clarify that the insurer is responsible for OPA liabilities of the responsible parties, and to add an agreement to update/renew expiring or terminated instruments. No change in the 120-hour burden is expected.

Form BOEM–1020, Surety Bond. The language and agreements in this form have been reworded for compliance with OPA, to clarify that the Surety is responsible for OPA liabilities of the responsible parties, and to add an agreement to update/renew expiring or terminated instruments. No change in the 24-hour burden is expected.

Forms BOEM–1021, Covered Offshore Facilities, and BOEM–1022, Covered Offshore Facility Changes. These forms remain essentially the same except for rewording of the subtitles to match the other forms and adding a provision for rights-of-way. There is no change in the 1-hour burden for BOEM–1022; however, based on respondent input we are increasing the burden for BOEM–1021 from 3 to 6 hours.

Form BOEM–1023, Financial Guarantee. This new form replaces the indemnity agreement (previously part of BOEM–1018) with a provision that an affiliated firm, such as a corporate parent, may promise to satisfy any claims against the responsible parties. It also adds an agreement to update/renew expiring or terminated instruments and a signature section. The hour burden is estimated as 1.5 hours.

Form BOEM–1025, Independent Designated Applicant Information Certification. This new form allows a designated applicant, who is not also a responsible party, to continue to agree to be jointly and severally liable under OPA until BOEM promulgates regulations that will repeal this requirement. We estimate the burden hour to be 1 hour.

We will protect information from respondents considered proprietary under the Freedom of Information Act (5 U.S.C. 552) and its implementing regulations (43 CFR part 2) and under regulations at 30 CFR 550.197, ''Data and information to be made available to the public or for limited inspection.'' No items of a sensitive nature are being collected. Responses are mandatory.

Frequency: On occasion or annual basis.

Description of Respondents: Holders of leases, permits, and rights of use and easement in the Outer Continental Shelf and in State coastal waters and those who will appoint designated applicants to process their OSFR paperwork. Other respondents will be the designated applicants' insurance agents and brokers, bonding companies, and guarantors.

Public Disclosure Statement: The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond.

Comments: Before submitting an ICR to OMB, PRA section 3506(c)(2)(A) requires each agency ''. . . to provide notice . . . and otherwise consult with members of the public and affected agencies concerning each proposed collection of information . . .''. Agencies must specifically solicit comments to: (a) Evaluate whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) evaluate the

accuracy of the agency's estimate of the burden of the proposed collection of information; (c) enhance the quality, usefulness, and clarity of the information to be collected; and (d) minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

Agencies must also estimate the non-hour cost burdens to respondents or recordkeepers resulting from the collection of information. Therefore, if you have costs to generate, maintain, and disclose this information, you should comment and provide your total capital and startup cost components or annual operation, maintenance, and purchase of service components. You should describe the methods you use to estimate major cost factors, including system and technology acquisition, expected useful life of capital equipment, discount rate(s), and the period over which you incur costs. Capital and startup costs include, among other items, computers and software you purchase to prepare for collecting information, monitoring, and record storage facilities. You should not include estimates for equipment or services purchased: (i) Before October 1, 1995; (ii) to comply with requirements not associated with the information collection; (iii) for reasons other than to provide information or keep records for the Government; or (iv) as part of customary and usual business or private practices.

We will summarize written responses to this notice and address them in our submission for OMB approval. As a result of your comments, we will make any necessary adjustments to the burden estimates in our submission to OMB.

Public Availability of Comments: Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: July 31, 2013.

Deanna Meyer-Pietruszka,

Chief, Office of Policy, Regulations, and Analysis.

BILLING CODE 4310–MR–P

U.S. Department of the Interior
Bureau of Ocean Energy Management

OMB Control No.: xxxxxxxx
Expiration Date: xxxxxxxxx

PAPERWORK REDUCTION ACT STATEMENT

BUREAU OF OCEAN ENERGY MANAGEMENT
OIL POLLUTION ACT OF 1990
OIL SPILL FINANCIAL RESPONSIBILITY FOR OFFSHORE FACILITIES

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) requires us to inform you that the Bureau of Ocean Energy Management (BOEM) collects this information to:

1. Provide a standard method for establishing eligibility for oil spill financial responsibility (OSFR) for offshore facilities;

2. Identify and maintain a record of those offshore facilities that have a potential oil spill liability;

3. Establish and maintain a continuous record, over the liability term specified in Title I of the Oil Pollution Act of 1990, of financial evidence and instruments established to pay claims for oil spill cleanup and damages resulting from operations conducted on offshore facilities and the transportation of oil from offshore platforms and wells;

4. Establish and maintain a continuous record of Responsible Parties, as defined in Title I of the Oil Pollution Act of 1990, and their agents or Authorized Representatives for oil spill financial responsibility for offshore facilities; and

5. Establish and maintain a continuous record, over the liability term specified in Title I of the Oil Pollution Act of 1990, of persons to contact and U.S. Agents for Service of Process for claims associated with oil spills from offshore facilities.

The BOEM will routinely use the information to:

1. Ensure compliance of offshore lessees and owners and operators of offshore facilities with Title I of the Oil Pollution Act of 1990;

2 Establish eligibility of applicants for OSFR; and

3. Establish a reference source of names, addresses, and telephone numbers of Responsible Parties for offshore facilities and their Authorized Representatives and Guarantors for claims associated with oil pollution from designated offshore facilities.

Responses are mandatory (33 U.S.C. 2716). No confidential or proprietary information is required to be submitted. The BOEM considers oil spill financial responsibility demonstrations, including supporting audited financial statements, to be public information open for review under the Freedom of Information Act (5 U.S.C. 552).

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 Office of Management and Budget (OMB) Control Number. The public reporting burden for an application for certification of oil spill financial responsibility is listed below. The burden includes the time for reviewing instructions, gathering and maintaining data, and completing and reviewing the application. The average burden for each of the forms and required information that could comprise a submission is:

Form BOEM-1016, Designated Applicant Information Certification ..... 1 hour
Form BOEM-1017, Appointment of Designated Applicant ..... 9 hours
Form BOEM-1018, Self-Insurance Information ..... 1 hour
Form BOEM-1019, Insurance Certificate ..... 120 hours
Form BOEM-1020, Surety Bond ..... 24 hours
Form BOEM-1021, Covered Offshore Facilities ..... 6 hours
Form BOEM-1022, Covered Offshore Facility Changes ..... 1 hour
Form BOEM-1023, Financial Guarantee ..... 1.5 hours
Form BOEM-1025, Independent Designated Applicant Information Certification ..... 1 hour

Comments regarding the burden estimate or any other aspect of this form should be directed to the Information Collection Clearance Officer, Bureau of Ocean Energy Management, 381 Elden Street, Herndon, VA 20170.

(Month/year)

U.S. Department of the Interior
Bureau of Ocean Energy Management

OMB Control No.: xxxxxxx
Expiration Date: xxxxxxx

DESIGNATED APPLICANT INFORMATION CERTIFICATION

CERTIFICATION OF OIL SPILL FINANCIAL RESPONSIBILITY IN ACCORDANCE WITH THE REQUIREMENTS OF THE OIL POLLUTION ACT OF 1990

(TYPE OR PRINT ALL INFORMATION EXCEPT SIGNATURES)

1. Designated Applicant: _____ (COMPANY LEGAL NAME) _____ (BOEM COMPANY NUMBER)

_____ (ADDRESS) _____ (BOEM COMPANY REGION)

_____ (CITY) _____ (STATE) _____ (ZIP CODE)

_____ (CONTACT PERSON) ( ) _____ (AREA CODE and TELEPHONE NUMBER)

_____ (CONTACT PERSON'S TITLE) ( ) _____ (AREA CODE and FAX NUMBER)

_____ (E-MAIL ADDRESS)

2. Summary of Evidence of Oil Spill Financial Responsibility:

Type of Evidence	Amount (in U.S. Dollars)	Effective Date of Evidence	Expiration Date of Evidence
■ Self-Insurance (BOEM-1018)	$		
■ Financial Guarantee (BOEM-1023)	$		
■ Surety Bonds (BOEM-1020)	$		
■ Insurance (BOEM-1019)	$		
■ Other	$		
TOTAL AMOUNT	$		

3. The Designated Applicant, for all of the Responsible Parties whose Designated Applicant authorizations (form BOEM-1017) are on file or attached, agrees to establish and maintain oil spill financial responsibility (OSFR), under the Oil Pollution Act of 1990, as amended, 33 U.S.C. § 2701 *et seq.*, for all said Responsible Parties. This OSFR will be maintained continuously for those leases, permits, rights of use and easement, and pipeline segments identified in form(s) BOEM-1017 on file or attached. I will immediately notify the Responsible Parties of any claims that I receive. I will immediately notify the BOEM OSFR program if information on this form changes. I certify the information contained herein, including all the information on the attached forms, is complete, true, and correct to the best of my information and knowledge.

_____ (NAME OF AUTHORIZED REPRESENTATIVE) _____ (SIGNATURE)

_____ (TITLE OF AUTHORIZED REPRESENTATIVE) _____ (DATE)

4. The Designated Applicant's U.S. Agent for Service of Process is: _____ (NAME)

_____ (ADDRESS) _____ (BOEM COMPANY NUMBER)

_____ (CITY) _____ (STATE) _____ (ZIP CODE)

( ) _____ (AREA CODE and TELEPHONE NUMBER) ( ) _____ (AREA CODE and FAX NUMBER) _____ (E-MAIL ADDRESS)

FORM BOEM-1016 (Month/year)
Previous Editions are Obsolete.

U.S. Department of the Interior
Bureau of Ocean Energy Management

OMB Control No.: xxxxxxx
Expiration Date: xxxxxxx

APPOINTMENT OF DESIGNATED APPLICANT

CERTIFICATION OF OIL SPILL FINANCIAL RESPONSIBILITY IN ACCORDANCE WITH THE REQUIREMENTS OF THE OIL POLLUTION ACT OF 1990

(TYPE OR PRINT ALL INFORMATION EXCEPT SIGNATURES)

1. Designated Applicant: _____ (COMPANY LEGAL NAME) _____ (BOEM COMPANY NUMBER)

_____ (ADDRESS) _____ (BOEM COMPANY REGION)

_____ (CITY) _____ (STATE) _____ (ZIP CODE)

2. Responsible Party: _____ (COMPANY LEGAL NAME) _____ (BOEM COMPANY NUMBER)

_____ (ADDRESS) _____ (BOEM COMPANY REGION)

_____ (CITY) _____ (STATE) _____ (ZIP CODE)

_____ (CONTACT PERSON) _____ (CONTACT PERSON'S TITLE)

( ) _____ (AREA CODE and TELEPHONE NUMBER) ( ) _____ (AREA CODE and FAX NUMBER) _____ (E-MAIL ADDRESS)

3. I, the undersigned, serving as the Authorized Representative of the Responsible Party named in section 2, do hereby appoint and authorize the Designated Applicant identified in section 1 to act on behalf of the Responsible Party to obtain a certification of oil spill financial responsibility (OSFR) for each covered offshore facility at the locations described in section 5, and to establish and maintain OSFR on the Responsible Party's behalf for these specified covered offshore facilities in accordance with 30 CFR Part 553 and in the amounts specified by the Bureau of Ocean Energy Management (BOEM). On behalf of the Responsible Party, I explicitly agree that the Responsible Party be strictly liable, jointly and severally, together with the other Responsible Parties for each covered offshore facility described in section 5, for all oil spill removal costs and damages in accordance with the Oil Pollution Act of 1990, as amended, 33 U.S.C. § 2701 *et seq.*

This appointment is effective beginning on _____ (DATE). I agree, on behalf of the Responsible Party, that the Responsible Party will notify the BOEM oil spill financial responsibility program in writing when this appointment is canceled; that the Responsible Party will concurrently appoint a substitute Designated Applicant; and that the Responsible Party shall be bound by the actions of the Designated Applicant hereby appointed until such time as BOEM receives such notice and a substitute Designated Applicant so appointed.

_____ (NAME OF AUTHORIZED REPRESENTATIVE) _____ (SIGNATURE)

_____ (TITLE OF AUTHORIZED REPRESENTATIVE) _____ (DATE)

4. The Responsible Party's U.S. Agent for Service of Process is: _____ (NAME)

_____ (ADDRESS) _____ (BOEM COMPANY NUMBER)

_____ (CITY) _____ (STATE) _____ (ZIP CODE)

( ) _____ (AREA CODE and TELEPHONE NUMBER) ( ) _____ (AREA CODE and FAX NUMBER) _____ (E-MAIL ADDRESS)

5. Locations of Covered Offshore Facilities:

STATE OR OCS REGION	LEASE NUMBER	ALIQUOT PORTION (If Applicable)	DEPTH RANGE (If Applicable)	AREA NAME	BLOCK NUMBER	PERMIT NUMBER	RUE OR ROW NUMBER	PIPELINE SEGMENT NUMBER

U.S. Department of the Interior
Bureau of Ocean Energy Management

OMB Control No.: xxxxxxx
Expiration Date: xxxxxxxxx

SELF-INSURANCE INFORMATION

RESPONSIBLE PARTY SELF-INSURANCE CERTIFICATION OF OIL SPILL FINANCIAL RESPONSIBILITY IN ACCORDANCE WITH THE REQUIREMENTS OF THE OIL POLLUTION ACT OF 1990

(TYPE OR PRINT ALL INFORMATION EXCEPT SIGNATURES)

1. I, the undersigned, as the Authorized Representative of the Responsible Party (described in section 6), certifies that the Responsible Party is acting in the capacity of a Self-Insurer, in accordance with the requirements of 30 CFR 553.41.

2. The amount of coverage for which evidence of oil spill financial responsibility is being established by the Responsible Party using self-insurance is:

FROM	$	0 LOWER LIMIT

TO	$
	UPPER LIMIT (MUST BE COMPLETED)

3. This coverage is effective: _____ and expires on the first calendar day of the fifth month
DATE
after the close of the Self-Insurer's fiscal year, which ends: _____.
DATE

4. The Responsible Party providing evidence of oil spill financial responsibility in the form of Self-Insurance is:

_____ _____
COMPANY LEGAL NAME BOEM COMPANY NUMBER

_____
ADDRESS

_____ _____ _____
CITY STATE ZIP CODE

_____ _____
CONTACT PERSON FOR CLAIMS CONTACT PERSON'S TITLE

_____ _____ _____
AREA CODE AND TELEPHONE NUMBER AREA CODE AND FAX NUMBER E-MAIL ADDRESS

5. The undersigned certifies on behalf of the Responsible Party that the requirements set forth in 30 CFR Part 553 and specifically §§ 553.21 through 553.28 have been met.

The undersigned further agrees that the Responsible Party, pursuant to the requirements of 30 CFR 553.15, will notify the BOEM oil spill financial responsibility program in the event the Responsible Party is no longer able to maintain evidence of oil spill financial responsibility as a Self-Insurer in the amounts stated in section 2 above.

6. The Responsible Party, as Self-Insurer, acting through the Designated Applicant must, no later than the first calendar day of the fifth month after the close of your fiscal year, submit either a renewal of this Self-Insurance or other acceptable evidence of financial responsibility.

NAME OF AUTHORIZED REPRESENTATIVE OF RESPONSIBLE PARTY

SIGNATURE

TITLE OF AUTHORIZED REPRESENTATIVE OF RESPONSIBLE PARTY

DATE

7. The Self-Insurer's U.S. Agent for Service of Process is:

NAME

BOEM COMPANY NUMBER

ADDRESS

CITY

STATE

ZIP CODE

AREA CODE AND TELEPHONE NUMBER

AREA CODE AND FAX NUMBER

E-MAIL ADDRESS

8. In witness whereof, the Designated Applicant and the Self-Insurer have executed this instrument on the _____ day of _____, _____.

MONTH YEAR

Designated Applicant for the Responsible Parties named herein:

SIGNATURE OF AUTHORIZED REPRESENTATIVE OF DESIGNATED APPLICANT

NAME OF AUTHORIZED REPRESENTATIVE OF DESIGNATED APPLICANT

TITLE OF AUTHORIZED REPRESENTATIVE OF DESIGNATED APPLICANT

U.S. Department of the Interior
Bureau of Ocean Energy Management

OMB Control No.: xxxxxxx
Expiration Date: xxxxxxx

INSURANCE CERTIFICATE

CERTIFICATION OF OIL SPILL FINANCIAL RESPONSIBILITY IN ACCORDANCE WITH THE REQUIREMENTS OF THE OIL POLLUTION ACT OF 1990

(TYPE OR PRINT ALL INFORMATION EXCEPT SIGNATURES)

1. Designated Applicant: _____ _____
COMPANY LEGAL NAME — BOEM COMPANY NUMBER

2. The amount of insurance coverage established by the named Insurers as evidence of oil spill financial responsibility (OSFR) for the Responsible Parties, identified in form(s) BOEM-1017 on file or attached, (hereafter the Insured), as represented by the Designated Applicant, in compliance with the Oil Pollution Act of 1990, as amended, 33 U.S.C. §§ 2701-2672 (hereafter the Act) and with Title 30 Code of Federal Regulations (CFR), part 553, for any one incident is:

FROM $_____ (STARTING AMOUNT ABOVE ANY DEDUCTIBLE OR EXCESS AMOUNT) TO: $_____ (UPPER LIMIT OF THIS INSURANCE LAYER)

The following insurance option has been selected to provide this coverage:

☐ Full Option—Insurance is provided for the first full $_____ million without deductible.

☐ Deductible Option—Insurance is provided for the amount of $_____ million less the deductible amount of $ _____.

☐ Excess Option—Insurance is provided for the amount of $_____ million in excess of the amount of of $ _____ million.

3. This coverage is effective: _____ (DATE) at _____ (Central Standard Time) and expires: _____ (DATE) at _____ (Central Standard Time).

4. The Insurer may at any time cancel this insurance certificate by written notice of intent to cancel sent by certified mail to the Designated Applicant with copies (plainly indicating the original notice was sent by certified mail) to all Responsible Parties and to the BOEM oil spill financial responsibility program by certified mail. This instrument will remain in force and the undersigned will remain liable until the expiration date or until the earlier of (1) thirty calendar days after BOEM and the Designated Applicant receive a notification of your intent to cancel this insurance certificate; (2) BOEM receives other acceptable OSFR evidence from the Designated Applicant; or (3) all the COFs to which this Insurance Certificate applies have been permanently abandoned either in compliance with 30 CFR part 250 or the equivalent state requirements. The undersigned agrees that any termination of this Insurance Certificate will not affect the liability of the Insurer for any claims that arise from an incident (i.e., oil discharge or substantial threat of the discharge of oil) that occurs on or before the effective date of termination of this Insurance Certificate.

5. The named Insurers agree that any suit or claim for which the Responsible Parties identified in form(s) BOEM-1017, on file or attached, represented by the aforementioned Designated Applicant may be liable under Title I of the Act may be brought directly against the named Insurers for claims up to the amount of insurance coverage asserted by the U.S. government or by other claimants when a Responsible Party denies or fails to pay a claim on the basis of insolvency or a Responsible Party has petitioned for bankruptcy under Title 11 of the U.S. Code.

6. The undersigned further agrees not to use any defense except those that would be available to a Responsible Party for whom the insurance was provided or that the incident leading to the claim for removal costs or damages was caused by willful misconduct of a Responsible Party covered by this insurance.

7. The undersigned Responsible Party further agrees, pursuant to the requirements of 30 CFR 553.15, to notify the BOEM oil spill financial responsibility program in the event the Responsible Party is no longer able to maintain evidence of oil spill financial responsibility to the extent stated in section 2 above.

8. The Designated Applicant must, no later than the first calendar day of the fifth month after the close of the Insurer's fiscal year or expiration if earlier, submit either a renewal of this insurance or other acceptable evidence of financial responsibility.

9. Insurance agent or broker for this Insurance Certificate:

COMPANY NAME _____ BOEM COMPANY NUMBER _____

ADDRESS _____

CITY _____ STATE _____ COUNTRY (If not U.S.A.) _____ ZIP CODE _____

( ) _____ AREA CODE and TELEPHONE NUMBER

( ) _____ AREA CODE and FAX NUMBER

E-MAIL ADDRESS _____

10. As an Authorized Representative of the insurance agent or broker identified above, I certify that the information contained in this Insurance Certificate is accurate and correct, that quota shares total 100 percent for this Insurance Certificate, and that this Insurance Certificate and the named Insurers, complies with the requirements stated in 30 CFR 553.29. The identified insurance agent or broker agrees to maintain and provide to the Designated Applicant and BOEM, on demand, any delegations of authority to a broker or an underwriter of another insurer or underwriting manager to bind a named Insurer to all risks and liabilities specified in Title I of the Act.

NAME _____ SIGNATURE _____

TITLE _____ DATE _____

11. The named Insurers, listed below, certify that the Insured is insured by the named Insurers for the offshore facilities, as specified below, against liability for removal costs and damages to which the Insured could be subjected under Title I of the Oil Pollution Act and 30 CFR 553 within the insurance layer specified.

The following offshore facility coverage option has been selected:

☐ General Option—All covered offshore facilities for which the named Designated Applicant serves in that capacity.

☐ Schedule Option— All covered offshore facilities on the Designated Applicant's attached information form and schedule of properties forms, effective _____.
DATE

12. The named Insurers designate the following U.S. Agent for Service of Process for this Insurance Certificate:

NAME _____ BOEM COMPANY NUMBER _____

ADDRESS _____

CITY _____ STATE _____ ZIP CODE _____

( ) _____ AREA CODE and TELEPHONE NUMBER

( ) _____ AREA CODE and FAX NUMBER

E-MAIL ADDRESS _____

13. In witness whereof, the Designated Applicant for the Responsible Parties and the named Insurers have executed this instrument on the _____ day of _____.
MONTH YEAR

Designated Applicant for the Responsible Parties named herein:

_____
SIGNATURE OF AUTHORIZED REPRESENTATIVE OF DESIGNATED APPLICANT

_____
NAME OF AUTHORIZED REPRESENTATIVE OF DESIGNATED APPLICANT

_____
TITLE OF AUTHORIZED REPRESENTATIVE OF DESIGNATED APPLICANT

Named Insurers:

_____
COMPANY NAME

_____
ADDRESS

_____
CITY STATE ZIP CODE

14. The following named Insurers hereby certify their participation on this.

BOEM ID NUMBER	INSURER'S NAME	QUOTA SHARE	AUTHORIZED SIGNATURE	NAME AND TITLE OF BINDING OFFICIAL	INSURANCE RATING	INSURANCE RATING SERVICE	DATE OF RATING (MM/YY)
	SUBTOTAL OF QUOTA						

If additional space is required, additional copies of this page may be attached as continuation pages.

FORM BOEM-1019 (Month/Year)
Previous Editions are Obsolete.

PAGE 4 OF 5

14. The following named Insurers hereby certify their participation on this (continued).

BOEM ID NUMBER	INSURER'S NAME	QUOTA SHARE	AUTHORIZED SIGNATURE	NAME AND TITLE OF BINDING OFFICIAL	INSURANCE RATING	INSURANCE RATING SERVICE	DATE OF RATING (MM/YY)
SUBTOTAL FROM PREVIOUS PAGE							
	TOTAL QUOTA SHARE (MUST EQUAL 100%)						

If additional space is required, additional copies of this page may be attached as continuation pages.

FORM BOEM-1019 (Month/Year)
Previous Editions are Obsolete.

PAGE 5 Of 5

U.S. Department of the Interior
Bureau of Ocean Energy Management

OBM Control No.: xxxxxxx
Expiration Date: xxxxxxxxx

SURETY BOND

CERTIFICATION OF OIL SPILL FINANCIAL RESPONSIBILITY IN ACCORDANCE WITH THE REQUIREMENTS OF THE OIL POLLUTION ACT OF 1990

(TYPE OR PRINT ALL INFORMATION EXCEPT SIGNATURES)

1. Designated Applicant: _____ _____
COMPANY LEGAL NAME BOEM COMPANY NUMBER

2. Surety Company Bond Number: _____.

3. The Designated Applicant and Responsible Parties, identified in form(s) BOEM-1017 on file or attached, and _____, a company created under the laws of _____, and
NAME OF SURETY COMPANY STATE
authorized to do business in the United States, as Surety (hereinafter called Surety), are held and firmly bound unto the United States of America and other claimants for damages and removal cost liability under the Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq.* (hereinafter called Act), in the sum of $ _____, for
AMOUNT
which payment, we bind ourselves and our heirs, executors, administrators, successors, and assigns, jointly and severally, under the terms and conditions of Part 553 of Title 30 of the Code of Federal Regulations. This bond is hereby provided on behalf of the Responsible Parties to comply with the requirements of 33 U.S.C. § 2716(c) and is offered to satisfy any claim made under OPA.

4. The liability of the Surety will not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments will amount in the aggregate to the penalty of the bond. In no event will the Surety's obligation hereunder exceed the amount of the penalty, provided the Surety furnishes timely written notice to the Bureau of Ocean Energy Management (BOEM) oil spill financial responsibility (OSRP) program of all claims filed, judgments rendered, and payments made by the Surety under this bond.

5. This bond is effective the _____ day of _____, _____, 12:01 a.m., Eastern Standard Time
NUMBER MONTH YEAR
as stated herein and will continue in force until terminated as hereinafter provided. The Surety may at any time terminate this bond by written notice of intent to cancel sent by certified mail to the Designated Applicant with copies (plainly indicating the original notice was sent by certified mail) to all Responsible Parties and to the BOEM oil spill financial responsibility program by certified mail. This surety bond will remain in force and the undersigned will remain liable until termination on the earlier of: (1) thirty calendar days after BOEM and the Designated Applicant receive a notification of an intent to cancel this Surety Bond; (2) BOEM receives other acceptable OSFR evidence from the Designated Applicant; or (3) all the COFs to which this Surety Bond applies have been permanently abandoned either in compliance with 30 CFR part 250 or equivalent state requirements. The Surety will not be liable in connection with an incident occurring after the termination of this bond as herein provided; but termination will not affect the liability of the Surety in connection with an incident occurring before the termination becomes effective.

6. The undersigned agree that any suit or claim for which the Responsible Parties identified in form(s) BOEM-1017, on file or attached, represented by the aforementioned Designated Applicant may be liable under Title I of the Act may be brought directly against the Surety for claims up to the amount of the penalty asserted by the U.S. government or by other claimants when a Responsible Party denies or fails to pay a claim on the basis of insolvency or a Responsible Party has petitioned for bankruptcy under Title 11 of the U.S. Code.

7. The undersigned further agrees not to use any defense except those that would be available to a Responsible Party for whom the Surety was provided or that the incident leading to the claim for removal costs or damages was caused by willful misconduct of a Responsible Party covered by this Surety Bond.

8. The undersigned further agrees that the Responsible Party, pursuant to the requirements of 30 CFR 553.15, will notify the BOEM oil spill financial responsibility program in the event the Responsible Party is no longer able to maintain evidence of oil spill financial responsibility to the extent stated in section 3 above.

9. The Designated Applicant must, no later than the first calendar day of the fifth month after the close of your Financial Guarantor's fiscal year or termination if earlier, submit either a renewal of this Surety Bond or other acceptable evidence of financial responsibility.

10. In witness whereof, the Designated Applicant and the Surety have executed this instrument on the _____ day of _____, _____.

MONTH YEAR

Designated Applicant:

_____
SIGNATURE OF AUTHORIZED REPRESENTATIVE

_____
NAME OF AUTHORIZED REPRESENTATIVE

_____
TITLE OF AUTHORIZED REPRESENTATIVE

Surety:

_____
COMPANY NAME

_____
ADDRESS

_____
CITY STATE ZIP CODE

_____
SIGNATURE OF AUTHORIZED REPRESENTATIVE

_____
NAME OF AUTHORIZED REPRESENTATIVE

_____
TITLE OF AUTHORIZED REPRESENTATIVE

U.S. Department of the Interior
Bureau of Ocean Energy Management

OMB Control No.: xxxxxxx
Expiration Date: xxxxxxx

COVERED OFFSHORE FACILITIES

CERTIFICATION OF OIL SPILL FINANCIAL RESPONSIBILITY IN ACCORDANCE WITH THE REQUIREMENTS OF THE OIL POLLUTION ACT OF 1990

(TYPE OR PRINT ALL INFORMATION EXCEPT SIGNATURES)

1. Designated Applicant: _____ (COMPANY LEGAL NAME) _____ (BOEM COMPANY NUMBER)

2. The following list comprises all of the _____ (NUMBER) locations of covered offshore facilities to be covered by my certification of oil spill financial responsibility.

_____ (NAME OF AUTHORIZED REPRESENTATIVE) _____ (SIGNATURE OF AUTHORIZED REPRESENTATIVE)

_____ (TITLE) _____ (DATE)

3. Locations of covered offshore facilities:

STATE OR OCS REGION	LEASE NUMBER	ALIQUOT PORTION (If Applicable)	AREA NAME	BLOCK NUMBER	PERMIT NUMBER	RUE or ROW NUMBER	PIPELINE SEGMENT NUMBER	POTENTIAL WORST CASE OIL-SPILL DISCHARGE (In Barrels)

3. Locations of covered offshore facilities (continued):

STATE OR OCS REGION	LEASE NUMBER	ALIQUOT PORTION (If Applicable)	AREA NAME	BLOCK NUMBER	PERMIT NUMBER	RUE or ROW NUMBER	PIPELINE SEGMENT NUMBER	POTENTIAL WORST CASE OIL-SPILL DISCHARGE (In Barrels)

If additional space is required, additional copies of this page may be attached as continuation pages.

U.S. Department of Interior
Bureau of Ocean Energy Management

OMB Control No.: xxxxxxx
Expiration Date: xxxxxxx

COVERED OFFSHORE FACILITY CHANGES

CERTIFICATION OF OIL SPILL FINANCIAL RESPONSIBILITY IN ACCORDANCE WITH THE REQUIREMENTS OF THE OIL POLLUTION ACT OF 1990

(TYPE OR PRINT ALL INFORMATION EXCEPT SIGNATURES)

1. Designated Applicant: _____ _____
COMPANY LEGAL NAME — BOEM COMPANY NUMBER

2. The following list comprises all of _____ changes to locations of covered offshore facilities or potential worst case oil spill discharges listed in the previously submitted certification of oil spill financial responsibility of _____.
NUMBER — DATE

_____ _____
NAME OF AUTHORIZED REPRESENTATIVE — SIGNATURE OF AUTHORIZED REPRESENTATIVE

_____ _____
TITLE — DATE

3. Changes to locations of covered offshore facilities or potential worst case oil-spill discharges:

STATE OR OCS REGION	LEASE NUMBER	ALIQUOT PORTION (If Applicable)	AREA NAME	BLOCK NUMBER	PERMIT NUMBER	RUE OR ROW NUMBER	PIPELINE SEGMENT NUMBER	POTENTIAL WORST CASE OIL-SPILL DISCHARGE (In Barrels)	TYPE OF CHANGE * (A/D/N)

*A = Addition, D = Deletion, and N = New Potential Worst Case Oil Spill

If additional space is required, additional copies of this page may be attached as continuation pages.

FORM BOEM-1022 (Month/Year)
Previous Editions are Obsolete.

U.S. Department of the Interior
Bureau of Ocean Energy Management

OMB Control No.: xxxxxxx
Expiration Date: xxxxxxx

FINANCIAL GUARANTEE

CERTIFICATION OF OIL SPILL FINANCIAL RESPONSIBILITY IN ACCORDANCE WITH THE REQUIREMENTS OF THE OIL POLLUTION ACT OF 1990

(TYPE OR PRINT ALL INFORMATION EXCEPT SIGNATURES)

1. Designated Applicant: _____ _____
COMPANY LEGAL NAME BOEM COMPANY NUMBER

2. The Responsible Parties, identified in form(s) BOEM-1017 on file or attached, and _____,
NAME OF ENTITY

a _____ created under the laws of _____,
TYPE OF ENTITY STATE

and authorized to do business in the United States, as Guarantor, (hereinafter called Guarantor), agree to be jointly and severally liable to the United States of America and other claimants for damages and removal costs under the Oil Pollution Act of 1990, as amended, 33 U.S.C. § 2701 *et seq.* (hereinafter called OPA), in the sum indicated in section 4, for which payment our heirs, executors, administrators, successors, and assigns will also be liable, under the terms and conditions of Title 30 part 553 of the Code of Federal Regulations (CFR).

This Guarantee is hereby provided on behalf of the Responsible Parties to comply with the requirements of 33 U.S.C. 2716(c) and is offered to satisfy any claim made under OPA.

3. For the purpose of this application, the undersigned is acting in the capacity of a Financial Guarantor in accordance with the requirements of 30 CFR 553.32.

4. The amount of coverage for which evidence of oil spill financial responsibility (OSFR) is being established is:

$

5. This coverage is effective: _____ and expires on the first calendar day of the fifth month after the
DATE

close of the Financial Guarantor's fiscal year, which ends: _____.

6. The Financial Guarantor may at any time give notice of intent to cancel this Guarantee by written notice sent by certified mail to the Designated Applicant with copies (plainly indicating the original notice was sent by certified mail) to all Responsible Parties and to the BOEM oil spill financial responsibility program by certified mail. This instrument will remain in force and the undersigned will remain liable until the expiration date above or until the earlier of: (1) thirty calendar days after Bureau of Ocean Energy Management (BOEM) and the Designated Applicant receive from the instrument issuer a notification of intent to cancel; (2) BOEM receives other acceptable OSFR evidence from your Designated Applicant; or (3) all the COFs to which the instrument applies are permanently abandoned in compliance with 30 CFR Part 250 or equivalent state requirements. The undersigned agrees that termination of this instrument will not affect the liability of the Financial Guarantor for claims arising from an incident (i.e., oil discharge or substantial threat of the discharge of oil) that occurs on or before the effective date of termination of this Guarantee.

The undersigned agrees that any suit or claim for which any Responsible Parties identified in form(s) BOEM-1017, on file or attached, represented by the aforementioned Designated Applicant may be liable under Title I of the Act may be brought directly against the Financial Guarantor for claims up to the amount of the penalty asserted by the U.S. government or other claimants when a Responsible Party denies or fails to pay a claim on the basis of insolvency or a Responsible Party has petitioned for bankruptcy under Title 11 of the U.S. Code.

The undersigned further agrees not to use any defenses except those that would be available to a Responsible Party for whom the Guarantee was provided or that the incident (i.e., oil discharge or a substantial threat of the discharge of oil) leading to the claim for removal costs or damages was caused by willful misconduct of a Responsible Party for whom the Designated Applicant demonstrated OSFR.

7. Financial Guarantor providing evidence of oil spill financial responsibility in the form of a Guarantee.

COMPANY LEGAL NAME | BOEM COMPANY NUMBER

ADDRESS

C ITY | STATE | ZIP CODE

CONTACT PERSON FOR CLAIMS | CONTACT PERSON'S TITLE

AREA CODE AND TELEPHONE NUMBER | AREA CODE AND FAX NUMBER | E-MAIL ADDRESS

8. The undersigned, as an Authorized Representative of the above-named Financial Guarantor, certifies on behalf of the Financial Guarantor that the requirements set forth in 30 CFR Part 553, and specifically §§ 553.20, 553.23-28, 553.30 and 553.40 have been met, and further agrees that, the Financial Guarantor, pursuant to the requirements of 30 CFR 553.15, will notify the BOEM oil spill financial responsibility program in the event that the Financial Guarantor is no longer able to maintain evidence of oil spill financial responsibility to the extent stated in section 4 above.

NAME | SIGNATURE

TITLE | DATE

9. The Financial Guarantor's U.S. Agent for Service of Process is:

NAME | BOEM COMPANY NUMBER

ADDRESS

CITY | STATE | ZIP CODE

AREA CODE AND TELEPHONE NUMBER | AREA CODE AND FAX NUMBER | E-MAIL ADDRESS

10. The liability of the Financial Guarantor will not be discharged by any payment or succession of payments made, unless and until such payment or payments will amount in the aggregate to the amount of the Guarantee. In no event will the Financial Guarantor's obligation exceed the amount of the Guarantee, provided the Financial Guarantor furnishes timely written notice to the BOEM oil spill financial responsibility program of all claims filed, judgments rendered, and payments made by the Financial Guarantor under this Guarantee.

11. The Designated Applicant must, no later than the first calendar day of the fifth month after the close of your Financial Guarantor's fiscal year or expiration if earlier, submit either a renewal of this Financial Guarantee or other acceptable evidence of financial responsibility.

12. In witness whereof, the Designated Applicant for the Responsible Parties and the Financial Guarantor have executed this instrument on the _____ day of _____.
MONTH YEAR

Designated Applicant for the Responsible Parties named herein:

_____
SIGNATURE OF AUTHORIZED REPRESENTATIVE

_____
NAME OF AUTHORIZED REPRESENTATIVE

_____
TITLE OF AUTHORIZED REPRESENTATIVE

Financial Guarantor:

_____
SIGNATURE

_____
NAME

_____
TITLE

BOEM ID NUMBER	RESPONSIBLE PARTIES COVERED BY THIS AGREEMENT

U.S. Department of the Interior
Bureau of Ocean Energy Management

OMB Control No.: xxxxxxx
Expiration Date: xxxxxxxx

INDEPENDENT DESIGNATED APPLICANT INFORMATION CERTIFICATION

CERTIFICATION OF OIL SPILL FINANCIAL RESPONSIBILITY
IN ACCORDANCE WITH THE REQUIREMENTS OF THE OIL POLLUTION ACT OF 1990
(TYPE OR PRINT ALL INFORMATION EXCEPT SIGNATURES)

This form is intended for use by Designated Applicants that are not also Responsible Parties, as defined in BOEM Regulations at 30 CFR part 553.

1. Designated Applicant: _____ _____
COMPANY LEGAL NAME — BOEM COMPANY NUMBER

_____ _____
ADDRESS — BOEM COMPANY REGION

_____
CITY — STATE — ZIP CODE

_____ (____)_____
CONTACT PERSON — AREA CODE AND TELEPHONE NUMBER

_____ (____)_____
CONTACT PERSON'S TITLE — AREA CODE AND FAX NUMBER

_____
E-MAIL ADDRESS

2. Summary of Evidence of Oil Spill Financial Responsibility:

As an Authorized Representative of the Designated Applicant, I explicitly agree that the Designated Applicant will be jointly and severally liable for claims, under the Oil Pollution Act of 1990, as amended, 33 U.S.C. § 2701 *et seq.*, with the Responsible Parties for the covered offshore facilities covered by this certification.

_____ _____
NAME OF AUTHORIZED REPRESENTATIVE OF DESIGNATED APPLICANT — SIGNATURE

_____ _____
TITLE OF AUTHORIZED REPRESENTATIVE OF DESIGNATED APPLICANT — DATE

[FR Doc. 2013–18923 Filed 8–5–13; 8:45 am]
BILLING CODE 4310–MR–C

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[MMAA104000]

Environmental Documents Prepared for Oil, Gas, and Mineral Operations by the Gulf of Mexico Outer Continental Shelf (OCS) Region

AGENCY: Bureau of Ocean Energy Management (BOEM), Interior.

ACTION: Notice of the Availability of Environmental Documents Prepared for OCS Mineral Proposals by the Gulf of Mexico OCS Region.

SUMMARY: BOEM, in accordance with Federal Regulations that implement the National Environmental Policy Act (NEPA), announces the availability of NEPA-related Site-Specific Environmental Assessments (SEAs) and Findings of No Significant Impact (FONSIs). These documents were prepared during the period April 1, 2013, through June 30, 2013, for oil, gas, and mineral-related activities that were proposed in the Gulf of Mexico, and are more specifically described in the Supplementary Information Section of this notice.

FOR FURTHER INFORMATION CONTACT: Bureau of Ocean Energy Management, Gulf of Mexico OCS Region, Attention: Public Information Office (GM 250E), 1201 Elmwood Park Boulevard, Room 250, New Orleans, Louisiana 70123–2394, or by calling 1–800–200–GULF.

SUPPLEMENTARY INFORMATION: BOEM prepares SEAs and FONSIs for certain proposals that relate to exploration, development, production, and transport of oil, gas, and mineral resources on the Federal OCS. These SEAs examine the potential environmental effects of proposed activities and present BOEM conclusions regarding the significance of those effects. The SEAs are used as a basis for determining whether or not approval of the proposals constitutes a major Federal action that significantly affects the quality of the human environment in accordance with NEPA Section 102(2)(C). A FONSI is prepared in those instances where BOEM finds that approval will not result in significant effects on the quality of the human environment. The FONSI briefly presents the basis for that finding and includes a summary or copy of the SEA.

This notice constitutes the public notice of availability of environmental documents as required under the NEPA Regulations.

Activity/operator	Location	Date
ATP Oil & Gas Corporation, Structure Removal, SEA ES/SR 13–094.	Brazos, Block 544, Lease OCS–G 10226, located 31 miles from the nearest Texas shoreline.	01–Apr–13.
ATP Oil & Gas Corporation, Structure Removal, SEA ES/SR 13–092.	South Timbalier, Block 76, Lease OCS–G 04460, located 25 miles from the nearest Louisiana shoreline.	01–Apr–13.
EPL Oil & Gas, Inc., Structure Removal, SEA ES/SR 13–091	Eugene Island, Block 247, Lease OCS–G 21111, located 57 miles from the nearest Louisiana shoreline.	02–Apr–13.
LLOG Exploration Offshore, L.L.C., Exploration Plan, SEA R–5839.	Mississippi Canyon, Block 258, Lease OCS–G 24066, located 62 miles from the nearest Louisiana shoreline.	02–Apr–13.
EMGS Americas LP, Geological & Geophysical Survey, SEA L13–004.	Central Planning Area of the Gulf of Mexico	04–Apr–13.
Walter Oil & Gas Corporation, Exploration Plan, SEA R–5840	Central Planning Area of the Gulf of Mexico	04–Apr–13.
Chevron U.S.A. Inc., Geological & Geophysical Survey, SEA L13–003.	Central Planning Area of the Gulf of Mexico, located 198 miles from the nearest shoreline.	04–Apr–13.
Pisces Energy LLC, Structure Removal, SEA ES/SR 11–330 & 11–331.	Eugene Island, Block 53, Lease OCS–G 00479, located 14 miles from the nearest Louisiana shoreline.	04–Apr–13.
McMoRan Oil & Gas LLC, Structure Removal, SEA ES/SR 13–084.	West Cameron, Block 294, Lease OCS–G 04090, located 28 miles from the nearest Louisiana shoreline.	04–Apr–13.
Shell Offshore Inc., Exploration Plan, SEA R–5856	Central Planning Area of the Gulf of Mexico, located 82 miles south of the nearest Louisiana shoreline.	05–Apr–13.
Chevron U.S.A. Inc., Exploration Plan, SEA R–5845	Central Planning Area of the Gulf of Mexico, located 221 miles south of the nearest Louisiana shoreline.	08–Apr–13.
TESLA Offshore, LLC, Geological & Geophysical Survey, SEA L13–008.	Central Planning Ares of the Gulf of Mexico	08–Apr–13.
ATP Oil & Gas Corporation, Structure Removal, SEA ES/SR 13–095.	South Timbalier, Block 77, Lease OCS–G 04827, located 19 miles from the nearest Louisiana shoreline.	09–Apr–13.
Anadarko Petroleum Corporation, Exploration Plan, SEA R–5853.	Central Planning Area of the Gulf of Mexico, located 224 miles from the nearest Louisiana shoreline.	10–Apr–13.
White Oak Operating Company, L.L.C., Structure Removal, SEA ES/SR 13–105.	Chandeleur, Block 3, Lease OCS–G 25041, located 4 miles from the nearest Louisiana shoreline.	11–Apr–13.
Fairfield Nodal, Geological & Geophysical Survey, SEA L12–003	Main Pass & Mississippi Canyon in the Central Planning Area of the Gulf of Mexico.	11–Apr–13.
Energy XXI GOM, LLC, Structure Removal, SEA ES/SR 13–074	South Timbalier, Block 21, Lease OCS 00263, located 5 miles from the nearest Louisiana shoreline.	11–Apr–13.
Hilcorp Energy GOM, LLC, Structure Removal, SEA ES/SR 13–101.	Vermilion, Block 39, Lease OCS 00206, located 10 miles from the nearest Louisiana shoreline.	11–Apr–13.
Pisces Energy LLC, Structure Removal, SEA ES/SR 13–100	West Cameron, Block 081, Lease OCS–G 01477, located 24 miles from the nearest Louisiana shoreline.	11–Apr–13.
Cobalt International Energy, L.P., Exploration Plan, SEA R–5848	Central Planning Area of the Gulf of Mexico, located 137 miles south of the nearest Louisiana shoreline.	15–Apr–13.
Century Exploration New Orleans, LLC, Structure Removal, SEA ES/SR 11–046.	West Cameron, Block 369, Lease OCS–G 00301, located 58 miles from the nearest Louisiana shoreline.	15–Apr–13.
Shell Offshore Inc., Development Operations Coordination Document, SEA R–5746.	Mississippi Canyon, Block 934, Lease OCS–G 07975, located 61 miles from the nearest Louisiana shoreline.	17–Apr–13.
Century Exploration New Orleans, LLC, Structure Removal, SEA ES/SR 10–194.	Ship Shoal, Block 153, Lease OCS–G 18011, located 29 miles from the nearest Louisiana shoreline.	17–Apr–13.

Activity/operator	Location	Date
White Oak Operating Company, L.L.C., Structure Removal, SEA ES/SR 13–104.	Viosca Knoll, Block 20, Lease OCS–G 25047, located 7 miles from the nearest Louisiana shoreline.	17–Apr–13.
Shell Offshore Inc., Exploration Plan, SEA S–7599	Walker Ridge, Block 508, Lease OCS–G 17001, located 178 miles from the nearest Louisiana shoreline.	17–Apr–13.
McMoRan Oil & Gas LLC, Structure Removal, SEA ES/SR 13–087.	Brazos, Block 504, Lease OCS–G 20616, located 32 miles from the nearest Texas shoreline.	18–Apr–13.
Apache Corporation, Structure Removal, SEA ES/SR 13–109	Ship Shoal, Block 68, Lease OCS–G 02917, located 6 miles from the nearest Louisiana shoreline.	18–Apr–13.
EP Energy E&P Company, L.P., Structure Removal, SEA ES/SR 13–108.	West Cameron, Block 150, Lease OCS 00254, located 23 miles from the nearest Louisiana shoreline.	18–Apr–13.
Peregrine Oil & Gas, LP, Structure Removal, SEA ES/SR 13–067.	West Delta, Block 64, Lease OCS–G 25008, located 18 miles from the nearest Louisiana shoreline.	18–Apr–13.
Stone Energy, Exploration Plan, SEA N–9684	Mississippi Canyon, Block 26, Lease OCS–G 31474, located 23 miles from the nearest shoreline in Plaquemines Parish, Louisiana.	19–Apr–13.
CGGVeritas Services (US) Inc., Geological & Geophysical Survey, SEA L13–011.	Central Planning Area of the Gulf of Mexico	22–Apr–13.
Fairfield Nodal, Inc., Geological & Geophysical Survey, SEA L13–010.	Central Planning Area of the Gulf of Mexico	22–Apr–13.
Mariner Energy Resources, Inc., Structure Removal, SEA ES/SR 13–113.	High Island, Block 116, Lease OCS–G 06156, located 25 miles from the nearest Louisiana shoreline.	22–Apr–13.
Mariner Energy Resources, Inc., Structure Removal, SEA ES/SR 13–114.	Vermilion, Block 35, Lease OCS–G 00549, located 8 miles from the nearest Louisiana shoreline.	22–Apr–13.
Apache Corporation, Structure Removal, SEA ES/SR 13–111	West Cameron, Block 293, Lease OCS–G 04398, located 28 miles from the nearest Louisiana shoreline.	22–Apr–13.
Apache Corporation, Structure Removal, SEA ES/SR 13–112	West Cameron, Block 293, Lease OCS–G 04398, located 29 miles from the nearest Louisiana shoreline.	22–Apr–13.
Apache Corporation, Structure Removal, SEA ES/SR 13–110	West Cameron, Block 294, Lease OCS–G 04090, located 28 miles from the nearest Louisiana shoreline.	22–Apr–13.
Apache Corporation, Structure Removal, SEA ES/SR 13–118	Eugene Island, Block 189, Lease OCS–G 00423, located 32 miles from the nearest Louisiana shoreline.	23–Apr–13.
Hilcorp Energy GOM, LLC, Structure Removal, SEA ES/SR 13–116.	Vermilion, Block 39, Lease OCS 00206, located 10 miles from the nearest Louisiana shoreline.	23–Apr–13.
Eni US Operating Co. Inc., Exploration Plan, SEA N–9683	Mississippi Canyon, Block 214, Lease OCS–G 24059, located 62 miles from the nearest shoreline in Plaquemines Parish, Louisiana.	02–May–13.
EPL Oil & Gas, Inc., Structure Removal, SEA ES/SR 07–128	East Cameron, Block 161, Lease OCS–G 15141, located 44 miles from the nearest Louisiana shoreline.	07–May–13.
LLOG Exploration Offshore, L.L.C., Exploration Plan, SEA N–9690.	Mississippi Canyon, Block 208, Lease OCS–G 32303, located 46 miles from the nearest shoreline in Plaquemines Parish, Louisiana.	07–May–13.
Mariner Energy Resources, Inc., Structure Removal, SEA ES/SR 13–117.	West Cameron, Block 110, Lease OCS 00081, located 17 miles from the nearest Louisiana shoreline.	07–May–13.
Stone Energy Corporation, Structure Removal, SEA ES/SR 13–120.	West Cameron, Block 45, Lease OCS 00299, located 7 miles from the nearest shoreline.	07–May–13.
CGG Veritas Services (US) Inc., Geological & Geophysical Survey, SEA L13–015.	Central and Western Planning Areas of the Gulf of Mexico	08–May–13.
Apache Corporation, Structure Removal, SEA ES/SR 13–123	Ship Shoal, Block 126, Lease OCS–G 12940, located 25 miles from the nearest Louisiana shoreline.	08–May–13.
Stone Energy Corporation, Structure Removal, SEA ES/SR 13–121.	West Cameron, Block 166, Lease OCS–G 05549, located 27 miles from the nearest Louisiana shoreline.	08–May–13.
Stone Energy Corporation, Structure Removal, SEA ES/SR 13–122.	West Cameron, Block 45, Lease OCS 00299, located 7 miles from the nearest Louisiana shoreline.	08–May–13.
Apache Corporation, Structure Removal, SEA ES/SR 13–082	Eugene Island, Block 296, Lease OCS–G 02105, located 60 miles from the nearest Louisiana shoreline.	13–May–13.
Stone Energy Corporation, Structure Removal, SEA ES/SR 2006–156.	West Cameron, Block 220, Lease OCS–G 03323, located 63 miles from the nearest Louisiana shoreline.	15–May–13.
LLOG Exploration Offshore, L.L.C., Exploration Plan, SEA R–5876.	Mississippi Canyon, Block 300, OCS Lease OCS– G 22868, located 56 miles from the nearest Louisiana shoreline.	16–May–13.
Anadarko Petroleum Corporation, Exploration Plan, SEA S–7604.	Green Canyon, Block 768, Lease OCS–G 21817, located south of Morgan City, Louisiana, 125 miles from the nearest shoreline in Terrebonne Parish, Louisiana.	17–May–13.
EMGS Americas, Geological & Geophysical Survey, SEA L13–012.	Central Planning Area of the Gulf of Mexico	21–May–13.
Anadarko Petroleum Corporation, Structure Removal, SEA ES/SR 2013–078.	Garden Banks, Block 876, Lease OCS–G 23338, located 146 miles from the nearest Louisiana shoreline.	21–May–13.
CGG Veritas Services (US) Inc., Geological & Geophysical Survey, SEA L13–019.	Central Planning Area of the Gulf of Mexico	23–May–13.
Arena Offshore, LP, Structure Removal, SEA ES/SR 12–323	Eugene Island, Block 318, Lease OCS–G 27121, located 63 miles from the nearest Louisiana shoreline.	23–May–13.
Apache Deepwater LLC, Exploration Plan, SEA R–5880	Green Canyon, Block 274, Lease OCS–G 33241, located 100 miles from the nearest Louisiana shoreline.	23–May–13.
Merit Energy Company, LLC, Structure Removal, SEA ES/SR 12–13.6.	Galveston, Block 252, Lease OCS–G 11307, located 13 miles from the nearest Texas shoreline.	28–May–13.

Activity/operator	Location	Date
Anadarko Petroleum Corporation, Exploration Plan, SEA S–7593.	Lloyd Ridge, Block 317, Lease OCS–G 31834, located 136 miles from the nearest shoreline in Plaquemines Parish, Louisiana.	28–May–13.
Stone Energy Corporation, Structure Removal, SEA ES/SR 13–124.	South Timbalier, Block 143, Lease OCS–G 06767, located 31 miles from the nearest Louisiana shoreline.	28–May–13.
Stone Energy Corporation, Structure Removal, SEA ES/SR 13–13.0.	West Cameron, Block 19, Lease OCS 00073, located 26 miles from the nearest Louisiana shoreline.	28–May–13.
Badger Oil Corporation, Structure Removal, SEA ES/SR 13–030	West Cameron, Block 240, Lease OCS–G 27008, located 42 miles from the nearest Louisiana shoreline.	28–May–13.
Petrobas America Inc., Exploration Plan, SEA N–9674	Mississippi Canyon, Block 697, Lease OCS–G 34019, located 77 miles from the nearest Louisiana shoreline.	29–May–13.
Chevron U.S.A. Inc., Structure Removal, SEA ES/SR 13–13.2 ...	South Marsh Island, Block 236, Lease OCS–G 00310, located 12 miles from the nearest Louisiana shoreline.	29–May–13.
Stone Energy Corporation, Structure Removal, SEA ES/SR 13–129.	South Pelto, Block 15, Lease OCS–G 09652, located 10 miles from the nearest Louisiana shoreline.	29–May–13.
Chevron U.S.A. Inc. Structure Removal, SEA ES/SR 11–028	South Marsh, Block 217, Lease OCS–G 00310, located 7 miles from the nearest Louisiana shoreline.	30–May–13.
Black Elk Energy Offshore Operations, LLC, Structure Removal, SEA ES/SR 13–125.	Galveston, Block 389, Lease OCS–G 17133, located 29 miles from the nearest Texas shoreline.	31–May–13.
Apache Deepwater LLC, Exploration Plan, SEA N–9678	Mississippi Canyon, Block 983, Lease OCS–G 34468, located 66 miles from the nearest shoreline in Plaquemines Parish, Louisiana.	31–May–13.
Apache Deepwater LLC, Exploration Plan, SEA N–9702	Mississippi Canyon, Block 554, Lease OCS–G 34444, & Block 555, Lease OCS–G 34445, located 50 miles from the nearest shoreline in Plaquemines Parish, Louisiana.	03–Jun–13.
Hall–Houston Exploration II, L.P., Structure Removal, SEA ES/SR 13–127.	Galveston, Block 151, Lease OCS–G 15740, located 9 miles from the nearest Texas shoreline.	04–Jun–13.
Merit Energy Company, LLC, Structure Removal, SEA ES/SR 12–13.9.	East Cameron, Block 23, Lease OCS–G 02853, located 5 miles from the nearest Louisiana shoreline.	06–Jun–13.
Exxon Mobil Corporation, Exploration Plan, SEA N–9713	Walker Ridge, Block 282, Lease OCS–G 33364, located 162 miles from the nearest Louisiana shoreline.	06–Jun–13.
Northstar Offshore Group, LLC, Structure Removal, SEA ES/SR 13–13.4.	West Cameron, Block 132, Lease OCS–G 27003, located 20 miles from the nearest Louisiana shoreline.	07–Jun–13.
Stone Energy Corporation, Structure Removal, SEA ES/SR 98–078.	Eugene Island, Block 243, Lease OCS–G 02899, located 56 miles from the nearest Louisiana shoreline.	10–Jun–13.
Merit Energy Company, LLC, Structure Removal, SEA ES/SR 04–116.	High Island, Block A270, Lease OCS–G 26556, located 83 miles from the nearest Louisiana shoreline.	11–Jun–13.
Anadarko Petroleum Corporation, Exploration Plan, SEA S–7606.	Keathley Canyon, Block 919, Lease OCS–G 21447, located 215 miles from the nearest shoreline in Terrebonne Parish, Louisiana.	11–Jun–13.
ConocoPhillips Company, Exploration Plan, SEAR–5885	Walker Ridge, Block 460, Lease OCS–G 32688, located 174 miles from the nearest Louisiana shoreline.	11–Jun–13.
Fairfield Nodal, Geological & Geophysical Survey, SEA L13–001	Central Planning Area of the Gulf of Mexico	17–Jun–13.
Shell Offshore Inc., Exploration Plan, SEA R–5890	Central Planning Area of the Gulf of Mexico	21–Jun–13.
LLOG Exploration Offshore, L.L.C., Exploration Plan SEA N–9709.	Mississippi Canyon, Block 816, Lease OCS–G 33178, located 55 miles from the nearest shoreline in Plaquemines Parish, Louisiana.	21–Jun–13.
TGS, Geological & Geophysical Survey, SEA L13–016	Central Planning Area of the Gulf of Mexico	25–Jun–13.
Stone Energy Corporation, Exploration Plan, SEA N–9706	Alaminos Canyon, Block 943, Lease OCS–G 31205, located 134 miles from the nearest shoreline in Cameron County, Texas.	26–Jun–13.
Nexen Petroleum U.S.A. Inc., Structure Removal, SEA ES/SR 2013–13.6, 137, & 138.	Vermilion, Block 67, Lease OCS–G 00559, located 14 miles from the nearest Louisiana shoreline.	26–Jun–13.
Anadarko Petroleum Corporation, Structure Removal, SEA ES/SR 11–224 & 225.	West Cameron, Block 181, Lease OCS–G 01971, located 27 miles from the nearest Louisiana shoreline.	26–Jun–13.

Persons interested in reviewing environmental documents for the proposals listed above or obtaining information about the SEAs and FONSIs prepared by the Gulf of Mexico OCS Region are encouraged to contact BOEM at the address or telephone listed in the **FOR FURTHER INFORMATION CONTACT** section.

Dated: July 12, 2013.

David Cooke,

Acting Regional Director, Gulf of Mexico OCS Region.

[FR Doc. 2013–19097 Filed 8–5–13; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[BOEM–2013–0022; MMAA104000]

Right-of-Way Grant of Submerged Lands on the Outer Continental Shelf to Support Renewable Energy Development

AGENCY: Bureau of Ocean Energy Management (BOEM), Interior.

ACTION: Notice.

SUMMARY: BOEM will use Form 0009 to issue a renewable energy right-of-way (ROW) grant on the Outer Continental Shelf (OCS). BOEM developed a draft of the form included in this Notice, and published it in the **Federal Register** (77 FR 52353, August 29, 2012) with a 30-day comment period (Draft Form). BOEM has reviewed all the comments received and revised the Draft Form where appropriate. For further information, including the comments received and BOEM's response to those comments, visit BOEM's Web site, at *http://www.boem.gov/Renewable-Energy Program/Regulatory-Information/ Index.aspx.*

DATES: The ROW grant form will be effective and available for use on August 21, 2013.

FOR FURTHER INFORMATION CONTACT: Maureen A. Bornholdt, Program Manager, Office of Renewable Energy Programs, (703) 787–1300.

Dated: July 17, 2013.

Tommy P. Beaudreau,

Director, Bureau of Ocean Energy Management.

[FR Doc. 2013–18949 Filed 8–5–13; 8:45 am]

BILLING CODE 4310–MR–P

INTERNATIONAL TRADE COMMISSION

Submission of Questionnaire for OMB Review

AGENCY: United States International Trade Commission.

ACTION: In accordance with the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the U.S. International Trade Commission (Commission) hereby gives notice that it has submitted a request for approval of a questionnaire to the Office of Management and Budget for review.

Purpose of Information Collection: The information requested by the questionnaire is for use by the Commission in connection with analysis of the effectiveness of Section 337 remedial exclusion orders, issued under the authority of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337).

Summary of Proposal:

(1) *Number of forms submitted:* two

(2) *Title of forms:* 2013 USITC Survey Regarding Outstanding ' 337 Exclusion Orders (General Exclusion Order) and 2013 USITC Survey Regarding Outstanding ' 337 Exclusion Orders (Limited Exclusion Order)

(3) *Type of request:* new

(4) *Frequency of use:* survey, single data gathering, scheduled for FY 2013

(5) *Description of responding firms:* complainants that obtained exclusion orders from the Commission following investigations under Section 337 that remain in effect at the time of the survey

(6) *Estimated number of responding firms:* 86

(7) *Estimated number of hours to complete the forms:* 1 hour or less per responding firm

(8) Information obtained from the questionnaire that qualifies as confidential business information will be so treated by the Commission and not disclosed in a manner that would reveal the individual operations of a firm

Additional Information or Comment: Copies of the questionnaire are posted on the Commission=s Internet server at *http://pubapps2.usitc.gov/comments-misc-042* or may be obtained from Anne Goalwin, Acting Director, Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone, 202–205–2574. Comments about the proposals should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Room 10102 (Docket Library), Washington, DC 20503, Attention: Docket Librarian. All comments should be specific, indicating which part of the questionnaire is objectionable, describing the concern in detail, and including specific suggested revisions or language changes. Copies of any comments should be provided to Andrew Martin, Chief Information Officer, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, who is the Commission's designated Senior Official under the Paperwork Reduction Act.

General information concerning the Commission may also be obtained by accessing its Internet address (*http://www.usitc.gov*). Hearing impaired individuals are advised that information on this matter can be obtained by contacting the TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Secretary at 202–205–2000.

Issued: July 31, 2013

By order of the Commission.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2013–18889 Filed 8–5–13; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–739 (Enforcement Proceeding)]

Certain Ground Fault Circuit Interrupters and Products Containing Same

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission seeks written submissions from the parties and from the public on remedy, bonding, and the public interest in the above-referenced enforcement proceeding.

FOR FURTHER INFORMATION CONTACT: Clark S. Cheney, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2661. Copies of all nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov/*. Hearing-impaired persons are advised that information on the matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted the investigation underlying this enforcement proceeding on October 8, 2010, based on a complaint filed by Leviton Manufacturing Co., Inc., of Melville, New York (''Leviton''). 75 *FR* 62420 (Oct. 8, 2010). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain ground fault circuit interrupters and products containing the same by reason of infringement of, *inter alia,* U.S. Patent No. 7,737,809 (''the '809 patent'').

On April 27, 2012, the Commission issued a general exclusion order barring entry of ground fault circuit interrupters that infringe certain claims of the '809 patent. The Commission also entered

cease and desist orders against several respondents.

On November 1, 2012, the Commission instituted a proceeding for the enforcement of the Commission's remedial orders based on an enforcement complaint filed by Leviton. 77 FR 66080 (Nov. 1, 2012). The enforcement complaint alleged that respondents American Electric Depot Inc. (''AED''); Shanghai ELE Manufacturing Corp. (''Shanghai ELE''), and Shanghai Jia AO Electrical Co., Ltd. (''Shanghai Jia AO'') violated the general exclusion order. The enforcement complaint also alleged that other respondents violated cease and desist orders. On February 14, 2013, the presiding administrative law judge (''ALJ'') (Chief Judge Bullock) issued an initial determination finding AED, Shanghai ELE, and Shanghai Jia AO in default. All other respondents settled. On April 10, 2013, the Commission determined not to review the initial determination with respect to the defaulting respondents.

On April 16, 2013, complainant Leviton filed a motion requesting that the Commission issue (1) a cease and desist order against AED; and (2) seizure and forfeiture orders against ground fault circuit interrupters imported or sold by AED, Shanghai ELE, and Shanghai Jia AO. On April 26, 2013, the Commission investigative attorney (''IA'') filed a response supporting Leviton's motion. No respondent filed a response to Leviton's motion.

On May 22, 2013, the ALJ issued a recommended determination (''RD'') on remedy. The ALJ drew an inference from AED's refusal to participate in the enforcement proceeding that AED has commercially significant inventories of infringing articles. Accordingly, the ALJ recommended that the Commission issue a cease and desist order prohibiting AED from selling or distributing infringing articles in the United States. The ALJ declined to recommend seizure and forfeiture orders because he found Leviton failed to show evidence that infringing articles were previously denied entry, as required under Commission Rule 210.75(b)(6)(ii).

In connection with the final disposition of this enforcement proceeding, the Commission may issue or modify a cease and desist order and/or exclusion order in any manner necessary to prevent the unfair practices that were originally the basis for issuing the remedial orders in the original investigation. The Commission may also issue a seizure and forfeiture order upon satisfaction of the conditions in 19 CFR 210.75(b)(6).

Prior to effecting any remedy in this enforcement proceeding, the Commission must consider the effects of a potential remedy upon the public interest. The factors the Commission must consider include the effect that the remedy would have on (1) the public health and welfare; (2) competitive conditions in the U.S. economy; (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation; and (4) U.S. consumers.

Accordingly, the Commission is interested in receiving written submissions that address the public interest factors above and the form of remedy and bonding, if any, that should be ordered.

Written Submissions: Parties to the enforcement proceeding, interested government agencies, and any other interested members of the public are encouraged to file written submissions on the issues of remedy, bonding, and the public interest. Such submissions should address the ALJ's recommendation on remedy set forth in the RD. Complainant Leviton and the IA are also requested to submit proposed remedial orders for the Commission's consideration. Initial written submissions and proposed remedial orders must be filed no later than close of business on August 16, 2013. Reply submissions must be filed no later than the close of business on August 30, 2013. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the investigation number (''Inv. No. 337–TA–739 (Enforcement Proceeding)'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf*). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with the any confidential filing. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.
Issued: July 31, 2013.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2013–18890 Filed 8–5–13; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 11–30]

Mireille Lalanne, M.D.; Denial of Application

On August 18, 2011, Chief Administrative Law Judge (ALJ) John J. Mulrooney, II, issued the attached decision, recommending that I deny the Respondent's application for a Certificate of Registration as a practitioner. Thereafter, the Government, but not Respondent, filed Exceptions to the decision.[1]

Having reviewed the entire record and the Government's Exceptions, I have decided to adopt the ALJ's recommended rulings, findings of fact, conclusions of law, and recommended order except as discussed below.[2] I will

[1] All citations to the ALJ's Decision are to the slip opinion as originally issued by him.

[2] I do not adopt the ALJ's discussion of Factor 2 (the applicant's experience in dispensing controlled substances) contained in the third paragraph of page 52 of his decision. Nor do I adopt the ALJ's reasoning that there is ''an arguable lack of at least readily- apparent ambiguity'' in the language of factor two. ALJ at 53 (citing *Chevron U.S.A., Inc.* v. *NRDC, Inc.,* 467 U.S. 837 (1984)). In short, Congress only directed that the Agency ''consider'' evidence regarding an applicant's experience in dispensing controlled substances; nothing in the statute tells the Agency how much weight to give a practitioner's evidence of, in the ALJ's words, ''hav[ing] conducted a significant level of sustained activity within the scope of [her] registration for a sustained period.'' ALJ at 52.

As set forth in multiple cases, DEA can revoke based on a single act of intentional or knowing diversion, and an applicant's/registrant's evidence that she has otherwise complied with the CSA for a sustained period, does not, by itself, refute the Government's *prima facie* case. *See Dewey C. MacKay,* 75 FR 49956, 49977 (2010) (citing *Jayam*

therefore order that Respondent's application be denied.

The Government's Exception

The Government takes exception to the ALJ's conclusion that the unsworn hearsay statement of TG, purportedly one of Respondent's former patients, was entitled to no weight, because the Government did not establish that the statements contained therein are sufficiently reliable to constitute substantial evidence of a material fact.[3] Exceptions at 1 (citing ALJ at 7–9). Specifically, the Government elicited the testimony of a former Assistant Commonwealth's Attorney (hereinafter, prosecutor) regarding his interview of TG to show that Respondent had doubled TG's dose of Xanax for no medical reason. Exceptions at 2. Significantly, TG's unsworn statement comprised the entirety of the Government's proof of the allegation.

In declining to give weight to TG's statement, the ALJ applied the four factors for assessing the reliability of hearsay evidence set forth in *J.A. M. Builders, Inc.,* v. *Herman,* 233 F.3d 1350 (11th Cir. 2000). More specifically, the ALJ explained that:

> No foundation was laid by the Government regarding the absence of bias from . . . TG. The information provided in the interview[] could not be tested for consistency because such testimony was not corroborated by other evidence of record. Furthermore, there is no case law or other authority recognizing this variety of evidence as inherently reliable. Simply put, the Government, as a proponent of the evidence, did not lay a foundation sufficient to permit consideration of [TG's] interview[] to support [a finding that it constitutes] substantial evidence . . . .

ALJ at 8.

Notably, the Government does not take issue with the ALJ's reliance on *J.A. M. Builders,* even though that case is not binding on the Agency outside of a matter which falls within the jurisdiction of the Eleventh Circuit.[4] Instead, the Government argues that the ALJ improperly ''placed the burden on the Government to prove a stream of negatives as a prerequisite to giving the testimony any weight.'' Exceptions at 3.[5]

Regarding the first *J.A. M. Builders* factor—the issue of TG's potential bias—the Government argues that the former prosecutor testified about his interview and ''based on the testimony and cross-examination, no bias or inconsistencies were detected on TG's part.'' Exceptions at 4. As to the second factor—whether the statement was made known to Respondent prior to the hearing and whether the declarant could have been subpoenaed—the Government argues that TG's name and the details of his interview were ''disclosed to Respondent prior to the hearing, but Respondent declined to have [him] subpoenaed or take any steps to determine the veracity of [his] statement.'' *Id.* With respect to the third factor—whether the information was inconsistent on its face—the Government argues that ''there was nothing inconsistent on its face'' in the testimony of the former prosecutor regarding the interview, and that the ALJ improperly relied on inconsistencies in a transcript of the interview which the Government did not offer into evidence. *Id.*

Finally, addressing the fourth factor—whether the information has been recognized by the courts as inherently reliable—the Government contends that ''the truth of the facts alleged by TG could have been corroborated (or refuted) by an examination of TG's medical record,'' and that ''[p]resuming that Respondent made medical notes reflecting changes in TG's condition, she would have had access to the type of evidence needed to verify TG's statement that he received an amount of Xanax in excess of what was medically necessary.'' *Id.*[6] Thus, the Government contends that TG's statement ''was not unlike hearsay testimony from a laboratory report or laboratory technician which has been found to be inherently reliable because it can be verified with other scientific data, *i.e.,* TG's medical file.'' *Id.* at 4–5 (citing *United States* v. *Minnitt,* 617 F. 3d 327, 334–35 (5th Cir. 2010)).

Notwithstanding that the ALJ should have looked to the case law of the Sixth and DC Circuits in determining whether TG's statement constituted substantial evidence of the material fact for which it was offered, the Government's exception is still not well taken. As for its contention that the ALJ improperly ''placed the burden on the Government to prove a stream of negatives as a prerequisite to giving the testimony any weight,'' Exceptions at 3, apparently, in the Government's view, the mere admission of the evidence was sufficient to place on Respondent the burden of showing that the statement is not reliable.

The Government cites no authority for its position. Moreover, while it may be that the burden of producing evidence showing that some of the factors which counsel against giving weight to a hearsay statement is properly placed on the party against whom the statement is offered, the Government acknowledges no obligation to establish even a threshold level of reliability.[7] However, under the Administrative Procedure Act, ''the proponent of a rule or order has the burden of proof,'' 5 U.S.C. 556(d), and given the manner in which courts generally treat the admission of hearsay, it seems most unlikely that any

Krishna-Iyer, 74 FR 459,463 (2009)), *pet. for rev.* ≤ *denied* 664 F.3d 808 (10th Cir. 2011). Indeed, in *MacKay,* the Tenth Circuit expressly rejected the contention that a practitioner's so-called ''positive experience'' negates a *prima facie* showing of intentional diversion. *See* 664 F.3d at 819 (''Although Dr. MacKay may have engaged in the legitimate practice of pain medicine for many of his patients, the conduct found by the Deputy Administrator with respect to [two patients] is sufficient to support her determination that his continued registration is inconsistent with the public interest.''). So too, where, as here, the evidence supports a finding that an applicant/registrant acted with deliberate ignorance in prescribing controlled substances. As the ALJ correctly noted, in such cases, ''Agency precedent has firmly placed acknowledgment of [wrongdoing] and acceptance of responsibility as conditions precedent to merit the granting or continuation'' of a registration. ALJ at 44 (citing cases).

This is not to say that such evidence is never entitled to weight. Such evidence may persuade the Agency that an applicant/registrant has offered credible testimony that she accepts responsibility and will not engage in future misconduct. So too, where the Government's proof does not establish egregious violations, such evidence is given due consideration in setting the appropriate sanction. *See Gregg & Sons, Distributors,* 74 FR 17517, 17524 (2009).

[3] The Government agrees with the ALJ's ultimate conclusion that Respondent '''has committed acts that render [her] registration inconsistent with the public interest''' and his recommendation that her application be denied. Exceptions at 1.

[4] It is noted that the Government does not cite to any case law of either the Sixth Circuit or DC Circuit, the two courts of appeals which would have jurisdiction were Respondent to file a petition for review.

[5] The Government notes that ''there was no objection to [the former prosecutor's] testimony regarding TG's out of court statement.'' Exceptions at 3 & n.1. While Respondent's failure to object '''is a waiver upon appeal of any ground of complaint against its admission,''' TG's statement became '''part of the evidence in the case, and is usable as proof to the extent of whatever rational persuasive power it may have.''' *Passaic Daily News* v. *NLRB,* 736 F.2d 1543, 1554 (DC Cir. 1984) (quoting C. McCormick, *Handbook of the Law of Evidence* 113 (2d ed. 1972)). However, because as explained in this decision, I agree with the ALJ that TG's statement lacks sufficient indicia of reliability, it has no rational persuasive power. Accordingly, Respondent's failure to object to the testimony is of no consequence.

[6] Contrary to the Government's statement, it is obvious that Respondent would have no interest in verifying TG's statements that he received Xanax in an amount that exceeded what was medical necessary.

[7] For example, had TG given his statement under oath or provided an affidavit, some threshold level of reliability would have been established. Under such circumstances, the Government might have a point in arguing that Respondent should then have to show that TG was not disinterested. However, unsworn statements are notoriously unreliable and the Government put forward no evidence of corroborating circumstances which would support the conclusion that the statement was trustworthy.

court of appeals would sustain the Government's view.

For example, under the Federal Rules of Evidence, the proponent offering a hearsay statement ''bears the burden of showing the requirements are satisfied.'' Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 8:140, at 271 (3d ed. 2007). Analogous to the statement at issue here, a hearsay statement, which is not otherwise admissible under one of the various exceptions contained in Rules 803 and 804 of the Federal Rules of Evidence, may nonetheless be admissible if ''the statement has equivalent circumstantial guarantees of trustworthiness''; in other words, if it is deemed to be sufficiently reliable. F.R. Evid. R. 807. Yet the courts have uniformly held that the proponent of the statement has the burden of establishing that it is trustworthy and admissible. *See United States* v. *Kim,* 595 F.2d 755, 766 (DC Cir. 1979) (''the burden is on the proponent to produce evidence of trustworthiness''); *see also United States* v. *York,* 852 F.2d 221, 225 (7th Cir. 1988) (''The government argues that it was [the defendant] who failed to make the notes of the interviewers a part of the record. However, it was the government . . . which bore the burden of demonstrating that the testimony it offered was trustworthy and entitled to an exception under the rule against hearsay testimony.''); *See also NLRB* v. *United Sanitation Serv.,* 737 F.2d 936, 941 (11th Cir. 1984) (''the burden is on the party seeking to invoke the residual exception to clearly demonstrate the existence of the requisite guarantees of trustworthiness''); *United States* v. *Colson,* 662 F.2d 1389, 1392 (11th Cir. 1981) (''having offered the transcript [of an interview by police of a third-party] under the residual hearsay exception . . . [defendant] bore the burden of establishing, *inter alia,* the trustworthiness and probative value of the transcript, a burden he failed to maintain'').

To be sure, the Federal Rules of Evidence do not apply in this proceeding and '''[p]rovided it is relevant and material, hearsay is admissible in [an] administrative proceeding,''' and may '''under certain circumstances . . . constitute substantial evidence.' '' *Bobo* v. *United States,* 52 F.3d 1406, 1414 (6th Cir. 1995) (quoting *Hoska* v. *United States Dep't of the Army,* 677 F.2d 131, 138 (DC Cir. 1982)). However, establishing that evidence is admissible requires crossing a lower threshold (whether in an administrative or judicial proceeding) than does showing that the evidence is sufficiently reliable to constitute substantial evidence (or, in a judicial proceeding, to satisfy a party's burden of proof). As a leading authority states:

> Admissibility . . . is a quality standing between relevancy, or probative value, on the one hand, and proof, or weight of the evidence, on the other hand. . . . Yet it does not signify that the particular fact has demonstrated or proved the proposition to be proved, but merely that it is received by the tribunal for the purpose of being weighed with other evidence.

I *Wigmore on Evidence* § 12, at 689 (Tillers rev. ed. 1983). As Wigmore further explains, ''[a]dmissibility falls short of proof or demonstration.'' *Id.* at 692.

With respect to the use of hearsay in administrative proceedings, both the Sixth and DC Circuits have explained that '''hearsay may be substantial evidence depending on its truthfulness, reasonableness, and credibility; hearsay statements are highly probative where declarants are disinterested witnesses, statements are essentially consistent, and counsel had access to the statements prior to agency hearing.''' *Bobo,* 56 F.3d at 1414 (quoting *Hoska,* 677 F.3d at 138–39). Moreover, '''hearsay may constitute substantial evidence depending upon its probative value and reliability, considering *inter alia,* possible bias of the declarant, whether [the] statements are signed and sworn to, whether they are contradicted by direct testimony, whether the declarant is available, and whether the hearsay is corroborated.''' *Bobo,* 56 F.3d at 1414 (quoting *Hoska,* 677 F.3d at 139) (other citation omitted).[8]

As to the potential bias of TG, the Government has not established that he was a disinterested witness. As the record establishes, TG was questioned during a law enforcement investigation into drug trafficking syndicates that were traveling from Harlan County, Kentucky to Nashville, Tennessee to obtain controlled substances which were then sold in Harlan County, and it appears that he offered the specific statement at issue here when the prosecutor needed evidence to respond to a motion by Respondent to dismiss the state court indictment. No evidence was offered as to whether, at the time of the interview, TG had been offered immunity or remained under jeopardy of criminal prosecution. Indeed, the Government argues that ''TG freely implicated himself in a scheme to obtain controlled substances from Respondent's practice for illegal purposes.'' Exceptions at 5. However, having implicated himself in such activity, TG would have had ample motivation to curry favor for himself (such as a reduction in likely criminal charges) by telling the authorities what they wanted to hear. *See United States* v. *McCleskey,* 228 F.3d 640, 644 (6th Cir. 2000) (''[W]here, as here, it is the government which seeks to introduce a statement, otherwise hearsay, which inculpates its declarant but which, in its detail, also inculpates the defendant by spreading or shifting onto him some, much, or all of the blame, the out-of-court statement lacks such indicia of reliability. It is garden variety hearsay as to the defendant and it does not lose that character merely because it in addition reliably inculpates the declarant.'').

Moreover, TG's statement was unsworn. While an unsworn hearsay statement may, in some circumstances, still constitute substantial evidence, *see J.A.M. Builders,* 233 F.3d at 1353 & 1355, courts are frequently skeptical of such statements, especially where the declarant cannot be viewed as a disinterested observer and the proponent of the evidence fails to put forward any evidence corroborating the statement or demonstrating its reliability. *See Hoska,* 677 F.2d at 288.

Here, the Government did not introduce TG's medical chart, which might well have shown that Respondent had doubled the dose of Xanax without documenting any reason for doing so. Indeed, the Government did not introduce any evidence (other than TG's statement) to show that Respondent had even prescribed controlled substances to him, let alone that she had doubled TG's purported Xanax dose for no medical reason. Contrary to its understanding, the ALJ properly placed the burden on the Government to corroborate TG's statement and not on Respondent to refute it.[9]

[8] While the ALJ relied on *J.A.M. Builders,* the same outcome is reached under the decisions of the Sixth Circuit in *Bobo* and DC Circuit in *Hoska.* I address the Government's exception under both the *J.A.M. Builders* factors and the *Bobo/Hoska* factors.

[9] As for the Government's contention that TG's statement is ''not unlike hearsay testimony from a laboratory report or a laboratory technician, which has been found to be inherently reliable,'' Exceptions at 4–5 (citing *Minnitt,* 617 F.3d at 334–35, the Government ignores that the *Minnitt* court expressly stated that such reports '''are not so inherently reliable as to be automatically admissible.' '' *Id.* at 334 (quoting *United States* v. *McCormick,* 54 F.3d 214, 223–24 (5th Cir. 1995)). Indeed, in neither *Minnitt* nor *McCormick* did the Government simply introduce the report of the failed drug test and nothing more to establish that the evidence was reliable. *See id.* (discussing other evidence supporting a finding that the evidence was reliable including that result had been confirmed by two different labs); *see also McCormick,* 54 F.3d at 224 (noting that ''the government proffered significant evidence demonstrating that the information reported in . . . urinalysis report [wa]s extremely reliable''). In addition, the evidence at issue in *Minnitt* (and *McCormick*) involved an issue

Nor does the purported consistency of TG's statement give any reason to reject the ALJ's finding that TG's statement does not constitute substantial evidence. Absent the complete statement, and thus the ability to determine whether there were inconsistencies in the statement (or potential inconsistencies which were not explored by the former prosecutor), the absence of inconsistencies in the snippets which were related by the former prosecutor is of considerably less consequence in determining whether TG's statement was reliable.[10] *See U.S.* v. *York,* 852 F.2d at 225–26.

The Government further argues that TG's name and the details of the statement were provided to Respondent in advance of the hearing, and that Respondent could have, but did not, subpoena him. While it true that the Government disclosed TG's name and that it intended to elicit testimony of his statement regarding the increase in his Xanax prescription, *see* ALJ Ex. 6, at 17, as for whether TG was available as a witness, the record is completely barren.[11]

Finally, it is acknowledged that Respondent did not contradict TG's statement in her testimony.[12] Putting aside whether Respondent had any obligation to contradict an unsworn and uncorroborated hearsay statement, this factor provides some support for concluding that TG's statement was reliable. However, even when it is coupled with the other factors which support the Government's position, on balance, the Government has still failed to overcome the other factors (*i.e.,* lack of proof that TG was disinterested, the unsworn nature of the statement, and lack of any corroboration) which strongly counsel against the conclusion that TG's statement possesses sufficient indicia of reliability to be deemed substantial evidence. Accordingly, I reject the exception.[13]

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f), as well as 28 CFR 0.100(b), I order that the application of Mireille Lalanne, M.D., for a DEA Certificate of Registration as a practitioner be, and it hereby is, denied. This order is effective September 5, 2013.

Dated: July 30, 2013.

Michele M. Leonhart,

Administrator.

Frank Mann, Esq., for the Government
Paul J. Bruno, Esq., for the Respondent

RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION OF THE ADMINISTRATIVE LAW JUDGE

John J. Mulrooney, II, Chief Administrative Law Judge. On January 14, 2010, Dr. Mireille Lalanne, M.D., (Respondent) filed an application with the Drug Enforcement Administration (DEA) for a practitioner Certificate of Registration (COR), Control No. W10001926C. Gov't Ex. 2. On February 10, 2011, the DEA Deputy Assistant Administrator issued an Order to Show Cause (OSC) proposing to deny the Respondent's COR application on the grounds that the granting of her request for a COR would be inconsistent with the public interest, as that term is used in 21 U.S.C. § 823(f) (2006 & Supp. III 2010). On March 11, 2011, the Respondent timely requested a hearing, which was conducted in Nashville, Tennessee from June 7 through June 9, 2011.

The issue ultimately to be adjudicated by the Administrator, with the assistance of this recommended decision, is whether the record as a whole establishes by substantial evidence that the Respondent's application for a registration with the DEA should be denied as inconsistent with the public interest, as that term is used in 21 U.S.C. § 823(f).

After carefully considering the testimony elicited at the hearing, the admitted exhibits, the arguments of counsel, and the record as a whole, I have set forth my recommended findings of fact and conclusions of law below.

The Allegations

The OSC issued by the Government alleges that granting the Respondent's pending COR application would be inconsistent with the public interest based on the facts which, in its view, were related and contributed to the February 26, 2009, voluntary surrender of the COR that she held previously. Specifically, the OSC alleges: (1) that the Respondent was indicted and arrested for various state criminal violations, including facilitating the activities of a criminal syndicate trafficking in controlled substances,[1] second degree assault,[2] and wanton endangerment; [3] (2) that, consistent with a plea deal, she was ultimately convicted in a Kentucky state court of facilitating the trafficking of a controlled substance in the first degree; [4] and (3) that on March 22, 2010, the Tennessee Board of Medical Examiners (Tennessee Medical Board) concluded that she had committed misconduct sufficient to provide grounds for discipline, to wit: unprofessional, dishonorable, or unethical conduct [5] and a state drug law conviction.[6] ALJ Ex. 1 at 2. The Government's OSC further alleges that granting the pending COR application would be improvident because the Respondent prescribed controlled substances ''without a legitimate medical purpose and/or outside the

of scientific fact; as such, the credibility of the declarant (*i.e.,* the lab technician), stands on a dramatically different footing than that of TG, who was implicated in criminal activity. Likewise, in contrast to TG's statement, which involved the relation of historical facts several years after the incident, a lab report is typically a contemporaneously prepared record of the results and thus a record of a regularly conducted activity, which is admissible in Federal Court as a hearsay exception under Rule 803, in part because the preparer of the report has a duty to accurately report the results. Finally, there is absolutely no support for the contention that the courts have found statements, such as that given by TG, to be inherently reliable.

[10] The Government notes that the ALJ relied on the transcript of the interview TG gave to a deputy sheriff, which was not entered into evidence and faults the ALJ for relying on this interview to conclude that TG's statement contained inconsistencies. According to the Government, ''[l]ooking at the testimony of [the former prosecutor] regarding his interview with TG, there was nothing inconsistent on its face and the alleged inconsistencies pointed out by the ALJ (from Government Exhibit 21) [, a non-admitted exhibit,] were neither inconsistencies nor part of the official administrative record.'' Exceptions at 4. Even if the ALJ erred in reviewing a non-admitted exhibit to determine whether TG's statement was consistent, given that the weight of the factors counsels against the statement being deemed reliable, I conclude that any error is not prejudicial. *Cf.* 5 U.S.C. 706 (''due account shall be taken of the rule of prejudicial error''); *cf. also* F.R. Evid. R. 104 (''In making its determination'' as to whether evidence is admissible, a court is ''not bound by the rules of evidence except those with respect to privileges.'').

[11] It is acknowledged that the Government disclosed TG's actual name in a legend which listed the names of various patients. See ALJ Ex. 7; Ex. 1, at 2. However, it did not disclose TG's address and no other information establishes if his whereabouts are known. *Cf.* F.R. Evid. R. 807 (requiring party offering statement to ''make[] known to the adverse party . . . the particular of [the statement], including the name and address of the declarant'').

[12] The Government did not address this factor.

[13] While the Government took exception to the ALJ's declination to give weight to TG's statement, it did ''not take exception to the ALJ's failure to give weight to the out-of-court statements'' of three other persons, AW, TE, and CM. Exceptions at 5 n.4. Significantly, the Government moved into evidence an affidavit provided by AW, as well as a transcription of an interview she gave to the former prosecutor. AW's out-of-court statements presented a considerably stronger case than that of TG as to whether they were sufficiently reliable so as to constitute substantial evidence. However, because the Government does not challenge the ALJ's findings with respect to AW, I do not address whether her statements constitute substantial evidence.

[1] Ky. Rev. Stat. Ann. § 506.120 (West 2009).

[2] *Id.* § 508.020.

[3] *Id.* § 508.060.

[4] *Id.* § 218A.1412.

[5] Tenn. Code Ann. § 63–6–214(b)(1) (LexisNexis 2009).

[6] *Id.* § 63–6–214(b)(10).

usual course of professional practice'' on numerous occasions, in the face of evidence where such prescribing was contraindicated or heightened diversion risks were present. *Id.*

The Stipulations of Fact

The Government and the Respondent, through counsel, have entered into stipulations regarding the following matters:

Stipulation A: The Respondent was previously registered with DEA as a practitioner in Schedules II–V under DEA registration number AL1720588 at Tennessee Professional Associates, 3507 Charlotte Avenue, Nashville, Tennessee 37209–3936.

Stipulation B: On November 10, 2008, the Respondent was indicted by a grand jury in Harlan County, Kentucky (Harlan County Grand Jury) on five felony counts, including: (1) engaging in organized crime by providing controlled substances to three different ''syndicates'' (Counts I–III); (2) second degree assault by providing controlled substances to a pregnant patient whose child's health was damaged by the drugs (Count IV); and (3) wanton endangerment of an unborn child by providing controlled substances to the mother (Count V).[7]

Stipulation C: On February 4, 2009, the Respondent was arrested and charged with prescribing large quantities of OxyContin and methadone to approximately 350 residents of Harlan County with the knowledge that the patients were distributing these drugs to others.[8]

Stipulation D: On February 26, 2009, the Respondent surrendered her DEA registration as a condition of being released on bond.

Stipulation E: On September 8, 2009, the Respondent was indicted by the Harlan County Grand Jury on a single count of wanton murder, a capital offense. The Grand Jury charged that Respondent caused the death of a woman by providing her with addictive and dangerous drugs with the knowledge that the woman was addicted to the drugs and at a very high risk of death by overdose.[9]

Stipulation F: On January 11, 2010, the Respondent entered an *Alford*[10] plea to a misdemeanor count of facilitation of trafficking in a controlled substance in the first degree (Schedule I or II) in satisfaction of the pending criminal charges. By entering an *Alford* plea, Respondent did not admit guilt but acknowledged that the evidence against her strongly indicated guilt and that her best interests were served by a guilty plea. As a result of the *Alford* plea, all remaining charges were dismissed.

Stipulation G: The Respondent was sentenced to four months of unsupervised probation and agreed not to prescribe controlled substances to any resident of Harlan County, Kentucky. Respondent also agreed to forfeit $500,000 in bond money, with half going to fund youth drug prevention.

Stipulation H: On January 14, 2010, the Respondent submitted an online application for registration, control number W10001926C.

Stipulation I: On January 29, 2010, the Tennessee Board of Medical Examiners summarily suspended the Respondent's medical license, No. 14207.

Stipulation J: By Final Order effective March 23, 2010, the Tennessee Medical Board reinstated the Respondent's medical license and placed her license on probation for five years and until Respondent completed several conditions specified in the Order. The specified probation conditions include: (1) undergoing an evaluation by the Center for Personalized Education; (2) completing a 2-day course on medical ethics and a 3-day course of medical recordkeeping; and (3) obtaining practice monitoring for five years.[11] During the practice monitoring, at least ten percent of all Respondent's patient medical files must be reviewed each month and Respondent must receive training in the treatment of chronic or intractable pain. The practice monitor must also provide the Medical Board with reports every three months that include Respondent's: (1) compliance with the practice monitor's recommendations; (2) completion of education programs; (3) prescribing practices; (4) medical recordkeeping; and (5) treatment of chronic or intractable pain.

Stipulation K: Missing pages from the medical chart of Patient RW[12] contained in Respondent's Exhibit 32 were not available to the Government's medical expert witness, through no fault of his own, at the time of his review of the medical file and preparation of his report.

Stipulation L: Respondent's Exhibit 2 reflects an interview conducted of Patient RF by Carl Christiansen, a private investigator employed by the Respondent. The interview was conducted on a date between February 2009 and January 2010. Neither party warrants the veracity of RF's statements.

[7] Early during prehearing proceedings, the Government indicated that it did not intend to prove up acts set forth in the indictments or arrest warrants beyond the acts that were the subject of the misdemeanor plea disposition. *See* Stipulation F. Thus, although these criminal charges are the subject of a stipulation, and the procedural posture of the criminal case factored into the circumstances surrounding the Respondent's COR surrender, *see* Stipulation D, the underlying criminal allegations have played no role in this recommended decision and must play no role in the ultimate disposition of the pending application. *See Paul Weir Battershell, N.P.,* 76 Fed. Reg. 44359, 44364 n.17 (2011) (concluding that an indictment is an instrument containing accusations, not proof of the Respondent's actions).

[8] *See supra* note 7.

[9] *See supra* note 7.

[10] *See North Carolina v. Alford,* 400 U.S. 25 (1970).

[11] During the April 12, 2011 Prehearing Conference, the Respondent, through counsel, represented that because she has not been practicing medicine since the conviction, she has not been monitored.

[12] Pursuant to a Protective Order issued in this case on March 21, 2011, initials have been substituted for the names of patients. ALJ Ex. 9.

The Evidence

At the hearing conducted in this matter, the Government presented the testimony of: (1) a former state prosecutor and local police officer familiar with the criminal cases that comprise the genesis of the administrative investigation of the COR application that the Respondent filed in this case; (2) two diversion investigators relative to the investigation of the pending application; and (3) and an expert witness who reviewed selected patient charts from the Respondent's practice and provided expert opinions regarding the Respondent's prescribing practices.

In addition to presenting her case through her own testimony, the Respondent called her own expert witness.

The Kentucky Criminal Investigation and Conviction

The Government presented the testimony of Deputy John Teagle. At all times relevant to this case, Deputy Teagle was a narcotics detective at the Harlan County, Kentucky Sheriff's Department. Tr. 409. Deputy Teagle testified that the investigation that culminated ultimately in the Respondent's conviction commenced when law enforcement personnel noticed that controlled substance prescription bottles discovered during drug raids were issued by the Respondent's (then) partner at Tennessee Professional Associates (TPA), Dr. V. Vilvarajah. Tr. 410. While Teagle's testimony was sufficiently detailed, internally consistent, and plausible to be regarded as credible for these proceedings, this brief summary of its content circumscribes completely the entire boundaries of its acceptable use in these proceedings.

The Government elicited testimony from Deputy Teagle regarding an interview [13] he conducted with TE, a former patient at TPA.[14] A timely (and ultimately well-founded) objection was interposed by the Respondent's counsel in resistance to the Government's efforts to present this evidence in this manner. Tr. 412–14. While it is true that the evidence regarding Teagle's interview was received into the record as not patently inadmissible, that is a separate issue from the weight that can correctly be afforded to it. To be sure, hearsay testimony (as well as other forms of hearsay) is admissible evidence in administrative proceedings. *Richardson v. Perales,* 402 U.S. 389, 402 (1971) (signed reports prepared by licensed physicians admitted correctly at Social Security disability hearing); *Keller v. Sullivan,* 928 F.2d 227, 230 (7th Cir. 1991) (insurance company investigative reports admitted correctly in Social Security disability hearing where sufficient indicia of reliability established); *Calhoun v. Bailar,* 626 F.2d 145, 149 (9th Cir. 1980) (hearsay affidavits admitted correctly where indicia of reliability established). However, the weight afforded such testimony and, *a fortiori,* whether that testimony constitutes substantial evidence is an entirely different matter. As succinctly stated by the Eleventh Circuit:

> Although the rules of evidence are not strictly applied in administrative hearings, there are due process limits on the extent to which an adverse administrative determination may be based on hearsay evidence. As was held in *U.S. Pipe and Foundry Company v. Webb,* ''hearsay may constitute substantial evidence in administrative proceedings as long as the factors that assure the 'underlying reliability and probative value' of the evidence are present.'' 595 F.2d 264, 270 (5th Cir. 1979).

Basco v. Machin, 514 F.3d 1177, 1182 (11th Cir. 2008). Thus, the utility of hearsay evidence before an administrative tribunal is limited by its reliability and probative value. Divining the correct use of hearsay evidence requires a balancing of four factors: (1) whether the out-of-court declarant was not biased and had no interest in the outcome of the case; (2) whether the opposing party could have obtained the information contained in the hearsay before the hearing and could have subpoenaed the declarant; (3) whether the information was inconsistent on its face; and (4) whether the information has been recognized by the courts as inherently reliable. *Id.* at 1182; *J.A.M. Builders v. Herman,* 233 F.3d 1350, 1354 (11th Cir. 2000).

Applying the *J.A.M. Builders* factors to this testimony, while true enough that the Respondent arguably could have secured TE's live testimony through process, the Government (the proponent of the evidence) has presented no predicate upon which a reasonable finding could be made that would justify consideration of this evidence in support of a finding of substantial evidence. Although there is no direct evidence of bias and TE was not then under investigation, the interview took place in a law enforcement setting where Teagle had suspicions that TE may have been dealing drugs. Tr. 416–17. There was insufficient other evidence to determine whether the information provided in the TE interview was consistent on its face, and not only has this form of information never been recognized by the courts as inherently reliable, but TE admitted that his memory of events during that time is less than stellar, or in his words, ''my mind's erased where I was on that junk.'' Without the live testimony of TE, there would not be a way to test meaningfully TE's residual memory capacity. The Government elected to offer TE's statements as hearsay at its own peril, and such testimony cannot be used to support a finding of substantial evidence in these proceedings.

The Government also presented the testimony of Sherif Guindi, Esq., a former Assistant Commonwealth Attorney (ACA) for the county of Harlan, Kentucky. Tr. 345, 399. Like Teagle, Guindi recalled that the attention of law enforcement was drawn to TPA because law enforcement officials had discovered prescription bottles authorized by the Respondent and her partner at the scene of narcotic enforcement activities (such as arrests, seizures, stings, and searches). Tr. 355. Mr. Guindi was involved in prosecuting the Respondent and negotiated, at least in part, her plea bargain. Tr. 345, 373–75, 379. Guindi, whose testimony was sufficiently detailed, consistent, and plausible to be credited, provided some level of background regarding the Respondent's procedural odyssey through the Harlan County state criminal case. Tr. 345–46, 371–81. As part of the plea agreement, the Respondent agreed to forfeit $250,000 that she had posted to secure her release on bond,[15] and she *donated* $250,000 to the Harlan Fiscal Court for use in drug eradication, rehabilitation, or prevention.[16] Tr. 345–46, 371–75; *see also* Stipulations B–C, E–G.

Not unlike its presentation of Deputy Teagle's testimony, the Government elicited information from former ACA Guindi relative to interviews that he

[13] A transcript of this interview, which had been taped by Teagle, was received into evidence. *See* Gov't Ex. 20.

[14] The sum and substance of TE's statement to Teagle portrayed him as an addict who successfully procured controlled substance prescriptions from the Respondent and her partner at TPA for no legitimate reason. Tr. 413–14; Gov't Ex. 20.

[15] This sum represented, at least in the state's theory, ill-gotten gains (85% of which went to the Harlan County Sheriff's Department, 15% of which went to the Harlan County Commonwealth Attorney's Office).

[16] The circumstances surrounding the Respondent's Harlan County guilty plea, including the Respondent's discomfiture regarding the propriety of the forfeitures, are well beyond the jurisdiction of this forum, have played no part in this recommended decision, and can play no part in the Agency decision in this matter.

conducted of AW [17] and TG,[18] who, like TE, were purportedly former patients of TPA while the Respondent was a partner there. An affidavit executed by AW was offered by the Government and received into evidence.[19] Gov't Ex. 17; Tr. 364–67. The Respondent, through counsel, registered timely, cogent (ultimately well-founded) objections to the Government's approach in this regard. Tr. 347, 360, 362–64, 367.

An application of the *J.A.M. Builders* factors to the interviews of AW and TG militate against affording it weight. Although the Respondent's counsel conceded that he neither made an attempt to subpoena AW, nor expended efforts to discover whether she still remained in jail, Tr. 347–48, (and while not on the record, the same circumstance may be assumed as true with regard to TG), each of the remaining factors favor exclusion of the evidence regarding Guindi's interviews. Regarding AW's possible bias, the transcript reveals that at the time of the interview AW was serving prison time after flunking a drug diversion rehabilitation program. Tr. 351–52. On the issue of whether AW could have been influenced by a desire to reduce her criminal liability based on her cooperation, Mr. Guindi was not particularly helpful. Guindi testified that he did not think AW was in a position to be placed back into the (rehab) program that she had washed out of, but that he did not know whether cooperation was a condition of the pretrial agreement that resulted in her diversion to Drug Court.[20] Tr. 353–54, 356. It is, likewise, not insignificant that during her interview, AW volunteered that she was inflicted with a back issue that conceivably could have justified the proper utilization of pain medications. Tr. 357.

No foundation was laid by the Government regarding the absence of bias from AW or TG. The information provided in the interviews could not be tested for consistency because such testimony was not corroborated by other evidence of record. Furthermore, there is no case law or other authority recognizing this variety of evidence as inherently reliable. Simply put, the Government, as the proponent of the evidence, did not lay a foundation sufficient to permit consideration of the AW/TG interviews to support substantial evidence, or even sufficient for this tribunal to make findings relevant to the issue that could be defended at any level of appeal. AW acknowledged her intoxication during the events that were the subject of the interview, and presented in this third-hand fashion, there is no way that her recollection could be meaningfully explored. TG, who at the tail end of his interview acknowledged that he saw the Respondent ninety percent of the time, overwhelmingly used the pronoun ''he'' throughout the transcript to describe the physician who treated him at TPA, referring to the Respondent's partner, Dr. Vilvarajah. Gov't Ex. 21 at 17. Regarding his state of mind during the events that he was recounting, TG revealed that ''[a]ll you think about is the medicine, you know, where your next little bit's going to come from.'' Gov't Ex. 21 at 17–18. As discussed, *supra,* the Government opted to elicit this information in this fashion rather than to produce the witnesses at the hearing or at least lay an adequate foundation for the meaningful reception of their testimony, and made this election at its own peril. Without more of a foundation, such as a way to gauge their degree of bias, potential interest, or the consistency of their recollections,[21] the reliability of the testimony regarding the AW/TG interviews falls short of a level where they can be considered gainfully, or contribute to a determination supported by substantial evidence.

Consistent with Mr. Guindi's testimony (as well as mutually-stipulated facts), the Government submitted into evidence documents reflecting the transactions of the Respondent's conviction and sentencing in Harlan County, Kentucky. Among the documents was the Commonwealth's Offer on a Plea of Guilty, which indicated that Count I of the indictment for engaging in organized crime, a felony, was amended to facilitation to trafficking in a controlled substance, a misdemeanor. Gov't Ex. 7 at 1; *see* Stipulation B. The state's offer of a reduced charge was conditioned on the Respondent's agreement to refrain from prescribing any medications to residents of Harlan County, and was based, at least in part, on the Respondent's having excluded at least 251 patients from her pain management practice for ''misusing prescription drugs,'' and the state's conclusion that the Respondent was ''instrumental'' in prosecuting 16 patients for ''misusing printed prescription pads and forging signatures.'' Gov't Ex. 7 at 2. The recommended sentence part of the plea offer, which was ultimately ratified by the state district court,[22] proposed that the court dismiss Counts II through V; that the court dismiss the subsequent indictment for wanton murder, *see* Stipulation E; [23] that the Respondent receive eleven months imprisonment in the county jail, probated to four months; and that the Respondent forfeit $500,000 [24] to the state. Gov't Ex. 7 at 2. The Government also introduced into evidence the Order of Probation, dated January 11, 2010, pursuant to the plea agreement and conviction, that ordered, *inter alia,* the unsupervised probation of the Respondent and the proscription from prescribing controlled substances

[17] In the transcript prepared in connection with her statements to Mr. Guindi, it was clear that at the time she made her statements to him, AW was incarcerated based on charges related to the investigation of TPA. Gov't Ex. 19 at 1. AW admitted that she was addicted to drugs during the time she was being seen at TPA and ''was under the influence most of the time [she] was in [at the practice].'' *Id.* at 6. AW's interview provided information that, if credited, could arguably have established that the Respondent knew or should have known that AW always had fresh needle marks on her arms from intravenously injecting her pain medications before office visits, had prior scarring from same, and wore sleeveless shirts during warm weather so that these obvious signs of drug abuse were clearly displayed. Furthermore, her interview also could have supported the proposition that AW was not physically examined by the Respondent prior to receiving controlled substance prescriptions, and that she was never questioned by the Respondent about selling her controlled prescriptions or her reasons for travelling such a long distance each month for medical care. Additionally, the interview results would have arguably shown that AW recognized other patients at TPA as residents of her home town in Harlan County, and that some of her neighbors/fellow patients exhibited signs and behaviors of intoxication that also should have been apparent to the Respondent and other TPA staff. Tr. 358–60, 364, 385; Gov't Ex. 19.

[18] If credited, TG's interview could have provided evidence that he and other Harlan County residents travelled a long distance together to obtain controlled substances from the Respondent to abuse or sell back in Harlan, that the Respondent prescribed controlled substances to TG for three years, that she increased his dosage at least once for no reason, and that the practice habits at TPA allowed TG to abuse the controlled substances that he obtained there. Tr. 368–71.

[19] The affidavit was generated by the prosecution in the state criminal case in opposition to a defense motion to dismiss. Tr. 378–83

[20] Although Mr. Guindi represented that this sort of information was easily obtainable at the time through his mobile smart phone or by quick telephone request made to the Harlan County Clerk's Office to fax over AW's plea sheet, neither the Government nor the Respondent entreated him to make such an inquiry. Tr. 354, 356–57.

[21] Further confounding the usefulness of AW's statements, Guindi testified that AW told him that she was impaired by the effects of the narcotic pain drugs most of the time that she visited the Respondent's practice and that the drugs interfered with her recollection abilities. Tr. 384–85. The same was reflected in the transcript of AW's interview. Gov't Ex. 19 at 6.

[22] Gov't Ex. 10 (Judgment and Sentence on Plea of Guilty); *see* Gov't Ex. 9 (Guilty Plea).

[23] The indictment was ordered dismissed by the Harlan Circuit Court on February 2, 2010. Gov't Ex. 12.

[24] Half of the $500,000 sum was forfeited to the state as illegal drug trafficking proceeds, and the remaining half was donated to the Harlan Fiscal Court for use in youth activities and facilities aimed at preventing drug abuse. Gov't Ex. 10 at 5.

to residents of Harlan County. Gov't Ex. 11 at 2.

During her testimony at her DEA administrative hearing, the Respondent made it clear that even though she entered a guilty plea on the criminal charge, she has always maintained, and still does unwaveringly maintain, her innocence on the charges, and believes her acts were ''unintentional.'' Tr. 922–24, 1038; *see also* Stipulation F.

State Medical Board Proceedings

The evidence of record unequivocally establishes that the Tennessee Medical Board adjudicated a disciplinary case based on the Respondent's Kentucky state court criminal conviction. Following an initial summary suspension effected on January 29, 2010, a hearing was conducted by the Board. A final order issued by the Board on March 22, 2010, acknowledged the Respondent's state court misdemeanor conviction for facilitation to trafficking in a controlled substance in the first degree, but afforded her the benefit of retaining her medical privileges, subject to several conditions.[25] Gov't Exs. 14, 15; Stipulations I, J.

The Respondent's Prescribing Practices

The Government's investigation regarding the COR application [26] at the center of these administrative proceedings was presented primarily through the testimony of Rhonda Phillips and James Stevens, DEA Diversion Investigators (DIs) stationed in Nashville, Tennessee.

The Diversion Investigators

Notwithstanding the parties' stipulations regarding the procedural milestones associated with the Respondent's state criminal case, DI Phillips, a veteran of over twenty-three years as a DI, outlined numerous court-related documents associated with the misdemeanor conviction. Gov't Exs. 3–7, 9–12; Resp't Ex. 31. DI Phillips also testified that the Respondent surrendered a previous COR [27] through the execution of a Form DEA–104 (Form 104) signed by the Respondent and conveyed to Phillips by facsimile through her counsel. Tr. 672–74; Gov't Ex. 13. DI Phillips recalled that she prepared the surrender form upon telephonic consultation with the Respondent's counsel, explained that the surrender would be designated as ''for cause,'' and received an executed facsimile copy the same day. Tr. 672–74. Above the Respondent's signature, the Form 104 has a checked box adjacent to boilerplate language in the form reading, in pertinent part:

> In view of my alleged failure to comply with the Federal requirements pertaining to controlled substances, and as an indication of my good faith in desiring to remedy any incorrect or unlawful practices on my part[,] I hereby voluntarily surrender my [COR], unused order forms, and all my controlled substances . . . as evidence of my agreement to relinquish my privilege to handle controlled substances . . . . Further, I agree and consent that this document shall be authority for the Administrator of the Drug Enforcement Administration to terminate and revoke my registration without an order to show cause, a hearing, or any other proceedings . . . .

Gov't Ex. 13. Immediately above the afore-quoted standard surrender language appear the words: ''I am surrendering this privilege only as a condition of bond, and I am not making any admissions as to any wrongdoing.'' *Id.* The Respondent's counsel and Phillips had discussions surrounding the execution of the Form 104 wherein the former explained to the latter that the Respondent needed to effect a COR surrender as a condition of her bond release on the state criminal court matter. Tr. 810–11. Phillips explained unequivocally that a new application and administrative show cause process must precede the Respondent's reacquisition of her registration privileges. Tr. 811–12

DI Phillips also testified that, as part of her investigation into the current application, she obtained [28] and reviewed some charts from TPA [29] that were identified to her as relating to the Respondent's patients from the custody of the Tennessee Medical Board's Office of General Counsel (OGC),[30] and three additional charts [31] from the Harlan County, Kentucky Commonwealth's Attorney's Office (KCA). Tr. 688–94, 700. Ten files from the universe of files retrieved from OGC [32] and KCA were selected at random and provided to a medical consultant, Dr. Stephen Loyd, M.D., for analysis. Tr. 825.

Additionally, over a well-reasoned, timely objection interposed by the Respondent's counsel, Tr. 793–99, DI Phillips testified concerning her interview of CM,[33] a former patient of TPA that was treated by the Respondent,[34] Tr. 799–808. Applying the *J.A.M. Builders* [35] factors to this evidence, CM's hearsay statements, conveyed through DI Phillips, cannot be considered for any purpose in these proceedings. While the Respondent's counsel arguably could have subpoenaed the witness, the Government has tendered no information as to how lack of bias could be assessed or how to gauge the consistency of the information, and this is not the type of information that has been recognized by the courts as inherently reliable. Thus, DI Phillips' account of CM's statements have not been considered for any purpose in this recommended decision and should not be used in support of any finding in the adjudication of the present application.

DI Stevens testified that while he has been a DI for approximately three years, he is also a retired police lieutenant with over thirty years of experience, twenty-four of which were spent assigned to cases involving narcotics, pharmaceutical drugs, and illegal

[25] The specified probation conditions include: (1) undergoing an evaluation by the Center for Personalized Education; (2) completing a two-day course on medical ethics and a three-day course of medical recordkeeping; and (3) obtaining practice monitoring for five years. During the practice monitoring, at least ten percent of all Respondent's patient medical files must be reviewed each month and Respondent must receive training in the treatment of chronic or intractable pain. The practice monitor must also provide the Medical Board with reports every three months that include the Respondent's: (1) compliance with the practice monitor's recommendations; (2) completion of education programs; (3) prescribing practices; (4) medical recordkeeping; and (5) treatment of chronic or intractable pain. Stipulation J.

[26] A copy of the current application, which was submitted online, was received into evidence. *See* Gov't Ex. 2.

[27] A copy of the Respondent's prior COR was received into the record. *See* Gov't Ex. 1.

[28] Phillips utilized an administrative subpoena to acquire the patient charts. Tr. 424.

[29] Phillips credibly testified that, through differences in handwriting, she was able to distinguish the Respondent's notes from those of her partner at TPA, Dr. Vilvarajah. Tr. 704–05. The Respondent, who heard DI Phillips' testimony in which she distinguished the Respondent's hand from Dr. Vilvarajah's, testified that Phillips' interpretations were accurate. Tr. 982–83.

[30] According to DI Phillips, all but two of the charts selected bore a certification of accuracy from the Respondent. Tr. 690–92, 826–28.

[31] Gov't Exs. 26, 45, 51.

[32] DI Stevens testified that while two boxes of charts were retrieved from OGC, the two DIs reviewed only one box of charts, and that one box was chosen at whim. Tr. 514–15.

[33] DI Phillips testified that the interview was not recorded by video or audiotape. Tr. 831. However, Phillips testified that she did prepare written notes regarding the interview, and at the hearing the Government acquiesced to a request made by Respondent's counsel for access to those notes. Tr. 833.

[34] Had CM's statements to Phillips been deemed sufficiently reliable to have been considered, they would have indicated that she was treated by TPA for four years, and that the Respondent and Dr. Vilvarajah did not take her off controlled substances even after she informed them that she was pregnant. Tr. 802–07. Ironically, in light of the fact that neither of the two experts who testified at the hearing was asked to render an opinion on the relative merits of prescribing controlled substances to pregnant patients (or continuing to do so), on the present record, the usefulness of CM's statements to Phillips regarding this issue (even if they had been sufficiently reliable to be considered) would have been dubious.

[35] 233 F.3d 1350, 1354 (2000).

controlled substances. Tr. 418–19. Like DI Phillips, Stevens testified to reviewing patient charts in connection with the Respondent's case to detect indicators of abuse or diversion.[36] Tr. 421. The testimonies presented by DI Stevens and DI Phillips were sufficiently detailed, consistent, and plausible to be deemed credible in these proceedings.

The Government's Expert

The Government presented testimony from, and a written report[37] prepared by, Dr. Stephen Loyd, M.D.[38] Dr. Loyd testified that: (1) he holds a board certification in general internal medicine; (2) he serves as the Associate Chief of Staff for Education at the Veterans Affairs Medical Center (VAMC) in Johnson City, Tennessee; and (3) he is an associate professor of internal medicine at the James H. Quillen College of Medicine at East Tennessee State University.[39] Tr. 11, 13. Dr. Loyd testified that he practices medicine at VAMC in both in-patient and out-patient capacities, teaches medical school courses at all levels, trains medical residents, and has been recognized as an expert in other litigation forums. Tr. 14–16, 231–32. He testified that although he handles chronic pain patients, those cases comprise less than ten percent of his patient-base.[40] Tr. 16. Without objection, Dr. Loyd was received as an expert in the field of internal medicine with an emphasis on proper controlled substance prescribing practices.[41] Tr. 14–16.

Dr. Loyd testified that, when treating patients afflicted with chronic pain, physicians follow a protocol, the first step of which is to identify the chief complaint, or in other words, the patient's own understanding of why they are seeking medical intervention. Tr. 17–19. The second step of the protocol is to ascertain the patient's history regarding the genesis of the chief complaint. Tr. 19–20. A differential diagnosis, that is a list of possible etiologies for the pain symptom(s), comes next, with a review of bodily systems and physical examination, followed by an assessment and treatment plan prepared based on the information acquired by the foregoing process. Tr. 20–24. According to Dr. Loyd, the nature and extent of the physical exam can be affected by the nature of the chief complaint and can be of a more limited nature on subsequent visits. Tr. 23–24.

According to Dr. Loyd, in treating chronic pain, consistent with the guidance set forth in the Pain Control Ladder (PCL) developed by the World Health Organization (WHO), he commences chronic pain treatment with the least addictive medication, which is generally a non-controlled, non-steroidal, anti-inflammatory drug (NSAID). Tr. 25–28. If that level of medication has not proven effective, Dr. Loyd testified that he would ''take it up a notch'' to the second rung of the PCL, a low-potency opioid analgesic, reserving ''the very powerful narcotics, such as oxycodone, OxyContin, [or] Duragesic'' for ''severe chronic pain.'' Tr. 27.

Dr. Loyd also testified that a physician prescribing controlled substances has an obligation to probe for signs of patient addiction, and that this is a process that normally commences with questions deployed while eliciting the patient's history and are designed to flesh out areas of potential concern. Tr. 28–31. Dr. Loyd opined that the questioning becomes more in depth when he is treating a chronic pain case where the utilization of controlled-substance medication may be of longer duration, and that there are identifiable ''red flags'' of diversion risk that a treating physician should look for. Tr. 31.

A ''crescendo pattern of drug use,'' defined in his testimony as an increase ''in the frequency and strength of the drug over time,'' is a phenomenon that Loyd identified as a diversion red flag. Tr. 31–32. Dramatic, overstated, but vague pain complaints, as well as a patient seeking a specific medication by name[42] are other red flags described by Dr. Loyd. Tr. 33–34. Likewise, patient reports of lost or stolen prescriptions and early requests for refills were also characterized by Loyd as red flags, Tr. 49, as was evidence that a patient has declined to avail himself of treatment recommendations that are not related to controlled substances (e.g., a patient who ignores a recommendation to obtain an MRI or participate in physical therapy), Tr. 59–60. In Dr. Loyd's opinion, monitoring to ensure that patients are not procuring controlled substances from multiple physicians and/or pharmacies, or as Dr. Loyd characterized it, ''doctor shopping'' and ''pharmacy shopping,'' is also an important feature of controlled substance prescribing. Tr. 35–36. In that regard, Dr. Loyd testified that Tennessee has had an online prescription monitoring program available for practitioner query since 2008. Tr. 49.

Dr. Loyd testified that the practice of directing random urine drug screens (UDS) is a tool that should be utilized when prescribing controlled substances. Tr. 34–35. According to Loyd, through the use of UDSs, practitioners can evaluate whether pain patients are taking the medication that has been prescribed to them, which serves the dual purposes of assisting the physician in determining how effective a given drug regimen is in addressing pain symptoms and monitoring for diversion. Tr. 35. Patients who screen positive for illicit substances were described by Dr. Loyd as ''very much at risk for suffering from addiction'' and need careful monitoring. Tr. 36. Dr. Loyd testified that although a physician could prescribe to a patient who initially presents with positive UDS results for illicit substances (e.g., marijuana or cocaine), evidence of continued use would be grounds to discontinue controlled substance pain medication. *Id.* Dr. Loyd testified that he would be reluctant to prescribe a controlled substance before receiving results from an initial UDS administered to a patient upon intake, but that he would possibly go ahead and issue controlled substances in a case where a patient presented with a cancer diagnosis. Tr. 37.

Loyd testified that, in his opinion, the accepted medical practice is always to address a UDS anomaly with what he characterized as a ''confrontation'' with the patient to investigate the basis. Tr. 42–44. While Dr. Loyd agreed that a single UDS anomaly was not universally a reason to summarily discharge a patient from his practice, even a single

[36] Stevens credibly testified that, through differences in handwriting, he was able to distinguish the Respondent's notes from those of her partner at TPA, Dr. Vilvarajah. Tr. 428. The Respondent confirmed that DI Stevens' interpretations were able. Tr. 982–83.

[37] Dr. Loyd's written report was received into evidence. *See* Gov't Ex. 57.

[38] Dr. Loyd testified that the Government was compensating him at a rate of $300.00 per hour for his expertise and testimony. Tr. 232.

[39] Dr. Loyd testified that his duties include both direct patient care and teaching responsibilities. Tr. 218–19, 223–24.

[40] Interestingly, although Dr. Loyd testified that while he treats chronic pain patients, his practice group also refers patients requiring more specialized care out to a medical group that specializes in pain management. Tr. 220–23. In response to a question seeking clarification about his qualifications, Dr. Loyd stated ''If you're talking about the medical specialty of pain management, no, I did not practice that. Did I take care of pain patients? Absolutely.'' Tr. 221.

[41] Dr. Loyd's CV was received into evidence. *See* Gov't Ex. 55.

[42] Dr. Loyd acknowledged that his utilization of this phenomenon as a red flag is tempered by the reality that some patients, through experience, can legitimately apprise a treating physician regarding the success of particular medications used in the past in a way that can appropriately inform the doctor's prescribing decisions. Tr. 253.

inconsistent UDS requires exploration of the issue. Tr. 251. In describing the standards at his own practice, Dr. Loyd stated that ''at the very least, when you had [a UDS] that was inconsistent, you would investigate.'' *Id.* Thus, a suspicious UDS requires a patient confrontation. Furthermore, such a confrontation and its results must be documented in the patient chart. Dr. Loyd put it this way:

> *If you didn't document it, you didn't do it. That's the standard.* So I may have had a long discussion with my patient and [he] may have told me [he] didn't take [his] medication because [he was] hospitalized and [he] didn't take it for two weeks while [he was] on a ventilator. Very well may have been the case. *If I didn't document it in my chart, then it didn't happen. That is the standard.*

Tr. 44 (emphasis supplied); *see also id.* at 50.

Interestingly, Dr. Loyd testified that he is unaware of any recognized standard regarding the frequency with which UDSs should be administered, but in his practice, he directs one at intake, and another upon his perception of a red flag that emerges during the course of treatment. Tr. 48–49.

Dr. Loyd's presentation regarding the accepted standard set within the state of Tennessee for controlled substance prescribing was not without rough spots. The witness initially indicated that there was no acceptable medical practice within the state that he knew of that would provide guidance on how to handle a UDS anomaly. Tr. 39–40. He then retreated from this (otherwise seemingly unequivocal) position by indicating that there was an ''[a]ccepted medical practice,'' for that issue and others, as described above. Tr. 42. Loyd also acknowledged that he was not aware of any state standard for the definition of chronic pain, Tr. 17, 319–20, and conceded that he was unaware that any standards for prescribing within the state were memorialized in any formal way, Tr. 28. As discussed in some detail, *infra,* there is guidance in Tennessee regarding the utilization and monitoring of pain medication that the Government's expert was unaware of and woefully unprepared to address. In a similar vein, Dr. Loyd conceded that he had no familiarity with the Federation of State Medical Boards' *Model Policy for the Use of Controlled Substances for the Treatment of Pain,* 2004 (*Model Policy*), a widely recognized guidance tool utilized by physicians and legislatures nationwide. Tr. 137.

It was also interesting that Dr. Loyd did not outline pain management standards existent within the state of Tennessee, but instead styled the parameters of his critical analysis as ''accepted medical practice'' that he learned ''in [his] training.'' Tr. 42. While undoubtedly true that there is an established requirement in legal precedent to tailor analysis of medical practice to standards existent within a state law, *Volkman v. DEA,* 567 F.3d 215, 223 (6th Cir. 2009) (citing *Gonzales v. Oregon,* 546 U.S. 243, 272, 274 (2006)), the Agency has recently accepted the propriety of ''measur[ing] the usual course of professional practice under [the CSA and the regulations] with reference to generally recognized and accepted medical practices.'' *Jacobo Dreszer, M.D.,* 76 Fed. Reg. 19386 (2011) (quoting *United States v. Smith,* 573 F.3d 639, 647–48 (8th Cir. 2009) (internal quotation marks omitted) (citing *United States v. Merrill,* 513 F.3d 1293, 1306 (11th Cir. 2008)).

A written report of sorts that was prepared by Dr. Loyd in connection with his review of selected patient charts from the Respondent's practice was also received into evidence. Gov't Ex. 57. As a preliminary matter, it is worthy of note that the format of Dr. Loyd's report was confusing and singularly unhelpful. While a critical objective of securing expert assistance is to aid the trier of fact in analyzing and processing material beyond the ken of the ordinary citizen, Dr. Loyd's report is untitled, unsigned, disorganized, unfocused, and written in a manner that bespeaks a free association narration of documents and other items provided to him by the Government in no particular order. A principal reason for the difficulty in the structure (or lack of it) employed by the report undoubtedly comes from the manner of its genesis. During his testimony, Dr. Loyd explained that the document that was characterized as his ''report'' was actually a collection of patient chart review summaries that he provided to the lead diversion investigator (DI) on the case ''to see what [DEA] thought of my work.'' Tr. 53–54. Loyd acknowledged that clerical mistakes are present in the report, owing in his estimation, to his own limited typing skills and misunderstanding of the purpose to which the pages he provided to DEA would be utilized. *Id.* Although undoubtedly true that enhanced communication between expert and proponent could likely have yielded a more refined written product, the submitted pages demonstrated a significant level of analysis regarding the reviewed patient charts.

Its weaknesses notwithstanding, Dr. Loyd's overall presentation as an expert was sufficiently clear, cogent, and well-reasoned to be relied upon in this recommended decision.

The Respondent's Expert

The Respondent presented the testimony of Dr. Thomas Miller, M.D.,[43] a board-certified anesthesiologist who is also a diplomate of the American Academy of Pain Management.[44] Tr. 541–41. Dr. Miller, who specializes in pain management and has practiced in that area since 1978, was accepted without objection as an expert in the fields of anesthesiology and pain management. Tr. 543.

While, in contrast to Dr. Loyd, Dr. Miller expressed some level of awareness that the Federation of State Medical Boards had adopted a *Model Policy,* he like Dr. Loyd, had no awareness of any pain medication guidance set forth in state statutes. Tr. 591. In some contrast to Dr. Loyd, however, Dr. Miller testified that pain management is the principal focus of his practice. Tr. 544–46. In the course of his testimony, Dr. Miller outlined the steps ordinarily taken regarding chronic pain patient care at intake. During the intake process, Dr. Miller, who does not accept walk-in patients, has each new patient complete pain symptom forms, directs that the patient bring in any current medication(s), explains the parameters and significance of the pain medication contract between doctor and patient, takes vital signs, directs a UDS, conducts a full physical examination, and outlines a treatment plan. Tr. 545–48. Regarding the appropriate use of an intake UDS report that reflects the presence of illicit drugs, Dr. Miller indicated that while he would not automatically refuse to treat every patient who registers positive for illegal drugs, there would be much discussion with such a patient on the issue and that he would schedule an additional urinalysis and explain to the prospective patient that he or she must be clean from illicit drugs prior to treatment. Tr. 549–52. According to Miller, ''[T]here's a lot of interaction going on with that patient, but *I simply don't write controlled substances for somebody who has an illicit substance in their urine.''* Tr. 552 (emphasis supplied). When pressed on the issue later in his testimony, Dr. Miller was emphatic that he would not continue to treat a patient who demonstrated illicit drug use on more than one occasion, and indicated that doing so would be

[43] Dr. Miller testified that he was being compensated by the Respondent at a rate of $500 per hour for his expertise and testimony. Tr. 544.

[44] Dr. Miller's CV was received in evidence. *See* Resp't Ex. 30.

problematic. Tr. 613–14. Dr. Miller testified that he believes that he tests for drugs more often than other pain management specialists because, in his words, ''I'm very, very keyed in on trying to identify diverters.'' Tr. 556. It is Dr. Miller's practice to inquire of the last time the patient took a dose of his or her prescribed medication prior to the administration of a UDS. Tr. 563. Inasmuch as Dr. Miller is aware of the expected length of time medications will remain in the body and the patient has advised him of the most recent dose taken, there is little room for ambiguity in this evolution regarding the implications of his patients' UDS results. Tr. 563. When a UDS report in Dr. Miller's practice reflects the absence of a controlled substance that his pre-test conversation reveals should have been in the patient's system, his reaction is unequivocal; he stated: ''[T]hat's a drug diverter, and I will then alert law enforcement.'' *Id.* Miller also explained that where a patient takes medicine in a way that is inconsistent with the terms of the pain medication contract (even with an excuse), that patient is directly told that such a deviation will not be tolerated in the future. Tr. 566. Dr. Miller also endorsed the importance of documenting UDS results, stating as unequivocally as Dr. Loyd, that ''*if there's no documentation, then I assume it wasn't done.''* Tr. 593 (emphasis supplied). Furthermore, according to Dr. Miller, ''[i]gnoring [UDS] results would be a problem.'' Tr. 616. Much as the two experts agreed on the issue of the importance of documentation, Miller's testimony concerning the handling of a UDS anomaly revealed a consonant viewpoint with that of Dr. Loyd. While not referring to the evolution as a ''confrontation,'' Dr. Miller indicated that upon a UDS irregularity, he would invariably discuss the discrepancy with the patient and document the results of that discussion. Tr. 623–25.

Dr. Miller also testified that, in his practice, reviewing a new patient's prior medical records is a condition precedent to rendering opioid pain management treatment, and that he has insisted on the expeditious acquisition of such records even where the patient's former doctor is hundreds of miles away. Tr. 587–88. Miller observed that, although the charts he reviewed for the Respondent reflected that while the pain management contracts employed at TPA included a provision requiring that past medical records be obtained, ''they just didn't follow through with it all the time.'' Tr. 588. Miller was clear in stating that he would not rely only on the word of his patient regarding the pain medications and dosages prescribed by former physicians. Tr. 604.

Dr. Miller testified that, at the Respondent's request, he reviewed and evaluated thirty-two of her patient files that were provided to DEA through the Tennessee Medical Board and the Commonwealth's Attorney's Office.[45] Tr. 567–70. In that regard, Miller testified that in his expert opinion there were both positive and negative features about the Respondent's patient files. Tr. 570. On the positive side, the records reflected histories and physical examinations on intake, as well as indicators that UDS testing was being performed at the practice. Tr. 571. On the negative side, when asked about the presence of prior medical records and imaging reports, Miller could say only that these were ''sometimes'' present in the charts. *Id.* Dr. Miller indicated that the type of UDS that TPA employed to test for opiates did not measure the presence of oxycodone. Tr. 575–76. Additionally, Miller faulted the Respondent's practice for unevenness in obtaining referral information from the patients, and for ''poor documentation'' on follow up visits regarding areas such as activities of daily living and aberrant behavior with respect to medication compliance. Tr. 576–78. Furthermore, Dr. Miller criticized the Respondent's practice regarding how well the doctors and staff followed up on diversion red flags once they were enountered. Miller put it this way:

> Sometimes they had a problem that they recognized some substance abuser or that a person had a substance abuse problem, and they recognized that they needed to send [the patient] to rehab, but there's no evidence that the patient actually went to rehab, and they continued prescribing.

Tr. 578.

Based upon his review of the Respondent's patient charts, Dr. Miller also concluded that that one or two patients among those he analyzed were prescribed methadone and OxyContin together, a combination of medications that in Miller's view is unwise. Tr. 584–85, 610–11.

However, Dr. Miller was also of the view that the deficiencies that the Respondent demonstrated regarding her pain management practice were correctable with proper training. Tr. 579–80. Although Dr. Miller testified that the Respondent advised him that she no longer intended to practice pain management,[46] he also testified that the Respondent visited him for two days at his office and they spent that time reviewing correct controlled medication prescribing practices and monitoring. Tr. 581–83. Miller indicated his willingness to serve as a ''practice monitor'' for the Respondent in the same manner as he has performed this function in the past for nurse practitioners. Tr. 590–91.

Dr. Miller's testimony, while not without its weaknesses, was sufficiently consistent, comprehensive, and founded on material in the evidence of record to be relied upon in the adjudication of this application. Although there were no dramatic differences of significant consequence between his expert opinions and those of Dr. Loyd that impact on consequential issues here, to the extent that conflicts exist, Dr. Miller's depth and breadth of experience in the area of pain management were clearly more comprehensive than that of Dr. Loyd.

The Respondent's Testimony

The Respondent testified that she graduated medical school in Haiti in 1977, acquired subspecialties of pain medicine and anesthesiology, and amassed what can fairly be characterized as an impressive level of experience in those fields. The Respondent apparently practiced medicine for twenty-seven (presumably uneventful)[47] years prior to her regrettable foray into the Kentucky criminal justice system. Tr. 862, 867. A year after graduation she began residing regularly in the United States and moved to the District of Columbia where she completed her first year of residency at a hospital concentrating in surgery. Tr. 862–63. In 1979, she embarked on three additional years of medical training at Howard University Hospital, the first two of which were focused in the area of anesthesia satisfying her second and third year residency requirements, and the last year which was a fellowship in the dual areas of anesthesiology and obstetrics. Tr. 873. The Respondent testified that she accepted a job offer following her formal

[45] The patient charts that were offered and received into evidence represent a subset of this group.

[46] Tr. 615. However, this view is in some conflict with the Respondent's own testimony, wherein she seemed to convey a potential interest to resume practice in the field of pain management when explaining reasons why she wished that DEA would grant her COR application. Tr. 993–94.

[47] The Respondent testified that although the Kentucky Medical Board had asked to review patient charts in 2003, no charges resulted from that inquiry. Tr. 929–32. In fact, she stated that she has never been disciplined by any medical board prior to the evolution by the Tennessee Medical Board that caused her license there to be placed on probation. Tr. 866–67.

medical training at the formerly-known Meharry-Hubbard Hospital in Nashville, Tennessee, serving a thirteen-year post as the head of the anesthesia department within the division of surgery, from 1982 until 1995. Tr. 863–64. She also had the additional responsibility of teaching classes to medical and dental students as an assistant professor in surgery. Tr. 864. The Respondent explained that she was laid off due to a hospital merger in 1995. *Id.* Brief stints practicing bariatric medicine and anesthesiology at the Orofacial Institute followed, until 1997 when she and Dr. V. Vilvarajah formed TPA,[48] a practice focused primarily in pain management and secondarily in bariatrics. Tr. 864–65; 882. The Respondent testified to holding medical licenses in three states: an inactive license in Kentucky,[49] a probated license in Tennessee, and an active license in Florida. Tr. 866–67. She also testified that throughout the time that she practiced pain management, she kept current and abreast of the specialty's progress and evolution by investing considerable time each year into continuing medical education (CME) courses and networking, and that she incorporated the improvements and advances to the field that she learned about into her own practice. Tr. 892–93. By the Respondent's own reckoning, she accumulated twice the minimum CME credits required to maintain her license every three years. Tr. 893.

As discussed in more detail elsewhere in this recommended decision, her plea of guilty notwithstanding, the Respondent is now and has consistently been resolute in her conviction that she has committed no crime. Tr. 922–24, 1038.

Regarding her medical practice, the Respondent testified that each prospective patient who penetrated the doors of TPA, whether by referral or as a walk-in,[50] was subjected to a screening process by which their appropriateness for pain management was evaluated and their medical complaint was verified. Tr. 876–80. The medical assistant who scheduled the initial appointment was tasked with notifying the prospective patient that he or she must bring identification to their first visit (*e.g.,* a driver's license), a medical record, past imaging reports, pharmacy profiles, and bottles that held previously-prescribed medications (if any) to their first visit. Tr. 877. The Respondent stated that patients were not automatically accepted into the practice, even with the required documentation, and medical assistants were directed to inform the patients of that policy when arranging the first appointment. *Id.* The Respondent also stated that once the patient arrived at the office for an initial visit, the medical assistant would ensure that he or she was in compliance with the documentation production policy, to wit: ''[T]he medical assistant verifie[d] that they ha[d] whatever she asked them to bring.'' Tr. 879. It was the Respondent's recollection (at least initially) that seventy percent of all patients coming into TPA were based on referrals from other doctors. Tr. 898–90. The Respondent testified that some patients were screened by the TPA staff and rejected as patients for various reasons,[51] and sometimes patients were discharged with reports made to law enforcement authorities. Tr. 905–06, 913–14. According to the Respondent, TPA stopped accepting medical insurance and became a cash-only practice in 2006. Tr. 890.

As assertive as her testimony began, the Respondent progressively became more equivocal in how she continued to describe the office's new patient evaluation procedure. The next phase of the protocol that she explained included a face-to-face conversation between the patient and either Dr. Vilvarajah or herself, to allow the physician to observe, among other things, dress, demeanor, and manner of speech. *Id.* The Respondent's portrayal of the protocol shifted from the doctor routinely verifying the authentication of the patient-supplied documents, to ''*if* we see a report of an x-ray, we *may* call that x-ray lab and verify that this x-ray lab is correct.'' *Id.* (emphasis added). The Respondent later stated that if she or her partner decided to accept the person as a patient, and caused the initial workup procedures to commence (including taking vital signs, blood work, and a urine screen), that she would ''go again over their medical record and *if they [brought] a medical record,* we [would] take from that medical record whatever is pertinent to the patient's problem and have the medical assistant make a copy of [these] document reports.'' Tr. 885. (emphasis supplied). When pressed on the issue of why she would ever prescribe controlled substances at an initial visit in a case where the patient declined to furnish his or her prior medical records, the Respondent's equivocation diminished and she asserted that such a practice was ''[n]ot [done] without prior medical records [and that] [t]hey ha[d] to have some type of problem, some medical reason why [she] would prescribe to them.'' Tr. 898. Such medical justification might be established to the satisfaction of the Respondent with just an MRI (in addition to the patient's complaint and her exam). *Id.* When pressed on the issue of why she did not forbear prescribing until a full medical record was obtained rather than just an x-ray or pharmacy report, the Respondent stated that ''some [of her patients did] not have a medical record[, s]o, all they bring is that x-ray,'' and testified that she believed that there was not a patient chart in evidence reflecting that the patient lacked a prior medical record or x-ray but yet still received prescriptions for opiates on the first visit. Tr. 899; *see* Tr. 1004 (confirming her policy of not prescribing controlled substances without some form of prior medical record). However, even a perfunctory glance at the charts received into the record reflects that the Respondent's statements in this regard are inaccurate. *See, e.g.,* Gov't Ex. 22 (controlled substance prescriptions issued first visit, MRI report dated same as initial visit and initialed by TPA the *day after* initial visit, no prior medical record); Gov't Ex. 23 (controlled substance prescriptions issued at first visit, two MRI reports for knee and lumbar spine, no prior medical chart); Gov't Ex. 24 (controlled substance prescription issued at first visit, only MRI submitted with sole impression of ''[n]o acute osseous abnormality,'' no prior medical chart); Gov't Ex. 28 (controlled substance prescriptions issued at first visit, only MRI report dated four years prior, no prior medical chart); Gov't Ex. 31 (controlled substance prescriptions issued at first visit, only prescription label for OxyContin 40 mg and MRI with ''[m]ild degenerative changes'' as sole impression submitted at first visit, no prior patient chart); Gov't Ex. 32 (controlled substance prescriptions issued at first visit, MRI report dated almost five years prior, single progress

[48] While the Respondent and Dr. Vilvarajah were married for a brief period, their marriage had dissolved prior to the formation of their business relationship. Tr. 1041–42.

[49] According to the Respondent's testimony, she let her license lapse without renewing it, and it has not been the subject of any disciplinary action. Tr. 866.

[50] The Respondent testified that while TPA used to advertise in the telephone directory and accepted walk-in patients (who arranged for an appointment by their own devices beforehand) starting in 1997, this was a practice that ceased in 2006. Tr. 876–78.

[51] The Respondent testified that TPA maintained a log book with photocopies of the driver's licenses of prospective patients who were rejected in the course of the intake process. Tr. 905–06. An exhibit that was purported to be photocopies of the contents of the log book was excluded based on foundational and relevance grounds. Tr. 906–13; Resp't Ex. 1 (ID). The evidence does not contradict the Respondent's assertion that some patients were rejected from TPA at intake, and the Government has not contested this premise.

note by former physician over nine months prior, no prior patient chart); Gov't Ex. 33 (controlled substance prescriptions first visit, incomplete record of an initial evaluation by former physician four and a half years prior, no prior patient chart); Gov't Ex. 34 (controlled substance prescriptions issued by Respondent at first visit, chief complaint regarding ribs and knees, one follow up chart note regarding elbow x-ray by previous physician less than two years prior, no prior medical chart); Gov't Ex. 38 (controlled substance prescriptions issued at first visit, no prior medical records); Gov't Ex. 43 (controlled substance prescriptions issued by Respondent at first visit, prior MRI report dated over eight years prior and office visit note by a prior neurosurgeon over eight years prior, no prior medical chart); Gov't Ex. 48 (controlled substance prescriptions issued by Respondent at first visit, no prior medical records); Gov't Ex. 49 (controlled substance prescriptions issued by Respondent at first visit, no prior medical records). Even the Respondent's own expert, Dr. Miller, indicated that past medical records and imaging reports were only ''sometimes'' in the patient charts. Tr. 571.

This area saw some additional level of exploration during the Respondent's cross-examination. Regarding Patient FH (Gov't Ex. 39), the Respondent recounted that the patient's chief compliant was pain emanating from a broken rib and his knees, and that she prescribed him Lortab, OxyContin, and Xanax at his first visit. Tr. 1004–06.[52] When confronted that the only prior objective medical evidence furnished by the patient was a record pertaining to an elbow fracture, the Respondent was moved to concede on reflection that ''looking at it back, I *probably* gave it to him, this prescription, based on my findings from his broken ribs and his knees.'' Tr. 1006 (emphasis supplied). She then further admitted that she failed to follow up, and prescribed controlled substances to FH for four years, grounded almost exclusively based upon a subjective patient complaint. The chart reflects no x-ray or MRI that could have confirmed, refuted, or explained the patient's alleged conditions. The Respondent agreed that upon reflection, her controlled substance prescribing lacked a medical justification. Tr. 1006–07.

During her testimony, the Respondent addressed the manner in which she reacted to UDS anomalies, including how she responded to new patients whose UDS failed to reflect medications they attested to being on, or who subsequently tested negative for drugs prescribed at TPA. According to the Respondent's testimony, it was not uncommon for patients to test negative for substances prescribed, but in those cases she would speak to the patient and document the reason why that was the case. Tr. 894–95. The Respondent recounted numerous justifications she encountered that were connected with UDS result irregularities. Examples included TPA's determination to commence opioid treatment on a new patient at a lesser dose than the patient's former practice, a phenomenon that sometimes resulted in the patient consuming the medications prescribed at TPA at a more rapid pace; another patient who experienced vomiting before providing a urine sample, an event that could result in a reduction of the drug in the system; a patient who was prescribed antibiotics by his or her primary care physician, and was therefore directed by that physican to suspend the taking of TPA's pain medications; a patient who suspended taking controlled prescriptions temporarily on his or her own judgment out of safety concerns associated with impaired driving ability. Tr. 894–96. The Respondent recollected that the TPA's tolerance for prescribing to patients who demonstrated potential drug addiction became more restrictive near the end of 2007. Tr. 1013. However, unlike the more stringent policy of her expert witness, Dr. Miller, the Respondent indicated that TPA would tolerate two UDS stumbles which reflected illicit drug hits. Tr. 1013–15.

The Respondent's assertions to the contrary notwithstanding, the record is replete with instances where the Respondent remained willing to continue to prescribe controlled substances in the face of negative UDS results that should have been positive, with associated charts that were devoid of documentation that might explain the discrepancies. *See, e.g.,* Gov't Ex. 27 (Patient CE); Gov't Ex. 28 (Patient DF); Gov't Ex. 33 (Patient TH); Gov't Ex. 34 (Patient FH); Gov't Ex. 38 (Patient MM); Gov't Ex. 48 (Patient HGW).

The Respondent's handling of this issue during the course of her testimony was not altogether consistent. Upon a representation made by Government counsel that Patient HGW's chart (Gov't Ex. 48) contained twenty instances of individual substances found in drug screen reports that reflected results inconsistent with what was legal or prescribed by TPA (at which point the Respondent admitted that there were at least some inconsistent drug results that she noticed), the Respondent initially disclaimed that her care and prescribing did not fall below the standard of care in Tennessee by responding this way, ''For that particular patient, it depends on how you see it.'' Tr. 1002–03. But when directed to a page reflecting that she prescribed four separate controlled substances at HGW's next to last visit of four years of treatment, the Respondent agreed that issuing that set of controlled prescriptions after so many red flags did fall below the state standard of care. Tr. 1003.

The Respondent provided detail about additional policies she employed to stem diversion. She testified that when she suspected a patient was engaged in doctor shopping, she would confront the patient, where appropriate verify the treatment with the another treating physician, and in cases where the patient's explanation for a discrepancy panned out, the Respondent testified that it was her custom to offer the patient the option of continuing treatment with her partner. Tr. 1010–11. However, the Respondent later admitted that although Patient RN's chart[53] reflected exactly this scenario, no such notes were to be found in the file. Tr. 1011–12. The Respondent explained that prospective patients who were unable to produce a pharmacy profile were afforded the option providing prescription bottles, the labels of which would be removed and affixed to the TPA patient chart. Tr. 1009–10. When asked if the patient charts produced at the hearing contained such indicia, she clarified that those patients who lacked profiles in reality only sometimes brought in their bottles. According to the Respondent, she knew that it occurred at least on occasion, inasmuch as she observed bottle labels affixed in several ''other charts'' not submitted into evidence (of the thirty that were). *Id.*

The Respondent stated that TPA switched drug screen analysis methods from immunoassay (IA) to gas chromatography (GC) midway through 2007, because the GC has a more sensitive cutoff and is able to discriminate among naturally-occurring or synthetically-engineered opioid

[52] The chart reflects that the Respondent failed to take down a patient history reflective of what opioid drugs Patient FH had received in the past, if any, when she prescribed Lortab and OxyContin for the first time. *See* Gov't Ex. 39 at 23, 85–86, 89. This was apparently in spite of FH reporting on his intake form that while he was not currently on any pain medications, *see id.* at 89 (blank line under prompt regarding treatments and medications presently received for pain); *see also id.* at 86 (new patient notes filled in by Respondent), he experienced ninety percent relief in the last day from the pain medications or treatments he was experiencing, *id.* at 89.

[53] Gov't Ex. 39.

substances. *See* Tr. 899–902. However, in light of TPA's history of chronic inaction in the face of problematic testing results, enhancements regarding UDS testing bear little relevance on the Respondent's suitability for a registration. Put another way, unreliable results are as easily ignored as reliable ones.

During the course of her testimony, the Respondent conceded that the recordkeeping entries she employed in her patient charts ''were not completely adequate,'' but ascribed at least some of the blame to the nature of her early training during the 70's and 80's. Tr. 903. The Respondent testified that she now understood how the field had changed over time. *Id.* There was no direct link made by the Respondent between recent developments in examination protocol and her history of seeming indifference to diversion red flags (principally the unresolved UDS result anomalies) that appear throughout the examined patient charts. In the Respondent's estimation, she may have been ''duped'' by some of her patients in the midst of her endeavors ''to take care of these patients with all [her] heart.'' Tr. 993–94, 1041.

The Respondent, through her own testimony, submitted into evidence numerous certificates demonstrating the successful participation in CME seminars. Some courses were completed pursuant to the probation status imposed on her by the Medical Board as obligatory terms, while others were undertaken over-and-above the probationary conditions. Tr. 986–87; *see* Tr. 987–92; Resp't Ex. 3 (''Intensive Course in Medical Record Keeping,'' June 3–4, 2010) (certificate of attendance only, no credit value indicated); Resp't Ex. 4 (''Prescribing Controlled Drugs,'' July 21–23, 2010) (20.75 credits);[54] Resp't Ex. 7 (''Intensive course in Medical Ethics, Boundaries & Professionalism,'' Sept. 2–3, 2010) (22.50 credits); Resp't Ex. 8 (''Topics in Pain Management, Volume 26, Issue 1,'' Sept. 20, 2010) (1.50 credits); Resp't Ex. 9 (''Topics in Pain Management, Volume 26, Issue 2,'' Sept. 20, 2010) (1.50 credits); Resp't Ex. 10 (''Risk Management Essentials for Physicians, Second Edition, Part I,'' October 15, 2010) (5.0 credits); Resp't Ex. 12 (''Controversies in Pain Management, Pain, Dependency, and Addiction,'' Nov. 12, 2010) (7.00 credits); Resp't Ex. 13 (''Topics in Pain Management, Volume 26, Issue 3,'' Nov. 24, 2010) (1.50 credits); Resp't Ex. 14 (''CME.COM Principles and Practice of Pain Medicine,'' Dec. 30, 2010) (27.00 credits).[55] She also provided a letter, dated August 23, 2010, from Winston C.V. Parris, M.D., a professor of anesthesiology and the Division Chief of Pain Management at Duke Medicine. Resp't Ex. 5. Dr. Parris certified that the Respondent was with him for two weeks in August of 2010, at the Pain and Palliative Care Clinic at Duke University Medical Center. *Id.* During that time, the Respondent observed Dr. Parris's new patient interactions and evaluations, follow-up patient assessments, and performance of interventional procedures. *Id.* In addition to her observations, Dr. Parris verified that the Respondent also ''attended all Grand Round lectures and Journal Club'' and participated in discussions regarding chronic pain management patients. *Id.; see* Tr. 988–89.

During the Respondent's testimony, there was no acknowledgement of her own culpability. Consistent with her guilty plea and the surrender of her COR, the Respondent maintained a relatively calm demeanor that lent itself more to one patiently enduring a required procedural evolution than one who has truly acknowledged any measure of wrongdoing or desired to signal acceptance of any measure of responsibility. On the issue of credibility, the Respondent repeatedly acknowledged clear conflicts with admitted documentary evidence of record, and was forced, on multiple occasions, to withdraw from positions she had previously presented without discernible ambiguity. Her position that much of the deficiencies outlined in discharging her obligations were explainable by the time period during which she attended medical residency[56] flies directly in the face of her extensive and impressive training and experience in the fields of pain management and anesthesiology, and simply stated, is patently implausible. She was also frequently ambiguous in outlining details associated with her patient care. In short, beyond some biographical data and a handful of uncontested topics, the Respondent's testimony was not sufficiently detailed, consistent, or plausible to be deemed fully credible on contested issues in these proceedings.

Patient Chart Reviews

DIs Phillips and Stevens both reviewed patient charts that the former had procured from the Tennessee Medical Board and the Commonwealth's Attorney's Office. A subset of ten of the acquired charts were provided to and reviewed by the Government's medical consultant, Dr. Loyd, and the entire group was eventually provided to and reviewed by the Respondent's medical expert, Dr. Miller. By a preponderance, the evidence of record supports the following observations and findings relative to the reviewed patient records.

Patient LC

The LC patient chart[57] was reviewed by DI Stevens, was received in evidence for review by this tribunal, and was analyzed by Dr. Loyd. Dr. Loyd testified that although his review of LC's chart revealed numerous urinalysis anomalies, there was no evidence of any of the sort of patient confrontations about those anomalies that he indicated were required by his understanding of accepted medical practice.[58] Tr. 60–61. Loyd also testified that there were other red flags of diversion in the chart, including requests for specific drugs, signs of doctor shopping (to the tune of ''eight different providers, utilizing five different pharmacies in a three-month period''),[59] and a crescendo pattern of controlled substance use that was unsupported by history, physical examination, or imaging. Tr. 63, 65–66. According to Dr. Loyd, these red flags, that were present in the chart, did not receive the required patient confrontation. *Id.* Additionally, a chart note references a possible addiction issue, recommends a formal addiction treatment regimen at an identified facility, but sets forth no measure of documented follow up on the issue. Tr. 66–67. Significantly, Dr. Loyd found that the Respondent continued to prescribe controlled substances to LC even after the UDS anomalies became apparent. Tr. 72. Loyd testified he concluded that the controlled substances prescribed by the

[54] Where indicated, all credits submitted reflect that they are awarded as something counting toward ''American Medical Association (AMA) PRA Category 1,'' a term that regrettably does not have the benefit of further explanation in the record.

[55] Although unclear as to any relevant purpose it has toward the disposition of her COR application, the Respondent also provided proof as to her attendance in a course on ''Domestic Violence: Care and Intervention,'' completed as mandatory CME credit for her continued licensure on November 1, 2010. Resp't Ex. 11; Tr. 990.

[56] Tr. 903.

[57] *See* Gov't Ex. 24.

[58] Although Dr. Loyd initially testified that he perceived that the patient's failure to follow up on a physical therapy recommendation also constituted a red flag that did not benefit from a required confrontation, his subsequent acknowledgement that he was unable to ascertain the mechanics of how the recommendation was made or followed up on, sufficiently eviscerated the strength of this observation to deprive it of any appreciable weight. Tr. 58–62.

[59] Tr. 66.

Respondent to LC ''were outside the scope of accepted medical practice and not for legitimate medical reasons.'' *Id.* In his report, Dr. Loyd summarized his conclusions regarding the Respondent's controlled substance prescribing practices relative to LC as follows:

> [LC] was prescribed scheduled drugs in quantities and frequency [sic] inappropriate for his complaint or illness. He had dramatic and compelling but vague complaint (10/10 pain) not substantiated by physical exam findings or imaging. He was clearly ''doctor shopping.'' He had five inconsistent drug screens, several of which were suspicious for diversion. He had a crescendo pattern of drug use with progression to multiple drugs. He requested drugs by name. . . . The controlled substances prescribed in [LC's] case were outside the scope of accepted medical practice and not for a legitimate medical purpose.

Gov't Ex. 57 at 2.

Through his testimony, DI Stevens identified what he believed to be six red flags [60] of abuse or diversion, five of which were purportedly inconsistent UDS results and one that was a letter reporting suspicion of doctor shopping by a health insurance company. DI Stevens addressed these areas in the LC patient chart chronologically.

The first UDS addressed by DI Stevens' testimony was conducted on August 20, 2003. Tr. 425–26; Gov't Ex. 24 at 64. The results of this UDS reflected values below the cutoff thresholds (negative results) for each of the controlled substance classes tested, including amphetamines, barbiturates, benzodiazepines, cocaine, marijuana, methadone, methaqualone, opiates, phencyclidine (PCP), and propoxyphene. Gov't Ex. 24 at 64; see Tr. 425–26. DI Stevens, who is not a medical professional, testified that he found a prescription in the chart issued by the Respondent on July 23, 2003 (less than a month prior to the UDS) for Percocet, a Schedule II controlled substance that contains oxycodone. Tr. 426; Gov't Ex. 24 at 50 (script photocopy); *see* 21 C.F.R. § 1308.12(b)(1)(xiii) (2011). Percocet is a drug that DI Stevens expected to cause a positive result on Patient LC's UDS for opiates.[61] Notwithstanding this alleged anomaly, which would have been received by the Respondent's clinic some days after the screen, DI Stevens pointed out that Patient LC continued to receive controlled substances in ascending quantities and additional varieties at subsequent office visits, including the first visit after the UDS on October 15, 2003, Gov't Ex. 49 (script photocopy for #84 Percocet 10/325 mg), and another visit on January 6, 2004 by the Respondent, *id.* at 47 (script photocopies for #112 Percocet 10/325 mg and the benzodiazepine #30 Valium 5 mg), without any notation regarding the anomaly to the patient chart, Tr. 427–31; *see also* Gov't Ex. 24 at 17–18 (chart entries dated October 15, 2003 and January 6, 2004 reflecting issuance of same prescriptions as the script photocopies).[62] DI Stevens testified that the chart note for the October visit, rather than expressing concern over the anomaly, instead observed (counter intuitively) that ''patient has no side effects or evidence of addiction.'' Tr. 430; Gov't Ex. 24 at 18 (chart entry dated October 15, 2003, ''Patient has no side effects or evidence of addiction''); *see also id.* at 17 (chart entry dated January 6, 2004, ''No side effects or evidence of addiction'').

DI Stevens testified that a drug screen collected March 3, 2004 indicated Patient LC was negative for all controlled substances including opiates and benzodiazepines, notwithstanding a chart entry reflecting prescriptions issued on February 3, 2004 for Percocet and Valium signed by the Respondent. Tr. 431–33; Gov't Ex. 24 at 17. Again, this information inspired the Respondent to enter a note that there were ''[n]o side effects or evidence of addiction.'' Tr. 433; Gov't Ex. 24 at 17. However, DI Stevens testified to finding photocopies of additional scripts issued and signed by the Respondent following the March 2004 UDS results. Tr. 433–34; Gov't Ex. 24 at 44; *see also id.* at 16 (chart entry with Respondent's signature dated May 26, 2004 documenting ''No side effects or evidence of addiction'' and prescriptions for Percocet and Valium).

DI Stevens also noted a September 15, 2004 discrepant UDS report that signaled positive results for the presence of opiates, benzodiazepines, and methadone. Tr. 434; Gov't Ex. 24 at 60. Stevens review of the chart revealed controlled prescriptions only for Percocet and Valium (no methadone) at documented visits occurring before the test, Tr. 435–36; Gov't Ex. 24 at 16 (chart entry dated May 26, 2004 signed by Respondent), and that Patient LC received his first prescription for methadone from the Respondent's practice on the same visit that he first tested positive for the drug, Tr. 436; Gov't Ex. 24 at 15 (chart note), 43 (script photocopy). The chart also shows no controlled substance prescription for the month before the September UDS, and no explanation as to why the patient was not coming in, or whether during his absence from the practice he was receiving controlled prescriptions elsewhere. *See* Tr. 438. According to DI Stevens, this is another example of a drug screen anomaly. *See* Tr. 437–38. A progress note dated September 15, 2004 (a time concurrent with the UDS but before methadone was prescribed) and signed by the Respondent reads, ''[Patient] feels that the methadone gives him more profound relief. No side effects or evidence of addiction.'' Gov't Ex. 24 at 15. The chart sets forth neither a basis for the patient's knowledge of the advantages of methadone, nor a comment regarding whether and under what conditions (legal or otherwise) LC obtained and tried methadone, nor is any detail provided as to what dosages of methadone were taken by LC and how often. Despite these possible causes for concern (or at the very least grounds for further documentation), DI Stevens testified that he observed evidence within LC's patient chart of controlled substances being prescribed by the Respondent at his next two office visits, on October 13, 2004, for Valium and Percocet, and on November 10, 2004, for Valium and methadone. Tr. 436–37; Gov't Ex. 24 at 15 (chart notes).

The next red flag that DI Stevens identified in his testimony was a report generated by, and accompanied with a

[60] A single anomalous UDS may contain multiple anomalies.

[61] During the course of DI Stevens' testimony, it quickly became apparent that he was operating under the assumption that a substance containing oxycodone, like Percocet, should cause a positive on the UDS for opiates if taken as prescribed the month preceding it. *See, e.g.,* Tr. 434–38 (noting the significance that Patient LC tested positive in a later UDS for opiates even though he was not issued a prescription for Percocet a month immediately prior), 460 (commenting the significance of Patient HGW's UDS negative result for opiates even though he obtained prescriptions for Percocet and OxyContin a month prior).

[62] Both parties to this proceeding submitted proposed evidence in the form of photocopies contained in exhibits in advance of hearing that, due presumably to poor or multi-generational photocopying, were found profoundly unintelligible. Prior to hearing, this tribunal issued an advisal to the parties taking notice of this issue, ALJ Ex. 19, and the parties were further advised on the record before the first witness was sworn that these pages would be returned to its respective proponent at the time the balance of the exhibit was offered into evidence, Tr. 5–6, as these pages could not constitute substantial evidence in any shape or form. Throughout the course of the hearing, to cure this problem, the parties identified some problematic portions of their respective proposed exhibits and were afforded the relief of substituting better-quality reproductions. Insofar as proving that prescriptions for controlled substances emanated from the Respondent, the Government also employed the alternative method of relying solely on progress and treatment plan notes entered in the patient chart appearing to have been written by the Respondent's hand when the photocopies of scripts were indiscernible or only partially depicted. This alternative process proceeded without objection by the Respondent, and the Respondent confirmed, through her own testimony, the reliability of prescription notes that Government witnesses claimed were made by her, Tr. 982–83.

cover letter dated November 19, 2004, from, the insurance company United Health Care, which was found in the LC patient chart and addressed to the Respondent.[63] Tr. 438–39; Gov't Ex. 24 at 70–71. The report advised that during the third quarter of 2004, eight prescribers individually prescribed an assortment of controlled substances to Patient LC that he filled at five different pharmacies. *Id.* at 70. In its letter, the insurance company ''encourage[d]'' Respondent to, ''if appropriate, use [the report] to modify [Patient LC's] use of narcotic analgesics.'' *Id.* at 71. Based upon his experience as a diversion investigator, Stevens believed this information to be demonstrative of doctor shopping on the part of Patient LC. Tr. 439. A chart note reflective of this information was identified by DI Stevens to have been made by Dr. Vilvarajah on December 7, 2004, to wit: ''According to UHC [Patient LC] visited 8 MD's, 5 Pharmacies [sic] and obtained 215 days [sic] supply during 7/9/04 through 9/30/04.''[64] Tr. 439; Gov't Ex. 24 at 13. A hand-scrawled annotation was also identified as the phrase ''Correct immediately!'' with an arrow pointing to the total number of unique pharmacies reported. Gov't Ex. 24 at 82. Still, DI Stevens identified prescriptions issued by the Respondent approximately one month later on January 5, 2005, for methadone and Valium, notwithstanding the presence of the entries and insurance letter in the chart. Tr. 440; Gov't Ex. 24 at 40. A chart note reflecting these prescriptions was entered by the Respondent immediately below (on the same page as) Dr. Vilvarajah's chart note documenting his doctor shopping reservations. Gov't Ex. 24 at 40.

Another anomalous UDS, taken May 25, 2005, was also addressed by DI Stevens' testimony. *See* Tr. 440–42; Gov't Ex. 24 at 59. The results, reminiscent of others discussed *supra,* were negative for all controlled substances tested. Tr. 441–42; Gov't Ex. 24 at 59. Because Patient LC received prescriptions for Valium and methadone at an office visit the month before the test on April 27, 2005, a UDS report that was devoid of these substances would presumably come as a surprise to the treating physician confronting such results. Tr. 441; Gov't Ex. 24 at 12 (chart note). DI Stevens testified that because he expected, based on the controlled substances prescribed the month before the UDS, to see positive showings for benzodiazepines and methadone, this was another example of a red flag of diversion that earned no mention in the progress notes written into the patient chart by the Respondent. Tr. 442–43. Nevertheless, Patient LC received controlled substances issued by the Respondent at the next two office visits for Valium and methadone on June 22 and July 22, 2005, respectively. Tr. 443–45; Gov't Ex. 24 at 11 (chart note), 37 (June 22, 2005 script photocopy for methadone), 36 (July 20, 2005 script photocopies for methadone and Valium).

An UDS that was collected on March 1, 2005 reflected a positive response only for methadone should have raised some level of concern, in view of the fact that the Respondent has prescribed methadone plus Percocet and Valium to LC twenty-eight days prior (February 1, 2006) to the date the urine sample was provided. Tr. 445–46; Gov't Ex. 24 at 56, 32 (script photocopies); *id.* at 12 (chart note). As perceived by DI Stevens, not even passing concern over the apparent inconsistency appears anywhere in the patient chart. Tr. 446–47; Gov't Ex. 24 at 8–9. In spite of the drug screen, the Respondent blithely continued to provide Patient LC with a steady flow of Percocet, methadone, and Valium prescriptions during the course of the next three office visits that followed the UDS results. Tr. 447–48; Gov't Ex. 24 at 30 (script photocopies dated April 26, 2006), 29 (script photocopies dated May 24, 2006), 28 (script photocopies dated June 21, 2006); *see id.* at 7–8 (chart entries reflecting same prescriptions issued by Respondent).

Patient RN

The patient chart[65] maintained on Patient RN was reviewed by DI Phillips, was received in evidence for review by this tribunal, and was evaluated by Dr. Loyd. Dr. Loyd's report and testimony discussed the controlled substance prescribing practices evident in the patient chart maintained on RN. Loyd noted that although this chart reflected an effective pain assessment history, no alcohol or substance abuse history was taken, and although controlled substances were ostensibly prescribed to address complaints of chronic knee pain, the chart failed to show any physical examination of the knee during the patient's monthly office visits. Gov't Ex. 57 at 7. It was Loyd's view that the upward titrations of controlled pain drugs were implemented ''without a history, physical exam or imaging to support the increase in medications.'' *Id.* In fact, Loyd testified that he ''didn't feel like there was enough [in the chart] to indicate the use of opiate narcotics.'' Tr. 163.

More fundamentally, Loyd observed that three UDS reports recorded in the chart reflect the absence of controlled substances that had been prescribed to RN and should have been in his system.[66] Gov't Ex. 57 at 7. The chart reflects that RN eventually was expelled from the practice upon a fourth UDS which showed the presence of cocaine. Gov't Ex. 39 at 4; Gov't Ex. 57 at 7.

At the conclusion of his assessment regarding the RN patient chart, Dr. Loyd summarized his conclusions as follows:

> [RN] was prescribed scheduled drugs in quantities and frequency [sic] inappropriate for his complaint(s)—left knee and low back pain. These complaints were not supported with physical exam findings or imaging. He had no substance abuse history taken. He requested medication by name—Percocet. He had a total of four failed drug tests. He had findings that were consistent with drug diversion that were not followed up on. He had a crescendo pattern of drug use with progression to multiple drugs. . . . The controlled substances prescribed for left knee pain and low back pain in [RN's] case were outside the scope of accepted medical practice and not for a legitimate medical purpose.

Id. at 7–8.[67]

In her testimony, DI Phillips presented what she believed to have been five anomalous UDS results evident in RN's patient chart. Among them was a drug screen reporting negative results for all controlled substances a month after opiates and benzodiazepines were prescribed to RN, Tr. 703–06; Gov't Ex. 39 at 14 (chart entry dated August 27, 2005 noting prescriptions for Percocet, OxyContin, and Xanax), 37 (photocopies of same), 50 (UDS report dated September 6, 2005 negative for all substances), and another reflected a positive result for cocaine, Tr. 715–16; Gov't Ex. 39 at 44 (UDS report dated March 24, 2007); *see* Gov't Ex. 39 at 4 (March 31, 2007 chart note by Dr. Vilvarajah reflecting RN positive for cocaine).[68] Regarding a UDS that popped positive for methadone and opiates, neither of which were ever prescribed by Dr. Vilvarajah, and had not been prescribed for the month prior to the screen by the Respondent, the presence of methadone was addressed by the Respondent as reflected in

[63] For reasons non-apparent, the report was dated after the cover letter, November 30, 2004.

[64] Therefore, Patient LC was able to fill enough prescriptions to supply him with 215 days worth of controlled substances in only an 83-day period.

[65] *See* Gov't Ex. 39.

[66] Yet Dr. Loyd felt that regarding a positive methadone UDS result, the chart reflected a sufficient inquiry. Tr. 300.

[67] The Government also elicited some testimony regarding Dr. Loyd's estimation of the relative distance between RN's home and the Respondent's practice, Tr. 159–61, but the issue was not sufficiently developed to merit consideration on any issue to be decided in this case, and like other testimony relative to such distances, played no part in this recommended decision.

[68] The patient record shows that Dr. Vilvarajah terminated Patient RN from the practice as a consequence for testing positive for cocaine. Gov't Ex. 39 at 3–4.

a chart note. Tr. 707–08, 710–11, 845–49. The handwritten entry by the Respondent indicated that Patient RN had been admitted to the VA hospital and that the VA administered methadone to RN. Tr. 846–47; Gov't Ex. 39 at 11–12; *see* 710–11. Records within Patient RN's file to verify the veracity of her account, or documented efforts to procure them, were absent from the chart. During her testimony, the Respondent acknowledged that RN's chart did not reflect any efforts by anyone at TPA to reach out to the VA hospital to inquire about the alleged methadone prescription. Tr. 1012.

DI Phillips also pointed to chart indications that Patient RN tested negative for opiates despite prescriptions for oxycodone 40 mg and oxycodone 15 mg a month before the test. Tr. 711–12; Gov't Ex. 39 at 10 (chart entry of prescriptions issued August 12, 2006), 47 (UDS dated September 9, 2006 negative for opiates). DI Phillips' testimony demonstrated that the Respondent's seemingly inexorable response to each anomaly was to provide Patient RN with additional prescriptions for controlled substances.[69] *See, e.g.,* Tr. 707–09, 713–15.

Patient BR

The BR patient chart [70] was reviewed by DI Phillips, was received in evidence for review by this tribunal,[71] and was evaluated by Dr. Loyd. In his report and testimony, Dr. Loyd noted that pain medications trended upwards, and that the chart contained indications of three UDS reports where BR failed to test positive for controlled substance pain medications that should have been in his system, with no indication that the matter was raised between doctor and patient. Gov't Ex. 57 at 10; Tr. 186–87. The chart also contained a remark that BR was visibly drowsy while standing by for his appointment in the office waiting room, as well as a phone call notation that a pharmacy employee had telephoned to report that on the same day he was nodding off in the waiting room, he had fallen down at the pharmacy. Gov't Ex. 57 at 10; Tr. 188–89. Loyd testified that respiratory suppression is a potential side effect of the controlled substance medications prescribed to BR, Tr. 187, 190, and that, in his expert opinion, simply jotting a note that memorialized these events and conducting no confrontation or follow up is not within the usual course of professional practice, Tr. at 189–91.

Loyd also found a red flag that, although BR's intake paperwork indicated that he was currently taking no medication,[72] a UDS [73] performed registered positive for marijuana metabolite and opiates. Tr. 191–93. There was no chart indication that an appropriate confrontation about this issue between physician and patient ever occurred.

Dr. Loyd's report set forth the essence of his analysis as follows:

> [BR] was prescribed narcotics inappropriately. He had a trauma injury that may have required a controlled substance. However, his urine drug screens were negative for medication that he was being prescribed for his pain. He had a crescendo pattern of drug use with a progression to multiple drugs. . . .[74]

Gov't Ex. 57 at 10.

Patient MC

The MC chart [75] was reviewed by DI Phillips, was received in evidence for review by this tribunal,[76] and was evaluated by Dr. Loyd. Dr. Loyd testified that although chart indicators supported the utilization of controlled substance pain agents, Tr. 83–85, the Respondent incorrectly continued to prescribe controlled substances to MC, even after encountering multiple UDS anomalies with no documentation supporting any evidence that an appropriate patient confrontation took place.[77] Tr. 78–80. Even though MC's patient chart shows three UDS reports which were negative for opiates that were prescribed, according to Loyd's report, ''[t]here were no questions raised as to why the screens were negative and the possibility of diversion was not mentioned.'' Gov't Ex. 57 at 3. Based on the uninterrupted controlled substance prescribing without probing confrontation, Dr. Loyd opined that the Respondent's controlled substance prescribing regarding Patient MC was not within the usual course of a professional practice. Tr. 86.

Patient MF

The MF patient chart [78] was reviewed by DI Phillips, was received in evidence for review by this tribunal,[79] and was evaluated by Dr. Loyd. Dr. Loyd testified that the chart maintained on Patient MF demonstrated both a crescendo pattern

[69] One purported UDS irregularity suggested by DI Phillips relative to the RN chart does not withstand objective analysis. A UDS conducted in connection with RN's initial visit on March 11, 2005 reflects the presence of opiates in RN's system on that date. Tr. 717; Gov't Ex. 39 at 52. DI Phillips concluded that this was problematic based upon the form for new patient notes wherein it signified that RN was not currently on any medications. Tr. 716; Gov't Ex. 39 at 67. While, after it was brought to her attention, DI Phillips conceded that on the same form under ''History of Present Illness'' prescriptions for OxyContin and Lortab were written, it was her theory that these drugs were presumably taken by Patient RN at some point, but not necessarily contemporary with the initial visit. Tr. 851–53. It was further revealed on cross-examination that Patient RN indicated on one of his intake forms that he was currently receiving oxycodone and Lortab for his pain. Tr. 853–54, Gov't Ex. 39 at 74. Thus, on the current record, the March 11, 2005 UDS report cannot be conclusively found to support a true anomaly requiring additional investigation or confrontation.

[70] *See* Gov't Ex. 42.

[71] *Compare* Gov't 42 at 54 (Patient BR denies on patient history intake form ''nervous breakdown/depression/anxiety''), *with id.* at 52 (patient anxiety documented on new patient notes); *compare id.* at 44 (UDS anomalies positive for marijuana and non-prescribed opiates, *and id.* at 43 (UDS anomalies negative for prescribed opioids and benzodiazepines), *with id.* at 11, 30 (prescriptions afterward by Respondent for OxyContin, Percocet, and Xanax), *and id.* at 11, 29 (same); *compare id.* at 42 (UDS anomaly negative for prescribed opioids), *with id.* at 10, 28 (prescriptions afterward by Respondent for OxyContin, Percocet, and Xanax), *and id.* at 10, 27 (same but substituting methadone for Percocet), *and id.* at 9, 26 (same), *and id.* at 8–9, 25 (same), *and id.* at 8, 24 (same); *compare id.* at 39 (UDS anomalies negative for prescribed methadone and opioids), *and id.* at 7 (chart note by Dr. Vilvarajah that BR tripped and fell in pharmacy day of UDS and that BR was negative for opiates and methadone), *and id.* (chart entry at next visit by Dr. Vilvarajah that BR was notified about the pharmacist call), *with id.* at 6, 21 (prescriptions afterward by Respondent for methadone and Xanax), *and id.* at 6, 20 (same), *and id.* at 5, 18 (same), *and id.* at 4, 17 (same), *and id.* at 3, 16 (same). For reasons discussed elsewhere in this decision, DI Phillips' observations regarding the possible commuting distance for Patient BR that she apparently gleaned from the Internet, Tr. 792–93, has not been sufficiently developed on the present record to be utilized for any purpose in this recommended decision.

[72] Gov't Ex. 42 at 55.

[73] Gov't Ex. 42 at 44.

[74] Although Dr. Loyd also mentioned that he attached some level of significance to his observation that BR did not participate in recommended physical therapy, Tr. 185–86, as discussed elsewhere in this decision, *see supra* note 42, this aspect of his review is critically diminished by Loyd's acknowledgement that he is unfamiliar with the office protocol regarding referrals and follow-up. Tr. 58–62. Similarly, although in his report and initial testimony Dr. Loyd felt that the patient's continued ability to pursue physically arduous employment while simultaneously registering complaints of significant pain constituted a red flag, he subsequently retreated from that position. Tr. 195–97.

[75] *See* Gov't Ex. 25.

[76] *Compare* Gov't Ex. 25 at 50 (UDS anomaly negative for prescribed opioids), *with id.* at 13, 37 (prescriptions afterward by Respondent for OxyContin and Percocet with note authored by her ''no evidence of addiction''), *and id.* 13 (same); *compare id.* at 48 (UDS anomalies positive for PCP and negative for prescribed opioids), *with id.* at 9, 28 (prescriptions afterward by Respondent for OxyContin and Percocet), *and id.* at 9, 27 (same), *and id.* at 8, 26 (same), *and id.* at 7–8 (same); *compare id.* at 47 (UDS anomaly negative for prescribed opioids and note on report by Dr. Vilvarajah remarking same), *with id.* at 6, 22 (prescriptions afterward by Respondent for OxyContin and Percocet and chart entry to ''[c]ontinue present pain regime''), *and id.* at 4, 18 (prescriptions same).

[77] While Dr. Loyd testified that he would have preferred to see additional evidence of development of a potential psychological issue stemming from a traumatic event raised by MC's history, Tr. 82–83, 85–86, there was insufficient development of this issue to put it to useful purpose in a disposition of the issues relevant to this case.

[78] *See* Gov't Ex. 29.

[79] *Compare* Gov't Ex. 29 at 48 (UDS anomalies negative for prescribed opioids and benzodiazepines), *with id.* at 9, 29 (prescriptions afterward by Respondent for OxyContin 20mg, OxyContin 40mg, and Xanax); *compare id.* at 46 (UDS anomaly negative for prescribed benzodiazepines), *with id.* at 5 (chart entry by Respondent ''Lab results discussed with patient and copy given. P[atien]t's mother died a w[ee]k ago and the next day after the funeral, her father fell and got a head concussion [illegible] was released yesterday. P[atien]t feel (sic) overwhelmed [with] all these problems.''), *and id.* at 4–5, 21 (prescriptions by Respondent after UDS and concurrent with chart entry for OxyContin, Percocet, and Xanax), *and id.* at 4, 19 (same prescriptions), *and id.* at 3, 17 (same prescriptions).

of controlled substance use and multiple UDS anomalies, neither of which received the benefit of an appropriate confrontation conference with the patient.[80] Tr. 89–94. According to Dr. Loyd's report, the chart showed three UDS reports that were negative for prescribed controlled substances that had been prescribed to [MF] and should have registered positive, and that ''[n]o questioning took place as to why these screens didn't show the drugs [MF] was supposed to be taking[,] and the possibility of diversion was not raised.'' Gov't Ex. 57 at 4. Regarding a subsequent UDS that reflected a positive result for methadone, a drug that had not been prescribed to Patient MF, the report noted that the patient's explanation that she had fallen out of bed and taken her husband's medication was an unacceptable explanation which only showed a violation of the law and her medication pain agreement. *Id.*

Regarding the Respondent's controlled substance prescribing to MF, Dr. Loyd acknowledged that narcotics were appropriate for this patient based on the chart,[81] but opined that ''[t]he controlled substances prescribed in th[is] case were inappropriate in strength and frequency while obvious signs of misuse of controlled substances were ignored,'' Tr. 101.

DI Phillips' testimony identified a drug screen report that reflected positive results for methadone and propoxyphene, two substances that were not prescribed to Patient MF by either the Respondent or Dr. Vilvarajah, and a negative result for benzodiazepines, which had been prescribed to MF in the form of Xanax a month prior to the test. Tr. 756–57; Gov't Ex. 29 at 14 (chart entry noting prescriptions issued September 14, 2005), 51 (UDS report dated October 12, 2005). As acknowledged by DI Phillips, in a chart note, the Respondent recorded that she confronted and admonished MF about her unauthorized methadone use. Tr. 841; *see* Gov't Ex. 29 at 13. It was also DI Phillips' testimony that other than reading on to check for patient compliance with the Respondent's warning, she declined to make a judgment call on the sufficiency of the Respondent's actions here,[82] Tr. 845–46, but did note that there was nothing to indicate that the positive propoxyphene elicited any documented reaction from the Respondent. Tr. 841. Regarding MF's explanation that she took her husband's methadone after a spill out of bed, Phillips opined that beyond Dr. Loyd's estimation that the excuse was wanting, the scenario was not merely indicative of a red flag, but constituted an admission of actual diversion. Tr. 89–90. What is more, as highlighted in the Government's brief and similar to the unexplained presence of propoxyphene, no effort was documented to confront Patient MF regarding the absence of Xanax (which had been prescribed) from her system. *See* Gov't Br. at 17. Later drug screens in the record support the continued practice of the Respondent to prescribe controlled substances to Patient MF in the face of red flags and without raising them with the patient.

Patient TH

The TH chart[83] was reviewed by DI Phillips, was received in evidence for review by this tribunal,[84] and was evaluated by Dr. Loyd. In his testimony and in his report, Dr. Loyd observed that the chart maintained on Patient TH reflected several red flags. A UDS administered at the time of intake showed positive for cocaine. Gov't Ex. 57 at 5; Gov't Ex. 33 at 13, 49. The chart does record a confrontation of sorts on this issue, wherein TH apparently explained his use as a method to ''deal with the pain.'' Gov't Ex. 33 at 13. However, during his testimony, Dr. Loyd explained that while direct application of cocaine could cause some level of local, topical numbing, the ingestion of cocaine has no pain relieving feature. Tr. 289–90. Inasmuch as the offered explanation (that the patient was using cocaine to ameliorate pain symptoms) has no medically reasonable basis, the note documenting the patient's statement in the chart can hardly be reasonably perceived as a valid explanation of a UDS anomaly produced by the investigation of a serious registrant.

Dr. Loyd also described a subsequent positive marijuana UDS result, Gov't Ex. 33 at 45, as well as negative drug screens that failed to show the presence of controlled substances the patient had been prescribed, Gov't Ex. 57 at 5; Tr. 104–06. Loyd opined that the chart reflected inadequate follow up measures,[85] that there was no sign of the required patient confrontation on the issues, and that the prescribing of controlled substances should have been abated upon the second UDS that reflected an illicit substance. Tr. 107. In his report, Dr. Loyd noted a two-year period of treatment that was devoid of physical exams and imaging reports, and noted that

> [d]uring this same two[-]year period [TH] had two other [UDSs] that were inappropriate for the medications that he was being prescribed [one that was][86] negative for [benzodiazepines] and opiates—he was supposed to be taking both and [another that was] negative for opiates [that] he was supposed to be taking. No questioning took place as to why these were negative and about the possibility of diversion.
> Gov't Ex. 57 at 5.

Dr. Loyd testified that while he takes no professional issue with the decision to prescribe controlled substances based on the chart findings, the prescriptions were not within the usual course of a professional practice in that ''[t]he strengths and frequency were inappropriate given the history, physical examination and imaging findings and the [UDSs] being inconsistent [was] ignored. Tr. 102. In his report, Dr. Loyd stated that TH

> was prescribed scheduled drugs in quantities and frequency [sic] inappropriate for his complaint or illness. He lacked physical exam findings or imaging results to support the use of chronic narcotics. [TH] had a crescendo pattern of drug use with progression to multiple drugs. He had a history of active illicit drug use—cocaine and marijuana. He had multiple, inconsistent drug screens that were not questioned. The controlled substances prescribed in [TH's] case were outside the scope of accepted

[80] Dr. Loyd also discussed a letter in the patient chart from MF's attorney detailing an interaction with police wherein her medication was seized, and asking that her medication be replaced. Tr. 95–99; Gov't Ex. 57 at 4. There was some level of confusion regarding the date of the letter, Tr. 280–82, 314–15, and insufficient development of the issue to reliably divine an appropriate utilization of this incident for a relevant issue in the case.

[81] Tr. 102.

[82] Undoubtedly a prudent course in view of her lack of medical training.

[83] *See* Gov't Ex. 33.

[84] *Compare* Gov't Ex. 33 at 49–50 (UDS anomaly positive for cocaine), *and id.* at 48 (UDS anomalies negative for prescribed opioids and benzodiazepines), *with id.* at 13 (prescriptions afterward by Respondent for OxyContin 20 mg, OxyContin 40 mg, Tylox, and Xanax and chart note by Respondent noting Patient TH took cocaine to try to ''deal'' with the pain but absence of explanation for negative prescribed opioids and benzodiazepines result), *and id.* at 12 (same), *and id.* at 12, 40 (same), *and id.* at 11, 39 (same); *compare id.* at 45 (UDS anomaly positive for marijuana), *with id.* at 7, 42 (chart entry by Dr. Vilvarajah to repeat UDS because of possible false positive due to TH's denial of marijuana use and claim of taking several antacids, but no verification of claim and drug test not repeated until eight months later; entry also notes that TH should attend substance abuse classes and proof of attendance and completion is expected, but no follow up indicated in chart), *and id.* at 5, 20 (prescriptions afterward by Respondent for OxyContin, Tylox, and Xanax), *and id.* at 4, 19 (same), *and id.* at 3–4, 18 (same), *and id.* at 15 (same).

[85] Although a chart entry concerning the positive marijuana result reads, ''Takes several antacids possible false (+) will repeat [drug screen],'' Gov't Ex. 33 at 7, Dr. Loyd testified that TH's chart did not reflect any prescription for the antacids that could cause false results for the marijuana metabolite. Tr. 107–08. Furthermore, although Dr. Loyd testified that a UDS should have been conducted a month after the positive UDS was discussed with TH, the patient was not retested for marijuana for another seven months. Tr. 110–12; Gov't Ex. 33 at 42.

[86] Dr. Loyd corrected a UDS date in his testimony. Tr. 113.

medical practice and not for a legitimate medical purpose.

Gov't Ex. 57 at 5.

Patient RW

The RW chart [87] was reviewed by DI Phillips, was placed in evidence for review by this tribunal,[88] and was evaluated by Dr. Loyd. Dr. Loyd's report and testimony addressed his analysis of the chart maintained on Patient RW. Dr. Loyd observed that the intake processes for this patient contained an insufficient history and physical examination and that there was no indication that a substance abuse history was elicited. Gov't Ex. 57 at 12. Loyd noted three UDS results that failed to reflect the presence of controlled substances that had been prescribed and should have been in RW's system. *Id.;* Tr. 210–12.

The report written by Dr. Loyd summarized his review of RW's chart as follows:

[RW] was prescribed scheduled drugs in quantities and frequency [sic] inappropriate for her complaint or illness. She was prescribed narcotics on the first office visit without alternatives being tried and without a physical exam or imaging to support her complaint. No alcohol or drug history was taken. She requested drugs by name—Oxycodone, Hydrocodone. She had urine drug screens that were inconsistent with the medication that she was being prescribed multiple times per day. The controlled substances prescribed in [RW's] case were outside the scope of accepted medical practice and not for a legitimate purpose.

Govt' Ex. 57 at 12; *see also* Tr. 212–13.

Patient LS

The chart [89] maintained on Patient LS was also reviewed by DI Stevens, was received in evidence for review by this tribunal,[90] and was analyzed by Dr. Loyd in his report and in his testimony. Dr. Loyd noted that the LS patient chart evidenced three UDS reports reflecting negative results for controlled substance medications that had been prescribed, which should have been in the patient's system, and which did not inspire any manner of confrontation or inquiry. Gov't Ex. 57 at 11; Tr. 202–05. Loyd also found it significant that the level of controlled substance medication remained stagnant for three years without benefit of further physical examination or imaging.[91] *Id.*

In his report, Dr. Loyd set forth his view on the controlled substance prescribing as follows:

[LS] was prescribed scheduled drugs in quantities and frequency [sic] inappropriate for her illness. She had no physical exam findings or imaging to support the use of chronic narcotics. She was started on controlled substances, multiple, [sic] on the first office visit without alternatives being tried. . . . Her complaint was dramatic and compelling, 9/10 pain, and was not supported with history, physical exam findings or imaging. She had three separate urine drug screens that were inappropriate for the medications that she was being prescribed indicating that she was not taking them as prescribed and raising the possibility of diversion. The controlled substances prescribed in this case were outside the scope of accepted medical practice and were not for a legitimate medical purpose.

Gov't Ex. 57 at 11; *see* Tr. 207.

Patient FH

The patient chart [92] maintained on Patient FH was reviewed by DI Stevens, was placed in evidence for review by this tribunal,[93] and was analyzed by Dr. Loyd. In his report and testimony, Dr. Loyd noted that FH's chart reflects seven UDS reports that did not contain the controlled substance opioids and benzodiazepines that the patient had been prescribed, and no sign of the appropriate doctor-patient confrontation that should have occurred based on those incidents. Gov't Ex. 57 at 6; Tr. 134–37. Although a potentially painful rib fracture was among the possible etiologies of the pain symptoms, FH declined to obtain the chest x-ray directed by the Respondent. Tr. 129. Furthermore, Dr. Loyd testified that his review of the chart did not reveal ''anything from the history, the physical examination or imaging to support . . . a narcotic analgesic at any dose.'' Tr. 129.

In his report, Dr. Loyd provides the following summary regarding his chart analysis:

[FH] was prescribed controlled substances in quantities and frequency [sic] inappropriate for his illness. He was prescribed narcotics on the first office visit. He lacked physical exam findings or imaging to support the indication of controlled substances.[94] He had a crescendo pattern of

[87] *See Gov't* Ex. 50.

[88] *Compare* Gov't Ex. 50 at 34 (UDS anomaly negative for prescribed opioids), *and id.* at 9 (note by Dr. Vilvarajah following that Patient RW tested negative for prescribed medications), *with id.* at 9 (note immediately underneath by Respondent that RW has ''[n]o side effects or evidence of addiction [and that RW] takes her medications regularly [and] feels better''), *and id.* at 8, 23 (prescription afterward by Respondent for Percocet), *and id.* at 7, 21 (same with increased dosage units).

[89] *See* Gov't Ex. 44.

[90] *Compare* Gov't Ex. 44 at 69 (UDS anomaly negative for prescribed opioids), *with id.* at 13, 39 (prescriptions afterward by Respondent for OxyContin, Percocet, and Xanax), *and id.* at 12 (same); *compare id.* at 66 (UDS anomaly negative for prescribed opioids), *with id.* at 11, 36 (prescriptions afterward by Respondent for OxyContin, Percocet, and Xanax and chart entry documenting that drug screen results were discussed and a copy of the report was given to LS), *and id.* at 9, 31 (prescriptions same), *and id.* at 8, 30 (same), *and id.* at 7–8, 29 (same); *compare id.* at 65 (UDS anomaly negative for prescribed opioids), *with id.* at 7, 28 (prescriptions afterward by Respondent for OxyContin, Percocet, and Xanax), *and id.* at 5, 26 (same), *and id.* at 5, 25 (same), *and id.* at 4, 23–24 (same), *and id.* at 3–4, 22 (same).

[91] Although Dr. Loyd testified that in his view the level of the patient's complaints seemed inconsistent with his perceived severity of the MRI results, Tr. 199–200, it would be difficult (and in this case unnecessary) to tease out where his testimony in this regard constitutes a potential good-faith professional difference of medical opinions, from a departure from a registrant-related duty to minimilegitimate prescriptions. The latter concern is a proper focus of ze diversion by issuing only these proceedings, while the former presents an issue for a different venue. 21 C.F.R. § 1306.04(a); *see Gonzales v. Oregon,* 546 U.S. 243, 270 (2006) (explaining that the CSA grants the Attorney General authority to regulate the practice of medicine ''insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood [not the power] to regulate the practice of medicine generally''). Dr. Loyd's testimony that he would have commenced treatment of LS with an NSAID, Tr. 201–02, warrants like consideration.

[92] *See* Gov't Ex. 34.

[93] *Compare* Gov't Ex. 34 at 78 (UDS anomalies negative for prescribed opioids and benzodiazepines and positive for non-prescribed propoxyphene), *and id.* at 76 (UDS anomalies negative for prescribed opioids and benzodiazepines, *and id.* at 75 (UDS anomalies negative for prescribed opioids and benzodiazepines), *with id.* at 14, 47 (prescriptions afterward by Respondent for OxyContin, Lortab, and Xanax), *and id.* at 14, 46 (same); *compare id.* at 73 (UDS anomalies negative for prescribed opioids and benzodiazepines), *and id.* at 72 (UDS anomalies negative for prescribed opioids and benzodiazepines), *with id.* at 10, 38 (prescriptions after by Respondent for OxyContin, Lortab, and Xanax), *and id.* at 10 (same), *and id.* at 9 (same), *and id.* at 9, 36 (same); *compare id.* at 70 (UDS anomalies negative for prescribed opioids and benzodiazepines), *with id.* at 8, 34 (prescriptions afterward by Respondent for OxyContin, Lortab, Xanax), *and id.* at 32 (same), *and id.* at 30 (same), *and id.* at 6 (same with chart entry by Respondent ''Lab results discussed [with patient] and copy given. [Patient] states that he takes [*sic*] ''runs out'' his medications every [month]. . . . No side effects. [Patient] aware that he must take his medication of to [*sic*] his visit to TPA. Will reject random [drug screen].''), *and id.* at 6, 29 (same prescriptions), *and id.* at 5, 28 (same), *and id.* at 5, 27 (same), *and id.* at 4, 25 (same).

[94] Although Dr. Loyd testified that, consistent with the guidance provided in the WHO Ladder, he would have initiated a course of NSAIDs, Tr. 118–21, there is no basis on the current record upon which this apparent difference of medical opinion can be construed to reflect positively or negatively on whether the Respondent failed in some way to discharge her duties as a DEA registrant to minimize the risk of diversion and issue controlled substance prescriptions for a legitimate medical purpose and within the course of a professional practice. *See* 21 C.F.R. § 1306.04(a); *Gonzales v. Oregon,* 546 U.S. 243, 270 (2006) (explaining that the CSA grants the Attorney General authority to regulate the practice of medicine ''insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood [not the power] to regulate the practice of medicine generally''). This is a difference, albeit a nuanced one, from Dr. Loyd's conclusion that the objective imaging, information, and documented observations

drug use with progression to multiple drugs. He seemed to have no interest in his diagnosis as he didn't follow up and obtain a chest x-ray. He had seven inconsistent urine drug screens. The controlled substances prescribed in [FH's] case were outside the scope of accepted medical practice and not for a legitimate medical purpose.

Gov't Ex. 57 at 6. During his testimony, Dr. Loyd affirmed his view that the controlled substance prescribing practices demonstrated in LC's chart were outside the scope of accepted medical practice, were not for a legitimate medical purpose, and were not within the usual course of a professional practice. Tr. 141–42.

Patient DP

Dr. Loyd's report and testimony also outlined his review of the patient chart[95] maintained on DP. Loyd's assessment was that DP's medical history, which included a right-leg crush injury (from a 500-pound boulder), multiple resultant surgeries, and reflex sympathetic dystrophy (described by Loyd as ''very painful and debilitating''), Tr. 171, justified the utilization of controlled pain medication. In fact, Dr. Loyd's report contains his conclusion that ''[t]he narcotics prescribed in [DP's] case were for a legitimate medical condition and [] were used within the scope of accepted medical practice.'' Gov't Ex. 57 at 9.

That said, Dr. Loyd also noted that the chart contained three UDS reports which reflected that prescribed controlled pain medications that should have been present in DP's system were not, and that the chart is devoid of any indication that the patient was confronted about a single one.[96] *Id.;* Tr. 172–73, 176.

Patient ES

DI Phillips also presented testimony regarding her review of the patient chart[97] maintained on Patient ES. Phillips testified that she identified six anomalies connected to UDSs reports in the ES chart. Among those anomalies were testing positive for marijuana while testing negative for all other substances, including benzodiazepines and opiates following prescriptions for Xanax and two strengths of OxyContin, Tr. 722–23; testing negative for all substances, including those prescribed (twice), Tr. 725, 733–34;[98] testing positive for methadone without a prescription from the Respondent's practice, Tr. 728–29; testing negative for benzodiazepines following a prescription for Xanax, Tr. 731–33; and testing negative for opiates after being prescribed two forms of oxycodone, Tr. 739–40.[99] Consistent with the aforementioned anomalies, Patient ES was supplied with prescriptions for controlled substances following them. *See* Tr. 724–30, 733, 735–45.

Patient HGW

DI Stevens reviewed the patient chart[100] of HGW. DI Stevens identified nine UDS that contained anomalies, Gov't Ex. 48 at 161 (dated February 14, 2003), 160 (dated March 14, 2003), 159 (dated April 11, 2003), 157 (dated October 28, 2003), 148 (dated May 19, 2004), 147 (dated March 29, 2005), 146 (dated May 24, 2005), 145 (dated November 10, 2005), 142 (dated May 25, 2006), and one phone message dated December 21, 2005 from another pain management clinic seeking verification of information pertaining to Patient HGW as a new patient (indicating that HGW was doctor shopping on the Respondent's practice),[101] *id.* at 15; *see generally* Tr. 449–75. Anomalies were identified by DI Stevens within each drug screen, yet the Respondent, undeterred, continued to supply the patient with increasing quantities and varieties of controlled substances. For instance, at the first visit, Patient HGW represented that he was not on any medications at all, Tr. 452; Gov't Ex. 48 at 181, yet his drug test came back with positive results for cocaine, marijuana, opiates, and benzodiazepines, Tr. 450; Gov't Ex. 48 at 161–62. HGW was tested again the next month (March 14, 2003) and a second positive marijuana result appeared on the drug screen report. Tr. 453; Gov't Ex. 48 at 160. The Respondent, despite both of these red flags, prescribed Percocet and Xanax on July 31, 2003. Tr. 458; Gov't Ex. 48 at 130. In all, Patient HGW tested positive for marijuana four times while at the Respondent's practice. *See* Tr. 461; Gov't Ex. 48 at 148 (May 19, 2004 UDS), 147 (March 29, 2005 UDS). There were even times identified in the HGW patient chart by DI Stevens that the Respondent continued to prescribe controlled substances following UDS results that were negative for all substances tested. *See, e.g.,* Tr. 467, 469–70. *Compare,* Gov't Ex. 48 at 100–01 (prescriptions dated October 8, 2004 for OxyContin, Xanax, and Percocet), *and* 145 (UDS dated November 10, 2005 reporting negative results for all substances examined), *with* 71 (controlled prescriptions issued December 8, 2005 by Respondent for OxyContin, Percocet, Xanax, and Halcion), *and* 15 (chart note dated December 8, 2005 reflecting issuance of controlled prescriptions, but silent regarding UDS anomaly). Even though each of these anomalous drug screens were noted in the patient chart, the Respondent doled out prescriptions for controlled substances to HGW after almost every one.

Additional Patient Charts

Other medical files were addressed by DI Phillips' testimony in an expedited fashion and were subjected to this tribunal's examination. According to Phillips, her review of each of these charts revealed that the Respondent continued to prescribe controlled substances without resolving UDS irregularities that presented red flags in need of further investigation or inquiry. This list of additional charts reviewed incorporated patients CE (Gov't Ex. 27),[102] DF (Gov't Ex. 28),[103] EJ (Gov't Ex.

in the chart do not support the utilization of controlled substances.

[95] *See* Gov't Ex. 41.

[96] The Government also elicited some testimony regarding Dr. Loyd's estimation of the relative distance between DP's home and the Respondent's practice, Tr. 181–82, but the issue was not sufficiently developed to merit consideration on any issue to be decided in this case, and like other testimony relative to such distances, played no part in this recommended decision.

[97] *See* Gov't Ex. 43.

[98] At the visit following an all-negative drug screen on July 21, 2004, the Respondent entered the following concurrent observations in the patient chart, dated August 18, 2004, that Patient ES is ''very anxious'' due to a divorce evolution and '''runs out' of [medication] 3–4 days before visit,'' but that he also evidences ''[n]o side effects or evidence of addiction.'' Gov't Ex. 43 at 23. These assertions along with the negative drug screen, coexisting in somewhat of a tension with the Respondent's duties as a registrant charged with detecting addiction to those she prescribes controlled substances and verifying red flags, was noticed by the Government in its brief. *See* Gov't Br. at 11 n.13.

[99] Patient ES's medical chart reflects numerous prescriptions for the drug Adipex, which is a brand of phentermine, a Schedule IV controlled substance, prescribed to ES for weight loss. 21 C.F.R. § 1308.14(e)(9) (2011); *see, e.g.,* Gov't Ex. 43 at 20. For reasons that were not established at hearing or otherwise, the Government did not address these prescriptions in its case. Accordingly, they will play no role in the determination that must be made through this recommended decision.

[100] *See* Gov't Ex. 48.

[101] Receiving prescriptions for controlled substances from other physicians was a violation of HGW's pain management contract with the Respondent. Gov't Ex. 48 at 178, para. 9.

[102] *Compare* Gov't Ex. 27 at 24 (UDS anomalies negative for prescribed opioids and benzodiazepines and initialed by Respondent), *and id.* at 7 (chart entry by Respondent noting CE tested negative for her prescribed medications), *with id.* at 6, 14 (prescriptions afterward by Respondent for Lortab and Xanax), *and id.* at 6 (same), *and id.* at 5, 13 (same), *and id.* at 5, 12 (same), *and id.* at 4 (same), *and id.* at 4 (same).

[103] *Compare* Gov't Ex. 28 at 37 (UDS anomaly negative for prescribed opioids), *with id.* at 8, 26 (prescriptions afterward by Respondent for OxyContin, Percocet, and Xanax and chart entry by Respondent ''no evidence of addiction''), *and id.* at

Continued

35),[104] TK (Gov't Ex. 36),[105] TP (Gov't Ex. 40),[106] DP (Gov't Ex. 41),[107] and SY (Gov't Ex. 52).[108]

During his testimony, DI Stevens in like, summary fashion identified additional medical charts in which he found continued controlled substance prescribing in the face of at least one unresolved UDS anomaly. *See* Tr. 475–508. These additional charts, which were similarly parsed by this tribunal, corresponded to Patients LB (Gov't Ex. 22),[109] RB (Gov't Ex. 23),[110] JE (Gov't Ex. 26),[111] PG (Gov't Ex. 30),[112] BG (Gov't Ex. 31),[113] EG (Gov't Ex. 32),[114] SM (Gov't Ex. 37),[115] MM (Gov't Ex. 38),[116] WS (Gov't Ex. 45),[117] AT (Gov't

9, 25 (same), *and id.* at 10, 21 (same), *and id.* at 11, 20 (same).

[104] *Compare* Gov't Ex. 35 at 54 (pharmacy report supplied by Patient EJ, OxyContin 80 mg absent), *with id.* at 57 (new patient notes documenting purported prescription by prior practitioner for OxyContin 80 mg); *compare id.* at 59 (patient history intake form indicating Patient EJ denied ''nervous breakdown/depression/anxiety''), *with id.* at 57 (new patient notes documenting complaints of anxiety and insomnia); *compare id.* at 46–47 (UDS anomalies positive for purportedly non-prescribed benzodiazepines and propoxyphene), *with id.* at 13, 36 (prescriptions afterward by Respondent for OxyContin, Oxy IR, and Xanax), *and id.* at 12, 35 (same); *compare id.* at 44 (UDS anomaly negative for prescribed opioids and positive for non-prescribed propoxyphene), *with id.* at 11, 33 (prescriptions afterward by Respondent for OxyContin 40 mg, OxyContin 5 mg, and Xanax), *and id.* at 10, 30 (same), and *id.* at 9, 28 (same), *and id.* at 8 (same).

[105] *Compare* Gov't Ex. 36 at 34 (UDS anomalies positive for non-prescribed methadone), *with id.* at 9, 22 (prescriptions afterward by Respondent for OxyContin 40 mg, OxyContin 20 mg, and Xanax), *and id.* at 8, 21 (same), *and id.* at 7, 18 (same); *compare id.* at 32 (UDS anomalies negative for prescribed opioids and benzodiazepines), *with id.* at 5, 15 (prescriptions afterward by Respondent for OxyContin 20 mg, OxyContin 40 mg, and Ativan (brand name for lorazepam, a Schedule IV substance pursuant to 21 C.F.R. § 1308.14(c)(28) (2011))).

[106] *Compare* Gov't Ex. 40 at 42 (UDS anomaly negative for prescribed opioids), *with id.* at 10, 22 (prescriptions afterward by Respondent for OxyContin and Percocet), *and id.* at 10, 23 (same), *and id.* at 9, 25 (same), *and id.* at 8, 27 (same); *compare id.* at 40 (UDS anomaly negative for prescribed opioids and note written on report by Dr. Vilvarajah that Patient TP is ''negative for prescribed meds''), *with id.* at 7, 29 (prescriptions afterward by Respondent for OxyContin and Percocet), *and id.* at 6, 30 (same), *and id.* at 6, 31 (same).

[107] *Compare* Gov't Ex. 41 at 65 (UDS anomalies negative for prescribed methadone, opioids, and benzodiazepines), *with id.* at 15, 53 (prescriptions afterward by Respondent for methadone, OxyContin 40 mg, and Xanax), *and id.* at 14, 50 (same), *and id.* at 14, 49 (same with increase in dosage units for methadone), *and id.* at 13, 47 (same); *compare id.* at 62 (UDS anomalies negative for prescribed opioids and benzodiazepines), *with id.* at 11, 42 (prescriptions afterward by Respondent for methadone, OxyContin 40 mg, OxyContin 80 mg, and Xanax), *and id.* at 10, 39–40 (same), *and id.* at 9, 37 (same), *and id.* at 7, 32 (prescriptions by Respondent for methadone, OxyContin 40 mg, Fioricet, and Xanax); *compare id.* at 60 (UDS anomaly negative for prescribed benzodiazepines), *with id.* at 6–7, 30–31 (prescriptions afterward by Respondent for methadone, OxyContin 40 mg, Fioricet, and Xanax), *and id.* at 5, 26 (same), *and id.* at 4–5, 24 (same), *and id.* at 4, 22 (same).

[108] *Compare* Gov't Ex. 52 at 24–25 (UDS anomaly positive for non-prescribed propoxyphene), *with id.* at 4, 11 (prescriptions afterward by Respondent for MS Contin ER, Percocet, and Xanax). For reasons stated elsewhere in this recommended decision, DI Phillips' observations regarding patient commuter distances that she gleaned from the Internet, Tr. 788–90, were generally disputed in principle by Dr. Miller, Tr. 571, and have not been the subject of sufficient development in this record to be considered for any purpose.

[109] *Compare* Gov't Ex. 22 at 35 (UDS anomalies negative for prescribed opioids and benzodiazepines and positive for non-prescribed propoxyphene), *with id.* at 5 (prescriptions afterward by Respondent for OxyContin, Percocet, and Xanax), *and id.* at 5, 16 (same), *and id.* at 4, 14 (same), *and id.* at 3, 13 (same with increased dosage units).

[110] *Compare* Gov't Ex. 23 at 45 (UDS anomaly negative for opiates and benzodiazepines), *with id.* at 13, 37 (prescriptions afterward by Respondent for Xanax and Lortab); *compare id.* at 43 (UDS anomaly negative for prescribed opioids and benzodiazepines), *with id.* at 8, 31 (prescriptions afterward by Respondent for Lortab and Xanax), *and id.* (same), *and id.* (same).

[111] It was revealed on cross-examination that the chart for Patient JE did not possess a true drug screen anomaly. DI Stevens misidentified a prescription for Xanax that he believed was issued before the UDS (and therefore should have caused a positive result for benzodiazepines), but due to an administrative error on the part of the Respondent, the wrong date was transcribed onto the prescription. *See* Tr. 480, 530–38. *Compare* Gov't Ex. 26 at 8 (UDS at initial office visit with collection date November 19, 2004), *with* 10 (photocopy of prescription for Xanax dated November 9, 2004 depicted next to prescription for OxyContin dated November 19, 2004). Still, this oversight, due in part by an error made by the Respondent, is not so significant as to outweigh the assertions made by DI Stevens in his testimony that the other patient files contained one or more drug screen anomalies that were trailed by additional quantities of controlled substances being supplied to each patient.

[112] *Compare* Gov't Ex. 30 at 55 (January 28, 2006 UDS anomalies negative for prescribed opioids and positive for non-prescribed methadone), *and id.* at 11 (February 11, 2006 chart entry by Respondent that drug screen was positive for methadone and PG is on Roxicodone), *and id.* (February 25, 2006 chart entry by Dr. Vilvarajah noting that PG had unused methadone from a prescription he received back in April 2005 and that PG is against surgical measures), *with id.* at 9, 32–33 (prescriptions afterward by Respondent five months after UDS for MS Contin, Xanax, and Roxicodone), *and id.* at 8, 30 (same for the month subsequent); *compare id.* at 54 (UDS anomaly negative for prescribed benzodiazepines), *with id.* at 7–8, 29 (prescriptions afterward by Respondent for MS Contin, Roxicodone, and Xanax), *and id.* at 7, 27–28 (same plus Ambien), *and id.* at 6, 25–26 (same).

[113] *Compare* Gov't Ex. 31 at 44 (UDS anomaly negative for prescribed benzodiazepines), *with id.* at 10, 28 (prescriptions afterward by Respondent for OxyContin, hydrocodone, and Xanax), *and id.* at 10, 27 (same), *and id.* at 9, 26 (same), *and id.* at 9, 25 (same), *and id.* at 8, 24 (same); *compare id.* at 41 (UDS anomaly negative for prescribed benzodiazepines), *with id.* at 8, 23 (prescriptions afterward by Respondent for OxyContin, hydrocodone, and Xanax), *and id.* at 7, 22 (same), *and id.* at 7, 21 (same), *and id.* at 6, 20 (same), *and id.* at 6, 19 (same); *compare id.* at 42 (UDS anomaly negative for prescribed benzodiazepines), *with id.* at 4, 16 (prescriptions afterward by Respondent for OxyContin, hydrocodone, and Xanax).

[114] *Compare* Gov't Ex. 32 at 78 (UDS anomaly negative result for prescribed benzodiazepines), *with id.* at 18–19, 58 (prescriptions by Respondent afterward for OxyContin, Lortab, and Xanax and chart note ''[n]o side effects or evidence of addiction''), *and id.* at 18 (same); *compare id.* at 17 (chart entry noting pharmacy informed Respondent's practice that Patient EG filled prescription by another doctor for Xanax indicating doctor shopping and violation of pain management contract), *with id.* at 17, 55 (prescriptions afterward by Respondent for OxyContin and Lortab); *compare id.* at 76 (UDS anomaly negative result for prescribed opioids), *with id.* at 16, 54 (prescriptions afterward by Respondent for OxyContin and Lortab), *and id.* at 16, 53 (same), *and id.* at 15, 50 (same), *and id.* at 15, 49 (same); *compare id.* at 75 (UDS anomaly positive for non-prescribed benzodiazepines), *with id.* at 13, 46 (prescriptions by Respondent afterward for OxyContin and Lortab), *and id.* at 13, 45 (same), *and id.* at 12 (same), *and id.* (same), *and id.* at 10, 41 (same); *compare id.* at 72 (UDS anomaly positive for non-prescribed benzodiazepines), *with id.* at 6–7, 34 (prescriptions afterward by Respondent for OxyContin and Lortab), *and id.* at 5, 32 (same).

[115] *Compare* Gov't Ex. 37 at 45 (UDS anomaly negative for prescribed opioids and benzodiazepines), *with id.* at 6, 15 (prescriptions afterward by Respondent for OxyContin, Percocet, and Xanax), *and id.* at 5, 14 (same); *compare id.* at 43 (UDS anomalies negative for prescribed opioids and benzodiazepines), *with id.* at 4–5, 13 (prescriptions afterward by Respondent for OxyContin, Percocet, and Xanax).

[116] *Compare* Gov't Ex. 38 at 106 (patient history intake form indicating Patient MM denied ''nervous breakdown/depression/anxiety''), *with id.* at 105 (new patient notes documenting complaints of anxiety and insomnia); *compare id.* at 97 (UDS anomaly negative for prescribed benzodiazepines), *with id.* at 20, 77 (prescriptions afterward by Respondent for OxyContin, Lortab, and Xanax), *and id.* at 19, 76 (same), *and id.* at 18, 73 (same), *and id.* at 18, 72 (same), *and id.* at 17–18, 71 (same); *compare id.* at 94 (UDS anomaly negative for prescribed benzodiazepines), *with id.* at 17, 69 (prescriptions afterward by Respondent for OxyContin, Lortab, and Xanax), *and id.* at 16, 65–66 (same), *and id.* at 16, 63 (same), *and id.* at 15 (same), *and id.* at 14, 56–57 (same); *compare id.* at 93 (UDS anomaly negative for prescribed benzodiazepines), *with id.* at 14, 54 (prescriptions afterward by Respondent for OxyContin, Lortab, and Xanax), *and id.* at 13, 53 (same), *and id.* at 11, 45–46 (same); *compare id.* at 91 (UDS anomaly negative for prescribed benzodiazepines), *with id.* at 8, 37 (prescriptions afterward by Respondent for OxyContin, Lortab, and Xanax), *and id.* at 8, 36 (same), *and id.* at 7, 34 (same); *compare id.* at 90 (UDS anomaly negative for prescribed benzodiazepines), *with id.* at 6–7, 32–33 (prescriptions afterward by Respondent for OxyContin, Lortab, and Xanax and chart entry, ''Lab results discussed [with patient and] copy given. . . . No side effects, no evidence of addiction.''), *and id.* at 6, 30 (same prescriptions), *and id.* at 4 (same prescriptions), *and id.* at 3–4, 23 (same prescriptions).

[117] *Compare* Gov't Ex. 45 at 36 (UDS anomalies negative for oxycodone despite purported prescription from prior practitioner for OxyContin and positive for hydromorphone despite absence of claim for prior prescription of same), *with id.* at 35, 36 (prescriptions afterward by Respondent for OxyContin and Roxicodone). Hydromorphone is a Schedule II controlled substance pursuant to 21 C.F.R. § 1308.12(b)(1)(vii) (2011).

Ex. 46),[118] TW (Gov't Ex. 49),[119] and AW (Gov't Ex. 51).[120]

Other evidence required for a disposition of this issue is set forth in the analysis portion of this decision.

The Analysis

The Administrator[121] is authorized to deny a COR application when convinced that the registrant has been convicted of a felony under the CSA or any state law relating to a controlled substance. 21 U.S.C. § 824(a)(2) (2006). It is undisputed in this case that the Respondent has been convicted of a Kentucky state crime relating to controlled substances.

Pursuant to 21 U.S.C. § 823(f) (2006 & Supp. III 2010), the Administrator may deny an application for a DEA COR if persuaded that the issuance of such a registration would be inconsistent with the public interest. The following factors have been provided by Congress in determining ''the public interest:''

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing, or conducting research with respect to controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

21 U.S.C. § 823(f).

''[T]hese factors are considered in the disjunctive.'' *Robert A. Leslie, M.D.,* 68 Fed. Reg. 15227, 15230 (2003). Any one or a combination of factors may be relied upon, and when exercising authority as an impartial adjudicator, the Administrator may properly give each factor whatever weight she deems appropriate in determining whether an application for a registration should be denied. *Id.; David H. Gillis, M.D.,* 58 Fed. Reg. 37507, 37508 (1993); *see Morall v. DEA,* 412 F.3d 165, 173–74 (D.C. Cir. 2005); *Joy's Ideas,* 70 Fed. Reg. 33195, 33197 (2005); *Henry J. Schwarz, Jr., M.D.,* 54 Fed. Reg. 16422, 16424 (1989). Moreover, the Administrator is ''not required to make findings as to all of the factors.'' *Hoxie v. DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *Morall,* 412 F.3d at 173–74. The Administrator is not required to discuss consideration of each factor in equal detail, or even every factor in any given level of detail. *Trawick v. DEA,* 861 F.2d 72, 76 (4th Cir. 1988) (Administrator's obligation to explain the decision rationale may be satisfied even if only minimal consideration is given to the relevant factors and remand is required only when it is unclear whether the relevant factors were considered at all). The balancing of the public interest factors ''is not a contest in which score is kept; the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest. . . .'' *Jayam Krishna-Iyer,* 74 Fed. Reg. 459, 462 (2009).

In the adjudication of an application for a COR, the DEA has the burden of proving that the requirements for registration are not satisfied. 21 C.F.R. § 1301.44(d) (2011). Where the Government has sustained its burden and established that an applicant has committed acts inconsistent with the public interest, that applicant must present sufficient mitigating evidence to assure the Administrator that he or she can be entrusted with the responsibility commensurate with such a registration. *Steven M. Abbadessa, D.O.,* 74 Fed. Reg. 10077, 10078, 10081 (2009); *Medicine Shoppe-Jonesborough,* 73 Fed. Reg. 364, 387 (2008); *Samuel S. Jackson, D.D.S.,* 72 Fed. Reg. 23848, 23853 (2007). Normal hardships to the practitioner, and even the surrounding community, which are attendant upon the denial of a registration are not a relevant consideration. *Abbadessa,* 74 Fed. Reg. at 10078; *see also, Gregory D. Owens, D.D.S.,* 74 Fed. Reg. 36751, 36757 (2009). The Agency's conclusion that past performance is the best predictor of future performance has been sustained on review in the courts, *Alra Labs. v. DEA,* 54 F.3d 450, 452 (7th Cir. 1995), as has the Agency's consistent policy of strongly weighing whether a registrant who has committed acts inconsistent with the public interest has accepted responsibility and demonstrated that he or she will not engage in future misconduct. *Hoxie,* 419 F.3d at 483; *see also Ronald Lynch, M.D.,* 75 Fed. Reg. 78745, 78749 (2010) (Respondent's attempts to minimize misconduct held to undermine acceptance of responsibility); *George Mathew, M.D.,* 75 Fed. Reg. 66138, 66140, 66145, 66148 (2010); *George C. Aycock, M.D.,* 74 Fed. Reg. 17529, 17543 (2009); *Abbadessa,* 74 Fed. Reg. at 10078; *Krishna-Iyer,* 74 Fed. Reg. at 463; *Medicine Shoppe,* 73 Fed. Reg. at 387.

While the burden of proof at this administrative hearing is a preponderance-of-the-evidence standard, *see Steadman v. SEC,* 450 U.S. 91, 100–01 (1981), the Administrator's factual findings will be sustained on review to the extent they are supported by ''substantial evidence.'' *Hoxie,* 419 F.3d at 481. And while ''the possibility of drawing two inconsistent conclusions from the evidence'' does not limit the Administrator's ability to find facts on either side of the contested issues in the case, *Shatz v. U.S. Dep't of Justice,* 873 F.2d 1089, 1092 (8th Cir. 1989); *Trawick,* 861 F.2d at 77, all ''important aspect[s] of the problem,'' such as a Respondent's defense or explanation that runs counter to the Government's evidence, must be considered. *Wedgewood Vill. Pharmacy v. DEA,* 509 F.3d 541, 549 (D.C. Cir. 2007); *Humphreys,* 96 F.3d at 663. The ultimate disposition of the case must be in accordance with the weight of the evidence, not simply supported by enough evidence to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to

[118] *Compare* Gov't Ex. 46 at 59 (UDS anomalies positive for non-prescribed barbiturates and negative for prescribed opioids and benzodiazepines), *and id.* at 57 (UDS anomalies positive for cocaine and marijuana), *with id.* at 7, 32 (prescriptions afterward by Respondent for OxyContin 40 mg, Lortab, and Xanax); *compare id.* at 55 (UDS anomaly negative for prescribed opioids), *with id.* at 6, 29–30 (prescriptions afterward by Respondent for OxyContin 20 mg, OxyContin 40 mg, Lortab, and Xanax), *and id.* at 5, 28 (same less OxyContin 20 mg), *and id.* at 5, 27 (same).

[119] *Compare* Gov't Ex. 49 at 111 (UDS anomaly positive for cocaine), *and id.* at 110 (UDS anomaly negative for prescribed benzodiazepines), *and id.* at 106 (UDS anomaly positive for cocaine, negative for prescribed opioids), *and id.* at 104 (UDS anomaly negative for prescribed opioids), *and id.* at 11 (chart entry by Respondent that Patient TW admitted she was taking some of her husband's medications ''to 'function''' after not visiting the practice for seven months due to birth of baby), *with id.* at 11, 52 (prescriptions afterward by Respondent for Percocet and Xanax contemporaneous with her chart entry about taking husband's medications). Evidence of record further demonstrates that the Respondent prescribed additional controlled substances at later office visits; however, those prescriptions followed drugs screens that were either consistent with the period of absence from the clinic (i.e., negative for all substances tested) or were consistent with prescribed opioids and benzodiazepines. While there were also two other drug screens that lacked anomalies, they were scattered among the string of anomalous UDS reports, and the Respondent's (one) cited prescription set was in the face of at least two red flags that were not addressed (a UDS with negative result for prescribed opioids and an admission of taking husband's medications without confrontation, admonishment, or inquiry into whether they were controlled).

[120] Patient AW is the individual that was interviewed by former ACA Guindi. Regarding her chart, compare Gov't Ex. 51 at 14 (UDS anomaly negative for benzodiazepines despite purported prescription by prior practitioner for Xanax), with *id.* at 12–13 (prescriptions afterward by Respondent for methadone and OxyContin), and *id.* at 10–11 (same with doubled dosage units for methadone), and *id.* at 6, 8 (same with doubled dosage units again for methadone), and *id.* at 6–7 (same), and *id.* at 2, 4 (prescriptions by Respondent for OxyContin, Percocet, and Xanax).

[121] This authority has been delegated pursuant to 28 C.F.R. §§ 0.100(b) and 0.104 (2011).

be drawn from it is one of fact for the jury. *Steadman,* 450 U.S. at 99 (internal quotation marks omitted).

Regarding the exercise of discretionary authority, the courts have recognized that gross deviations from past agency precedent must be adequately supported, *Morall,* 412 F.3d at 183, but mere unevenness in application does not, standing alone, render a particular discretionary action unwarranted. *Chein v. DEA,* 533 F.3d 828, 835 (D.C. Cir. 2008) (citing *Butz v. Glover Livestock Comm'n Co.,* 411 U.S. 182, 188 (1973)), *cert. denied,* __ U.S. __, 129 S. Ct. 1033 (2009). It is well-settled that since the Administrative Law Judge has had the opportunity to observe the demeanor and conduct of hearing witnesses, the factual findings set forth in this recommended decision are entitled to significant deference, *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 496 (1951), and that this recommended decision constitutes an important part of the record that must be considered in the Administrator's decision, *Morall,* 412 F.3d at 179. However, any recommendations set forth herein regarding the exercise of discretion are by no means binding on the Administrator and do not limit the exercise of that discretion. 5 U.S.C. § 557(b) (2006); *River Forest Pharmacy, Inc. v. DEA,* 501 F.2d 1202, 1206 (7th Cir. 1974); *Attorney General's Manual on the Administrative Procedure Act* 8 (1947).

Factor 1: The Recommendation of the Appropriate State Licensing Board or Professional Disciplinary Authority

In this case, it is undisputed that the Respondent holds a valid and current state license, albeit subject to the terms and conditions of a five-year probationary period, to practice medicine. Action taken by a state medical board is an important, though not dispositive, factor in determining whether the continuation of a DEA COR is consistent with the public interest. *Patrick W. Stodola, M.D.,* 74 Fed. Reg. 20727, 20730 (2009); *Jayam Krishna-Iyer, M.D.,* 74 Fed. Reg. 459, 461 (2009). It is well-established Agency precedent that a ''state license is a necessary, but not a sufficient condition for registration.'' *Robert A. Leslie, M.D.,* 68 Fed. Reg. 15227, 15230 (2003); *John H. Kennedy, M.D.,* 71 Fed. Reg. 35705, 35708 (2006). The considerations employed by, and the public responsibilities of, a state medical board in determining whether a practitioner may continue to practice within its borders are not coextensive with those attendant upon the determination that must be made by DEA relative to continuing a registrant's authority to handle controlled substances. Even the reinstatement of a state medical license does not affect the DEA's independent responsibility to determine whether a registration is in the public interest. *Mortimer B. Levin, D.O.,* 55 Fed. Reg. 9209, 8210 (1990). The ultimate responsibility to determine whether a registration is consistent with the public interest has been delegated exclusively to the DEA, not to entities within state government. *Edmund Chein, M.D.,* 72 Fed. Reg. 6580, 6590 (2007), *aff'd, Chein v. DEA,* 533 F.3d 828 (DC Cir. 2008), *cert. denied,* ____ U.S. ____, 129 S. Ct. 1033 (2009). Congress vested authority to enforce the CSA in the Attorney General and not state officials. *Stodola,* 74 Fed. Reg. at 20375. As stated in *Paul Weir Battershell, N.P.,* 76 Fed. Reg. 44359, 44365–66 (2011):

> [Precedent within the Agency] has repeatedly [recognized] that a practitioner's possession of state authority ''is not dispositive of the public interest inquiry.'' *George Mathew,* 75 Fed. Reg. 66138, 66145 (2010) (citing *Stodola,* 74 Fed. Reg. at 20730 n.16; *Leslie,* 68 Fed. Reg. at 15230). ''[T]''he [CSA] requires that the Administrator . . . make an independent determination [from that made by state officials] as to whether the granting of controlled substance privileges would be in the public interest.'' *Levin,* 57 Fed. Reg. at 8681.

Here, after a contested hearing on the merits, the Tennessee Medical Board found that the Respondent, in light of her criminal guilty plea, committed ''[u]nprofessional, dishonorable or unethical conduct,'' [122] and was ''[c]onvict[ed] of an[] offense of state or federal drug laws . . . .'' [123] Gov't Ex. 15 at 4. The Board restored the medical privileges that had been the subject of a prior emergency suspension,[124] but sanctioned the Respondent with a five-year term of probation upon her license, coupled with specific monitoring and training requirements and a $1,000.00 civil penalty. *Id.* at 5.

While the action of a state medical board must be considered under Factor 1, a state's action pertaining to the Respondent's medical license or ability to handle controlled substances (falling short of an executed revocation) is not dispositive in DEA's determination regarding the appropriateness of a sanction. *See Mathew,* 75 Fed. Reg. at 66145 (wherein DEA declines to adopt as dispositive under Factor 1 the state medical board's sanction of suspending respondent's medical license, then staying the suspension, in case where respondent was prescribing controlled substances without physically examining patients or maintaining medical records). On the one hand, the Tennessee Medical Board obviously concluded that it could discharge its responsibility to safeguard the public with something less than an outright revocation. On the other hand, the high level of required retraining and copious mandated monitoring hardly constitute a vote of confidence in the Respondent's abilities as a physician. Although the record contains no evidence that the Respondent has been non-compliant with the terms imposed by the state medical board, the relatively brief period of time that has passed since the issuance of the Medical Board's Order, and that by her own admission, the Respondent has not been practicing medicine to any degree since early 2009,[125] do not allow for a meaningful extrapolation regarding the Respondent's level of compliance with the probationary terms over the duration of the probation.

Thus, consideration of the evidence under this factor presents something of a mixed bag regarding the application and does not militate for or against revocation.

Factor 3: The Respondent's Conviction Record

Under Federal or State Laws Relating to the Manufacture, Distribution, or Dispensing of Controlled Substances

As discussed elsewhere in this decision, the record reflects that the Respondent was convicted [126] in a Kentucky state court of one count for the facilitation of trafficking of a controlled substance in the first degree. Stipulation F. Under Kentucky law:

> A person is guilty of criminal facilitation when, *acting with knowledge* that another person is committing or intends to commit a crime, he engages in conduct which *knowingly provides* such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime.

Ky. Rev. Stat. Ann. § 506.080(1) (emphasis supplied). The object crime of the Respondent's guilty plea, first degree controlled substance trafficking, requires proof that the trafficker(s) (in this case, the facilitated individuals),

[122] Tenn. Code Ann. § 63–6–214(b)(1).

[123] Tenn. Code Ann. § 63–6–214(b)(10).

[124] Gov't Ex. 14.

[125] Tr. 1044.

[126] Pursuant to the terms of a plea agreement, the Respondent made an *Alford* plea to a single misdemeanor count of facilitation of trafficking in controlled substances in the first degree. Stipulation F. Consistent with the plea agreement provisions, other counts, including facilitating the activities of a criminal syndicate trafficking in controlled substances, second degree assault, and wanton endangerment, were dismissed in satisfaction. *Id.*

knowingly and unlawfully trafficked a controlled substance. Ky. Rev. Stat. Ann. § 218A.1412(1). Kentucky includes distribution under the definition of trafficking,[127] and the statutory definition of distribution is defined as ''to deliver other than by administering and dispensing a controlled substance.'' Ky. Rev. Stat. Ann. § 218A.010(10).

The inchoate nature of criminal facilitation requires that resort be had to the conduct that established her guilt in determining whether her conviction relates to distributing or dispensing under this factor. The means of the Respondent's facilitation in the criminal matter was exclusively the writing of the controlled substance prescriptions that were utilized to secure the controlled substances trafficked by the facilitated patients. Inasmuch as the federal definition of ''dispense'' under the CSA includes prescribing,[128] and knowingly prescribing controlled substances to the facilitated traffickers defined her culpability under state law, it is clear that she was convicted of a state crime relating to the dispensing of controlled substances, and equally clear that consideration of the evidence under this factor, which supports a finding that actual diversion occurred, militates against granting the application.

Factors 2, 4, and 5: The Respondent's Experience in Dispensing Controlled Substances; Compliance With Applicable State, Federal, or Local Laws Relating to Controlled Substances; and Such Other Conduct Which May Threaten the Public Health and Safety

In this case, the gravamen of the allegations in the OSC offered in opposition to the application, as well as the factual concentration of much of the evidence presented, share as a principal focus the manner in which the Respondent has managed that part of her practice relative to prescribing controlled substances and acts allegedly committed in connection with that practice that formed the basis of her state criminal conviction and her state medical board sanctions. Thus, it is analytically logical to consider public interest factors two, four, and five together. That being said, factors two and four involve analysis of both common and distinct considerations.

Regarding Factor 2, in requiring an examination of a registrant's experience in handling controlled substances, Congress manifested an acknowledgement that the qualitative manner and the quantitative volume in which a registrant has engaged in the dispensing of controlled substances, and how long he or she has been in the business of doing so, are significant factors to be evaluated in reaching a determination as to whether he or she should be entrusted with a DEA COR. In some cases, viewing a registrant's actions against a backdrop of how she has performed activity within the scope of the certificate can provide a contextual lens to assist in a fair adjudication of whether continued registration is in the public interest.

Evidence that a practitioner may have conducted a significant level of sustained activity within the scope of the registration for a sustained period is a relevant and correct consideration, which must be accorded due weight. However, the Agency has taken the reasonable position that this factor can be outweighed by acts held to be inconsistent with the public interest. *Jayam Krishna-Iyer,* 74 Fed. Reg. at 463. Experience which occurred prior or subsequent to proven allegations of malfeasance may be relevant. Evidence that precedes proven misconduct may add support to the contention that, even acknowledging the gravity of a registrant's transgressions, they are sufficiently isolated and/or attenuated that adverse action against his registration is not compelled by public interest concerns. Likewise, evidence presented by the Government that the proven allegations are congruous with a consistent past pattern of poor behavior can enhance the Government's case.

In a similar vein, conduct which occurs after proven allegations can shed light on whether a registrant has taken steps to reform and/or conform his or her conduct to appropriate standards. Contrariwise, a registrant who has persisted in incorrect behavior, or made attempts to circumvent Agency directives, even after being put on notice, can diminish the strength of its case. *Novelty, Inc.,* 73 Fed. Reg. 52689, 52703 (2008), *aff'd,* 571 F.3d 1176 (DC Cir. 2009); *Southwood Pharm., Inc.,* 72 Fed. Reg. 36487, 36503 (2007); *John J. Fotinopoulous,* 72 Fed. Reg. 24602, 24606 (2007).

In *Jayam Krishna-Iyer,* 74 Fed. Reg. at 463, DEA policy regarding this aspect of the public interest determination was clarified. The decision in that case acknowledged the reality that even a significant and sustained history of uneventful practice under a DEA certificate can be offset by proof that a registrant has committed acts inconsistent with the public interest. *Id.; see also Jeri Hassman, M.D.,* 75 Fed. Reg. 8194, 8235 (2010) (acknowledging Agency precedential rejection of the concept that conduct which is inconsistent with the public interest is rendered less so by comparing it with a respondent's legitimate activities which occurred in substantially higher numbers); *Paul J. Cargine, Jr.,* 63 Fed. Reg. 51592, 51560 (1998) (''[E]ven though the patients at issue are only a small portion of Respondent's patient population, his prescribing of controlled substances to these individuals raises serious concerns regarding [his] ability to responsibly handle controlled substances in the future.''). In the context of a pharmacy registrant, Agency precedent has consistently held that even a significant level of legitimate dispensing cannot offset flagrant violations. *See, e.g., Medicine Shoppe-Jonesborough,* 73 Fed. Reg. 364, 386 & n.56 (2008).

The Agency, in its administrative precedent (notwithstanding what might be perceived as an arguable lack of at least readily-apparent ambiguity employed by Congress in the language of the statute),[129] has further curtailed the scope of Factor 2. The Agency's current view regarding Factor 2 is that while evidence of a registrant's experience handling controlled substances may be entitled to some weight in assessing whether errant practices have been reformed, it is entitled to no weight where a practitioner fails to acknowledge wrongdoing. *Cynthia M. Cadet, M.D.,* 76 Fed. Reg. 19450 n.3 (2011); *Roni Dreszer, M.D.,* 76 Fed. Reg. 19434 n.3 (2011); *Michael J. Aruta, M.D.,* 76 Fed. Reg. 19420 n.3 (2011); *Jacobo Dreszer, M.D.,* 76 Fed. Reg. 19386–87 n.3 (2011).

As discussed in more detail *infra,* inasmuch as the Respondent has accepted no measure of responsibility for her actions in this case, Agency precedent diminishes the availability of any consideration of those elements of her prior practice that reflect past compliance, ability, or competence in the handling of controlled substances.[130]

[127] Ky. Rev. Stat. Ann. § 218A.010(42).

[128] 21 U.S.C. § 802(10); *see also* Ky. Rev. Stat. Ann. § 218A.010(8) (Kentucky law to same effect).

[129] See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984) for the two-step process constructed by the United States Supreme Court regarding the deference afforded to an agency in interpreting a statute it is charged to administer.

First . . . . [i]f the intent of Congress is clear, that is the end of the matter; for the . . . agency[] must give effect to the unambiguously expressed intent of Congress. . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.''

467 U.S. at 842–43.

[130] However, the Respondent's evidence in this regard would not have altered the result in her

Continued

Many of the Respondent's controlled substance prescribing practices impact not only Factor 2 (experience dispensing [131] controlled substances), but also on Factors 4 (compliance with federal and state law relating to controlled substances) and 5 (other conduct which may threaten public health and safety). As discussed elsewhere in this decision, the Respondent stands convicted of a Kentucky state count of facilitation of trafficking of a controlled substance in the first degree. Stipulation F. Under Kentucky law:

> A person is guilty of criminal facilitation when, *acting with knowledge* that another person is committing or intends to commit a crime, he engages in conduct which *knowingly provides* such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime.

Ky Rev. Stat. Ann. § 506.080(1) (emphasis supplied). The notations that the Respondent added to the current application that she was convicted of an ''unintentional'' violation of that provision,[132] and her consistent position from the outset of these proceedings that the impact of her guilty plea is significantly altered here because it was tendered as an *Alford* plea, are both of equally little moment in these proceedings. Agency precedent has acknowledged the Supreme Court's recognition of the applicability of the *res judicata* doctrine in DEA administrative proceedings. *Christopher Henry Lister, P.A.,* 75 Fed. Reg. 28068, 28069 (2010) (quoting *Univ. of Tenn. v. Elliot,* 478 U.S. 788, 797–98 (1986) (''When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata*[.]''); *see Robert L. Dougherty, M.D.,* 76 Fed. Reg. 16823, 16830 (2011) (recognizing that absent an established exception, *res judicata* bars relitigation of factual findings and conclusions of law of prior DEA proceedings, state board decisions, and criminal convictions). This tribunal is without authority to relitigate the merits of the Kentucky state criminal conviction, or the plea, and there is certainly no warrant in the CSA or its implementing regulations to pass judgment on the propriety of the state court proceedings conducted in Harlan County, Kentucky. A conviction under the facilitation crime to which the Respondent pled guilty requires that the defendant ''act[ed] with knowledge'' that the facilitated person or persons was committing or intending to commit the crime that is the object of the charge. Ky. Rev. Stat. Ann. § 506.080(1). Furthermore, a conviction under this provision requires that the conduct that ''provide[d] the means or opportunity for the commission of the crime'' ''knowingly provide[d]'' the facilitated criminal(s) with the means or opportunity for a crime that was actually committed. *Id.* Thus, the Respondent was convicted under a criminal statute that requires that she had knowledge that she was facilitating the drug-trafficker patients that were the recipients of her controlled substance prescriptions and that her actions were done knowingly. The matter is *res judicata* in these proceedings. End of story.

To effectuate the dual goals of conquering drug abuse and controlling both legitimate and illegitimate traffic in controlled substances, ''Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA.'' *Gonzales v. Raich,* 545 U.S. 1, 13 (2005). Consistent with the maintenance of that closed regulatory system, subject to limited exceptions not relevant here, a controlled substance may only be dispensed upon a prescription issued by a practitioner, and such a prescription is unlawful unless it is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 U.S.C. § 829; 21 C.F.R. § 1306.04(a). Furthermore, ''an order purporting to be a prescription issued not in the usual course of professional treatment . . . is not a prescription within the meaning and intent of [21 U.S.C. § 829] and the person knowingly . . . issuing it, shall be subject to the penalties provided for violations of the provisions of law related to controlled substances.'' *Id.*

A registered practitioner is authorized to dispense,[133] which, as discussed elsewhere in this decision, the CSA defines as ''to deliver a controlled substance to an ultimate user [134] . . . by, or pursuant to the lawful order of a practitioner.'' 21 U.S.C. 802(10); *see also Rose Mary Jacinta Lewis,* 72 Fed. Reg. 4035, 4040 (2007). The prescription requirement is designed to ensure that controlled substances are used under the supervision of a doctor as a bulwark against the risk of addiction and recreational abuse. *Aycock,* 74 Fed. Reg. at 17541 (citing *Gonzales v. Oregon,* 546 U.S. 243, 274 (2006); *United States v. Moore,* 423 U.S. 122, 135, 142–43 (1975) (noting that evidence established that a physician exceeded the bounds of professional practice when he gave inadequate examinations or none at all, ignored the results of the tests he did make, and took no precautions against misuse and diversion)). The prescription requirement likewise stands as a proscription against doctors ''peddling to patients who crave the drugs for those prohibited uses.'' *Gonzalez,* 546 U.S. at 274. The courts have sustained criminal convictions based on the issuing of illegitimate prescriptions where physicians conducted no physical examinations or sham physical examinations. *United States v. Alerre,* 430 F.3d 681, 690–91 (4th Cir. 2005), *cert. denied,* 574 U.S. 1113 (2006); *United States v. Norris,* 780 F.2d 1207, 1209 (5th Cir. 1986).

While true that the CSA authorizes the ''regulat[ion of] medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood,'' *Gonzales,* 546 U.S. at 909–10, an evaluation of cognizant state standards is essential, *Joseph Gaudio, M.D.,* 74 Fed. Reg. 10083, 10090 (2009); *Kamir Garces-Mejias, M.D.,* 72 Fed. Reg. 54931, 54935 (2007); *United Prescription Servs., Inc.,* 72 Fed. Reg. 50397, 50407 (2007). In this adjudication, the evaluation of the Respondent's prescribing practices must be consistent with the CSA's recognition of state regulation of the medical profession and its bar on physicians from peddling to patients who crave drugs for prohibited uses. The analysis must be ''tethered securely'' to state law and federal regulations in application of the public interest factors, and may not be based on a mere disagreement between experts as to the most efficacious way to prescribe controlled

favor, even if the Agency precedent was otherwise. Beyond the Respondent's representations that she has practiced uneventfully, the record contains no evidence regarding her experience as a registrant prior to her current difficulties that would tend to shift the balance of the equities in favor of granting a registration. There is no evidence from peers, former supervisors, or other medical professionals that would lend any support towards considering her past history as a registrant as a positive factor. Regarding her past experience, the record establishes that she was trained as a physician and granted a registration. Nothing more.

[131] As noted *supra* note 128 and accompanying text, the statutory definition of the term ''dispense'' includes the prescribing and administering of controlled substances. 21 U.S.C. § 802(10).

[132] Gov't Ex. 2 at 2.

[133] 21 U.S.C. § 823(f).

[134] ''Ultimate user'' is defined as ''a person who has lawfully obtained, and who possesses, a controlled substance for his own use or for the use of a member of his household or for an animal owned by him or by a member of his household.'' 21 U.S.C. § 802(27).

substances to treat chronic pain sufferers. *Volkman v. DEA,* 567 F.3d 215, 223 (6th Cir. 2009) (citing *Gonzales,* 546 U.S. at 272, 274). Here the Government's expert couched his opinions, which are credited in this recommended decision, in terms of generally acceptable medical practice, a standard which has also been embraced as a suitable measure by the Agency and numerous courts of appeal. *Jacobo Dreszer, M.D.,* 76 Fed. Reg. 19386 (2011) (quoting *United States v. Smith,* 573 F.3d 639, 647–48 (8th Cir. 2009) (internal quotation marks omitted) (citing *United States v. Merrill,* 513 F.3d 1293, 1306 (11th Cir. 2008)).

Under the CSA, it is fundamental that a practitioner must establish and maintain a bona fide doctor-patient relationship in order to act ''in the usual course of . . . professional practice'' and to issue a prescription for a legitimate medical purpose.'' *Dewey C. Mackay, M.D.,* 75 Fed. Reg. 49956, 49973 (2010); *Stodola,* 74 Fed. Reg. at 20731 and *Shyngle,* 74 Fed. Reg. at 6057–58 (citing *Moore,* 423 U.S. at 141–43). The CSA generally looks to state law to determine whether a bonafide doctor-patient relationship was established and maintained. *Stodola,* 74 Fed. Reg. at 20731; *Shyngle,* 74 Fed. Reg. at 6058; *Garces-Mejias,* 72 Fed. Reg. at 54935; *United Prescription Servs.,* 72 Fed. Reg. at 50407.

A Tennessee statute lists the grounds by which the Board of Medical Examiners (Tennessee Medical Board) may, *inter alia,* suspend, revoke, or limit a physician's license to practice medicine within the state. *See* Tenn. Code Ann. § 63–6–214 (2011). Among the included grounds, a license may be revoked for committing an act of ''[u]nprofessional, dishonorable, or unethical conduct;'' as well as a ''conviction of any offense under state . . . laws relative to drugs;'' or ''prescribing . . . any controlled substance . . . not in the course of professional practice, or not in good faith to relieve pain and suffering . . . in amounts and/or for durations not medically necessary, advisable or justified for a diagnosed condition.'' *Id.* § 63–6–214(b)(1), (b)(10)–(12). Likewise, a physician who prescribes ''controlled substances in amounts or for durations not medically necessary, advisable or justified is considered to be practicing beyond the scope of the professional practice.'' Tenn. Comp. R. & Regs. 0880–02–.14(2)(d) (2010). Thus, Dr. Miller's uncontroverted testimony about the improvidence of prescribing methadone simultaneously with Oxycontin [135] arguably support a finding that these prescriptions were issued outside the scope of a professional practice. Equal grounds for revocation include ''prescribing . . . a controlled substance [to a] person [who] is addicted to the habit of using controlled substances without making a bona fide effort to cure the habit of such patient,'' or ''prescribing . . . any controlled substance . . . in violation of any law of [Tennessee] or of the United States.'' Tenn. Code Ann. § 63–6–214(b)(13) (14). Prescribing controlled substances to patients who have demonstrated, through irregular UDS results, potential addiction, are likewise improper under Tennessee state law.

In addition to the statutory requirements related to controlled prescriptions, the Tennessee Medical Board (apparently unbeknownst to the experts who testified in this case) adopted regulations pursuant to the Tennessee Intractable Pain Treatment Act, Tenn. Code Ann. § 63–6–1105, –1111, governing the authority physicians have to prescribe controlled substances, Tenn. Comp. R. & Regs. 0880–02–.14(6), necessary prerequisites prior to issuing prescriptions, *id.* at 0880–02–.14(7), and guidelines carrying the force of law for using controlled substances to treat pain, *id.* at 0880–02–.14(6)(e). Recognizing that controlled substances are indispensable for the treatment of pain, physicians only have the authority [136] to prescribe them ''after a reasonably based medical diagnosis has been made, in adequate doses, and for appropriate lengths of time.'' *Id.* at 0880–02–.14(6). Furthermore, to the extent pain management for intractable pain becomes the focus of the physician's practice, regardless of whether he prescribes opiates, he or she must have documented specialized education in pain management on causes, different and recommended treatment modalities, chemical dependency,[137] and psycho/social aspects of the condition sufficient to bring the practitioner into the current standard of care in the pain management field. *Id.* at 0880–02–.14(6)(c).

As conditions precedent to prescribing controlled substances, the Tennessee Medical Board promulgated a rule mandating compliance with several requirements regarding patient history, examination, testing, diagnosis, and treatment plan. In fact, according to the rule, prescribing a controlled drug is a *prima facie* violation of the statute that requires such medications to be issued only in the course of professional practice (and in amounts and durations medically necessary, advisable, and justified for a diagnosed condition), *unless* the physician has ''first done and *appropriately documented* . . . *all* of the following,'' *id.* at –.14(7) (emphasis supplied):

1. Performed an appropriate history and physical examination; and

2. Made a diagnosis based upon the examinations and all diagnostic and laboratory tests consistent with good medical care; and

3. Formulated a therapeutic plan, and discussed it, along with the basis for it and the risks and benefits of various treatments options, a part of which might be the prescription or dispensed drug, with the patient; and

4. Insured availability of the physician or coverage for the patient for appropriate follow-up care.

Id. [138] It is also a *prima facie* violation to prescribe controlled drugs based solely upon ''answers to a set of questions.'' *Id.* at –.14(7)(c).

The state pain management guidelines adopted by the Tennessee Medical Board through regulation (Tennessee Guidelines), which closely track the statutory language and requirements of the Tennessee Intractable Pain Treatment Act,[139] affirm that prescribing controlled substances for the treatment of pain will be considered for a legitimate medical purpose if ''based upon accepted scientific knowledge of the treatment of pain,'' not in violation of applicable Tennessee or federal laws, and prescribed in compliance with the Tennessee Guidelines where appropriate and as necessary depending on individual patient needs.[140] The Tennessee Guidelines, noted as follows, command that prescriptions may only be made:

1. After a documented medical history is taken from the patient and physical examination is conducted by the physician, including ''an assessment and consideration of the pain, physical and psychological function, any history and potential for substance abuse, coexisting diseases and conditions, and the presence of a recognized

[135] Tr. 584–85, 610–11.

[136] General authority to prescribe controlled substances as a course of treatment for patients suffering from intractable pain is granted in the Tennessee Intractable Pain Treatment Act. Tenn. Code Ann. § 63–6–1105 (2011).

[137] Physicians treating pain patients who require treatment for chemical dependency as well must also comply with the Intractable Pain Treatment Act. Tenn. Comp. R. & Regs. 0880–02–.14(d); *see* Tenn Code Ann. § 63–6–1107(c), (d).

[138] An exception is made that a new physical examination is not required for established patients before issuing new prescriptions so long as that determination is made by the physician based upon ''sound medical practices.'' Tenn. Comp. R. & Regs. 0880–02–.14(7)(b)(4).

[139] *See* Tenn. Code Ann. § 63–6–1107.

[140] Tenn. Comp. R. & Regs. 0880–02–.14(6)(e)(3).

medical indication for the use of a . . . controlled substance;'' [141]

2. ''Pursuant to a written treatment plan tailored for the individual needs of the patient'' that takes into account treatment progress and success as evaluated with stated objectives, like pain relief or improved physical or psychosocial function.[142] The written treatment plan requires consideration of the relevant patient medical history, physical examination conducted, and any need for further testing, consultation, referral, or employment of alternative treatment modalities; [143]

3. Following a discussion between the physician and the patient regarding the weighed risks and benefits of treatment through the use of controlled substances.[144]

4. ''Subject to documented periodic review'' of the treatment plan at reasonable intervals relative to any progress toward the defined treatment objectives;[145] and

5. While keeping ''[c]omplete and accurate records of the care'' listed above, including specific details of each prescription for a controlled substance.[146]

The Guidelines further provide that the validity of a physician's prescribing, including the quantities of drugs and chronicity of the prescribing, will be judged based on ''the documented appropriate diagnosis and treatment of the recognized medical indication, documented persistence of the recognized medical indication, and properly documented follow-up evaluation with appropriate continuing care as set out by [the Guidelines].'' *Id.* at –.14(6)(e)(6). Moreover, special attention and consideration is to be given to patients who have a history of substance abuse or live in an environment which poses a risk for drug misuse or diversion. *Id.* at –.14(6)(e)(3)(v); *see* Tenn. Code Ann. § 63–6–1107. Such scrutiny may be in the form of closer monitoring or consultation with other appropriate healthcare professionals. *Id.* Deviation from strict adherence to the Tennessee Guidelines, absent good cause, is grounds by the Tennessee Medical Board to take disciplinary action. *Id.* at –.14(6)(e)(8). Prescribing for other than legitimate medical purposes, writing false or fictitious controlled-substance prescriptions, or prescribing controlled medications in a manner inconsistent with the public health and welfare are all explicit bases for medical license cancellation, suspension, or revocation. Tenn. Code Ann. § 63–6–1108.

As demonstrated above, it is abundantly clear from the plain language of both the Tennessee statutes and regulations, including the Tennessee Guidelines, that the drafters placed critical emphasis on the need to document the objective signs and rationale employed in the course of pain treatment through the prescription of controlled substances. Conscientious documentation is not just a ministerial act, but a key treatment tool and a vital indicator to evaluate whether the physician's prescribing practices are ''within the usual course of professional practice.'' Here, the Respondent's documentation regarding UDS anomalies, follow-up, and recordkeeping, like her level of motivation in procuring prior medical records and referrals, were, based on the testimony of every witness (including herself), woefully inadequate and, based on expert testimony and practices readily apparent in the patient charts of evidence discussed elsewhere identified by the DIs as well as through review made by this tribunal, clearly noncompliant with the standards and law related to controlled substance prescribing in the state of Tennessee.

Suffice it to say that the Respondent's prescribing practices did little to advance the position that she fulfilled her obligations as a registrant to safeguard against diversion in any meaningful way. When pressed on the issue at the hearing, the Respondent acknowledged that even she no longer believes that her approach to minimizing diversion risks had been an effective one. Tr. 895–96. This tacit admission of dereliction notwithstanding, both the plain language employed by the Respondent and the tenor of her testimony as observed at the hearing revealed more of a resignation about specific deficiencies brought to her attention during the course of her testimony than any significant level of acknowledgment of wrongdoing and acceptance of responsibility. Her lackluster testimonial epiphanies occurred only at her own administrative hearing sporadically at times when confronted with the realities of the manner in which she discharged her obligations as a registrant. According to the Respondent, despite years of prescribing in the face of negative drug screens that were plainly divergent from any reasonable expectation, and/or prescribing immediately at the first visit without UDS results or even prior medical records, it was, according to her, only during the course of these proceedings that she discovered the weaknesses in her prescribing methods. In her testimony, when asked about whether she believed the approach in her practice regarding tolerance for aberrant UDS conduct was correct, the Respondent remarked that ''a few charts that [she] has looked over'' demonstrated suspicious UDS result fluctuations and that as to ''one patient eventually, we had to discharge that patient just because we found out that she was doctor shopping in one of the charts that I've looked here.'' Tr. 895–96. Another discovery that, according to the Respondent, was not made until hearing testimony (from no less than her own expert witness) at the hearing, was that controlled opioid prescription drugs can be abused in the same manner as illicit street drugs, and that she ''feel[s] that probably something needs to be done about it.'' [147] Tr. 896–97. The recency of her realizations stand in sharp contrast with the depth and breadth of her extensive training and experience in the fields of anesthesiology and pain management. Given the Respondent's years and level of practice, it would greatly strain credulity to accept that it was only the unfolding of the Government's evidence during litigation that lifted the shroud of confusion from her eyes and allowed her to see a better way to prescribe controlled substances. It is certainly more plausible to conclude that the Respondent was well aware of what her obligations required and intentionally turned a blind eye. A practitioner registrant may be charged with knowledge that prescriptions were for a non-legitimate purpose under a theory of deliberate ignorance based on his/her interactions with patients and other circumstances associated with the issuance of prescriptions to those persons. *Jeri Hassman, M.D.,* 75 Fed. Reg. 8194, 8228 (2010) (finding that the frequency of prescribing in the face of red flags supported the conclusion that Respondent was not negligent, but knowingly prescribed without a legitimate medical purpose); *see United States v. Katz,* 445 F.3d 1023, 1031 (8th Cir. 2006) (knowledge can be inferred when a practitioner is put ''on notice that criminal activity was particularly likely and yet . . . failed to investigate those facts'') (other citations and quotations omitted).

In like fashion, the Respondent's assertion that she now realizes the error of what was essentially intentional ignorance of obvious red flags, has procured guidance from other pain management specialists, and now has the ability and inclination to procure

[141] *Id.* at –.14(6)(e)(3)(i).

[142] *Id.* at –.14(6)(e)(3)(ii).

[143] *Id.*

[144] *Id.* at –.14(6)(e)(3)(iii).

[145] *Id.* at –.14(6)(e)(3)(iv).

[146] *Id.* at –.14(6)(e)(3)(v).

[147] Presumably, the Respondent was alluding to measures beyond criminal prosecutions and administrative proceedings brought against DEA registrants.

the services of a practice mentor, such as Dr. Miller, are equally unavailing on this record. The Agency has recognized that a cessation of illegal behavior only when ''DEA comes knocking at one's door,'' can be afforded a diminished weight borne of its own opportunistic timing. *Liddy's Pharmacy, L.L.C.,* 76 Fed. Reg. 48887, 48897 (2011). Despite her impressive pain management and anesthesiology credentials, the Respondent stopped prescribing controlled substances recklessly and dangerously only after she was caught. Plans to hire a practice monitor, taken under these conditions, when viewed in the context of the Respondent's level of pain management expertise, is hardly a consideration that militates in favor of her application with any appreciable momentum. *See also, Southwood Pharm., Inc.,* 72 Fed. Reg. at 36503 (DEA afforded no weight to registrant's ''stroke-of-midnight decision'' to cease illegal conduct and hire an experienced compliance officer).

During the course of the hearing and in her brief, a significant measure of the Respondent's case focused upon the possibility that there could have been valid reasons that several of the UDS results from her patients could have reflected negative results for controlled substance medications that were prescribed.[148] But that there could have been legitimate explanations supplied by patients and considered by the Respondent misses the point. Valid medically-based justifications credited by a prescribing physician for seemingly errant UDS reports certainly could have ranged from the expected to the outlandish. The problem for the Respondent here, is that there is no documented explanation or analysis for many instances where some explanation was demanded by reason and the applicable medical standards. The patient charts do not reflect a thought process that analyzed red flags and demonstrated any effort on the part of the Respondent to discharge her duty as a DEA registrant and vanguard within the closed regulatory system. Whether the potential universe of reasons that could have been offered by her patients ranged from the perfectly reasonable to the eccentric, they were clearly not part of the equation that resulted in the Respondent's documented prescribing methodology. What was apparent is that her patients demonstrated a disturbing level of potential diversion red flags that were met with a correspondingly disturbing level of complacency on her part. The uncontroverted expert testimony of record establishes that as a registrant, the Respondent was required to recognize diversion red flags, to confront the source of those red flags, and make controlled substance prescribing decisions that reflected due regard to her obligations as the holder of a DEA controlled substance registration. In this regard, she was deficient, and repeatedly so.

Similarly, the Respondent has pointed to the fact that entries corresponding to patient care performed by her former medical partner, Dr. Vilvarajah, are also reflected in the reviewed charts.[149] Tr. 258–262, 268, 284, 287–88, 292–95, 298–99, 305–09. These concerns are similarly unavailing, as the evidence demonstrates that the Respondent prescribed controlled substances without documented hesitation where accepted medical practice and her duties as a registrant required additional diligence. Dr. Loyd persuasively testified that even when patient responsibilities are shared between partners, it is incumbent upon the physician about to prescribe controlled substances to go back through the chart and see what has been done before. Tr. 333. Whatever Dr. Vilvarajah's failings were, they did not in any way diminish the Respondent's responsibilities to review the chart of the patients to whom she was prescribing controlled substances and to ask the required hard questions. The Respondent failed in this regard.

Thus, evaluating her level of compliance with applicable medical standards and adherence to state and federal regulatory guidance, consideration of the second and fourth factors militate powerfully against granting the Respondent's application.

The Fifth statutory factor, which plays a critical role in a disposition of this case given the facts presented, permits the Administrator to consider ''other conduct which may threaten the public health and safety.'' 21 U.S.C. § 823(f)(5). Under current Agency precedent, this factor encompasses ''conduct which creates a probably or possible threat . . . to public health and safety. *Cadet,* 76 Fed. Reg. at 19450 n.3; *Dreszer* 76 Fed. Reg. at 19386–87 n.3; *Dreszer,*76 Fed. Reg. at 19434 n.3; *Aruta,*76 Fed. Reg. at 19420 n.3. Many of the details of the Respondent's conduct that have been detailed elsewhere in this recommended decision under other public interest factor categories are also relevant under Factor 5.

Many of the details of the Respondent's conduct that have been detailed elsewhere in this recommended decision under other public interest factor categories are also relevant under Factor 5. The sheer volume of controlled substance prescriptions issued to patients in the face of uninvestigated diversion red flags created a situation where many people were provided with dangerous and addictive medications without adequate consideration about whether the patients were addicted or pumping out drugs into their communities to feed the habits of others who might be. The sheer numbers of prescriptions involved, coupled with the slipshod level of monitoring conducted by this registrant clearly threatened the public health and safety. Consideration of the evidence under Factor 5, like Factors 2 and 4, militates compellingly against the Respondent's application for a COR.

Recommendation

In cases, such as the present case, where the Government has made out a *prima facie* case that the Respondent has committed acts that render registration inconsistent with the public interest, Agency precedent has firmly placed acknowledgement of guilt and acceptance of responsibility as conditions precedent to merit the granting or continuation of status as a registrant. *Hoxie v. DEA,* 419 F.3d 477, 483 (6th Cir. 2005); *Hassman,* 75 FR at 8236; *Ronald Lynch, M.D.,* 75 Fed. Reg. 78745, 78749 (Respondent's attempts to minimize misconduct held to undermine acceptance of responsibility); *George Mathew, M.D.,* 75 Fed. Reg. 66138, 66140, 66145, 66148 (2010); *George C. Aycock, M.D.,* 74 Fed. Reg. 17529, 17543 (2009); *Steven M. Abbadessa, D.O.,* 74 Fed. Reg. 10077, 10078 (2009); *Jayam Krishna-Iyer, M.D.,* 74 Fed. Reg. 459, 463 (2009); *Medicine Shoppe-Jonesborough,* 73 Fed. Reg. 364, 387 (2008). A balancing of the statutory public interest factors supports the denial of the Respondent's application for a COR. The Respondent has not accepted responsibility for her actions, persuasively expressed remorse for her conduct, or presented evidence that could reasonably support a finding that the Administrator should entrust her with a registration. In light of current Agency precedent, her election to maintain her innocence in the face of her criminal conviction, her state board

[148] *See* Tr. 240–41, 291 (Xanax was prescribed on an ''as needed'' basis); *id.* at 297 (Xanax is short acting and can be eliminated from the body in a relatively short period of time); *id.* at 242–45 (oxycodone is a medication that can result in false negative results).

[149] Part of the confusion regarding multiple physicians arose from Dr. Loyd's initial, erroneous assumption during his chart review that the Tennessee Medical Board cover sheet in the front of each patient chart copy provided to him by DEA was evidence that the Respondent was that patient's treating physician and responsible for all notations within the chart. Tr. 335, 826.

proceedings, and the persuasive evidence offered against her in these proceedings was taken at her own procedural peril. Under current Agency precedent the present record supports and compels the Agency to deny her COR application, which is the course recommended by this decision.

Accordingly, the Respondent's application for a Certificate of Registration should be **DENIED.**

Dated: August 18, 2011 s/JOHN J. MULROONEY, II

Chief Administrative Law Judge

[FR Doc. 2013–18922 Filed 8–5–13; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–82,705; TA–W–82,705A; TA–W–82,705B; TA–W–82,705C; TA–W–82,705D; TA–W–82,705E]

The Boeing Company Boeing Commercial Aircraft (BCA) Auburn, Washington; The Boeing Company Boeing Commercial Aircraft (BCA) Everett, Washington; The Boeing Company Boeing Commercial Aircraft (BCA) Puyallup, Washington; The Boeing Company Boeing Commercial Aircraft (BCA) Including Four Locations In Renton, Washington; The Boeing Company Boeing Commercial Aircraft (BCA) Seattle, Washington; The Boeing Company Boeing Commercial Aircraft (BCA) Tukwila, Washington: Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on June 12, 2013, applicable to workers and former workers of The Boeing Company, (BCA) Auburn, Washington (TA–W–82,705), Everett, Washington (TA–W–82,705A), Puyallup, Washington (TA–W–82,705B), North 8th and Logan Avenue North, Renton, Washington (TA–W–82,705C), Seattle, Washington (TA–W–82,705D), and Tukwila, Washington (TA–W–82,705E). The workers are engaged in activities related to the production of commercial passenger aircraft. The Department's notice was published in the **Federal Register** on July 2, 2013 (78 FR 39775).

At the request of a union official, the Department reviewed the certification for workers of the subject firm.

New information shows that the correct name of the subject firm in its entirety should read The Boeing Company, Boeing Commercial Aircraft (BCA) located at the above mentioned locations. Information also shows that worker separations occurred during the relevant time period at two additional facilities: 10–16 Building 535 Garden Avenue North, Renton, Washington and 10–18 Building 635 Park Avenue North, Renton, Washington locations of The Boeing Company.

Accordingly, the Department is amending the certification to correctly identify the certified worker group as The Boeing Company, Boeing Commercial Aircraft (BCA) and to include workers at the 10–16 Building 535 Garden Avenue North, Renton, Washington and 10–18 Building 635 Park Avenue North, Renton, Washington facilities of the subject firm.

The amended notice applicable to TA–W–82,705, TA–W–82,705A, TA–W–82,705B, TA–W–82,705C, TA–W–82,705D and TA–W–82,705E is hereby issued as follows:

All workers of The Boeing Company, Boeing Commercial Aircraft (BCA), Auburn, Washington (TA–W–82,705), The Boeing Company, Boeing Commercial Aircraft (BCA), Everett, Washington (TA–W–82,705A), The Boeing Company, Boeing Commercial Aircraft (BCA), Puyallup, Washington (TA–W–82,705B), The Boeing Company, Boeing Commercial Aircraft (BCA), North 8th, Logan Avenue North, 10–16 Building 535 Garden Avenue North and 10–18 Building 635 Park Avenue North, Renton, Washington (TA–W–82,705C), The Boeing Company, Boeing Commercial Aircraft (BCA), Seattle, Washington (TA–W–82,705D) and The Boeing Company, Boeing Commercial Aircraft (BCA), Tukwila, Washington (TA–W–82,705E). who became totally or partially separated from employment on or after April 26, 2012 through June 12, 2015, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 17th day of July, 2013.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–18925 Filed 8–5–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–81,968; TA–W–81,968A; TA–W–81,968B]

Verizon Business Networks Services, Inc. Senior Analysts-Sales Impletmentation (SA–SI) Birmingham, Alabama; Verizon Business Networks Services, Inc. Senior Analysts-Sales Impletmentation (SA–SI) Service Program Delivery Division San Francisco, California; Verizon Business Networks Services, Inc.Senior Analysts-Sales Impletmentation (SA–SI) Alpharetta, Georgia: Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on December 7, 2012, applicable to workers of Verizon Business Networks Services, Inc., Senior Analysts-Sales Implementation (SA–SI), Birmingham Alabama (TA–W–81,968) and Verizon Business Network Services, Inc., Senior Analyst-Sales Implementation (SA–SI), and Service Program Delivery Division, San Francisco, California (TA–W–81,968A). The worker group supplies senior analyst-sales implementation and service program delivery services. The notice was published in the **Federal Register** on January 4, 2013 (78 FR 767).

At the request of a company official, the Department reviewed the certification for workers of the subject firm. Information shows that worker separations occurred during the relevant time period at the Senior Analyst-Sales Implementation (SA–SI), Alpharetta, Georgia location of Verizon Business Network Services, Inc. due to a shift in services to a foreign country.

Accordingly, the Department is amending the certification to include workers of the Senior Analyst-Sales Implementation (SA–SI), Alpharetta, Georgia location of Verizon Business Network Services, Inc.

The intent of the Department's certification is to include all workers of the subject firm who were adversely affected by a shift of senior analyst-sales implementation and service program delivery services to a foreign country.

The amended notice applicable to TA–W–81,968, TA–W–81,968A, and TA–W–81,968B is hereby issued as follows:

All workers from Verizon Business Network Services, Inc., Senior Analyst-Sales Implementation (SA–SI), Birmingham, Alabama (TA–W–81,968), Verizon Business Network Services, Inc., Senior Analyst-Sales Implementation (SA–SI), and Service Program Delivery Division, San Francisco, California (TA–W–81,968A) and Verizon Business Network Services, Inc., Senior Analyst-Sales Implementation (SA–SI), Alpharetta, Georgia (TA–W–81,968B), who became totally or partially separated from employment on or after September 13, 2011 through December 7, 2014, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC, this 18th day of July 2013.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–18928 Filed 8–5–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–82,688]

Rough & Ready Lumber, LLC; Including On-Site Leased Workers From Perpetua Forests Company Cave Junction, Oregon; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on May 31, 2013, applicable to workers and former workers of Rough & Ready Lumber, LLC, Cave Junction, Oregon (subject firm). The Department's Notice of determination was published in the **Federal Register** on June 21, 2013 (78 FR 37588). Workers were engaged in employment related to the production and sale of lumber.

At the request of a company official, the Department reviewed the certification for workers of the subject firm.

New information provided by the subject firm revealed that workers from Perpetua Forests Company were employed on-site at the Cave Junction, Oregon location of Rough & Ready Lumber, LLC. The Department has determined that workers of Perpetua Forests Company were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Perpetua Forests Company working on-site at the Cave Junction, Oregon location of Rough & Ready Lumber, LLC.

The amended notice applicable to TA–W–82,688 is hereby issued as follows:

All workers of Rough & Ready Lumber, LLC, including on-site leased workers of Perpetua Forests Company, Cave Junction, Oregon, who became totally or partially separated from employment on or after April 23, 2012, through May 31, 2015, and all workers in the group threatened with total or partial separation from employment on May 31, 2103 through May 31, 2015, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC this 17th day of July, 2013.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–18929 Filed 8–5–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers by (TA–W) number issued during the period of *July 8, 2013 through July 12, 2013.*

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Under Section 222(a)(2)(A), the following must be satisfied:

(1) a significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) the sales or production, or both, of such firm have decreased absolutely; and

(3) One of the following must be satisfied:

(A) imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased;

(B) imports of articles like or directly competitive with articles into which one or more component parts produced by such firm are directly incorporated, have increased;

(C) imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased;

(D) imports of articles like or directly competitive with articles which are produced directly using services supplied by such firm, have increased; and

(4) the increase in imports contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; or

II. Section 222(a)(2)(B) all of the following must be satisfied:

(1) a significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) One of the following must be satisfied:

(A) there has been a shift by the workers' firm to a foreign country in the production of articles or supply of services like or directly competitive with those produced/supplied by the workers' firm;

(B) there has been an acquisition from a foreign country by the workers' firm of articles/services that are like or directly competitive with those produced/supplied by the workers' firm; and

(3) the shift/acquisition contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in public agencies and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) a significant number or proportion of the workers in the public agency have become totally or partially separated, or are threatened to become totally or partially separated;

(2) the public agency has acquired from a foreign country services like or directly competitive with services which are supplied by such agency; and

(3) the acquisition of services contributed importantly to such

workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected secondary workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(c) of the Act must be met.

(1) a significant number or proportion of the workers in the workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) the workers' firm is a Supplier or Downstream Producer to a firm that employed a group of workers who received a certification of eligibility under Section 222(a) of the Act, and such supply or production is related to the article or service that was the basis for such certification; and

(3) either-

(A) the workers' firm is a supplier and the component parts it supplied to the firm described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) a loss of business by the workers' firm with the firm described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in firms identified by the International Trade Commission and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(f) of the Act must be met.

(1) the workers' firm is publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in—

(A) an affirmative determination of serious injury or threat thereof under section 202(b)(1);

(B) an affirmative determination of market disruption or threat thereof under section 421(b)(1); or

(C) an affirmative final determination of material injury or threat thereof under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A));

(2) the petition is filed during the 1-year period beginning on the date on which—

(A) a summary of the report submitted to the President by the International Trade Commission under section 202(f)(1) with respect to the affirmative determination described in paragraph (1)(A) is published in the **Federal Register** under section 202(f)(3); or

(B) notice of an affirmative determination described in subparagraph (1) is published in the **Federal Register**; and

(3) the workers have become totally or partially separated from the workers' firm within—

(A) the 1-year period described in paragraph (2); or

(B) notwithstanding section 223(b)(1), the 1- year period preceding the 1-year period described in paragraph (2).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production or services) of the Trade Act have been met.

TA–W number	Subject firm	Location	Impact date
82,297	Brunswick Laboratories, Inc., Brunswick R & D Center.	Southborough, MA	December 20, 2011.
82,792	BASF Corporation, AZO Organics Plant, On-Site Leased Workers From nextSource, Inc..	Louisville, KY	June 5, 2012.
82,804	LTX-Credence Corporation, Support and Repair Service Division.	Milpitas, CA	June 11, 2012.
82,806	Utica Mutual Insurance Company, Corporate Claims Support.	New Hartford, NY	June 11, 2012.
82,847	Tyco Electronics, Aerospace, Defense and Marine Division, Kelly Services.	Mt. Joy, PA	June 24, 2012.
82,847A	Tyco Electronics, Aerospace, Defense and Marine Division, Kelly Services.	Manheim, PA	June 24, 2012.
82,860	Atlas Copco Drilling Solutions LLC, RCI Division, Atlas Copco AB, Staff Sense and Aerotek.	Garland, TX	June 25, 2012.

I hereby certify that the aforementioned determinations were issued during the period of *July 8, 2013 through July 12, 2013.* These determinations are available on the Department's Web site *tradeact/taa/taa_search_form.cfm* under the searchable listing of determinations or by calling the Office of Trade Adjustment Assistance toll free at 888–365–6822.

Dated: July 17, 2013.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–18927 Filed 8–5–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers by (TA–W) number issued during the period of *July 15, 2013 through July 19, 2013.*

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Under Section 222(a)(2)(A), the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The sales or production, or both, of such firm have decreased absolutely; and

(3) One of the following must be satisfied:

(A) Imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased;

(B) Imports of articles like or directly competitive with articles into which one or more component parts produced by such firm are directly incorporated, have increased;

(C) Imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased;

(D) Imports of articles like or directly competitive with articles which are produced directly using services supplied by such firm, have increased; and

(4) The increase in imports contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; or

II. Section 222(a)(2)(B) all of the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) One of the following must be satisfied:

(A) There has been a shift by the workers' firm to a foreign country in the production of articles or supply of services like or directly competitive with those produced/supplied by the workers' firm;

(B) There has been an acquisition from a foreign country by the workers' firm of articles/services that are like or directly competitive with those produced/supplied by the workers' firm; and

(3) The shift/acquisition contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in public agencies and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) A significant number or proportion of the workers in the public agency have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The public agency has acquired from a foreign country services like or directly competitive with services which are supplied by such agency; and

(3) The acquisition of services contributed importantly to such workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected secondary workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(c) of the Act must be met.

(1) A significant number or proportion of the workers in the workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm is a Supplier or Downstream Producer to a firm that employed a group of workers who received a certification of eligibility under Section 222(a) of the Act, and such supply or production is related to the article or service that was the basis for such certification; and

(3) either—

(A) The workers' firm is a supplier and the component parts it supplied to the firm described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss of business by the workers' firm with the firm described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in firms identified by the International Trade Commission and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(f) of the Act must be met.

(1) The workers' firm is publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in—

(A) An affirmative determination of serious injury or threat thereof under section 202(b)(1);

(B) An affirmative determination of market disruption or threat thereof under section 421(b)(1); or

(C) An affirmative final determination of material injury or threat thereof under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A));

(2) the petition is filed during the 1-year period beginning on the date on which—

(A) A summary of the report submitted to the President by the International Trade Commission under section 202(f)(1) with respect to the affirmative determination described in paragraph (1)(A) is published in the **Federal Register** under section 202(f)(3); or

(B) Notice of an affirmative determination described in subparagraph (1) is published in the **Federal Register**; and

(3) the workers have become totally or partially separated from the workers' firm within—

(A) The 1-year period described in paragraph (2); or

(B) Notwithstanding section 223(b)(1), the 1- year period preceding the 1-year period described in paragraph (2).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

TA–W number	Subject firm	Location	Impact date
82,662	Thomas Nelson, Inc., Harpercollins Publishers, Spartan Staffing, Wood Personnel, etc..	Nashville, TN	April 15, 2012.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production or services) of the Trade Act have been met.

TA–W number	Subject firm	Location	Impact date
82,500	Mondelez International	Philadelphia, PA	February 23, 2012.
82,629	Boeing Company (The), Business Unit of Engineering, Operations & Technology, Print Services.	Bellevue, WA	April 3, 2012.
82,758	Republic Steel, Massillon Cold Finish Division	Massillon, OH	May 21, 2012.
82,767	Westmount Financial (US) LLLP, Mattei Insurance Service, Family Insurance Solutions, Economical Insurance.	Seattle, WA	May 24, 2012.
82,781	FLSmidth, Inc., Financial Services Group	Bethlehem, PA	June 4, 2012.
82,803	Cadmus Journal Services, Inc., D/B/A Cenveo Publisher Services, Lancaster Content, Manpower.	Lancaster, PA	June 12, 2012.
82,808	American Express Travel Related Services Company, Inc., World Service Global Service Delivery-Electronic, American Express, etc..	Phoenix, AZ	June 12, 2012.
82,810	Direct Brands Inc., DVD Direct Acquisition, LLC	Mechanicsburg, PA	June 12, 2012.
82,812	Seco Tools, Inc., Sandvik, Inc., Express Employment Professionals	Lenoir City, TN	June 12, 2012.
82,815	Deloitte Services LP, Payroll Processing Support Services	Hermitage, TN	June 17, 2012.
82,823	A.P. Sales Co., Doing Business As Applied Power Inc., Iccnexergy	Brighton, MI	June 17, 2012.
82,825	J.K. Products and Services, Inc., AID Temporary Services, Inc.	Jonesboro, AR	September 3, 2012.
82,826	AMETEK Aerospace and Defense, Measurement and Power Systems Division, AMETEK, Inc., M and K etc..	Wilmington, MA	June 19, 2012.
82,827	Wonik Quartz International Corporation	Albuquerque, NM	June 13, 2012.
82,830	Cast Metals Organization, Caterpillar Inc., Large Power Systems Division.	Mapleton, IL	June 19, 2012.
82,835	Cambridge International Inc., f/k/a Alloy Wire Belt	Modesto, CA	June 20, 2012.
82,859	American Medical Alert Corporation, DBA Tunstall	Long Island City, NY	June 27, 2012.
82,862	United States Enrichment Corporation, Paducah Gaseous Diffusion Plant, Diversified Management Consultants, etc..	Paducah, KY	June 27, 2012.
82,873	Tyco Electronics, ICT Division, Randstad Staffing Services	Tullahoma, TN	July 2, 2012.
82,875	Nordex USA, Inc., Nordex SE, Staffmark	Jonesboro, AR	July 3, 2012.
82,875A	Nordex USA, Inc., Nordex SE, Staffmark	Chicago, IL	July 3, 2012.
82,878	Honeywell Process Solutions, Honeywell International, Honeywell Field Products, CARA Resources, etc..	York, PA	July 3, 2012.

Negative Determinations for Worker Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

The investigation revealed that the criteria under paragraphs (a)(2)(A)(i) (decline in sales or production, or both) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W number	Subject firm	Location	Impact date
82,640	Renewable Environmental Solutions	Carthage, MO	

The investigation revealed that the criteria under paragraphs(a)(2)(A) (increased imports) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W number	Subject firm	Location	Impact date
82,513	Veyance Technologies, Inc., Adecco Services	Lincoln, NE	
82,737	California Newspapers Partnership, DBA San Gabriel Valley Tribune, Advertisement Division.	West Covina, CA	
82,819	Vaughan Furniture Company, Corporate Office, 816 Glendale Road	Galax, VA	
82,819A	Vaughan Furniture Company, T.G. Vaughan Distribution Center, 100 T. George Vaughan, Jr. Road.	Galax, VA	

Determinations Terminating Investigations of Petitions For Worker Adjustment Assistance

After notice of the petitions was published in the **Federal Register** and on the Department's Web site, as required by Section 221 of the Act (19 U.S.C. 2271), the Department initiated investigations of these petitions.

The following determinations terminating investigations were issued because the petitioner has requested that the petition be withdrawn.

TA–W number	Subject firm	Location	Impact date
82,738	Verizon Communications, Inc., and Affiliates	Victorville, CA	

TA–W number	Subject firm	Location	Impact date
82,795	Thermo Fisher Scientific	Sun Prairie, WI	
82,836	Water Pik, Inc.	Fort Collins, CO	

The following determinations terminating investigations were issued because the petitioning groups of workers are covered by active certifications. Consequently, further investigation in these cases would serve no purpose since the petitioning group of workers cannot be covered by more than one certification at a time.

TA–W number	Subject firm	Location	Impact date
82,759	Perpetua Forests Company	Cave Junction, OR	
82,809	Verizon Business Networks Services, Inc., Senior Analysts-Sales Implementation (SA–SI).	Alpharetta, GA	
82,853	Boeing Company (The), Boeing Commercial Aircraft (BCA)	Auburn, WA	
82,853A	Boeing Company (The), Boeing Commercial Aircraft (BCA)	Everett, WA	
82,853B	Boeing Company (The), Boeing Commercial Aircraft (BCA)	Puyallup, WA	
82,853C	Boeing Company (The), Boeing Commercial Aircraft (BCA)	Renton, WA	
82,853D	Boeing Company (The), Boeing Commercial Aircraft (BCA)	Seattle, WA	
82,853E	Boeing Company (The), Boeing Commercial Aircraft (BCA)	Tukwila, WA	

The following determinations terminating investigations were issued because the petitions are the subject of ongoing investigations under petitions filed earlier covering the same petitioners.

TA–W number	Subject firm	Location	Impact date
82,867	Liberty Medical	Port Saint Lucie, FL	
82,899	Hewlett Packard	Conway, AR	

I hereby certify that the aforementioned determinations were issued during the period of *July 15, 2013 through July 19, 2013.* These determinations are available on the Department's Web site tradeact/taa/taa_search_form.cfm under the searchable listing of determinations or by calling the Office of Trade Adjustment Assistance toll free at 888–365–6822.

Signed at Washington, DC, this 30th day of July 2013.

Michael W. Jaffe

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–18930 Filed 8–5–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Eligibility To Apply For Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than August 16, 2013.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than August 16, 2013.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue NW., Washington, DC 20210.

Signed at Washington, DC this 18th day of July 2013.

Michael W. Jaffe

Certifying Officer, Office of Trade Adjustment Assistance.

APPENDIX

24 TAA PETITIONS INSTITUTED BETWEEN 7/8/13 AND 7/12/13

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
82879	PDM Bridge (State/One-Stop)	Proctor, MN	07/09/13	07/08/13

24 TAA PETITIONS INSTITUTED BETWEEN 7/8/13 AND 7/12/13—Continued

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
82880	DAK Americas LLC; Mundy Maintenance, Services and Operations, LLC (Company).	Leland, NC	07/09/13	07/05/13
82881	IDG USA, LLC (Apex Tool Group) (Company)	Gastonia, NC	07/09/13	07/09/13
82882	AT&T (Union)	New Haven, CT	07/09/13	07/08/13
82883	NCR Corporation (State/One-Stop)	Duluth, GA	07/09/13	07/08/13
82884	Integrity Solutions Services Inc. (Workers)	Decorah, IA	07/09/13	07/03/13
82885	Acosta Sales & Marketing (State/One-Stop)	Marlborough, MA	07/09/13	07/08/13
82886	Chemtura (Workers)	Middlebury, CT	07/09/13	07/08/13
82887	Brown Jordan (State/One-Stop)	El Monte, CA	07/10/13	07/08/13
82888	Resco Electronics, LLC (State/One-Stop)	San Antonio, TX	07/10/13	07/09/13
82889	Chicago Bridge and Iron (CBI) (State/One-Stop)	El Dorado, AR	07/10/13	07/09/13
82890	YP Holdings & Advertising (Workers)	Tucker, GA	07/10/13	07/09/13
82891	Covidien (Company)	San Jose, CA	07/10/13	06/27/13
82892	Gregory Mountain Products (Workers)	Calexico, CA	07/10/13	06/28/13
82893	Walgreens (Workers)	Mount Prospect, IL	07/10/13	06/17/13
82894	International Paper Corporate Offices (State/One-Stop)	Modesto, CA	07/11/13	07/10/13
82895	Sanmina Corporation (Company)	Louisville, CO	07/11/13	06/19/13
82896	Charles Inc. (State/One-Stop)	Council Bluffs, IA	07/11/13	07/10/13
82897	Alorica, Inc. (State/One-Stop)	Cedar Rapids, IA	07/11/13	07/10/13
82898	LTX-Credence Corporation (State/One-Stop)	Norwood, MA	07/12/13	07/11/13
82899	Hewlett-Packard Company (State/One-Stop)	Conway, AR	07/12/13	07/11/13
82900	Honeywell International (State/One-Stop)	Phoenix, AZ	07/12/13	07/11/13
82901	Kids Supercenter (Workers)	El Paso, TX	07/12/13	07/11/13
82902	Gyrus ACMI Inc. (State/One-Stop)	Stamford, CT	07/12/13	07/11/13

[FR Doc. 2013–18926 Filed 8–5–13; 8:45 am]

BILLING CODE 4510–FN–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 13–083]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3506(c)(2)(A)).

DATES: All comments should be submitted within 60 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Frances Teel, National Aeronautics and Space Administration, 300 E Streets SW., Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Frances Teel, NASA Clearance Officer, NASA Headquarters, 300 E Street SW., JF0000, Washington, DC 20546, (202) 358–2225.

SUPPLEMENTARY INFORMATION:

I. Abstract

Homeland Security Presidential Directive 12 (HSPD–12) established a mandatory requirement for a Government-wide identify verification standard. In compliance with HSPD–12 and the National Institute of Standards and Technology (NIST) Federal Information Processing Standard (FIPS) 201: Personal Identity Verification of Federal Employees and Contractors, and OMB Policy memorandum M–05–24 Implementation of Homeland Security Presidential Directive 12, NASA must collect information from members of the public to: (1) Validate identity and (2) issue secure and reliable federal credentials to enable access to NASA facilities/sites and NASA information systems. Information collected is consistent with background investigation data to include but not limited to name, date of birth, citizenship, social security number (SSN), address, employment history, biometric identifiers (e.g. fingerprints), signature, digital photograph.

NASA collects information from U.S. Citizens requiring access 30 or more days in a calendar year. NASA also collects information from foreign nationals regardless of their affiliation time.

NASA collects, stores, and secures information from individuals identified above in the NASA Identify Management System (IdMAX) in a manner consistent with the Constitution and applicable laws, including the Privacy Act (5 U.S.C. 552a.)

Information is collected via a combination of electronic and paper processes and stored in the NASA Identify Account Exchange (IdMAX) System.

II. Method of Collection

Electronic (90%) and paper (10%).

III. Data

Title: Personal Identity Validation for Routine and Intermittent Access to NASA Facilities, Sites, and Information Systems.

OMB Number: 2700–XXXX.

Type of review: Active Information Collection without OMB Approval.

Affected Public: Individuals.

Estimated Number of Respondents: 52,000.

Estimated Time Per Response: 10 minutes.

Estimated Total Annual Public Burden Hours: 8,667.

Estimated Total Annual Government Cost: $1,189,350.00.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information

is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Frances Teel,

NASA PRA Clearance Officer.

[FR Doc. 2013–18865 Filed 8–5–13; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (13–083]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3506(c)(2)(A)).

DATES: All comments should be submitted within 60 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Frances Teel, National Aeronautics and Space Administration, 300 E Streets SW., Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Frances Teel, NASA Clearance Officer, NASA Headquarters, 300 E Street SW., JF0000, Washington, DC 20546, (202) 358–2225.

SUPPLEMENTARY INFORMATION:

I. Abstract

Homeland Security Presidential Directive 12 (HSPD–12) established a mandatory requirement for a Government-wide identify verification standard. In compliance with HSPD–12 and the National Institute of Standards and Technology (NIST) Federal Information Processing Standard (FIPS) 201: Personal Identity Verification of Federal Employees and Contractors, and OMB Policy memorandum M–05–24 Implementation of Homeland Security Presidential Directive 12, NASA must collect information from members of the public to: (1) validate identity and (2) issue secure and reliable federal credentials to enable access to NASA facilities/sites and NASA information systems. Information collected is consistent with background investigation data to include but not limited to name, date of birth, citizenship, social security number (SSN), address, employment history, biometric identifiers (e.g. fingerprints), signature, digital photograph.

NASA collects information from U.S. Citizens requiring access 30 or more days in a calendar year. NASA also collects information from foreign nationals regardless of their affiliation time. NASA collects, stores, and secures information from individuals identified above in the NASA Identify Management System (IdMAX) in a manner consistent with the Constitution and applicable laws, including the Privacy Act (5 U.S.C. 552a.)

Information is collected via a combination of electronic and paper processes and stored in the NASA Identify Account Exchange (IdMAX) System.

II. Method of Collection

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III. Data

Title: Personal Identity Validation for Routine and Intermittent Access to NASA Facilities, Sites, and Information Systems

OMB Number: 2700–XXXX

Type of review: Active Information Collection without OMB Approval

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Estimated Total Annual Government Cost: $1,189,350.00

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Frances Teel,

NASA PRA Clearance Officer.

[FR Doc. 2013–18634 Filed 8–5–13; 8:45 am]

BILLING CODE 7510–13–P

NUCLEAR REGULATORY COMMISSION

[NRC–2013–0175]

Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations

Background

Pursuant to Section 189a. (2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (NRC) is publishing this regular biweekly notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license or combined license, as applicable, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from July 11, 2013, to July 23, 2013. The last biweekly notice was published on July 23, 2013, (78 FR 44167).

ADDRESSES: You may submit comment by any of the following methods (unless this document describes a different method for submitting comments on a specific subject):

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2013–0175. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422;

email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual(s) listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: 3WFN, 06A44M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

For additional direction on accessing information and submitting comments, see ''Accessing Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2013–0175 when contacting the NRC about the availability of information regarding this document. You may access information related to this document, which the NRC possesses and is publicly-available, by the following methods:

• *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2013–0175.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly-available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* Documents may be viewed in ADAMS by performing a search on the document date and docket number.

• *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2013–0175 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC posts all comment submissions at *http://www.regulations.gov* as well as entering the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses and Combined Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in Section 50.92 of Title 10 of the *Code of Federal Regulations* (10 CFR), this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license or combined license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. The NRC regulations are accessible electronically from the NRC Library on the NRC's Web site at *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific

contentions which the requestor/petitioner seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of any amendment.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC's E-Filing rule (72 FR 49139; August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to request (1) a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in the NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through the Electronic Information Exchange System, users will be required to install a Web browser plug-in from the NRC's Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with the NRC guidance available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) first class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention:

Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/ehd/,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. However, a request to intervene will require including information on local residence in order to demonstrate a proximity assertion of interest in the proceeding. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from the date of publication of this notice. Requests for hearing, petitions for leave to intervene, and motions for leave to file new or amended contentions that are filed after the 60-day deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i)(iii).

Entergy Gulf States Louisiana, LLC, and Entergy Operations, Inc., Docket No. 50–458, River Bend Station, Unit 1, West Feliciana Parish, Louisiana

Date of amendment request: May 28, 2013.

Description of amendment request: The amendment would modify safety limits (SL) in Technical Specification (TS) 2.1.1, ''Reactor Core SLs,'' to reduce the minimum reactor dome pressure associated with the critical power correlation from 785 pounds per square inch gauge (psig) to 685 psig. The RBS has evaluated the critical power correlation for the General Electric Nuclear Energy advanced fuel designs (i.e., GE14 and GNF2 fuels) used at the facility which will allow for a lower-bound pressure. The change will provide a greater pressure margin such that the reactor remains above the proposed low SL of 685 psig in the event of a Pressure Regulator Maximum Demand Open transient.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

Decreasing the reactor dome pressure limit in TS Safety Limits 2.1.1 for reactor Rated Thermal Power range effectively expands the validity range for the GEXL 14 and GEXL 17 correlations and the calculation of Minimum Critical Power Ratio Safety Limit (MCPR). The MCPR rises during the pressure reduction following the scram that terminates the Pressure Regulator Failure Open (PRFO) transient. Since the change does not involve a modification of any plant hardware, the probability and consequence of the PRFO transient are essentially unchanged. The reduction in the reactor dome pressure safety limit from 785 psig to 685 psig provides greater margin to accommodate the pressure reduction during the transient within the revised TS limit.

The proposed change will continue to support the validity range for the GEXL correlations applied at RBS and the calculation of MCPR as approved. The proposed TS revision involves no significant changes to the operation of any systems or components in normal, accident or transient operating conditions.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed reduction in the reactor dome pressure safety limit from 785 psig to 685 psig is a change based upon previously approved documents and does not involve changes to the plant hardware or its operating characteristics. As a result, no new failure modes are being introduced.

Therefore, the change does not introduce a new or different kind of accident from those previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The margin of safety is established through the design of the plant structures, systems, and components, and through the parameters for safe operation and setpoints for the actuation of equipment relied upon to respond to transients and design basis accidents. The proposed change in reactor dome pressure enhances the safety margin, which protects the fuel cladding integrity during a depressurization transient, but does not change the requirements governing operation or availability of safety equipment assumed to operate to preserve the margin of safety. The change does not alter the behavior of plant equipment, which remains unchanged. The available pressure range is expanded by the change, thus offering greater margin for pressure reduction during the transient.

Therefore, the proposed change does not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Joseph A. Aluise, Associate General Counsel—Nuclear, Entergy Services, Inc., 639 Loyola Avenue, New Orleans, Louisiana 70113.

NRC Branch Chief: Michael T. Markley.

Entergy Nuclear Operations, Inc., Docket No. 50–293, Pilgrim Nuclear Power Station, Plymouth County, Massachusetts

Date of amendment request: April 5, 2013.

Description of amendment request: The proposed amendment would revise the Pilgrim Technical Specifications (TSs) to reduce the reactor steam dome pressure from 785 pounds per square inch, gauge (psig) to 685 psig specified in TS Reactor Core Safety Limits 2.1.1 and 2.1.2. The proposed amendment is intended to address the potential to exceed the low pressure TS safety limit associated with a pressure regulator failure open (PRFO)—maximum

demand abnormal operation occurrence, as identified by General Electric Nuclear Energy in its report, ''10 CFR 21 Reportable Condition Notification: Potential to Exceed Low Pressure Technical Specification Safety Limit,'' MFN 05–021, dated March 29, 2005.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration which is presented below, along with the NRC's edits in square brackets:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

Decreasing the reactor dome pressure in Technical Specification Safety Limits 2.1.1 and 2.1.2 for reactor Rated Thermal Power ranges effectively expands the validity range for GEXL [GE critical quality-boiling length correlation] and the calculation of Minimum Critical Power Ratio Safety Limit (MCPR). MCPR rises during the pressure reduction following the scram that terminates the PRFO transient. Since the change does not involve a modification of any plant hardware, the probability and consequence of the PRFO transient are essentially unchanged. The reduction in the reactor dome pressure value in the safety limit from 785 psig to 685 psig provides adequate margin to accommodate the pressure reduction during the transient within the revised TS limit.

The expanded GEXL correlation range supports Pilgrim's revised low pressure safety limit of 685 psig. The proposed TS revision involves no significant changes to the operation of any systems or components in normal or accident or transient operating conditions.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed reduction in the reactor dome pressure value in the safety limit from 785 psig to 685 psig reflects a wider range of applicability for the GEXL correlation which is approved by the NRC for fuels in use at Pilgrim and does not involve changes to the plant hardware or its operating characteristics. As a result, no new failure modes are being introduced.

Therefore, the [proposed] change does not [create the possibility of] a new or different kind of accident from any [accident] previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The margin of safety is established through the design of the plant structures, systems, and components, and through the parameters for safe operation and setpoints for the actuation of equipment relied upon to respond to transients and design basis accidents. The proposed change in reactor dome pressure restores the safety margin, which protects the fuel cladding integrity during a depressurization transient, but does not change the requirements governing operation or availability of safety equipment assumed to operate to preserve the margin of safety. The change does not alter the behavior of plant equipment, which remains unchanged. The reduction in the reactor dome pressure value in the safety limit from 785 psig to 685 psig provides adequate margin to accommodate the pressure reduction during the transient within the revised TS limit.

Therefore, the proposed change does not involve a significant reduction in [a] margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. William C. Dennis, Assistant General Counsel, Entergy Nuclear Operations, Inc., 400 Hamilton Avenue, White Plains, NY 10601.

NRC Acting Branch Chief: Robert Beall.

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., Docket No. 50–271, Vermont Yankee Nuclear Power Station, Vernon, Vermont

Date of amendment request: May 14, 2013.

Description of amendment request: The proposed amendment would revise the Vermont Yankee Technical Specifications (TSs) to reduce reactor pressure associated with the fuel cladding integrity safety limits (SLs) from 800 pounds per square inch, absolute (psia) to 700 psia in SLs 1.1.A and 1.1.B. The proposed change is intended to address the potential to exceed the low pressure TS SL associated with a pressure regulator failure-maximum demand open (PRFO) transient as reported by General Electric Nuclear Energy in its Part 21 Communication, ''Potential to Exceed Low Pressure Technical Specification Safety Limit,'' SC05–03, dated March 29, 2005.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change to the reactor pressure in Fuel Cladding Integrity Safety Limits 1.1.A and 1.1.B does not alter the use of the analytical methods used to determine the safety limits that have been previously reviewed and approved by the NRC. The proposed change is in accordance with NRC approved critical power correlation methodologies and as such maintains required safety margins. The proposed change does not adversely affect accident initiators or precursors nor does it alter the design assumptions, conditions, or configuration of the facility or the manner in which the plant is operated and maintained.

The proposed change does not alter or prevent the ability of structures, systems, and components (SSCs) from performing their intended function to mitigate the consequences of an initiating event within the assumed acceptance limits. The proposed change does not require any physical change to any plant SSCs nor does it require any change in systems or plant operations. The proposed change is consistent with the safety analysis assumptions and resultant consequences.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

There are no hardware changes nor are there any changes in the method which any plant systems perform a safety function. No new accident scenarios, failure mechanisms, or limiting single failures are introduced as a result of the proposed change.

The proposed change does not introduce any new accident precursors, nor does it involve any physical plant alterations or changes in the methods governing normal plant operation. Also, the change does not impose any new or

different requirements or eliminate any existing requirements. The change does not alter assumptions made in the safety analysis.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

Margin of safety is related to confidence in the ability of the fission product barriers (fuel cladding, reactor coolant system, and primary containment) to perform their design functions during and following postulated accidents. Evaluation of the 10 CFR Part 21 issue by General Electric determined that the PRFO transient provides additional margin to the Minimum Critical Power Ratio Safety Limit and is not a threat to fuel cladding integrity.

The proposed change to Fuel Integrity Cladding Safety Limits 1.1.A and 1.1.B is consistent with, and within the capabilities of the applicable NRC approved critical power correlations, and thus continues to ensure that valid critical power calculations are performed. No setpoints at which protective actions are initiated are altered by the proposed change. The proposed change does not alter the manner in which the safety limits are determined. This change is consistent with plant design and does not change the TS operability requirements; thus, previously evaluated accidents are not affected by this proposed change.

Therefore, the proposed change does not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. William C. Dennis, Assistant General Counsel, Entergy Nuclear Operations, Inc., 400 Hamilton Avenue, White Plains, NY 10601.

NRC Acting Branch Chief: Robert Beall.

Florida Power and Light Company, et al., Docket No. 50–335, St. Lucie Plant, Unit 1, St. Lucie County, Florida

Date of amendment request: May 10, 2013.

Description of amendment request: The amendment will revise the Technical Specifications (TSs) to allow the use of M5® fuel rod cladding material at St. Lucie Plant, Unit 1. The current acceptable fuel rod cladding material is identified in TS 5.3.1, Reactor Core, Fuel Assemblies. The proposed change would revise TS 5.3.1 to add M5® to the approved fuel rod cladding materials and TS 6.9.1.11 to add Framatome (AREVA) topical report BAW–10240(P)(A), Revision 0, ''Incorporation of M5® Properties in Framatome ANP Approved Methods,'' to the analytical methods used to determine the core operating limits previously reviewed and approved by the NRC.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change would allow the use of M5® fuel rod cladding in the St. Lucie Unit 1 reactor. The topical report BAW–10240(P)—A prepared by Framatome, currently known as AREVA, has been approved by the NRC for use with M5® fuel cladding. The fuel cladding itself is not an accident initiator and does not affect accident probability. Use of M5® fuel cladding, which has essentially the same properties as currently licensed Zircaloy, has been shown to meet all 10 CFR 50.46 acceptance criteria and, therefore, will not increase the consequences of an accident.

The proposed change to Technical Specification 6.9.1.11 (Core Operating Limits Report (COLR)) enables the use of the appropriate methodology to analyze accidents for cores containing fuel with M5® cladding to ensure that the plant continues to meet applicable design criteria and safety analysis acceptance criteria. The proposed change to the list of NRC-approved methodologies listed in Technical Specification 6.9.1.11 has no impact on plant operation and configuration. The list of methodologies in Technical Specification 6.9.1.11 does not impact either the initiation of an accident or the mitigation of its consequences.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

Use of M5® clad fuel will not result in changes in the operation or configuration of the facility. The material properties of M5® are similar to those of Zircaloy. Therefore, M5® fuel rod cladding will perform similarly to those fabricated from Zircaloy, thus precluding the possibility of the fuel becoming an accident initiator and causing a new or different type of accident. The proposed change to Technical Specification 5.3.1, to add M5® as a fuel clad material, does not create any new accident initiators.

The proposed change to the list of NRC-approved methodologies listed in Technical Specification 6.9.1.11, to add BAW–10240(P)—A, has no impact on any plant configuration or system performance. There is no change to the parameters within which the plant is normally operated, and thus the possibility of a new or different type of accident is not created.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change will not involve a significant reduction in the margin of safety because it has been demonstrated that the material properties of the M5® are not significantly different from those of Zircaloy. The M5® is expected to perform similarly to Zircaloy for all normal operating and accident scenarios, including both loss of coolant accident (LOCA) and non-LOCA scenarios. For LOCA scenarios, plant-specific LOCA analyses using M5® properties demonstrate that the acceptance criteria of 10 CFR 50.46 have been satisfied.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: James Petro, Managing Attorney—Nuclear, Florida Power & Light, P.O. Box 14000, Juno Beach, Florida 33408–0420.

NRC Branch Chief: Jessie F. Quichocho.

Pacific Gas and Electric Company, Docket Nos. 50–275 and 50–323, Diablo Canyon Nuclear Power Plant, Units 1 and 2, San Luis Obispo County, California

Date of amendment request: June 6, 2013.

Description of amendment request: The proposed amendments would revise Technical Specification (TS) 3.7.10, ''Control Room Ventilation System (CRVS),'' and TS 5.6.5, ''Core Operating Limits Report (COLR),'' to incorporate editorial changes. Specifically, the proposed amendments delete footnote (1), which expired on December 10, 2012, and is no longer applicable, from TS 3.7.10 Condition A Completion Time, and corrects inconsistent wording between TS 5.6.5a.4 and TS 3.2.1, between TS 5.6.5a.5, and TS 3.2.2, and between TS 5.6.5a.9 and TS 3.4.1.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed editorial changes do not involve any physical changes to structures, systems or components. The proposed editorial change to TS 3.7.10 deletes a footnote that is no longer applicable. The proposed editorial changes to TS 5.6.5 correct administrative discrepancies in the TS to provide consistency with the existing TS Sections 3.2.1, 3.2.2 and 3.4.1.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different accident from any accident previously evaluated?

Response: No.

The proposed editorial changes to TS 3.7.10 and TS 5.6.5 do not involve an accident.

Therefore, the proposed change does not create the possibility of a new or different accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed editorial changes to TS 3.7.10 and TS 5.6.5 do not impact accident analyses, fission product barriers, or margin of safety.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment requests involve no significant hazards consideration.

Attorney for licensee: Jennifer Post, Esq., Pacific Gas and Electric Company, P.O. Box 7442, San Francisco, California 94120.

NRC Branch Chief: Michael T. Markley.

South Carolina Electric and Gas Company, South Carolina Public Service Authority, Docket No. 50–395, Virgil C. Summer Nuclear Station, Unit 1, Fairfield County, South Carolina

Date of amendment request: April 3, 2013.

Description of amendment request: The proposed amendment would add an exception to Technical Specification 3.0.4 in Technical Specification 3/4.7.6, Control Room Emergency Filtration System (CREFS).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change adds an exception to the provisions of Specification 3.0.4 in Technical Specification 3/4.7.6, ''Control Room Emergency Filtration System (CREFS)'' that was previously included in this Technical Specification prior to Amendment 180. The proposed change would allow entry into the applicable Modes of Technical Specification 3/4.7.6 Actions b.1 and b.2 (Modes 5 and 6) while relying on the actions. The proposed change does not adversely affect accident initiators or precursors nor alter the design assumptions, conditions, or configuration of the facility. The proposed change does not alter or prevent the ability of structures, systems, and components (SSCs) to perform their intended function to mitigate the consequences of an initiating event within the assumed acceptance limits. The proposed change does not alter the Technical Specification Limiting Condition for Operation, Applicability, or remedial Actions that provide for the safe operation of the plant when the Limiting Condition for Operation is not met. The Actions in Technical Specification 3/4.7.6 Action statement b. continue to ensure the safe operation of the plant in the same manner as before. In addition, the proposed change does not affect the Surveillance Requirements of Technical Specification 3/4.7.6. As such, the Surveillance Requirements continue to provide the same level of assurance as before that the CREFS and control room boundary will perform their required safety functions to mitigate the consequences of events within the assumed acceptance limits.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change adds an exception to the provisions of Specification 3.0.4 in Technical Specification 3/4.7.6, ''Control Room Emergency Filtration System (CREFS)'' that was previously included in this Technical Specification prior to Amendment 180. The proposed change would allow entry into the applicable Modes of Technical Specification 3/4.7.6 Actions b.1 and b.2 (Modes 5 and 6) while relying on the actions. The proposed change does not alter the operability requirements or remedial Actions of Technical Specification 3/4.7.6, nor does the change affect the CREFS or control room boundary function during accident conditions. The change does not involve a physical alteration of the plant (i.e., no new or different type of equipment will be installed) or a significant change in the methods governing normal plant operation. The change does not alter assumptions made in the applicable safety analyses. As such, the proposed change does not impact the safety analyses assumptions and is consistent with current plant operating practices.

Therefore, the proposed TS change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change adds an exception to the provisions of Specification 3.0.4 in Technical Specification 3/4.7.6, ''Control Room Emergency Filtration System (CREFS)''

that was previously included in this Technical Specification prior to Amendment 180. The proposed change would allow entry into the applicable Modes of Technical Specification 3/4.7.6 Actions b.1 and b.2 (Modes 5 and 6) while relying on the actions. The proposed change does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The safety analysis acceptance criteria are not affected by the change. The proposed change will not result in plant operation in a configuration outside the design basis for an unacceptable period of time without compensatory measures. The proposed change does not adversely affect systems that respond to safely shutdown the plant and to maintain the plant in a safe shutdown condition. As such, the CREFS and control room boundary will continue to provide the same level of safety as before.

Therefore, the proposed TS change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: J. Hagood Hamilton, Jr., South Carolina Electric & Gas Company, Post Office Box 764, Columbia, South Carolina 29218.

NRC Branch Chief: Robert J. Pascarelli.

Southern Nuclear Operating Company, Inc. Docket Nos. 52–025 and 52–026, Vogtle Electric Generating Plant, Units 3 and 4, Burke County, Georgia

Date of amendment request: June 19, 2013.

Description of amendment request: The proposed changes would amend Combined License numbers NPF–91 and NPF–92 for Vogtle Electric Generating Plant Units 3 and 4 by departing from the plant-specific design control document Tier 2 and Tier 2* material contained within the updated final safety analysis report (UFSAR) related to the design of structural wall modules used to construct containment internal structures and portions of the auxiliary building. The proposed changes would revise requirements for design spacing of shear studs and the design of structural elements in order to address interferences and obstructions other than wall openings.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No

The design function of the containment structural modules is to support the reactor coolant system components and related piping systems and equipment. The design functions of the affected structural modules in the auxiliary building are to provide support and protection for new and spent fuel and the equipment needed to support fuel handling, cooling, and storage in the spent fuel racks, and to provide support, protection, and separation for the seismic Category I mechanical and electrical equipment located outside the containment building.

The design function of the shear studs is to enable the concrete and steel faceplates to act in a composite manner and transfer loads into the concrete of the structural modules. The structural modules are seismic Category I structures and are designed for dead, live, thermal, pressure, safe shutdown earthquake loads, and loads due to postulated pipe breaks. The loads and load combinations applicable to the structural modules in the auxiliary building are the same as for the containment internal structures except that there are no design basis accident loadings due to the automatic depressurization system or pressure loads due to pipe breaks. The proposed changes to the UFSAR are to include types of interferences other than wall openings and penetrations that may cause a change in the design spacing of shear studs and the design and spacing of wall module trusses in a local area. The proposed changes clarify that the stud spacing is specified as a design value and add the tolerance for stud spacing. The revised spacing including the tolerance continues to be in conformance with the design and analysis requirements identified in the UFSAR. The proposed changes also include clarification of a requirement for a complete joint penetration weld. The thickness, geometry, and strength of the structures are not adversely altered. The material of the steel plates is not altered. The properties of the concrete included in the structural modules are not altered. As a result, the design function of the containment structural modules is not adversely affected by the proposed change. There is no change to plant systems or the response of systems to postulated accident conditions. There is no change to the predicted radioactive releases due to postulated accident conditions. The plant response to previously evaluated accidents or external events is not adversely affected, nor does the change described create any new accident precursors.

Therefore, the proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes to the UFSAR acknowledge types of interferences (other than wall openings and penetrations) that may cause a change in the typical design spacing of shear studs and the design and spacing of wall module trusses in a local area. The proposed changes clarify that the stud spacing is specified as a design value and provide the tolerance for stud spacing. The revised spacing, including the tolerance, continues to be in conformance with the design and analysis requirements identified in the UFSAR. Stud spacing and sizing are evaluated to demonstrate that stud loadings and shear transfer capability are within acceptable limits and that the structural module acts in a composite manner. An additional proposed change is to clarify a requirement for a complete joint penetration weld. The thickness, geometry, and strength of the structures are not adversely altered. The materials of the steel plates are not altered. The properties of the concrete included in the structural modules are not altered. The changes to the internal design of the structural modules do not create any new accident precursors. As a result, the design function of the modules is not adversely affected by the proposed changes.

Therefore, the proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The criteria and requirements of American Concrete Institute (ACI) 349 and American Institute of Steel Construction (AISC) N690 provide a margin of safety to structural failure. The design of the shear studs and wall trusses for the structural wall modules conforms to applicable criteria and requirements in ACI 349 and AISC N690 and, therefore, maintain the margin of

safety. The proposed changes to the UFSAR acknowledge types of interferences (other than wall openings and penetrations) that may cause a change in the typical design spacing of shear studs and the design and spacing of wall module trusses in a local area. The proposed changes clarify that the stud spacing is specified as a design value and add the tolerance for stud spacing. The revised spacing including the tolerance continues to be in conformance with the design and analysis requirements identified in the UFSAR. An additional proposed change is to clarify a requirement for a complete joint penetration weld. There is no change to the capacity of the weld or to the design requirements of the modules. There is no change to the method of evaluation from that used in the design basis calculations.

Therefore, the proposed amendment does not result in a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. M. Stanford Blanton, Blach & Bingham LLP, 1710 Sixth Avenue North, Birmingham, AL 35203–2015.

NRC Branch Chief: Lawrence Burkhart.

ZionSolutions LLC, Docket Nos. 50–295 and 50–304, Zion Nuclear Power Station (ZNPS), Units 1 and 2, Lake County, Illinois

Date of amendment request: June 18, 2012, and supplemented June 5, 2013.

Description of amendment request: The proposed amendments would revise the Physical Security Plan associated with the transfer and storage of spent fuel at the Independent Spent Fuel Storage Installation (ISFSI).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed amendment, which incorporates ISFSI security functions, does not reduce the ability of the Security organization to prevent attempts of radiological sabotage and, therefore, does not increase the probability or consequences of a radiological release previously evaluated. The proposed ZNPS ISFSI Physical Security Plan will not affect any important-to-safety systems or components, their mode of operation or operating strategies. The changes have no effect on accident initiators or mitigation.

Therefore, the proposed amendment will not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed amendment incorporating ISFSI security functions does not affect the operation of systems that are important-to-safety. The ZNPS ISFSI Physical Security Plan amendment does not affect any of the parameters or conditions that could contribute to the initiation of any accident. No new accident scenarios are created as a result of the ZNPS ISFSI Physical Security Plan. In addition, the design functions of equipment important to safety are not altered as a result of the proposed ZNPS ISFSI Physical Security Plan.

Therefore, the proposed ISFSI Security Plan will not create the possibility of a new or different accident from any previously evaluated.

3. Does the change involve a significant reduction in a margin of safety?

Response: No.

Implementation of the proposed amendment incorporating ISFSI security functions will not reduce a margin of safety as detailed in the Technical Specifications, as there are no Technical Specification requirements associated with the physical security system. Specifically, the proposed ZNPS ISFSI Physical Security Plan does not represent a change in initial conditions, system response time, or any other parameter affecting the course of an accident analysis supporting the Bases of any Technical Specification. The proposed amendment does not reduce the effectiveness of any security/safeguards measures currently in place at the ZNPS.

Therefore, the proposed ZNPS ISFSI Physical Security Plan will not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Russ Workman, Deputy General Counsel, EnergySolutions, 423 West 300 South, Suite 200, Salt Lake City, UT 84101.

NRC Branch Chief: Bruce Watson.

Notice of Issuance of Amendments to Facility Operating Licenses and Combined Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating license or combined license, as applicable, proposed no significant hazards consideration determination, and opportunity for a hearing in connection with these actions, was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible electronically through the Agencywide Documents Access and Management System (ADAMS) in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html*. If you do not have access to ADAMS or if there are

problems in accessing the documents located in ADAMS, contact the PDR's Reference staff at 1–800–397–4209, 301–415–4737 or by email to *pdr.resource@nrc.gov.*

Detroit Edison Company, Docket No. 50–341, Fermi 2, Monroe County, Michigan

Date of application for amendment: December 21, 2012.

Brief description of amendment: The amendment revises Fermi 2 operating license to change its name on the license to ''DTE Electric Company.'' This name change is purely administrative in nature. Detroit Edison is a wholly owned subsidiary of DTE Energy Company, and this name change is part of a set of name changes of DTE Energy subsidiaries to conform their names to the ''DTE'' brand name. No other changes are contained within this amendment. This change does not involve a transfer of control over or of an interest in the license for Fermi 2.

Date of issuance: July 12, 2013.

Effective date: As of the date of issuance and shall be implemented within 60 days.

Amendment No.: 193.

Facility Operating License No. NPF–43: Amendment revised the operating license.

Date of initial notice in **Federal Register**: March 4, 2013 (78 FR 14131).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 12, 2013.

No significant hazards consideration comments received: No.

Duke Energy Carolinas, LLC, et al., Docket Nos. 50–413 and 50–414, Catawba Nuclear Station, Units 1 and 2, York County, South Carolina; and Docket Nos. 50–369 and 50–370, McGuire Nuclear Station, Units 1 and 2, Mecklenburg County, North Carolina

Date of amendment request: January 21, 2013.

Description of amendment request: The amendments revised the divider barrier seal test coupons' tensile strength in Technical Specification Surveillance Requirement 3.6.14.4 from ''> 39.7 psi'' to ''> 39.7 lbs.'' This change is an administrative change to correct an error where the wrong units were used when Catawba and McGuire converted to Standard Technical Specifications in 1998 using NUREG–1431, Revision 1.

Date of issuance: July 16, 2013.

Effective date: As of the date of issuance and shall be implemented within 30 days from the date of issuance.

Amendment Nos.: 270, 266, 270 and 250.

Renewed Facility Operating License Nos. NPF–35, NPF–52, NPF–9 and NPF–17: Amendments revised the licenses and the technical specifications.

Date of initial notice in **Federal Register:** May 14, 2013 (78 FR 28251).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 16, 2013.

No significant hazards consideration comments received: No.

Luminant Generation Company LLC, Docket Nos. 50–445 and 50–446, Comanche Peak Nuclear Power Plant, Units 1 and 2, Somervell County, Texas

Date of amendment request: July 12, 2012, as supplemented by letter dated October 23, 2012.

Brief description of amendments: The amendments revised Technical Specification (TS) 5.7.1, ''High Radiation Areas with Dose Rates not Exceeding 1.0 rem [roentgen equivalent man]/hour at 30 Centimeters from the Radiation Source or from any Surface Penetrated by the Radiation,'' and 5.7.2, ''High Radiation Areas with Dose Rates Greater than 1.0 rem/hour at 30 Centimeters from the Radiation Source or from any Surface Penetrated by the Radiation, but less than 500 rads/hour at 1 Meter from the Radiation Source or from any Surface Penetrated by the Radiation,'' to allow entry into high radiation areas by personnel continuously escorted by individuals qualified in radiation protection procedures and to require a pre-job briefing prior to entry into such areas. In addition, the amendment incorporates an editorial change to TS Table 3.3.3–1, ''Post Accident Monitoring Instrumentation.'' The typographical error in the title of TS Table 3.3.1–1 column ''CONDITION REFERENCED FROM REQUIRED ACTION E.1,'' is corrected to read, ''CONDITION REFERENCED FROM REQUIRED ACTION D.1,'' to reflect that the Required Actions for Condition D of TS 3.3.3, ''Post Accident Monitoring (PAM) Instrumentation'' are listed in the table.

Date of issuance: July 11, 2013.

Effective date: As of the date of issuance and shall be implemented within 120 days from the date of issuance.

Amendment Nos.: Unit 1—159; Unit 2—159.

Facility Operating License Nos. NPF–87 and NPF–89: The amendments revised the Facility Operating Licenses and Technical Specifications.

Date of initial notice in **Federal Register:** November 13, 2012 (77 FR 67683).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 11, 2013.

No significant hazards consideration comments received: No.

Northern States Power Company—Minnesota, Docket No. 50–263, Monticello Nuclear Generating Plant, Wright County, Minnesota

Date of application for amendment: September 18, 2012.

Brief description of amendment: The amendment revises the MNGP Technical Specifications (TS) Sections 3.1.6, ''Rod Pattern Control,'' and 3.3.2.1, ''Control Rod Block Instrumentation,'' to allow MNGP to reference an optional Banked Position Withdrawal Sequence (BPWS) shutdown sequence in the TS Bases. In addition, a footnote is revised in TS Table 3.3.2.1–1, ''Control Rod Block Instrumentation,'' to allow operators to bypass the rod worth minimizer if conditions for the optional BPWS shutdown process are satisfied. The changes are consistent with NRC-approved Technical Specifications Task Force (TSTF) Improved Standard Technical Specifications Change Traveler, TSTF–476, Revision 1, ''Improved BPWS Control Rod Insertion Process (NEDO–33091).''

Date of issuance: July 15, 2013.

Effective date: This license amendment is effective as of the date of its date of issuance and shall be implemented within 180 days after start-up from the 2013 Refueling Outage.

Amendment No.: 173.

Renewed Facility Operating License No. DPR–22: Amendment revises the Renewed Facility Operating License and Technical Specifications.

Date of initial notice in **Federal Register:** December 11, 2012.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 15, 2013.

No significant hazards consideration comments received: No.

PSEG Nuclear LLC, Docket Nos. 50–272 and 50–311, Salem Nuclear Generating Station, Units 1 and 2, Salem County, New Jersey

Date of application for amendments: July 17, 2012, as supplemented on January 28, 2013, and March 22, 2013.

Brief description of amendments: The amendment revised Salem Nuclear Generating Station Technical Specification 3.7.6.1 (Unit 1) and 3.7.6 (Unit 2), ''Control Room Emergency Air Conditioning System,'' to eliminate the separate action statements for securing an inoperable Control Area Air Conditioning System and Control Room

Emergency Air Conditioning System isolation damper in the closed position and entering the actions for an inoperable control room envelope boundary.

Date of issuance: July 17, 2013.

Effective date: As of the date of issuance, to be implemented within 60 days.

Amendment Nos.: 304 and 286.

Renewed Facility Operating License Nos. DPR–70 and DPR–75: The amendments revised the Technical Specifications.

Date of initial notice in **Federal Register:** April 2, 2013 (78 FR 19754).

The supplemental letter dated March 22, 2013, provided clarifying information that did not change the initial proposed no significant hazards consideration determination or expand the application.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 17, 2013.

No significant hazards consideration comments received: No.

Southern Nuclear Operating Company, Inc., Docket Nos. 50–348 and 50–364, Joseph M. Farley Nuclear Plant, Units 1 and 2, Houston County, Alabama

Date of amendment request: August 14, 2012, as supplemented by letters dated February 28, April 19, and June 24, 2013.

Brief description of amendment request: The amendments revised Technical Specification (TS) 5.6.5, ''Core Operating Limits Report (COLR),'' to reference and allow use of Westinghouse WCAP–16045–P–A, Addendum 1–A, ''Qualification of the NEXUS Nuclear Data Methodology,'' (Reference 1 of Enclosure 1) to determine core operating limits. The non-proprietary version is WCAP–16045–NP–A, Addendum 1–A (Reference 2 of Enclosure 1).

Date of issuance: July 17, 2013.

Effective date: As of the date of issuance and shall be implemented within 60 days from the date of issuance.

Amendment Nos: 191 and 187.

Facility Operating License Nos. NPF–2 and NPF–8: The amendment revised the Facility Operating License and Technical Specifications.

Date of initial notice in **Federal Register:** October 9, 2012 (77 FR 61440).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 17, 2013.

No significant hazards consideration comments received: No.

Dated at Rockville, Maryland, this 29th day of July, 2013.

For The Nuclear Regulatory Commission.

Michele G. Evans,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2013–18851 Filed 8–5–13; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 72–1044; NRC–2013–0174; EA–13–132]

In the Matter of Entergy Nuclear Generation Company Pilgrim Power Station Independent Spent Fuel Storage Installation Order Modifying License (Effective Immediately)

AGENCY: Nuclear Regulatory Commission.

ACTION: Order; modification.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has issued a general license to Entergy Nuclear Generation Company (Entergy), authorizing the operation of an Independent Spent Fuel Storage installation (ISFSI), in accordance with its regulations. This Order is being issued to Entergy because it has identified near-term plans to store spent fuel in an ISFSI under the general license provisions of the NRC's regulations.

ADDRESSES: Please refer to Docket ID NRC–2013–0174 when contacting the NRC about the availability of information regarding this document. You may access information related to this document, which the NRC possesses and is publicly available, using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2013–0174. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422; email: *Carol.Gallagher@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 access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION, CONTACT: L. Raynard Wharton, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–001; telephone: 301–287–9196; email: *Raynard.Wharton@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

Pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR) 2.106, the NRC is providing notice in the matter of Entergy Nuclear Generation Company, Pilgrim Nuclear Power Station Independent Spent Fuel Storage Installation (ISFSI) Order Modifying License (Effective Immediately).

II. Further Information

I

The NRC has issued a general license to Entergy Nuclear Generation Company (Entergy), authorizing the operation of an ISFSI, in accordance with the Atomic Energy Act of 1954, as amended, and 10 CFR part 72. This Order is being issued to Entergy because it has identified near-term plans to store spent fuel in an ISFSI under the general license provisions of 10 CFR part 72. The Commission's regulations at 10 CFR 72.212(b)(9), 10 CFR 50.54(p)(1), and 10 CFR 73.55(c)(5) require licensees to maintain physical security and safeguards contingency plan procedures to respond to threats of radiological sabotage and to protect the spent fuel against the threat of radiological sabotage, in accordance with 10 CFR part 73, Appendix C. Specific physical security requirements are contained in 10 CFR 73.51 or 73.55, as applicable.

Inasmuch as an insider has an opportunity to commit radiological sabotage equal to or greater than any other person, the Commission has determined these measures to be prudent. Comparable Orders have been issued to all licensees that currently store spent fuel, or have identified near-term plans to store spent fuel in an ISFSI.

II

On September 11, 2001, terrorists simultaneously attacked targets in New York, NY, and Washington, DC, using large commercial aircraft as weapons. In response to the attacks and intelligence

information subsequently obtained, the Commission issued a number of Safeguards and Threat Advisories to its licensees to strengthen licensees' capabilities and readiness to respond to a potential attack on a nuclear facility. On October 16, 2002, the Commission issued Orders to the licensees of operating ISFSIs to place the actions taken in response to the Advisories into the established regulatory framework, and to implement additional security enhancements that emerged from the NRC's ongoing comprehensive review. The Commission has also communicated with other Federal, State, and local government agencies and industry representatives to discuss and evaluate the current threat environment in order to assess the adequacy of security measures at licensed facilities. In addition, the Commission has conducted a comprehensive review of its safeguards and security programs and requirements.

As a result of its consideration of current safeguards and security requirements, as well as a review of information provided by the intelligence community, the Commission has determined that certain additional security measures (ASMs) are required to address the current threat environment in a consistent manner throughout the nuclear ISFSI community. Therefore, the Commission is imposing requirements, as set forth in Attachments 1 and 2 of this Order, on all licensees of these facilities. These requirements, which supplement existing regulatory requirements, promote the common defense and security, and will provide the Commission with reasonable assurance that the public health and safety, and the environment, continue to be adequately protected in the current threat environment. These requirements will remain in effect until the Commission determines otherwise.

The Commission recognizes that licensees may have already initiated many of the measures set forth in Attachments 1 and 2 to this Order in response to previously issued Advisories, or on their own. It also recognizes that some measures may not be possible or necessary at some sites, or may need to be tailored to accommodate the specific circumstances existing at certain facilities, to achieve the intended objectives and avoid any unforeseen effect on the safe storage of spent fuel.

Although the ASMs implemented by licensees in response to the Safeguards and Threat Advisories have been sufficient to provide reasonable assurance of adequate protection of public health and safety, in light of the continuing threat environment, the Commission concludes that these actions must be embodied in an Order, consistent with the established regulatory framework.

To provide assurance that licensees are implementing prudent measures to achieve a consistent level of protection to address the current threat environment, licenses issued pursuant to 10 CFR 72.210 shall be modified to include the requirements identified in Attachments 1 and 2 to this Order. In addition, pursuant to 10 CFR 2.202, I find that, in light of the common defense and security circumstances described above, the public health, safety, and interest require that this Order be effective immediately.

III

Accordingly, pursuant to Sections 53, 103, 104, 147, 149, 161b, 161i, 161o, 182, and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR Parts 50, 72, and 73, *it is hereby ordered, effective immediately, that Entergy's general license is modified as follows:*

A. Entergy shall comply with the requirements described in Attachments 1 and 2 to this Order, except to the extent that a more stringent requirement is set forth in the Pilgrim Nuclear Power Station's physical security plan. Entergy shall demonstrate its ability to comply with the requirements in Attachments 1 and 2 to the Order no later than 365 days from the date of this Order or 90 days before the first day that spent fuel is initially placed in the ISFSI, whichever is earlier. Entergy must implement these requirements before initially placing spent fuel in the ISFSI. Additionally, Entergy must receive written verification from the NRC that it has adequately demonstrated compliance with these requirements before initially placing spent fuel in the ISFSI.

B. 1. Entergy shall, within 20 days of the date of this Order, notify the Commission: (1) If it is unable to comply with any of the requirements described in Attachments 1 and 2; (2) if compliance with any of the requirements is unnecessary, in its specific circumstances; or (3) if implementation of any of the requirements would cause Entergy to be in violation of the provisions of any Commission regulation or facility license. The notification shall provide Entergy's justification for seeking relief from, or variation of, any specific requirement.

2. If Entergy believes that implementation of any of the requirements described in Attachments 1 and 2 to this Order would adversely impact the safe storage of spent fuel, Entergy must notify the Commission, within 20 days of the date of this Order, of the adverse safety impact, the basis for its determination that the requirement has an adverse safety impact, and either a proposal for achieving the same objectives specified in Attachments 1 and 2 requirements in question, or a schedule for modifying the facility to address the adverse safety condition. If neither approach is appropriate, Entergy must supplement its response to Condition B.1 of this Order to identify the condition as a requirement with which it cannot comply, with attendant justifications, as required under Condition B.1.

C. 1. Entergy shall, within 20 days of the date of this Order, submit to the Commission a schedule for achieving compliance with each requirement described in Attachments 1 and 2.

2. Entergy shall report to the Commission when it has achieved full compliance with the requirements described in Attachments 1 and 2.

D. All measures implemented or actions taken in response to this Order shall be maintained until the Commission determines otherwise.

Entergy 's response to Conditions B.1, B.2, C.1, and C.2, above, shall be submitted in accordance with 10 CFR 72.4. In addition, submittals and documents produced by Entergy as a result of this Order that contain Safeguards Information as defined by 10 CFR 73.22 shall be properly marked and handled in accordance with 10 CFR 73.21 and 73.22.

The Director, Office of Nuclear Material Safety and Safeguards, may, in writing, relax or rescind any of the above conditions for good cause.

IV

In accordance with 10 CFR 2.202, Entergy must, and any other person adversely affected by this Order may, submit an answer to this Order within 20 days of its publication in the **Federal Register.** In addition, Entergy and any other person adversely affected by this Order may request a hearing on this Order within 20 days of its publication in the **Federal Register.** Where good cause is shown, consideration will be given to extending the time to answer or request a hearing. A request for extension of time must be made, in writing, to the Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and

include a statement of good cause for the extension.

The answer may consent to this Order. If the answer includes a request for a hearing, it shall, under oath or affirmation, specifically set forth the matters of fact and law on which Entergy relies and the reasons as to why the Order should not have been issued. If a person other than Entergy requests a hearing, that person shall set forth with particularity the manner in which his/her interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309(d).

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in the NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through Electronic Information Exchange (EIE), users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by email at *MSHD.Resource@nrc.gov,* or by a toll-free call at (866) 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary of the Commission, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/ehd/,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

If a hearing is requested by Entergy or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the

issue to be considered at such hearing shall be whether this Order should be sustained.

Pursuant to 10 CFR 2.202(c)(2)(i), Entergy may, in addition to requesting a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the Order on the grounds that the Order, including the need for immediate effectiveness, is not based on adequate evidence, but on mere suspicion, unfounded allegations, or error.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions of this Order, as specified in Section III shall be final 20 days from the date this Order is published in the **Federal Register,** without further Order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions of this Order, as specified in Section III, shall be final when the extension expires, if a hearing request has not been received. *A request for hearing shall not stay the immediate effectiveness of this order.*

Dated at Rockville, Maryland, this 23rd day of July, 2013.

For the Nuclear Regulatory Commission.

Catherine Haney,

Director, Office of Nuclear Material Safety and Safeguards.

Attachment 1—Additional Security Measures (ASMs) for Physical Protection of Dry Independent Spent Fuel Storage Installations (ISFSIs) contains Safeguards Information and is not included in the Federal Register Notice

Attachment 2—Additional Security Measures for Access Authorization and Fingerprinting at Independent Spent Fuel Storage Installations, dated June 14, 2013

A. General Basis Criteria

1. These additional security measures (ASMs) are established to delineate an independent spent fuel storage installation (ISFSI) licensee's responsibility to enhance security measures related to authorization for unescorted access to the protected area of an ISFSI in response to the current threat environment.

2. Licensees whose ISFSI is collocated with a power reactor may choose to comply with the U.S. Nuclear Regulatory Commission (NRC)-approved reactor access authorization program for the associated reactor as an alternative means to satisfy the provisions of Sections B through G below. Otherwise, licensees shall comply with the access authorization and fingerprinting requirements of Section B through G of these ASMs.

3. Licensees shall clearly distinguish in their 20-day response which method they intend to use in order to comply with these ASMs.

B. Additional Security Measures for Access Authorization Program

1. The licensee shall develop, implement and maintain a program, or enhance its existing program, designed to ensure that persons granted unescorted access to the protected area of an ISFSI are trustworthy and reliable and do not constitute an unreasonable risk to the public health and safety for the common defense and security, including a potential to commit radiological sabotage.

a. To establish trustworthiness and reliability, the licensee shall develop, implement, and maintain procedures for conducting and completing background investigations, prior to granting access. The scope of background investigations must address at least the past three years and, as a minimum, must include:

i. Fingerprinting and Federal Bureau of Investigation (FBI) identification and criminal history records check (CHRC). Where an applicant for unescorted access has been previously fingerprinted with a favorably completed CHRC, (such as a CHRC pursuant to compliance with orders for access to safeguards information) the licensee may accept the results of that CHRC, and need not submit another set of fingerprints, provided the CHRC was completed not more than three years from the date of the application for unescorted access.

ii. Verification of employment with each previous employer for the most recent year from the date of application.

iii. Verification of employment with an employer of the longest duration during any calendar month for the remaining next most recent two years.

iv. A full credit history review.

v. An interview with not less than two character references, developed by the investigator.

vi. A review of official identification (e.g., driver's license; passport; government identification; state-, province-, or country-of-birth issued certificate of birth) to allow comparison of personal information data provided by the applicant. The licensee shall maintain a photocopy of the identifying document(s) on file, in accordance with ''Protection of Information,'' in Section G of these ASMs.

vii. Licensees shall confirm eligibility for employment through the regulations of the U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, and shall verify and ensure, to the extent possible, the accuracy of the provided social security number and alien registration number, as applicable.

b. The procedures developed or enhanced shall include measures for confirming the term, duration, and character of military service for the past three years, and/or academic enrollment and attendance in lieu of employment, for the past five years.

c. Licensees need not conduct an independent investigation for individuals employed at a facility who possess active ''Q'' or ''L'' clearances or possess another active U.S. Government-granted security clearance (i.e., Top Secret, Secret, or Confidential).

d. A review of the applicant's criminal history, obtained from local criminal justice resources, may be included in addition to the FBI CHRC, and is encouraged if the results of the FBI CHRC, employment check, or credit check disclose derogatory information. The scope of the applicant's local criminal history check shall cover all residences of record for the past three years from the date of the application for unescorted access.

2. The licensee shall use any information obtained as part of a CHRC solely for the purpose of determining an individual's suitability for unescorted access to the protected area of an ISFSI.

3. The licensee shall document the basis for its determination for granting or denying access to the protected area of an ISFSI.

4. The licensee shall develop, implement, and maintain procedures for updating background investigations for persons who are applying for reinstatement of unescorted access. Licensees need not conduct an independent reinvestigation for individuals who possess active ''Q'' or ''L'' clearances or possess another active U.S. Government granted security clearance, i.e., Top Secret, Secret or Confidential.

5. The licensee shall develop, implement, and maintain procedures for reinvestigations of persons granted unescorted access, at intervals not to exceed five years. Licensees need not conduct an independent reinvestigation for individuals employed at a facility who possess active ''Q'' or ''L'' clearances or possess another active U.S. Government granted security clearance, i.e., Top Secret, Secret or Confidential.

6. The licensee shall develop, implement, and maintain procedures designed to ensure that persons who have been denied unescorted access authorization to the facility are not

allowed access to the facility, even under escort.

7. The licensee shall develop, implement, and maintain an audit program for licensee and contractor/vendor access authorization programs that evaluate all program elements and include a person knowledgeable and practiced in access authorization program performance objectives to assist in the overall assessment of the site's program effectiveness.

C. Fingerprinting Program Requirements

1. In a letter to the NRC, the licensee must nominate an individual who will review the results of the FBI CHRCs to make trustworthiness and reliability determinations for unescorted access to an ISFSI. This individual, referred to as the ''reviewing official,'' must be someone who requires unescorted access to the ISFSI. The NRC will review the CHRC of any individual nominated to perform the reviewing official function. Based on the results of the CHRC, the NRC staff will determine whether this individual may have access. If the NRC determines that the nominee may not be granted such access, that individual will be prohibited from obtaining access.[1] Once the NRC approves a reviewing official, the reviewing official is the only individual permitted to make access determinations for other individuals who have been identified by the licensee as having the need for unescorted access to the ISFSI, and have been fingerprinted and have had a CHRC in accordance with these ASMs. The reviewing official can only make access determinations for other individuals, and therefore cannot approve other individuals to act as reviewing officials. Only the NRC can approve a reviewing official. Therefore, if the licensee wishes to have a new or additional reviewing official, the NRC must approve that individual before he or she can act in the capacity of a reviewing official.

2. No person may have access to Safeguards Information (SGI) or unescorted access to any facility subject to NRC regulation, if the NRC has determined, in accordance with its administrative review process based on fingerprinting and an FBI identification and CHRC, that the person may not have access to SGI or unescorted access to any facility subject to NRC regulation.

3. All fingerprints obtained by the licensee under this Order, must be submitted to the Commission for transmission to the FBI.

4. The licensee shall notify each affected individual that the fingerprints will be used to conduct a review of his/her criminal history record and inform the individual of the procedures for revising the record or including an explanation in the record, as specified in the ''Right to Correct and Complete Information,'' in section F of these ASMs.

5. Fingerprints need not be taken if the employed individual (e.g., a licensee employee, contractor, manufacturer, or supplier) is relieved from the fingerprinting requirement by 10 CFR 73.61, has a favorably adjudicated U.S. Government CHRC within the last five (5) years, or has an active Federal security clearance. Written confirmation from the Agency/employer who granted the Federal security clearance or reviewed the CHRC must be provided to the licensee. The licensee must retain this documentation for a period of three years from the date the individual no longer requires access to the facility.

D. Prohibitions

1. A licensee shall not base a final determination to deny an individual unescorted access to the protected area of an ISFSI solely on the basis of information received from the FBI involving: an arrest more than one (1) year old for which there is no information of the disposition of the case, or an arrest that resulted in dismissal of the charge, or an acquittal.

2. A licensee shall not use information received from a CHRC obtained pursuant to this Order in a manner that would infringe upon the rights of any individual under the First Amendment to the Constitution of the United States, nor shall the licensee use the information in any way that would discriminate among individuals on the basis of race, religion, national origin, sex, or age.

E. Procedures for Processing Fingerprint Checks

1. For the purpose of complying with this Order, licensees shall, using an appropriate method listed in 10 CFR 73.4, submit to the NRC's Division of Facilities and Security, Mail Stop TWB–05B32M, one completed, legible standard fingerprint card (Form FD–258, ORIMDNRCOOOZ) or, where practicable, other fingerprint records for each individual seeking unescorted access to an ISFSI, to the Director of the Division of Facilities and Security, marked for the attention of the Division's Criminal History Check Section. Copies of these forms may be obtained by writing the Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by calling (603) 829–9565, or by email to *forms.resource@nrc.gov.* Practicable alternative formats are set forth in 10 CFR 73.4. The licensee shall establish procedures to ensure that the quality of the fingerprints taken results in minimizing the rejection rate of fingerprint cards because of illegible or incomplete cards.

2. The NRC will review submitted fingerprint cards for completeness. Any Form FD–258 fingerprint record containing omissions or evident errors will be returned to the licensee for corrections. The fee for processing fingerprint checks includes one re-submission if the initial submission is returned by the FBI because the fingerprint impressions cannot be classified. The one free re-submission must have the FBI Transaction Control Number reflected on the re-submission. If additional submissions are necessary, they will be treated as initial submittals and will require a second payment of the processing fee.

3. Fees for processing fingerprint checks are due upon application. The licensee shall submit payment of the processing fees electronically. To be able to submit secure electronic payments, licensees will need to establish an account with Pay.Gov (*https://www.pay.gov*). To request an account, the licensee shall send an email to *paygo@nrc.gov.* The email must include the licensee's company name, address, point of contact (POC), POC email address, and phone number. The NRC will forward the request to Pay.Gov; who will contact the licensee with a password and user lD. Once the licensee has established an account and submitted payment to Pay.Gov, they shall obtain a receipt. The licensee shall submit the receipt from Pay.Gov to the NRC along with fingerprint cards. For additional guidance on making electronic payments, contact the Facilities Security Branch, Division of Facilities and Security, at (301) 492–3531. Combined payment for multiple applications is acceptable. The application fee (currently $26) is the sum of the user fee charged by the FBI for each fingerprint card or other fingerprint record submitted by the NRC on behalf of a licensee, and an NRC processing fee, which covers administrative costs associated with NRC handling of licensee fingerprint submissions. The Commission will directly notify licensees who are subject to this regulation of any fee changes.

[1] The NRC's determination of this individual's unescorted access to the ISFSI, in accordance with the process, is an administrative determination that is outside the scope of the Order.

4. The Commission will forward to the submitting licensee all data received from the FBI as a result of the licensee's application(s) for CHRCs, including the FBI fingerprint record.

F. Right to Correct and Complete Information

1. Prior to any final adverse determination, the licensee shall make available to the individual the contents of any criminal history records obtained from the FBI for the purpose of assuring correct and complete information. Written confirmation by the individual of receipt of this notification must be maintained by the licensee for a period of one (1) year from the date of notification.

2. If, after reviewing the record, an individual believes that it is incorrect or incomplete in any respect and wishes to change, correct, or update the alleged deficiency, or to explain any matter in the record, the individual may initiate challenge procedures. These procedures include either direct application by the individual challenging the record to the agency (i.e., law enforcement agency) that contributed the questioned information, or direct challenge as to the accuracy or completeness of any entry on the criminal history record to the Assistant Director, Federal Bureau of Investigation Identification Division, Washington, DC 20537–9700 (as set forth in 28 CFR 16.30 through 16.34). In the latter case, the FBI forwards the challenge to the agency that submitted the data and requests that agency to verify or correct the challenged entry. Upon receipt of an official communication directly from the agency that contributed the original information, the FBI Identification Division makes any changes necessary in accordance with the information supplied by that agency. The licensee must provide at least 10 days for an individual to initiate an action challenging the results of a FBI CHRC after the record is made available for his/her review. The licensee may make a final access determination based on the criminal history record only upon receipt of the FBI's ultimate confirmation or correction of the record. Upon a final adverse determination on access to an ISFSI, the licensee shall provide the individual its documented basis for denial. Access to an ISFSI shall not be granted to an individual during the review process.

G. Protection of Information

1. The licensee shall develop, implement, and maintain a system for personnel information management with appropriate procedures for the protection of personal, confidential information. This system shall be designed to prohibit unauthorized access to sensitive information and to prohibit modification of the information without authorization.

2. Each licensee who obtains a criminal history record on an individual pursuant to this Order shall establish and maintain a system of files and procedures, for protecting the record and the personal information from unauthorized disclosure.

3. The licensee may not disclose the record or personal information collected and maintained to persons other than the subject individual, his/her representative, or to those who have a need to access the information in performing assigned duties in the process of determining suitability for unescorted access to the protected area of an ISFSI. No individual authorized to have access to the information may re-disseminate the information to any other individual who does not have the appropriate need to know.

4. The personal information obtained on an individual from a CHRC may be transferred to another licensee if the gaining licensee receives the individual's written request to re-disseminate the information contained in his/her file, and the gaining licensee verifies information such as the individual's name, date of birth, social security number, sex, and other applicable physical characteristics for identification purposes.

5. The licensee shall make criminal history records, obtained under this section, available for examination by an authorized representative of the NRC to determine compliance with the regulations and laws.

[FR Doc. 2013–18936 Filed 8–5–13; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–454 and 50–455; NRC–2013–0178]

License Renewal Application for Byron Station, Units 1 and 2; Exelon Generation Company, LLC

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of intent to prepare an environmental impact statement and conduct scoping process; public meetings and opportunity to comment.

SUMMARY: Exelon Generation Company, LLC (Exelon) has submitted to the U.S. Nuclear Regulatory Commission (NRC) an application (ML131550528) for renewal of Facility Operating Licenses NPF–37 and NPF–66 for an additional 20 years of operation for Byron Station, Units 1 and 2 (Byron). Byron Station is located in Byron, Illinois. The current operating license for Byron Station, Unit 1, expires on October 31, 2024, and Unit 2, expires on November 6, 2026.

DATES: The scoping meetings, where the public can provide oral input on what issues should be addressed in the EIS, will be held on August 20, 2013. The first session will be from 2:00 p.m. to 4:00 p.m. and the second session will be from 7:00 p.m. to 9:00 p.m. Written scoping comments should be submitted by September 27, 2013. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

ADDRESSES: You may submit comments by any of the following methods (unless this document describes a different method for submitting comments on a specific subject):

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2013–0178. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422; email: *Carol.Gallagher@nrc.gov*. For technical questions, contact the individual(s) listed in the FOR FURTHER INFORMATION CONTACT section of this document.
- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: 3WFN–06–A44M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

For additional direction on accessing information and submitting comments, see ''Accessing Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Lois M. James, Environmental Project Manager, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–3306, email: *Lois.James@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2013–0178 when contacting the NRC about the availability of information regarding this document. You may access information related to this document,

which the NRC possesses and is publicly available, by any of the following methods:

• *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2013–0178.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly-available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this notice (if that document is available in ADAMS) is provided the first time that a document is referenced. Exelon's application for renewal can be found in ADAMS under ADAMS accession no. ML131550528.

• *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2013–0178 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *http://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. Discussion

The application for renewal, May 29, 2013, was submitted pursuant to Part 54 of Title 10 of the *Code of Federal Regulations* (10 CFR), which included an environmental report (ER). A separate notice of receipt and availability of the application was published in the **Federal Register** on June 13, 2013 (78 FR 35646). A notice of acceptance for docketing of the application and opportunity for hearing regarding renewal of the facility operating license was published on July 24, 2013, in the **Federal Register** (78 FR 44603). The purpose of this notice is to inform the public that the NRC will be preparing an environmental impact statement (EIS) related to the review of the license renewal application and to provide the public an opportunity to participate in the environmental scoping process, as defined in 10 CFR 51.29, ''Scoping-environmental impact statement and supplement to environmental impact statement.''

As outlined in 36 CFR 800.8, ''Coordination with the National Environmental Policy Act,'' the NRC plans to coordinate compliance with Section 106 of the National Historic Preservation Act (NHPA) in meeting the requirements of the National Environmental Policy Act of 1969 (NEPA). Pursuant to 36 CFR 800.8(c), the NRC intends to use its process and documentation for the preparation of the EIS on the proposed action to comply with Section 106 of the NHPA in lieu of the procedures set forth at 36 CFR 800.3 through 800.6.

In accordance with 10 CFR 51.53(c) and 10 CFR 54.23, Exelon submitted the ER as part of the application. The ER was prepared pursuant to 10 CFR Part 51 and is publicly available in ADAMS under Accession No. ML13155A422 and ML13155A423. The ER may also be viewed on the Internet at *http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html.* In addition, paper copies of the ER are available for public review near the site at the Byron Public Library District, 100 S. Washington St., Byron, IL 61010.

This document advises the public that the NRC intends to gather the information necessary to prepare a plant specific supplement to the NRC's ''Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants'' (NUREG–1437), related to the review of the application for renewal of the Byron Station operating licenses for an additional 20 years.

Possible alternatives to the proposed action (license renewal) include no action and reasonable alternative energy sources. The NRC is required by 10 CFR 51.95 to prepare a supplement to the GEIS in connection with the renewal of an operating license. This notice is being published in accordance with NEPA and the NRC's regulations found at 10 CFR Part 51.

The NRC will first conduct a scoping process for the supplement to the GEIS and, as soon as practicable thereafter, will prepare a draft supplement to the GEIS for public comment. Participation in the scoping process by members of the public and local, State, Tribal, and Federal government agencies is encouraged. The scoping process for the supplement to the GEIS will be used to accomplish the following:

a. Define the proposed action, which is to be the subject of the supplement to the GEIS;

b. Determine the scope of the supplement to the GEIS and identify the significant issues to be analyzed in depth;

c. Identify and eliminate from detailed study those issues that are peripheral or that are not significant;

d. Identify any environmental assessments and other ElSs that are being or will be prepared that are related to, but are not part of, the scope of the supplement to the GEIS being considered;

e. Identify other environmental review and consultation requirements related to the proposed action;

f. Indicate the relationship between the timing of the preparation of the environmental analyses and the Commission's tentative planning and decision-making schedule;

g. Identify any cooperating agencies and, as appropriate, allocate assignments for preparation and schedules for completing the supplement to the GEIS to the NRC and any cooperating agencies; and

h. Describe how the supplement to the GEIS will be prepared and include any contractor assistance to be used.

The NRC invites the following entities to participate in scoping:

a. The applicant, Exelon;

b. Any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved or that is authorized to develop and enforce relevant environmental standards;

c. Affected State and local government agencies, including those authorized to develop and enforce relevant environmental standards;

d. Any affected Indian tribe;

e. Any person who requests or has requested an opportunity to participate in the scoping process; and

f. Any person who has petitioned or intends to petition for leave to intervene.

III. Public Scoping Meeting

In accordance with 10 CFR 51.26, the scoping process for an EIS may include a public scoping meeting to help identify significant issues related to a proposed activity and to determine the scope of issues to be addressed in an EIS. The NRC has decided to hold public meetings for the Byron Station license renewal supplement to the GEIS. The scoping meetings will be held on August 20, 2013, and there will be two sessions to accommodate interested parties. The first session will convene at 2:00 p.m. and will continue until 4:00 p.m., as necessary. The second session will convene at 7:00 p.m. with a repeat of the overview portions of the meeting and will continue until 9:00 p.m., as necessary. Both sessions will be held at the Byron Forest Preserve, 7993 N River Rd, Byron, IL.

Both meetings will be transcribed and will include: (1) An overview by the NRC staff of the NEPA environmental review process, the proposed scope of the supplement to the GEIS, and the proposed review schedule; and (2) the opportunity for interested government agencies, organizations, and individuals to submit comments or suggestions on the environmental issues or the proposed scope of the supplement to the GEIS. Additionally, the NRC staff will host informal discussions one hour prior to the start of each session at the same location. No formal comments on the proposed scope of the supplement to the GEIS will be accepted during the informal discussions. To be considered, comments must be provided either at the transcribed public meetings or in writing, as discussed above.

Persons may register to attend or present oral comments at the meetings on the scope of the NEPA review by contacting the NRC Project Manager, Ms. Lois M. James, by telephone at 1–800–368–5642, extension 3306, or by email at *lois.james@nrc.gov* no later than August 15, 2013. Members of the public may also register to speak at the meeting within 15 minutes of the start of each session. Individual oral comments may be limited by the time available, depending on the number of persons who register. Members of the public who have not registered may also have an opportunity to speak if time permits. Public comments will be considered in the scoping process for the supplement to the GEIS. Ms. James will need to be contacted no later than August 13, 2013, if special equipment or accommodations are needed to attend or present information at the public meeting so that the NRC staff can determine whether the request can be accommodated.

Participation in the scoping process for the supplement to the GEIS does not entitle participants to become parties to the proceeding to which the supplement to the GEIS relates. Matters related to participation in any hearing are outside the scope of matters to be discussed at this public meeting.

At the conclusion of the scoping process, the NRC will prepare a concise summary of the determination and conclusions reached, including the significant issues identified, and will send a copy of the summary to each participant in the scoping process. The summary will also be available for inspection in ADAMS. The NRC staff will then prepare and issue for comment the draft supplement to the GEIS, which will be the subject of a separate notice and separate public meetings. Copies will be available for public inspection at the above-mentioned addresses. After receipt and consideration of the comments, the NRC will prepare a final supplement to the GEIS, which will also be available for public inspection.

Dated at Rockville, Maryland, this 31st day of July 2013.

For the Nuclear Regulatory Commission.

Elaine Keegan,

Acting Chief, Projects Branch 2, Division of License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. 2013–18935 Filed 8–5–13; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on US–APWR; Notice of Meeting

The ACRS Subcommittee on US–APWR will hold a meeting on September 17–18, 2013, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The meeting will be open to public attendance with the exception of portions that may be closed to protect information that is propriety pursuant to 5 U.S.C. 552(c)(4). The agenda for the subject meeting shall be as follows:

Tuesday, September 17, 2013—8:30 a.m. Until 5:00 p.m.; Wednesday, September 18, 2013—8:30 a.m. Until 5:00 p.m.

The Subcommittee will review Chapter 6, ''Engineered Safety Features,'' of the Safety Evaluation Report (SER) associated with the US–APWR design certification and the Comanche Peak Combined License Application (COLA) and Topical Report MUAP–07001, ''The Advanced Accumulator.'' The Subcommittee will hear presentations by and hold discussions with representatives of the NRC staff, Mitsubishi Heavy Industries, and Luminant Generation Company, LLC. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Girija Shukla (Telephone 301–415–6855 or Email: *Girija.Shukla@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 18, 2012, (77 FR 64146–64147).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (Telephone 240–888–9835) to be escorted to the meeting room.

Dated: July 31, 2013.

Cayetano Santos,

Chief Technical Support Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2013–18943 Filed 8–5–13; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on Reliability & PRA; Notice of Meeting

The ACRS Subcommittee on Reliability & PRA will hold a meeting on September 4, 2013, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Wednesday, September 4, 2013—1:00 p.m. Until 5:00 p.m.

The Subcommittee will be briefed on the development of a Risk Management Regulatory Framework (RMRF). The Subcommittee will hear presentations by and hold discussions with the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), John Lai (Telephone 301–415–5197 or Email: *John.Lai@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 18, 2012, (77 FR 64146–64147).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (Telephone 240–888–9835) to be escorted to the meeting room.

Dated: July 31, 2013.

Cayetano Santos,

Chief, Technical Support Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2013–18942 Filed 8–5–13; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS): Meeting of the ACRS Subcommittee on Planning and Procedures; Notice of Meeting

The ACRS Subcommittee on Planning and Procedures will hold a meeting on September 4, 2013, Room T–2B3, 11545 Rockville Pike, Rockville, Maryland.

The meeting will be open to public attendance with the exception of a portion that may be closed pursuant to 5 U.S.C. 552b(c)(2) and (6) to discuss organizational and personnel matters that relate solely to the internal personnel rules and practices of the ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy.

The agenda for the subject meeting shall be as follows:

Wednesday, September 4, 2013—12:00 p.m. until 1:00 p.m.

The Subcommittee will discuss proposed ACRS activities and related matters. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Quynh Nguyen (Telephone 301–415–5844 or Email: *Quynh.Nguyen@nrc.gov*) five days prior to the meeting, if possible, so that arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 18, 2012, (77 FR 64146–64147).

Information regarding changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with the DFO if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (240–888–9835) to be escorted to the meeting room.

Date: July 26, 2013.

Cayetano Santos,

Chief, Technical Support Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2013–18939 Filed 8–5–13; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2013–0001]

Sunshine Act Meetings

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission.

DATE: Weeks of August 5, 12, 19, 26, September 2, 9, 2013.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of August 5, 2013

There are no meetings scheduled for the week of August 5, 2013.

Week of August 12, 2013—Tentative

There are no meetings scheduled for the week of August 12, 2013.

Week of August 19, 2013—Tentative

There are no meetings scheduled for the week of August 19, 2013.

Week of August 26, 2013—Tentative

Tuesday, August 27, 2013

9:00 a.m. Briefing on NRC's Construction Activities (Public Meeting) (Contact: Michelle Hayes, 301–415–8375)

This meeting will be webcast live at the Web address—*www.nrc.gov*

3:00 p.m. Briefing on NRC International Activities (Closed –Ex. 1 & 9) (Contact: Karen Henderson, 301–415–0202)

Week of September 2, 2013—Tentative

There are no meetings scheduled for the week of September 2, 2013.

Week of September 9, 2013—Tentative

There are no meetings scheduled for the week of September 9, 2013.

* * * * *

* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—301–415–1292. Contact person for more information: Rochelle Bavol, 301–415–1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html.*

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify Kimberly Meyer, NRC Disability Program Manager, at 301–287–0727, or by email at *kimberly.meyer-chambers@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an email to *darlene.wright@nrc.gov.*

Dated: August 1, 2013.

Rochelle C. Bavol,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2013–19049 Filed 8–2–13; 4:15 pm]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0195]

Verification, Validation, Reviews, and Audits for Digital Computer Software Used in Safety Systems of Nuclear Power Plants

AGENCY: Nuclear Regulatory Commission.

ACTION: Revision to regulatory guide; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing a revised regulatory guide (RG), revision 2 of RG 1.168, ''Verification, Validation, Reviews, and Audits for Digital Computer Software Used in Safety Systems of Nuclear Power Plants.'' This guide endorses, with clarifications and exceptions, the Institute of Electrical and Electronic Engineers (IEEE) Standard 1012–2004, ''IEEE Standard for Software Verification and Validation,'' and IEEE Std. 1028–2008, ''IEEE Standard for Software Reviews and Audits.'' These two IEEE standards describe methods acceptable to the NRC staff for demonstrating compliance with the NRC's regulations for design verification and control of software used in the safety systems of a nuclear power plant.

ADDRESSES: Please refer to Docket ID NRC–2012–0195 when contacting the NRC about the availability of information regarding this document. You may access information related to this document, which the NRC possesses and is publicly available, using the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0195. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422; email: Carol.Gallagher@nrc.gov.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select *''Begin Web-based ADAMS Search.''* For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this notice (if that document is available in ADAMS) is provided the first time that a document is referenced. Revision 2 of RG 1.168 is available in ADAMS under Accession No. ML13073A210. The regulatory analysis may be found in ADAMS under Accession No. ML103160461.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

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FOR FURTHER INFORMATION CONTACT: Mark Orr, Division of Engineering, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–251–7495; email: *Mark.Orr@NRC.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is issuing a revision to an existing guide in the NRC's ''Regulatory Guide'' series. This series was developed to describe and make available to the public information such as methods that are acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

II. Further Information

Revision 2 of RG 1.168 was issued with a temporary identification as Draft Regulatory Guide, DG–1267 on August 22, 2012 (77 FR 50723) for a 60-day public comment period. The public comment period closed on November 23, 2012. Multiple public comments were received and addressed by the NRC staff. These comments and the NRC staff responses are available in ADAMS under Accession number ML13073A208.

Revision 2 of RG 1.168 endorses, with clarifications and exceptions, the consensus practices for complying with NRC regulations promoting the development of, and compliance with, a software lifecycle program for software used in safety systems in nuclear power plants described in the Institute of Electrical and Electronic Engineers (IEEE) Standard 1012–2004, ''IEEE

Standard for Software Verification and Validation,'' and IEEE Std. 1028–2008, ''IEEE Standard for Software Reviews and Audits.'' These two IEEE standards describe methods acceptable to the NRC staff for demonstrating compliance with the NRC's regulations for verification, validation, and design control of software used in safety systems of a nuclear power plant. In particular, the methods are consistent with part 50 of Title 10 of the *Code of Federal Regulations* (10 CFR), ''Domestic Licensing of Production and Utilization Facilities,'' Appendix A, ''General Design Criteria for Nuclear Power Plants,'' General Design Criterion (GDC) 1, ''Quality Standards and Records,'' which requires, in part, that a quality assurance program be established and implemented to provide adequate assurance that systems and components important to safety will satisfactorily perform their safety functions.

Revision 2 of RG 1.168 supersedes Revision 1 of RG 1.168 and represents the NRC staff's guidance for future users and guidance. Earlier versions of this RG, however, continue to be acceptable for those licensees whose licensing basis includes earlier versions of this RG, absent a licensee-initiated change to its licensing basis. Additional information on the staff's use of this revised RG with respect to both current and future users and applications is set forth in the ''Implementation'' section of the revised RG.

This RG is one of six revised RGs addressing computer software development and use in safety related systems of nuclear power plants. These RGs were developed by the Office of Nuclear Regulatory Research, Division of Engineering (RES/DE) with the assistance of multiple individuals in the Office of New Reactors, Division of Engineering (NRO/DE); Office Nuclear Reactor Regulation, Division of Engineering (NRR/DE); and the Office of Nuclear Security and Incident Response, Division of Security Policy (NSIR/DSP). The six interrelated RGs are:

1. Revision 2 of RG 1.168, ''Verification, Validation, Reviews, and Audits for Digital Computer Software used in Safety Systems of Nuclear Power Plants,'' issued for public comment as DG–1267. The package for Rev. 2 of RG 1.168 is in ADAMS at Accession No. ML12236A132.

2. Revision 1 of RG 1.169, ''Configuration Management Plans for Digital Computer Software used in Safety Systems of Nuclear Power Plants,'' issued for public comment as DG–1206. The package for Rev. 1 of RG 1.169 is in ADAMS at Accession No. ML12354A524.

3. Revision 1 of RG 1.170, ''Test Documentation for Digital Computer Software used in Safety Systems of Nuclear Power Plants,'' issued for public comment as DG1207. The package for Rev. 1 of RG 1.170 is in ADAMS at Accession No. ML12354A531.

4. Revision 1 of RG 1.171, ''Software Unit Testing for Digital Computer Software Used in Safety Systems of Nuclear Power Plants,'' issued for public comment as DG1208. The package for Rev. 1 of RG 1.171 is in ADAMS at Accession No. ML12354A534.

5. Revision 1 of RG 1.172, ''Software Requirements Specifications for Digital Computer Software used in Safety Systems of Nuclear Power Plants,'' issued for public comment as DG–1209. The package for Rev. 1 of RG 1.172 is in ADAMS at Accession No. ML12354A538.

6. Revision 1 of RG 1.173, ''Developing Software Life Cycle Processes for Digital Computer Software used in Safety Systems of Nuclear Power Plants,'' issued for public comment as DG–1210. The package for Rev. 1 of RG 1.173 is in ADAMS at Accession No. ML13008A338.

III. Backfitting and Issue Finality

Issuance of this revised RG does not constitute backfitting as defined in 10 CFR 50.109 (the Backfit Rule) and is not otherwise inconsistent with the issue finality provisions in 10 CFR part 52. As discussed in the ''Implementation'' section of this RG, the NRC has no current intention to impose this RG on holders of current operating licenses, early site permits or combined licenses, unless this final RG is part of the licensing basis for the facility. The NRC may apply this revised RG to applications for operating licenses, early site permits and combined licenses docketed by the NRC as of the date of issuance of the final RG, as well as to future applications for operating licenses, early site permits and combined licenses submitted after the issuance of the RG. Such action does not constitute backfitting as defined in 10 CFR 50.109(a)(1) and is not otherwise inconsistent with the applicable issue finality provision in 10 CFR part 52, inasmuch as such applicants or potential applicants are not within the scope of entities protected by the Backfit Rule or the relevant issue finality provisions in part 52.

IV. Congressional Review Act

This RG is a rule as designated in the Congressional Review Act (5 U.S.C. 801–808). However, the Office of Management and Budget (OMB) has not found it to be a major rule as designated in the Congressional Review Act.

Dated at Rockville, Maryland, this 19th day of July, 2013.

For the Nuclear Regulatory Commission.

Thomas H. Boyce,

Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2013–18728 Filed 8–5–13; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0195]

Test Documentation for Digital Computer Software Used in Safety Systems of Nuclear Power Plants

AGENCY: Nuclear Regulatory Commission.

ACTION: Revision to regulatory guide; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing a revised regulatory guide (RG), Revision 1 of RG 1.170, ''Test Documentation for Digital Computer Software Used in Safety Systems of Nuclear Power Plants.'' This RG endorses the Institute of Electrical and Electronic Engineers (IEEE) Standard 829–2008, ''IEEE Standard for Software and System Test Documentation'' with the clarifications and exceptions stated in Section C, ''Staff Regulatory Guidance'' of the RG. IEEE Std. 829–2008 describes methods that the NRC considers acceptable for use in complying with NRC regulations for developing test documentation and design quality in the software used in safety systems of nuclear power plants.

ADDRESSES: Please refer to Docket ID NRC–2012–0195 when contacting the NRC about the availability of information regarding this document. You may access information related to this document, which the NRC possesses and is publicly available, using the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0195. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422; email: Carol.Gallagher@nrc.gov.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC

Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''*Begin Web-based ADAMS Search.''* For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this notice (if that document is available in ADAMS) is provided the first time that a document is referenced. Revision 1 of RG 1.170 is available in ADAMS under Accession No. ML13003A216. The regulatory analysis may be found in ADAMS under Accession No. ML103200469.

• *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

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FOR FURTHER INFORMATION CONTACT: Mark Orr, Division of Engineering, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–251–7495; email: *Mark.Orr@NRC.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is issuing a revision to an existing guide in the NRC's ''Regulatory Guide'' series. This series was developed to describe and make available to the public information such as methods that are acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

II. Further Information

Revision 1 of RG 1.170 was issued with a temporary identification as Draft Regulatory Guide, DG–1207 on August 22, 2012 (77 FR 50720) for a 60-day public comment period. The public comment period closed on November 23, 2012. Multiple public comments were received and addressed by the NRC staff. These comments and the NRC staff responses are available in ADAMS under Accession number ML13003A209.

Revision 1 of RG 1.170 endorses IEEE Std. 829–2008, ''IEEE Standard for Software and System Test Documentation'' with the exceptions stated in the Section C ''Staff Regulatory Guidance'' of the RG. IEEE Std. 829–2008 describes methods that the NRC considers acceptable for use in complying with NRC regulations for developing test documentation and design quality in the software used in safety systems of nuclear power plants. In particular, the methods are consistent with the GDC in Appendix A to part 50 of Title 10 of the *Code of Federal Regulations* (10 CFR), ''Domestic Licensing of Production and Utilization Facilities'' and the criteria for quality assurance programs in Appendix B to 10 CFR part 50 as they apply to the documentation of software testing activities. The criteria in Appendices A and B of 10 CFR part 50 apply to systems and related quality assurance processes, and the requirements extend throughout the life cycle of the protection system especially when those systems include software. There are further requirements for software testing which can be found in the documentation retention and handling section of 10 CFR part 21.51, ''Maintenance and Inspection of Records.''

This RG is one of six RG revisions addressing computer software development and use in safety related systems of nuclear power plants. These RGs were developed by the Office of Nuclear Regulatory Research, Division of Engineering (RES/DE) with the assistance of multiple individuals in the Office of New Reactors, Division of Engineering (NRO/DE); Office Nuclear Reactor Regulation, Division of Engineering (NRR/DE); and the Office of Nuclear Security and Incident Response, Division of Security Policy (NSIR/DSP). The six interrelated RGs are:

1. Revision 2 of RG 1.168, ''Verification, Validation, Reviews, and Audits for Digital Computer Software used in Safety Systems of Nuclear Power Plants,'' issued for public comment as DG–1267. The package for Rev. 2 of RG 1.168 is in ADAMS at Accession No. ML12236A132.

2. Revision 1 of RG 1.169, ''Configuration Management Plans for Digital Computer Software used in Safety Systems of Nuclear Power Plants,'' issued for public comment as DG–1206. The package for Rev. 1 of RG 1.169 is in ADAMS at Accession No. ML12354A524.

3. Revision 1 of RG 1.170, ''Test Documentation for Digital Computer Software used in Safety Systems of Nuclear Power Plants,'' issued for public comment as DG1207. The package for Rev. 1 of RG 1.170 is in ADAMS at Accession No. ML12354A531.

4. Revision 1 of RG 1.171, ''Software Unit Testing for Digital Computer Software Used in Safety Systems of Nuclear Power Plants,'' issued for public comment as DG1208. The package for Rev. 1 of RG 1.171 is in ADAMS at Accession No. ML12354A534.

5. Revision 1 of RG 1.172, ''Software Requirements Specifications for Digital Computer Software used in Safety Systems of Nuclear Power Plants,'' issued for public comment as DG–1209. The package for Rev. 1 of RG 1.172 is in ADAMS at Accession No. ML12354A538.

6. Revision 1 of RG 1.173, ''Developing Software Life Cycle Processes for Digital Computer Software used in Safety Systems of Nuclear Power Plants,'' issued for public comment as DG–1210. The package for Rev. 1 of RG 1.173 is in ADAMS at Accession No. ML13008A338.

III. Backfitting and Issue Finality

Issuance of this revised RG does not constitute backfitting as defined in 10 CFR 50.109 (the Backfit Rule) and is not otherwise inconsistent with the issue finality provisions in 10 CFR part 52. As discussed in the ''Implementation'' section of this RG, the NRC has no current intention to impose this RG on holders of current operating licenses, early site permits or combined licenses, unless this final regulatory guide is part of the licensing basis for the facility. The NRC may apply this revised RG to applications for operating licenses, early site permits and combined licenses docketed by the NRC as of the date of issuance of the final RG, as well as to future applications for operating licenses, early site permits and combined licenses submitted after the issuance of the RG. Such action does not constitute backfitting as defined in 10 CFR 50.109(a)(1) and is not otherwise inconsistent with the applicable issue finality provision in 10 CFR part 52, inasmuch as such applicants or potential applicants are not within the scope of entities protected by the Backfit Rule or the relevant issue finality provisions in part 52.

Congressional Review Act

This RG is a rule as designated in the Congressional Review Act (5 U.S.C. 801–808). However, the Office of Management and Budget (OMB) has not found it to be a major rule as designated in the Congressional Review Act.

Dated at Rockville, Maryland, this 19th day of July, 2013.

For the Nuclear Regulatory Commission.

Thomas Boyce,

Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2013–18719 Filed 8–5–13; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70085; File Nos. SR–NYSE–2011–55; SR–NYSEAmex–2011–84]

Self-Regulatory Organizations; New York Stock Exchange LLC; NYSE MKT LLC; Order Granting an Extension to Limited Exemptions From Rule 612(c) of Regulation NMS In Connection With the Exchanges' Retail Liquidity Programs

July 31, 2013.

On July 3, 2012, the Commission issued an order pursuant to its authority under Rule 612(c) of Regulation NMS (''Sub-Penny Rule'') [1] that granted the New York Stock Exchange LLC (''NYSE'' or ''Exchange'') and NYSE MKT LLC [2] (''NYSE MKT'' and, together with NYSE, the ''Exchanges'') limited exemptions from the Sub-Penny Rule in connection with the operation of each Exchange's Retail Liquidity Program (''Programs'').[3] The limited exemptions were granted concurrently with the Commission's approval of the Exchanges' proposals to adopt their respective Retail Liquidity Programs for one-year pilot terms.[4] The exemptions were granted coterminous with the effectiveness of the pilot Programs; both the pilot Programs and exemptions are scheduled to expire on July 31, 2013.

The Exchanges now seek to extend the exemptions until July 31, 2014.[5] The Exchanges' request was made in conjunction with immediately effective filings that extend the operation of the Programs for one year, until July 31, 2014.[6] In their request to extend the exemptions, the Exchanges note that the Programs took some time after they were adopted to develop and implement fully. Accordingly, the Exchanges have asked for additional time to allow themselves and the Commission to analyze more robust data concerning the Programs, which the Exchanges committed to provide to the Commission.[7] For this reason and the reasons stated in the Order originally granting the limited exemptions, the Commission finds that extending the exemptions, pursuant to its authority under Rule 612(c) of Regulation NMS, is appropriate in the public interest and consistent with the protection of investors.

Therefore, it is hereby ordered that, pursuant to Rule 612(c) of Regulation NMS, each Exchange is granted a one-year extension of the limited exemption from Rule 612 of Regulation NMS that allows it to accept and rank orders priced equal to or greater than $1.00 per share in increments of $0.001, in connection with the operation of its Retail Liquidity Program.

The limited and temporary exemptions extended by this Order are subject to modification or revocation if at any time the Commission determines that such action is necessary or appropriate in furtherance of the purposes of the Exchange Act. Responsibility for compliance with any applicable provisions of the federal securities laws must rest with the persons relying on the exemptions that are the subject of this Order.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–18899 Filed 8–5–13; 8:45 am]

BILLING CODE 8011–01–P

[1] 17 CFR 242.612(c).

[2] At the time it filed the original proposal to adopt the Retail Liquidity Program, NYSE MKT went by the name NYSE Amex LLC. On May 14, 2012, the Exchange filed a proposed rule change, immediately effective upon filing, to change its name from NYSE Amex LLC to NYSE MKT LLC. *See* Securities Exchange Act Release No. 67037 (May 21, 2012), 77 FR 31415 (May 25, 2012) (SR–NYSEAmex–2012–32).

[3] *See* Securities Exchange Act Release No. 67347, 77 FR 40673 (July 10, 2012) (SR–NYSE–2011–55; SR–NYSEAmex–2011–84) (''Order'').

[4] *See id.*

[5] *See* Letter from Janet McGinness, SVP and Corporate Secretary, NYSE Euronext, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, dated July 30, 2013.

[6] *See* SR–NYSE–2013–48 and SR–NYSEMKT–2013–60.

[7] *See* Order, *supra* note 3, 77 FR at 40681.

[8] 17 CFR 200.30–3(a)(83).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70084; File No. SR–NYSEArca–2013–76]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Arca Options Fee Schedule To Increase the Royalty Fees Applicable to Non-Customer Transactions in Options on the Russell 2000 Index

July 31, 2013.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on July 25, 2013, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Arca Options Fee Schedule to increase the Royalty Fees applicable to non-Customer transactions in options on the Russell 2000 Index (''RUT''). The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the NYSE Arca Options Fee Schedule to increase the Royalty Fees applicable to non-Customer transactions in options on RUT from $0.15 to $0.40 per contract. Royalty Fees charged by the Exchange reflect the pass-through charges associated with the licensing of certain products, including RUT. The proposed increase in the Royalty Fee for RUT from $0.15 to $0.40 per contract is a reflection of the increased cost the Exchange has incurred in securing a license agreement from the index provider. Absent the license agreement, the Exchange and its participants would be unable to trade RUT options and would lose the ability to hedge small cap securities with a large notional value, European-style cash-settled index option.

The proposed change will be operative on August 1, 2013.

The proposed change is not otherwise intended to address any other issues relating to Royalty Fees and the Exchange is not aware of any problems that market participants would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[4] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[5] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers, and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed increase in the Royalty Fee from $0.15 to $0.40 for options on RUT is reasonable because Royalty Fees charged by the Exchange reflect the pass-through charges associated with the licensing of certain products, including RUT. The proposed increase is therefore a direct result of an increase in the licensing fee charged to the Exchange by the index provider and the owner of the intellectual property associated with the index.

The Exchange believes that the proposed increase in the Royalty Fee from $0.15 to $0.40 for options on RUT is equitable and not unfairly discriminatory because Royalty Fees are assessed only on those non-Customer participants who choose to transact in a product that requires the Exchange to obtain a licensing agreement based on the intellectual property rights associated with the product, as is the case with RUT. The Exchange further believes that this is equitable and not unfairly discriminatory because RUT has some products that can give participants a similar economic exposure without an associated Royalty Fee. In particular, there are exchange-traded fund (''ETF'') options that are based on RUT, such as the iShares Russell 2000 ETF traded under the symbol IWM. This means that participants that would be liable for the Royalty Fees can avoid them by transacting in alternative products, if they so choose.

The Exchange assesses the Royalty Fees on non-Customer participants such as NYSE Arca Market Makers, non-NYSE Arca Market Makers, OTP Holders and OTP Firms, and Broker Dealers.[6] The Exchange believes that it is equitable and not unfairly discriminatory to continue to not charge Royalty Fees to Customers, which has been the case since the Exchange implemented Royalty Fees, because the Exchange is attempting to continue to attract Customer order flow in RUT options, which in turn can interact with other participants' order flow on the Exchange to their benefit.[7]

For the reasons given above, the Exchange believes that the proposed increase from $0.15 to $0.40 for the Royalty Fee charged to non-Customer transactions in RUT options is reasonable, equitable, and not unfairly discriminatory. Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[8] the Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. By providing all participants on the Exchange with the ability to hedge via RUT options, the Exchange is not placing any burden on competition among its various participants. The Exchange further notes that the licensing agreement it has secured is not an exclusive agreement as at least two other option exchanges continue to trade RUT options and charge a fee related to such license.[9] As such, there is no burden on competition among exchanges for the trading of RUT options.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [10] of the Act and subparagraph (f)(2) of Rule 19b–4 [11] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [12] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4) and (5).

[6] *See* endnote 11 of the Fee Schedule.

[7] *See* Securities Exchange Act Release No. 55099 (January 12, 2007), 72 FR 2720 (January 22, 2007) (SR–NYSEArca–2006–91).

[8] 15 U.S.C. 78f(b)(8).

[9] *See* Chicago Board Options Exchange (''CBOE'') Fee Schedule, available at *http://www.cboe.com/TradingResources/FeeSchedule.aspx.* The Exchange's affiliate NYSE MKT LLC also has proposed to increase its Royalty Fee for RUT options from $0.15 to $0.40 per contract. *See* SR–NYSEMKT–2013–65.

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(2).

[12] 15 U.S.C. 78s(b)(2)(B).

arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2013–76 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca-2013–76. 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 Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2013–76, and should be submitted on or before August 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–18898 Filed 8–5–13; 8:45 am]

BILLING CODE 8011–01–P

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70087; File No. SR–CBOE–2013–055]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to List and Trade a P.M.-settled Mini-SPX Index Option Product

July 31, 2013.

I. Introduction

On May 14, 2013, Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') 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 listing and trading of P.M.-settled, cash-settled options on the Mini-SPX Index (''XSP'').[3] The proposed rule change was published for comment in the**Federal Register** on May 30, 2013.[4] The Commission received no comment letters on the proposal. On July 31, 2013, the Exchange filed Amendment No. 1 to the proposed rule change.[5] The Commission is publishing this notice to solicit comments on Amendment No. 1 from interested persons and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description of the Proposal

The Exchange is proposing to amend its rules to permit it to list and trade, on a pilot basis, cash-settled XSP options with third-Friday-of-the-month (''Expiration Friday'') expiration dates, for which the exercise settlement value will be based on the index value derived from the closing prices of the component securities (''P.M.-settled'').

CBOE proposes to add P.M.-settled XSP options to the existing SPXPM pilot program on CBOE. SPXPM options, which are P.M.-settled options on the S&P 500 Index,[6] are currently listed and traded on CBOE on a 12-month pilot set to end on February 8, 2014. CBOE has proposed to add P.M.-settled XSP options to that pilot so that the end of the pilot period for P.M.-settled XSP options will also be February 8, 2014.

CBOE proposes to abide by the same reporting requirements for the trading of P.M.-settled XSP options that it does for the trading of SPXPM options.[7] The Exchange proposes to include data regarding P.M.-settled XSP options in a pilot program report that it will submit to the Commission at least two months prior to the expiration date of the pilot program (the ''annual report''). The annual report will contain an analysis of volume, open interest, and trading patterns; and will examine trading in the proposed option product as well as trading in the securities that comprise the underlying index. In addition, for series that exceed certain minimum open interest parameters, the annual report will provide analysis of index price volatility and share trading

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] XSP options have 1/10th the value of S&P 500 Index options.

[4] *See* Securities Exchange Act Release No. 69638 (May 24, 2013), 78 FR 32524 (May 30, 2013) (''Notice'').

[5] In Amendment No. 1, the Exchange provided more details regarding the volume, open interest, and trading patterns data that the Exchange proposes to include in the report that it will submit to the Commission at least two months before the expiration of the pilot program. The Exchange noted that the analysis would examine trading in the proposed option product as well as trading in the securities that comprise the underlying index. The Exchange also described the interim reports that would be submitted to the Commission pursuant to the pilot program. In addition, the Exchange clarified its proposed amendment to Rule 6.42, Interpretation and Policy .03 to state that for so long as SPY options participate in the Penny Pilot program, the minimum increments for XSP options shall be the same as SPY for all option series (including LEAPS). Further, the Exchange proposed to amend its originally proposed change to Rule 24.9, Interpretation and Policy .11, to lower from $300 to $200 the maximum strike price for which the strike price interval for series of XSP options may be $1. The Exchange also proposed to lower from $5 to $1 the minimum strike price interval for LEAPS and reduced-value LEAPS on XSP options. In addition, the Exchange represented that it has enhanced surveillance and reporting procedures in place that are intended to allow the Exchange to detect and deter possible trading abuses that could otherwise occur in the absence of position limits, and described the Exchange's requirements for opening for trading additional series of P.M.-settled XSP options. The Exchange further represented that it and the Options Price Reporting Authority have the necessary systems capacity to handle any potential additional traffic associated with trading of P.M.-settled XSP options. Finally, the Exchange provided a more detailed description of its procedures relating to the changeover from A.M.-settled XSP options.

[6] SPXPM options were initially traded on a 14-month pilot basis on C2 Options Exchange, Incorporated (''C2''), an exchange that is wholly owned by CBOE Holdings, Inc., the same corporation that owns CBOE. *See* Securities Exchange Act Release No. 65256 (September 2, 2011), 76 FR 55969 (September 9, 2011) (''C2 SPXPM Approval Order''). The pilot to list and trade SPXPM was subsequently transferred from C2 to CBOE and reset to a new 12-month pilot period. *See* Securities Exchange Act Release No. 68888 (February 8, 2013), 78 FR 10668 (February 14, 2013) (''CBOE SPXPM Approval Order'').

[7] For the details of SPXPM's reporting requirements, *see* Securities Exchange Act Release No. 68457 (December 18, 2012), 77 FR 76135 (December 26, 2012).

activity. In addition to the annual report, the Exchange will provide the Commission with periodic interim reports while the pilot is in effect that contain some, but not all, of the information contained in the annual report (''interim reports'').

Further, the Exchange proposes to make a number of corresponding amendments to its rules in conjunction with the proposed trading of XSP options on a P.M.-settled basis. Interpretation and Policy .04 to CBOE Rule 24.6 states that on the last trading day, transactions in expiring P.M.-settled SPXPM options may be effected on the Exchange between 8:30 a.m. and 3:00 p.m. (Chicago time) (as opposed to the normal trading hours for non-expiring SPXPM options, which are from 8:30 a.m. until 3:15 p.m. (Chicago time)). CBOE proposes to amend this Interpretation and Policy to include P.M.-settled XSP options.[8]

CBOE proposes to amend Interpretation and Policy .03 to CBOE Rule 6.42 regarding minimum increments for bids and offers for XSP options. Currently, the minimum increments for bids and offers for XSP options are $0.01 for all option series quoted below $3 (including LEAPS) and $0.05 for all option series $3 and above (including LEAPS). However, the minimum increments for bids and offers for SPDR options (''SPY''), an exchange-traded fund that also tracks the performance of 1/10th the value of the S&P 500 Index, is $0.01, regardless of whether the options series is quoted above, at, or below $3. Since the prices of both XSP options and SPY options are based, in a similar manner, on 1/10th the size of the S&P 500 Index, CBOE proposes to amend Interpretation and Policy .03 to Rule 6.42 to state that for so long as SPY options participate in the Penny Pilot program, the minimum increments for XSP options shall be the same as SPY for all options series (including LEAPS).

CBOE also proposes to amend Interpretation and Policy .11 to CBOE Rule 24.9 regarding strike price intervals for XSP options. Currently, Interpretation and Policy .11 to Rule 24.9 states that ''[n]otwithstanding Interpretation and Policy .01(a) to Rule 24.9, the interval between strike prices of series of Mini-SPX options will be $1 or greater,'' subject to a number of conditions. In Amendment No. 1, the Exchange proposes to simplify this provision by deleting conditions (a) through (c) of Interpretation and Policy .11 to CBOE Rule 24.9 and providing instead that the interval between strike prices of series of XSP options will be $1 or greater where the strike price is $200 or less and $5.00 or greater where the strike price is greater than $200.[9] The Exchange proposes to keep in Interpretation and Policy .11 to CBOE Rule 24.9 the language currently in condition (d), which states that the Exchange shall not list LEAPS or reduced-value LEAPS on Mini-SPX options at intervals less than $5. However, CBOE proposes to reduce the threshold from $5 to $1. Because the minimum strike price interval for standard XSP options is proposed to be at least $1 (up to a strike price of $200), the Exchange proposes to reduce the LEAPS minimum strike price interval to be $1 as well in order to correspond to the regular, non-LEAPS minimum strike price interval.

Other than the changes described above, trading in P.M.-settled XSP options will operate in the same manner as trading currently operates in A.M.-settled XSP options. XSP options will continue to use a $100 multiplier. P.M.-settled XSP options will have European-style exercise, will not be subject to position or exercise limits, and the same position reporting and margin requirements that apply to A.M.-settled XSP options will apply to P.M.-settled XSP options.[10] As with A.M.-settled XSP options, the Exchange may list up to six expiration months of P.M.-settled XSP options at one time[11] and the Exchange may open for trading additional series of P.M.-settled XSP options whose exercise price is within 30% of the current XSP value. The Exchange also may open for trading additional series of P.M.-settled XSP options that are more than 30% away from the current index value, provided that demonstrated customer interest exists for such series, as expressed by institutional, corporate, or individual customers or their brokers.[12]

With regard to the impact of this proposal on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary systems capacity to handle any potential additional traffic associated with trading of P.M.-settled XSP options.[13] The Exchange believes that its Trading Permit Holders (''TPHs'') will not experience a capacity issue as a result of this proposal.[14] CBOE represents that it will monitor the trading volume associated with any possible additional options series listed as a result of this proposal and the effect (if any) of these additional series on market fragmentation and on the capacity of the Exchange's automated systems.[15]

CBOE will notify TPHs in advance via Regulatory Circular of all plans associated with the adoption of P.M.-settled XSP options, and will set a date for the changeover from A.M.-settled XSP options. On that date, P.M.-settled XSP options series will be introduced using the trading symbol XSP, and all remaining A.M.-settled XSP options series will be moved to the trading symbol XSPAM. Beginning with that date, the Exchange will cease issuing new A.M.-settled XSP options series, and on that date, the Exchange will de-list any open A.M.-settled XSP options series that do not have any open interest. From that date going forward, the only new XSP options series that will be opened will be P.M.-settled. Regarding any remaining A.M.-settled XSP options series, the Exchange will wait and allow the series to trade until expiration, or if, due to trading, any XSPAM series cease to have open interest, such series will be de-listed. Once all remaining XSPAM series have either expired or been de-listed due to a lack of open interest, the Exchange will have no more A.M.-settled XSP options series, and going forward, all XSP options series will be P.M.-settled for the duration of the pilot.

III. Discussion and Commission Findings

After careful consideration of the proposal, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities

[8] *See* Notice, *supra* note 4, at 32525.

[9] Under CBOE's current rules, minimum strike price intervals on XSP options depend on the percentage by which strike prices vary from one-tenth of the current value of the S&P 500 Index. CBOE may list series at $1 or greater strike price intervals on XSP options with strike prices that are no more than 20% away from one-tenth of the current value of the S&P 500 Index. CBOE may list series at $3 or greater strike price intervals on XSP options with strike prices that are no more than 25% away from one-tenth of the current value of the S&P 500 Index. CBOE may list series at $5 or greater strike price intervals on XSP options with strike prices that are more than 25% away from one-tenth of the current value of the S&P 500 Index. *See* Notice, *supra* note 4, at 32526.

[10] *See* Notice, *supra* note 4, at 32526. The Exchange represents that it has enhanced surveillance and reporting procedures in place that are intended to allow CBOE to detect and deter possible trading abuses that could otherwise occur in the absence of position limits. *See* Amendment No. 1, *supra* note 5.

[11] *See* CBOE Rule 24.9(a)(2).

[12] *See* CBOE Rule 24.9, Interpretation and Policy .04.

[13] *See* Amendment No. 1, *supra* note 5.

[14] *See id.*

[15] *See id.*

exchange,[16] and, in particular, the requirements of Section 6 of the Act.[17] Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[18] which provides that an exchange have rules designed to remove impediments to and perfect the mechanism of a free and open market to protect investors and the public interest.

As the Commission noted in its orders approving the listing and trading of SPXPM on C2 and on CBOE, the Commission has historically had concerns about the potential impact on the market at expiration for the underlying component stocks for P.M.-settled, cash-settled index options.[19] The Commission recognizes that these risks may be mitigated today by the enhanced closing procedures that are now in use at the primary equity markets. However, the extent of that mitigation is unclear.

To assist the Commission in assessing any potential impact of a P.M.-settled XSP option product on the options markets as well as the underlying cash equities markets, CBOE has obligated itself to submit data to the Commission in connection with the pilot program in the same scope and format as CBOE is required to submit as a condition of the SPXPM pilot.[20] The Commission believes that the data and analysis that CBOE will provide to the Commission in connection with adding XSP options to the SPXPM twelve-month pilot, will allow CBOE and the Commission to monitor for and assess any potential for adverse market effects. Specifically, the data and analysis will assist the Commission in evaluating the effect of allowing P.M. settlement for XSP options on the underlying component stocks.

The data collected from the pilot program will help inform the Commission's consideration of whether the pilot program, which will include P.M.-settled XSP options, should be modified, discontinued, extended, or permanently approved. The P.M. settlement pilot information should help the Commission assess the impact on the markets and determine whether other changes are necessary. Furthermore, the Exchange's ongoing analysis of the pilot should help it monitor any potential risks from large P.M.-settled positions and take appropriate action on a timely basis if warranted.[21]

As the Commission noted when it approved C2's and CBOE's proposals to list and trade SPXPM, approval of CBOE's proposal to add XSP options to the SPXPM pilot program could benefit investors and the public interest to the extent it attracts trading in P.M.-settled XSP options from the opaque OTC market to the more transparent exchange-listed markets, where trading in the product will be subject to exchange trading rules and surveillance.[22]

CBOE has represented that it has adequate surveillance and reporting procedures to monitor trading in these options, thereby helping to ensure the maintenance of a fair and orderly market, and has represented that it has sufficient capacity to handle additional traffic associated with this new listing.[23] In addition, CBOE has represented that it will give its TPHs advance notice of the changeover from A.M. settlement to P.M. settlement for XSP options through a Regulatory Circular and will utilize a clear and unambiguous process to phase out all remaining A.M.-settled XSP options series.[24]

The Commission believes that CBOE's proposal to amend Interpretation and Policy .04 to Rule 24.6 to close trading in expiring P.M.-settled XSP options at 3:00 p.m. (Chicago time) (as opposed to the normal closing time of 3:15 p.m. for non-expiring options) is designed to reduce potential investor confusion. The primary listing markets for the component securities that comprise the S&P 500 Index close trading in those securities at 3:00 p.m. (Chicago time). If trading in expiring P.M.-settled XSP options was allowed to continue until 3:15 p.m., a potential pricing divergence could occur between 3:00 p.m. and 3:15 p.m. on the final trading day in expiring P.M.-settled XSP options. The Commission therefore believes that CBOE's proposal to close trading in expiring P.M.-settled options at 3:00 p.m. (Chicago time) is designed to protect investors by avoid the potential disparities in pricing that could result past 3:00 p.m.

In addition, the Commission believes that CBOE's proposal to amend Interpretation and Policy .03 to Rule 6.42 to provide that minimum increments for bids and offers for XSP options be the same as those for SPY, regardless of the value at which the option series is quoted, may promote competition and benefit investors. The Commission believes that the proposal to align the minimum increments for XSP options with those for SPY options in order to allow market participants in options series quoted at or above $3 to quote in minimum increments of $0.01 rather than $0.05 is consistent with the Act because allowing participants to quote in smaller increments may provide the opportunity for reduced spreads, thereby lowering costs to investors.[25] In addition, because both XSP options and SPY options are based on 1/10th the price of the S&P 500 Index, it may be reasonable for the minimum increments of bids and offers to be the same for both types of options.

CBOE's proposal to simplify Interpretation and Policy .11 to Rule 24.9 to allow strike price intervals of as little as $1 for series of XSP options where the strike price is $200 or less and $5 where the strike price is greater than $200 may help protect investors by providing an easily understandable bright line threshold under which CBOE will offer an increased number of more granular price points. In addition, this proposed provision would harmonize the strike price intervals of XSP to match that of SPY, which may facilitate competition between the two products by allowing investors to trade XSP with the same level of granularity afforded to options on SPY. Further, CBOE's proposal to reduce the minimum strike price intervals of LEAPS on P.M.-settled XSP options from $5 to $1 allows the strike price intervals of LEAPS on P.M.-settled XSP options to match the non-LEAPS strike price intervals where the strike price is $200 or less. Together, these changes will simplify CBOE's XSP option strike price intervals rules and thereby reduce the potential for investor confusion.

Under CBOE's proposal, position limits would not apply to XSP options. In 2001, the Commission permanently approved a CBOE rule (which had been in place for a two-year pilot period) to eliminate position limits on SPX (as well as options on the Dow Jones Industrial Average and the S&P 100 Index).[26] The Commission found that

[16] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[17] 15 U.S.C. 78f.

[18] 15 U.S.C. 78f(b)(5).

[19] *See* C2 SPXPM Approval Order, *supra* note 6, at 55972, 55974–75; *see also* CBOE SPXPM Approval Order, *supra* note 6, at 10669.

[20] *See* CBOE SPXPM Approval Order, *supra* note 6, at 10669.

[21] *See* C2 SPXPM Approval Order, *supra* note 6, at 55975–76; CBOE SPXPM Approval Order, *supra* note 6, at 10669.

[22] *See* C2 SPXPM Approval Order, *supra* note 6, at 55976; CBOE SPXPM Approval Order, *supra* note 6, at 10669.

[23] *See* Amendment No. 1, *supra* note 5.

[24] *See id.*

[25] *See* Securities Exchange Act Release No. 34–61061 (November 24, 2009), 74 FR 62857, 62859 (December 1, 2009).

[26] *See* Securities Exchange Act Release No. 44994 (October 26, 2001), 66 FR 55722 (November 2, 2001).

because the S&P 500 Index is a broad-based index with considerable capitalization, manipulation of the 500 component stocks underlying the index would require extraordinarily large positions that would be readily detectable by enhanced surveillance procedures. In its approval order, the Commission relied in part on CBOE's enhanced surveillance and reporting procedures that are intended to allow CBOE to detect and deter trading abuses in the absence of position limits.

The Exchange has represented in this filing that it has enhanced surveillance and reporting procedures in place that are intended to allow CBOE to detect and deter possible trading abuses that could otherwise occur in the absence of position limits.[27] Accordingly, the Commission believes that position limits would not be necessary for XSP options as long as CBOE has in place and enforces effective enhanced surveillance and reporting requirements. These enhanced procedures will allow the Exchange to see, with considerable advance notice, the accumulation of large positions, which it can then monitor more closely as necessary and take additional action if appropriate.[28]

For the reasons discussed above, the Commission finds that CBOE's proposal is consistent with the Act, including Section 6(b)(5) thereof, in that it is designed to remove impediments to and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest. In light of the enhanced closing procedures at the underlying markets and the potential benefits to investors discussed above, the Commission finds that it is appropriate and consistent with the Act to add XSP options to the SPXPM pilot program. The collection of data during the pilot and CBOE's active monitoring of any effects of P.M.-settled XSP options on the markets should help CBOE and the Commission assess any impact of P.M. settlement for XSP options during the pilot program.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2013–055 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2013–055. 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 Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2013–055, and should be submitted on or before August 27, 2013.

V. Accelerated Approval of a Proposed Rule Change As Modified by Amendment No.1

As discussed above, the Exchange submitted Amendment No. 1 to make additional representations regarding: data to include in the pilot program report and interim reports to the Commission; minimum increments for XSP bids and offers; XSP strike price intervals; strike price intervals for LEAPS and reduced-value LEAPS on XSP options; the Exchange's enhanced surveillance and reporting procedures in place to detect and deter possible trading abuses; systems capacity to handle potential additional traffic associated with trading of P.M.-settled XSP options; and the Exchange's procedures relating to the changeover from A.M.-settled XSP options.[29] The Commission believes these additional representations are useful to, among other things: (1) Provide greater transparency with respect to the data that the Exchange must submit to the Commission regarding the pilot program; (2) clarify the Exchange's proposal by providing: that minimum increments for bids and offers on XSP options will be the same as those for SPY options, further detail on the minimum strike price intervals for XSP options, and the minimum strike price interval for LEAPS and reduced-value LEAPS on XSP options; (3) assure investors and the public of the Exchange's ability to detect and deter trading abuses; (4) provide assurance that the Exchange has sufficient capacity to handle the additional traffic resulting from the trading of P.M.-settled XSP options; and (5) provide greater detail regarding how the changeover from A.M.-settled XSP options will proceed. The content of Amendment No. 1, which does not raise any novel issues, provides additional clarifying information to support CBOE's analysis of how its proposal is consistent with the Act and thus facilitates the Commission's ability to herein approve the proposal on a pilot basis. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[30] for approving the proposed rule change, as modified by Amendment No. 1, prior to the 30th day after the date of publication of notice in the **Federal Register**.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[31] that the proposed rule change (SR–CBOE–2013–055), as modified by Amendment No. 1, be, and hereby is, approved on an accelerated basis for a pilot period that is set to expire on February 8, 2014.

[27] *See* Amendment No. 1, *supra* note 5.

[28] In addition, the Commission notes that CBOE would have access to information through its membership in the Intermarket Surveillance Group with respect to the trading of the securities underlying the S&P 500 index, as well as tools such as large options positions reports to assist its surveillance of XSP options.

In approving the proposed rule change, the Commission also has relied upon the Exchange's representation that it has the necessary systems capacity to support new options series that will result from this proposal.

[29] *See* Amendment No. 1, *supra* note 5.

[30] 15 U.S.C. 78s(b)(2).

[31] 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[32]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–18900 Filed 8–5–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

In the Matter of Bergamo Acquisition Corp.; Order of Suspension of Trading

August 2, 2013.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Bergamo Acquisition Corp. (''Bergamo''). Bergamo is a Delaware corporation based in Henderson, Nevada, and its stock is currently quoted on OTC Link, operated by OTC Markets Group, Inc. under the symbol BGMO. Questions have arisen concerning the adequacy and accuracy of press releases and other public statements concerning Bergamo's business operations and financial condition.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of Bergamo.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT, on August 2, 2013 through 11:59 p.m. EDT, on August 15, 2013.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2013–19044 Filed 8–2–13; 4:15 pm]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments

ACTION: 60 Day Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Small Business Administration's intentions to request approval on a new and/or currently approved information collection.

DATES: Submit comments on or before October 7, 2013.

ADDRESSES: Send all comments regarding whether these information collections are necessary for the proper performance of the function of the agency, whether the burden estimates are accurate, and if there are ways to minimize the estimated burden and enhance the quality of the collections, to Eric Wall, Financial Analyst, Office of Financial Assistance, Small Business Administration, 409 3rd Street SW., 6th Floor, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Eric Wall, Financial Analyst, 202–619–1625 *eric.wall@sba.gov* Curtis B. Rich, Management Analyst, 202–205–7030 *curtis.rich@sba.gov.*

Title: ''CDC Annual Report Guide''.

Abstract: 13 CFR, Section 120.830 requires CDCs to submit an annual report which contains financial statements, operational and management information. It is used by the district offices, Office of Financial Assistance, and Office of Lender Oversight to obtain information from the CDCs. The 1253 is a valuable tool for SBA to ensure that CDCs are operating according to the statues, regulations and policies governing the CDC loan program (504 program).

Description of Respondents: Certified Development Companies.

Form Number: 1253.

Annual Responses: 266.

Annual Burden: 7,488.

Title: ''Lender Advantage''.

Abstract: The information collected through these forms from the small business applicants and participating lenders will be used to determine eligibility and to properly evaluate and consider the merits of each loan request based on such criteria as character, capacity, credit, collateral, etc. for the purpose of extending credit under the 7(a) loan program.

Description of Respondents: 7(A) Lenders.

Form Numbers: 2301 Parts A, B, C, D, E.

Annual Responses: 13,650.

Annual Burden: 48,990.

Title: ''SBA Express and Pilot Loan Program (Export Express, Community Express and Patriot Express''.

Abstract: Section 7a of the Small Business Act (15 U.S.C) subsection 626(a) authorizes the Small Business Administration to guaranty loans in the SBA Express and Pilot Loan Programs. The regulations covering these and other loan programs at 13 CFR part 120 require certain information from loan applicants and lenders. These forms are the means for collecting that information.

Description of Respondents: Small Business Clients.

Form Numbers: 1919, 1920, 2237.

Annual Responses: 120,719.

Annual Burden: 58,856.

Curtis Rich,

Management Analyst.

[FR Doc. 2013–18902 Filed 8–5–13; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments

ACTION: 60 Day notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Small Business Administration's intentions to request approval on a new and/or currently approved information collection.

DATES: Submit comments on or before October 7, 2013.

ADDRESSES: Send all comments regarding whether these information collections are necessary for the proper performance of the function of the agency, whether the burden estimates are accurate, and if there are ways to minimize the estimated burden and enhance the quality of the collections, to Carol Fendler, Supervisor System Accountant, Office of Investment, Small Business Administration, 409 3rd Street SW., 6th Floor, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Carol Fendler, Supervisor System Accountant, 202–205–7559 *carol.fendler@sba.gov* Curtis B. Rich, Management Analyst, 202–205–7030 *curtis.rich@sba.gov.*

Title: ''Size Status Declaration''.

Abstract: The information collected on SBA Form 480, ''Size Status Declaration'' is a certification of small business size status. This information collection is used to ensure that SBIC financial assistance is provided only to small business concerns as defined in the Small Business Investment Act and SBA size regulations. Without this certification, businesses that exceed SBA's size standards could benefit from program resources meant for small businesses.

Description of Respondents: Small businesses requesting size determinations.

Form Number: 480.

Annual Responses: 2,500.

Annual Burden: 417.

Title: ''Financing Eligibility Statement –Social Disadvantaged/Economic: Disadvantage''.

Abstract: Small businesses seeking financing from specialized small

[32] 17 CFR 200.30–3(a)(12).

business investment companies (SSBICs) will complete this form for the purpose of demonstrating their eligibility for such financing based on their ownership by individuals who are either socially or economically disadvantaged. Written certification of eligibility is required by the Small Business Investment Act of 1958.

Description of Respondents: Small business investment companies.

Form Number: 1941.

Annual Responses: 80.

Annual Burden: 160.

Curtis Rich,

Management Analyst.

[FR Doc. 2013–18903 Filed 8–5–13; 8:45 am]

BILLING CODE P

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments

ACTION: 60 Day notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Small Business Administration's intentions to request approval on a new and/or currently approved information collection.

DATES: Submit comments on or before October 7, 2013.

ADDRESSES: Send all comments regarding whether this information collection is necessary for the proper performance of the function of the agency, whether the burden estimates are accurate, and if there are ways to minimize the estimated burden and enhance the quality of the collection, to Dean Koopel, Assistant Administrator, Office of Policy and Planning, Small Business Administration, 409 3rd Street SW. 8th Floor, Washington DC 20416.

FOR FURTHER INFORMATION CONTACT: Dean Koppel, Assistant Administrator, 202–205–7322 *dean.koppel@sba.gov* Curtis B. Rich, Management Analyst, 202–205–7030 *curtis.rich@sba.gov.*

Title: ''Certification for the Women-Owned Small Business Federal Contract Program''.

Abstract: The Small Business Act states that a women-owned small (WOSB) or an economically disadvantaged women-owned small business (EDWOSB) must (1) Be a Federal agency, a State government, or a national certifying entity as a WOSB. or, (2) certify to the contracting office that it is a WOSB and provide adequate documentation to support such certification. These documents will be used by the SBA, contracting offices and third party certifies to determine program eligibility and compliance.

Description of Respondents: Women Owned Small Businesses.

Form Number's: 2413, 2414.

Annual Responses: 12,000.

Annual Burden: 24,400.

Curtis Rich,

Management Analyst.

[FR Doc. 2013–18905 Filed 8–5–13; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments

ACTION: 60 Day Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Small Business Administration's intentions to request approval on a new and/or currently approved information collection.

DATES: Submit comments on or before October 7, 2013.

ADDRESSES: Send all comments regarding whether this information collection is necessary for the proper performance of the function of the agency, whether the burden estimates are accurate, and if there are ways to minimize the estimated burden and enhance the quality of the collection, to Kirk McElwain, Director, Office of Communications, Small Business Administration, 409 3rd Street SW. 7TH Floor, Washington DC 20416.

FOR FURTHER INFORMATION CONTACT: Kirk McElwain, Director, 202–205–6175 *kirk.mcelwain@sba.gov* Curtis B. Rich, Management Analyst, 202–205–7030, *curtis.rich@sba.gov*.

Title: ''SBA Direct and SBA Online Community''.

Abstract: The SBA.gov audience is not to submit their information to browse the Web site. The information collection is a voluntary option given to the audience members. The information collected assists with tailoring only the relevant information to the audience member's specific needs, Information is also collected to allow users of the site to create a unique user identification, which allows the ability to store information, contribute information, and interact with SBA and other users of the site.

Description of Respondents: SBA Web site users.

Form Number: N/A.

Annual Responses: 710,000.

Annual Burden: 4,000.

Curtis Rich,

Management Analyst.

[FR Doc. 2013–18904 Filed 8–5–13; 8:45 am]

BILLING CODE P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 13676 and # 13677]

Pennsylvania Disaster # PA–00059

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the Commonwealth of PENNSYLVANIA dated 07/29/2013.

Incident: Severe Storms and Flooding.

Incident Period: 06/26/2013 through 07/21/2013.

DATES: *Effective Date:* 07/29/2013.

Physical Loan Application Deadline Date: 09/27/2013.

Economic Injury (EIDL) Loan Application Deadline Date: 04/29/2014.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing And Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Allegheny.

Contiguous Counties:

Pennsylvania: Armstrong; Beaver; Butler; Washington; Westmoreland.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	3.750
Homeowners Without Credit Available Elsewhere	1.875
Businesses With Credit Available Elsewhere	6.000
Businesses Without Credit Available Elsewhere	4.000
Non-Profit Organizations With Credit Available Elsewhere	2.875
Non-Profit Organizations Without Credit Available Elsewhere	2.875
For Economic Injury:	

	Percent
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000
Non-Profit Organizations Without Credit Available Elsewhere	2.875

The number assigned to this disaster for physical damage is 13676 6 and for economic injury is 13677 0.

The State which received an EIDL Declaration # is Pennsylvania

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: July 29, 2013.

Karen G. Mills,

Administrator.

[FR Doc. 2013–18907 Filed 8–5–13; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 13579 and # 13580]

Illinois Disaster Number IL–00041

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 5.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Illinois (FEMA–4116–DR), dated 05/10/2013.

Incident: Severe Storms, Straight-line Winds and Flooding.

Incident Period: 04/16/2013 through 05/05/2013.

Effective Date: 07/25/2013.

Physical Loan Application Deadline Date: 08/08/2013.

EIDL Loan Application Deadline Date: 02/10/2014.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for the State of Illinois, dated 05/10/2013 is hereby amended to extend the deadline for filing applications for physical damages as a result of this disaster to 08/08/2013.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2013–18906 Filed 8–5–13; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #13683 and #13684]

Minnesota Disaster #MN–00051

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Minnesota (FEMA–4131–DR), dated 07/25/2013.

Incident: Severe storms, straight-line winds, and flooding.

Incident Period: 06/20/2013 through 06/26/2013.

Effective Date: 07/25/2013.

Physical Loan Application Deadline Date: 09/23/2013.

Economic Injury (EIDL) Loan Application Deadline Date: 04/25/2014.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing And Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 07/25/2013, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Benton; Big Stone; Douglas; Faribault ; Fillmore; Freeborn; Grant; Hennepin ; Houston; Mcleod; Morrison; Pope ; Sibley; Stearns; Stevens; Swift; Traverse; Wilkin.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere	2.875
Non-Profit Organizations without Credit Available Elsewhere	2.875
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	2.875
The number assigned to this disaster for physical damage is 13683B and for economic injury is 13684B.	

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2013–18884 Filed 8–5–13; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 13685 and # 13686]

Colorado Disaster # CO–00060

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Colorado (FEMA—4133—DR), dated 07/26/2013.

Incident: Royal Gorge Wildfire,

Incident Period: 06/11/2013 through 06/16/2013,

DATES: *Effective Date:* 07/26/2013,

Physical Loan Application Deadline Date: 09/24/2013,

Economic Injury (EIDL) Loan Application Deadline Date: 04/28/2014,

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 07/26/2013, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Fremont.

The Interest Rates are:

	Percent
For Physical Damage:	

	Percent
Non-Profit Organizations With Credit Available Elsewhere	2.875
Non-Profit Organizations Without Credit Available Elsewhere	2.875
For Economic Injury:	
Non-profit organizations without credit available elsewhere	2.875

The number assigned to this disaster for physical damage is 136855 and for economic injury is 136865
Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2013–18886 Filed 8–5–13; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 13667 and # 13668]

New York Disaster Number NY–00136

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 2.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of New York (FEMA–4129–DR), dated 07/12/2013.

Incident: Severe Storms and Flooding.

Incident Period: 06/26/2013 through 07/04/2013.

Effective Date: 07/26/2013.

Physical Loan Application Deadline Date: 09/10/2013.

Economic Injury (EIDL) Loan Application Deadline Date: 04/14/2014.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing And Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of NEW YORK, dated 07/12/2013, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Broome; Chautauqua; Clinton; Essex.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance,

[FR Doc. 2013–18891 Filed 8–5–13; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 13687 and # 13688]

Colorado Disaster #CO–00061

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Colorado (FEMA—4134—DR), dated 07/26/2013.

Incident: Black Forest Wildfire.

Incident Period: 06/11/2013 Through 06/21/2013.

Effective Date: 07/26/2013.

Physical Loan Application Deadline Date: 09/24/2013.

Economic Injury (Eidl) Loan Application Deadline Date: 04/28/2014.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 07/26/2013, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: El Paso.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations With Credit Available Elsewhere	2.875
Non-Profit Organizations Without Credit Available Elsewhere	2.875
For Economic Injury:	
Non-Profit Organizations Without Credit Available Elsewhere	2.875

The number assigned to this disaster for physical damage is 136875 and for economic injury is 136885.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008).

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2013–18887 Filed 8–5–13; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 13679 and # 13680]

Ohio Disaster # OH–00040

AGENCY: U.S. Small Business Administration .

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Ohio
dated 07/29/2013.

Incident: Severe storms and flooding.

Incident Period: 07/08/2013 through 07/10/2013.

Effective Date: 07/29/2013.

Physical Loan Application Deadline Date: 09/27/2013.

Economic Injury (EIDL) Loan Application Deadline Date: 04/29/2014.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing And Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Perry.

Contiguous Counties:

Ohio: Athens; Fairfield; Hocking; Licking; Morgan; Muskingum'.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	3.750
Homeowners Without Credit Available Elsewhere	1.875
Businesses With Credit Available Elsewhere	6.000
Businesses Without Credit Available Elsewhere	4.000

	Percent
Non-Profit Organizations With Credit Available Elsewhere ...	2.875
Non-Profit Organizations Without Credit Available Elsewhere	2.875
For Economic Injury:	
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere 4.000.	
Non-Profit Organizations Without Credit Available Elsewhere	2.875

The number assigned to this disaster for physical damage is 13679 6 and for economic injury is 13680 0.

The State which received an EIDL Declaration # is Ohio.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: July 29, 2013.

Karen G. Mills,

Administrator.

[FR Doc. 2013–18882 Filed 8–5–13; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 13667 and # 13668]

New York Disaster Number NY–00136

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of New York (FEMA—4129—DR), dated 07/12/2013.

Incident: Severe Storms and Flooding.

Incident Period: 06/26/2013 through 07/04/2013.

Effective Date: 07/26/2013.

Physical Loan Application Deadline Date: 09/10/2013.

Economic Injury (EIDL) Loan Application Deadline Date: 04/14/2014.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing And Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of New York, dated 07/12/2013, is hereby amended to re-establish the incident period for this disaster as beginning 06/26/2013 and continuing through 07/04/2013.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2013–18892 Filed 8–5–13; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 8406]

Waiver of Restriction on Assistance to the Central Government of Uzbekistan

Pursuant to Section 7031(b)(3) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2012 (Div. I, Pub. L.112–74) (''the Act'') as carried forward by the Further Continuing Appropriations Act, 2013 (Div. F, Pub. L. 113–6) and Department of State Delegation of Authority Number 245–1, I hereby determine that it is important to the national interest of the United States to waive the requirements of Section 7031(b)(1) of the Act and similar provisions of law in prior year Acts with respect to Uzbekistan and I hereby waive this restriction.

This determination and the accompanying Memorandum of Justification shall be reported to the Congress, and the determination shall be published in the **Federal Register**.

Dated: June 6, 2013.

William J. Burns,

Deputy Secretary.

[FR Doc. 2013–18860 Filed 8–5–13; 8:45 am]

BILLING CODE 4710–46–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2013–0314]

Parts and Accessories Necessary for Safe Operation; Application for an Exemption From Van Hool N.V. and Coach USA

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of application for exemption; request for comments.

SUMMARY: FMCSA requests public comment on an application for exemption from Van Hool N.V. and Coach USA (Van Hool/Coach USA) to allow the use of double deck motorcoaches constructed with a sleeper berth that has an exit that does not meet the minimum dimensional requirements specified in the Federal Motor Carrier Safety Regulations (FMCSRs). Section 393.76(c)(1) of the FMCSRs requires sleeper berths installed (1) on or after January 1, 1963 to have an exit that is a doorway or opening that is at least 18 inches high and 36 inches wide and (2) before January 1, 1963, to have sufficient area to contain an ellipse having a major axis of 24 inches and a minor axis of 16 inches. Because of the limited available locations to place the sleeper berth within the confines of the motorcoach, Van Hool/Coach USA is requesting an exemption that would allow the use of sleeper berths that comply with the pre-January 1, 1963, exit dimension requirements instead of the post-January 1, 1963, requirements. Van Hool/Coach USA believes that the reduced exit area of the sleeper berth will maintain a level of safety that is equivalent to or greater than the level of safety achieved without the exemption.

DATES: Comments must be received on or before September 5, 2013.

ADDRESSES: You may submit comments identified by DOT DMS Docket Number FMCSA–2013–yyyy by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the instructions for submitting comments on the Federal electronic docket site.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.
- *Hand Delivery:* Ground Floor, Room W12–140, DOT Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m. e.t., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the Agency name and docket number for this notice. For detailed instructions on submitting comments and additional information on the exemption process, see the ''Public Participation'' heading below. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the ''Privacy Act'' heading for further information.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or to Room W12–140, DOT Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19476) or you may visit *http://www.regulations.gov.*

Public participation: The *http://www.regulations.gov* Web site is generally available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help and guidelines under the ''help'' section of the *http://www.regulations.gov* Web site and also at the DOT's *http://docketsinfo.dot.gov* Web site. If you want us to notify you that we received your comments, please include a self addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments online.

FOR FURTHER INFORMATION CONTACT: Mr. Luke W. Loy, Vehicle and Roadside Operations Division, Office of Bus and Truck Standards and Operations, MC–PSV, (202) 366–0676; Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

Background

Section 4007 of the Transportation Equity Act for the 21st Century (TEA–21) [Pub. L. 105–178, June 9, 1998, 112 Stat. 401] amended 49 U.S.C. 31315 and 31136(e) to provide authority to grant exemptions from the Federal Motor Carrier Safety Regulations (FMCSRs). On August 20, 2004, FMCSA published a final rule (69 FR 51589) implementing section 4007. Under this rule, FMCSA must publish a notice of each exemption request in the **Federal Register** [49 CFR 381.315(a)]. The Agency must provide the public with an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews the safety analyses and the public comments and determines whether granting the exemption would likely achieve a level of safety equivalent to or greater than the level that would be achieved by the current regulation [49 CFR 381.305]. The decision of the Agency must be published in the **Federal Register** [49 CFR 381.315(b)]. If the Agency denies the request, it must state the reason for doing so. If the decision is to grant the exemption, the notice must specify the person or class of persons receiving the exemption and the regulatory provision or provisions from which an exemption is granted. The notice must also specify the effective period of the exemption (up to 2 years) and explain the terms and conditions of the exemption. The exemption may be renewed [49 CFR 381.315(c) and 49 CFR 381.300(b)].

Background

Van Hool/Coach USA Application for Exemption

On May 15, 2013, Van Hool/Coach USA applied for an exemption from 49 CFR 393.76(c)(1) to allow the use of a sleeper berth exit which meets the requirements of those sleeper berths installed before January 1, 1963. A copy of the application is included in the docket referenced at the beginning of this notice.

Section 393.76(c)(1) of the FMCSRs requires that for sleeper berths installed after January 1, 1963, the exit must be a doorway or opening at least 18 inches high and 36 inches wide.

In its application, Van Hool/Coach USA states:

> Van Hool and Coach USA are making this request because we jointly developed a double deck motorcoach with sleeper berths for passengers (hereafter referred to as sleeper coach) where in order to meet the driver hours of service requirements for the routes planned for this sleeper coach, a sleeper berth must be provided for a 2nd driver. The designed sleeper berth compartment in the sleeper motor coach meets and exceeds the minimum dimensional requirements for the actual sleeper berth, however due to the limited available locations to place the sleeper berth within the confines of the motorcoach, it is requested that the entry/exit to the sleeper berth be allowed to meet the dimensional requirements for those sleeper berths manufactured/installed before January 1, 1963 The entry/exit of the sleeper berth (as currently designed) has a maximum area of 606 square inches, which is sufficient area to contain an ellipse having a major axis of 24 inches and a minor axis of 16 inches, which was the requirement for sleeper berths installed prior to January 1, 1963.

Van Hool/Coach USA states that whereas the pre-January 1, 1963, exit dimension requirements accommodated all type of commercial motor vehicles including the sleeper coach, the current language of Section 393.76(c)(1) ''is designed to fit sleeper berths in trucks'' and does ''not take into account the limited space available on a motorcoach for utilization of a sleeper berth.''

Van Hool/Coach USA notes that without the proposed temporary exemption, it will not be able to fully utilize the operation of the sleeper coach on routes that require a second driver, because the sleeper berth exit does not meet the requirements for a sleeper berth installed on or after January 1, 1963.

Request for Comments

In accordance with 49 U.S.C. 31315 and 31136(e), FMCSA requests public comment from all interested persons on Van Hool/Coach USA's application for an exemption from 49 CFR 393.76(c)(1). All comments received before the close of business on the comment closing date indicated at the beginning of this notice will be considered and will be available for examination in the docket at the location listed under the **ADDRESSES** section of this notice. Comments received after the comment closing date will be filed in the public docket and will be considered to the extent practicable. In addition to late comments, FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should continue to examine the public docket for new material.

Issued on: July 29, 2013.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2013–18919 Filed 8–5–13; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2013–0165]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemptions; request for comments.

SUMMARY: FMCSA announces receipt of applications from 25 individuals for exemption from the vision requirement in the Federal Motor Carrier Safety Regulations. They are unable to meet the vision requirement in one eye for various reasons. The exemptions will enable these individuals to operate commercial motor vehicles (CMVs) in interstate commerce without meeting the prescribed vision requirement in one eye. If granted, the exemptions would enable these individuals to qualify as drivers of commercial motor vehicles (CMVs) in interstate commerce.

DATES: Comments must be received on or before September 5, 2013.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2013–0165 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket numbers for this notice. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below for further information.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the Federal Docket Management System (FDMS) published in the **Federal Register** on January 17, 2008 (73 FR 3316).

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the Federal Motor Carrier Safety Regulations for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' FMCSA can renew exemptions at the end of each 2-year period. The 25 individuals listed in this notice have each requested such an exemption from the vision requirement in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting an exemption will achieve the required level of safety mandated by statute.

Qualifications of Applicants

Larry E. Blakely

Mr. Blakely, age 63, has had a retinal detachment in his right eye since 2011. The visual acuity in his right eye is hand motion, and in his left eye, 20/25. Following an examination in 2013, his ophthalmologist noted, ''It would be my opinion that he would be safe on the road. I would feel very comfortable with him driving next to me and I think his level of visual performance should be adequate to operate a commercial vehicle.'' Mr. Blakely reported that he has driven straight trucks for 15 years, accumulating 510,000, and tractor-trailer combinations for 20 years, accumulating 1.4 million miles. He holds a Class A Commercial Driver's License (CDL) from Georgia. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

William Bucaria, Jr.

Mr. Bucaria, 37, has a shattered retina in his left eye due to a traumatic incident during childhood. The visual acuity in his right eye is 20/20, and in his left eye, light perception. Following an examination in 2013, his optometrist noted, ''My opinion is that Mr. Bucaria has sufficient vision to operate a commercial vehicle.'' Mr. Bucaria reported that he has driven tractor-trailer combinations for 3 years, accumulating 288,000 miles. He holds a Class A CDL from Florida. His driving record for the last 3 years shows no crashes and 2 convictions for moving violations in a CMV. In the first incident, he failed to yield to an emergency vehicle. In the second incident, he exceeded the speed limit by 10 mph.

Kevan M. Burke

Mr. Burke, 60, has had a retinal detachment in his right eye since childhood. The visual acuity in his right eye is hand motion, and in his left eye, 20/20. Following an examination in 2013, his optometrist noted, ''In my medical opinion Mr. Burke has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Burke reported that he has driven straight trucks for 40 years, accumulating 22,000 miles, and tractor-trailer combinations for 11 years, accumulating 2,200 miles. He holds a Class AM CDL from Pennsylvania. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Thomas F. Caithamer

Mr. Caithamer, 48, has had a strabismic amblyopia in his right eye since childhood. The visual acuity in his right eye is 20/60, and in his left eye, 20/20. Following an examination in 2013, his optometrist noted, ''Long standing amblyopia in the right eye (>40 yrs), which is stable and adaptable to allow the patient to perform his necessary operations for driving a commercial vehicle.'' Mr. Caithamer reported that he has driven straight trucks for 26 years, accumulating 270,400 miles. He holds an operator's license from Illinois. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Jaime M. Daigle

Mr. Daigle, 38, has had amblyopia in his right eye since birth. The visual acuity in his right eye is 20/100, and in his left eye, 20/20. Following an examination in 2013, his ophthalmologist noted, ''It is in my medical opinion that Mr. Daigle has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Daigle reported that he has driven straight trucks for 13 years, accumulating 651,742 miles. He holds an operator's license from Massachusetts. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

James E. Goodman

Mr. Goodman, 44, has a corneal laceration in his left eye due to a traumatic incident in 2011. The visual acuity in his right eye is 20/20, and in his left eye, 20/400. Following an examination in 2012, his

ophthalmologist noted, ''In my medical opinion, the patient has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Goodman reported that he has driven tractor-trailer combinations for 25 years, accumulating 1.5 million miles. He holds an operator's license from Alabama. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Britt A. Green

Mr. Green, 43, has had exotropia in his left eye since birth. The visual acuity in his right eye is 20/15, and in his left eye, 20/200. Following an examination in 2013, his optometrist noted, ''Therefore, I certify that in my medical opinion, Mr. Green has sufficient vision to perform the driving tasks required to operate a commercial vehicle to take a practical, behind-the-wheel test.'' Mr. Green reported that he has driven straight trucks for 28 years, accumulating 210,000 miles, and tractor-trailer combinations for 22 years, accumulating 110,000 miles. He holds a Class A CDL from North Dakota. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Craig C. Harris

Mr. Harris, 41, has a macular scar in his right eye due to a traumatic incident during childhood. The visual acuity in his right eye is 20/125, and in his left eye, 20/20. Following an examination in 2012, his optometrist noted, ''It is my opinion that Mr. Harris is able to drive with no limitations per my November 15, 2012 exam.'' Mr. Harris reported that he has driven straight trucks for 21 years, accumulating 630,000 miles. He holds an operator's license from New Hampshire. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Jesus J. Huerta

Mr. Huerta, 41, has optic nerve damage in his right eye due to a traumatic incident in 1995. The visual acuity in his right eye is no light perception, and in his left eye, 20/25. Following an examination in 2013, his optometrist noted, ''Mr. Huerta has had a CDL license for a great many years after the loss of his right eye. I think his driving record speaks for itself with regards to having 'sufficient vision to perform the driving tasks required to operate a commercial vehicle.' '' Mr. Huerta reported that he has driven straight trucks for 8 years, accumulating 108,000 miles. He holds a Class B CDL from Nevada. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Arlene S. Kent

Ms. Kent, 52, has had refractive amblyopia in her right eye since childhood. The visual acuity in her right eye is 20/70, and in her left eye, 20/20. Following an examination in 2013, her optometrist noted, ''Due to the fact that her condition only affects the central vision in her right eye, the other eye has 20/20 with correction, and her peripheral vision is excellent in both eyes, it is my medical opinion that she has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Ms. Kent reported that she has driven buses for 8 years, accumulating 16,000 miles. She holds a Class C CDL from New Hampshire. Her driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Willie L. Murphy

Mr. Murphy, 52, has a prosthetic left eye due to a traumatic incident during childhood. The visual acuity in his right eye is 20/20, and in his left eye, no light perception. Following an examination in 2013, his optometrist noted, ''In my medical opinion he has sufficient vision to perform the driving tasks associated with driving a commercial vehicle.'' Mr. Murphy reported that he has driven straight trucks for 25 years, accumulating 1 million miles. He holds a Class B CDL from Indiana. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Chad J. Nolan

Mr. Nolan, 42, has had a congenitally underdeveloped optic nerve in his right eye since birth. The visual acuity in his right eye is counting fingers, and in his left eye, 20/20. Following an examination in 2013, his optometrist noted, ''I feel Mr. Nolan does have the visual ability to continue to safely operate a commercial vehicle.'' Mr. Nolan reported that he has driven straight trucks for 4 years, accumulating 38,000 miles. He holds an operator's license from Ohio. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Joseph J. Pudlik

Mr. Pudlik, 47, has had a refractive amblyopia in his left eye since birth. The visual acuity in his right eye is 20/20, and in his left eye, 20/400. Following an examination in 2013, his optometrist noted, ''In my opinion vision is sufficient for driving commercial vehicle.'' Mr. Pudlik reported that he has driven straight trucks for 24 years, accumulating 672,000 miles. He holds a Class BM CDL from Illinois. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Freddie G. Reed

Mr. Reed, 60, has a corneal scar in his right eye due to a traumatic incident in 2006. The visual acuity in his right eye is 20/80, and in his left eye, 20/20. Following an examination in 2013, his ophthalmologist noted, ''It is my medical opinion that Mr. Reed's vision is stable and sufficient with correction to perform driving tasks required to operate a commercial vehicle.'' Mr. Reed reported that he has driven tractor-trailer combinations for 39 years, accumulating 1.4 million miles. He holds a Class A CDL from Mississippi. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Elmer L. Roberson

Mr. Roberson, 64, has a prosthetic left eye due to a traumatic incident during childhood. The visual acuity in his right eye is 20/25, and in his left eye, no light perception. Following an examination in 2013, his optometrist noted, ''This individual has driven almost 50 years with one eye and seems to have sufficient vision to perform the driving tasks required for a commercial vehicle.'' Mr. Roberson reported that he has driven straight trucks for 3 years, accumulating 288,000 miles, and tractor-trailer combinations for 10 years, accumulating 1.6 million miles. He holds an operator's license from Oklahoma. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Anthony R. Santomango

Mr. Santomango, 68, has had amblyopia in his right eye since childhood. The visual acuity in his right eye is 20/100, and in his left eye, 20/20. Following an examination in 2012, his optometrist noted, ''Patient has adapted very well over his lifetime and can perform all driving task [sic] well, commercially or otherwise.'' Mr. Santomango reported that he has driven straight trucks for 50 years, accumulating 100,000 miles, tractor-trailer combinations for 50 years, accumulating 1.5 million miles, and buses for 5 years, accumulating 5000 miles. He holds a Class A CDL from

Maine. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Daniel W. Schafer

Mr. Schafer, 29, has had optic atrophy in his right eye since birth. The visual acuity in his right eye is 5/200, and in his left eye, 20/15. Following an examination in 2013, his optometrist noted, ''In summary, in my medical opinion, Dan meets the standards set forth in 49 CFR 391.41 and from an ophthalmic standpoint, appears capable of operating a commercial vehicle.'' Mr. Schafer reported that he has driven straight trucks for 13 years, accumulating 455,000 miles. He holds an operator's license from Pennsylvania. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Keith A. Sommers

Mr. Sommers, 46, has complete loss of vision in his right eye due to a traumatic incident during childhood. The visual acuity in his right eye is light perception, and in his left eye, 20/20. Following an examination in 2013, his ophthalmologist noted, ''In my opinion, Mr. Sommers has sufficient vision to operate a commercial vehicle safely.'' Mr. Sommers reported that he has driven straight trucks for 20 years, accumulating 5,000 miles, and tractor-trailer combinations for 10 years, accumulating 3,750 miles. He holds a chauffeur's license from Indiana. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

James A. Spell

Mr. Spell, 56, has a macular scar in his right eye due to a traumatic incident in 2009. The visual acuity in his right eye is 20/400, and in his left eye, 20/20. Following an examination in 2012, his ophthalmologist noted, ''I have found no reason that should preclude Mr. Spell from obtaining a commercial driving license. He is safe to continue driving commercial motor vehicles.'' Mr. Spell reported that he has driven tractor-trailer combinations for 20 years, accumulating 700,000 miles. He holds a Class A CDL from Maryland. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Robert L. Spencer

Mr. Spencer, 58, has had amblyopia in his left eye since childhood. The visual acuity in his right eye is 20/20, and in his left eye, 20/200. Following an examination in 2013, his optometrist noted, ''Patient has sufficient vision to perform driving tasks required to operate a commercial vehicle.'' Mr. Spencer reported that he has driven straight trucks for 35 years, accumulating 875,000 miles. He holds an operator's license from Connecticut. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Scott C. Star

Mr. Star, 43, has had an anisometropic amblyopia in his left eye since childhood. The visual acuity in his right eye is 20/20, and in his left eye, 20/200. Following an examination in 2013, his optometrist noted, ''His best corrected vision was 20/20 right eye and 20/200 left eye . . . It is my impression that with correction, Mr. Star, is able to operate a commercial motor vehicle without problem.'' Mr. Star reported that he has driven straight trucks for 20 years, accumulating 2.9 million miles. He holds an operator's license from New Jersey. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Brian S. Stockwell

Mr. Stockwell, 52, has a retinal tear and cataract in his right eye due to a traumatic incident in 1997. The visual acuity in his right eye is 20/60, and in his left eye, 20/20. Following an examination in 2013, his ophthalmologist noted, ''Brian Stockwell, a 51-year-old patient has requested a letter to determine if he qualifies for a visual exemption for a certain level Commercial Driver's Licence [sic] . . . Mr. Stockwell has had an unblemished driving record over the past 15 years, with the same level of vision, I feel it is reasonable to assume that he will continue to do so.'' Mr. Stockwell reported that he has driven straight trucks for 15 years, accumulating 450,000 miles. He holds a Class BM CDL from Illinois. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Jeffrey R. Swett

Mr. Swett, 39, has had open angle glaucoma in his right eye since 2010. The visual acuity in his right eye is 20/300, and in his left eye, 20/20. Following an examination in 2013, his ophthalmologist noted, ''Mr. Swett has sufficient vision to perform driving tasks required to operate a commercial vehicle.'' Mr. Swett reported that he has driven tractor-trailer combinations for 14 years, accumulating 2.7 million miles. He holds a Class A CDL from South Carolina. His driving record for the last 3 years shows no crashes and one conviction for a moving violation in a CMV; he was driving in an improper lane.

Brian C. Tate

Mr. Tate, 37, has had amblyopia in his right eye since birth. The visual acuity in his right eye is 20/100, and in his left eye, 20/25. Following an examination in 2013, his ophthalmologist noted, ''It is of my professional opinion that he is safe to operate a commercial vehicle.'' Mr. Tate reported that he has driven straight trucks for 15 years, accumulating 240,000 miles, and tractor-trailer combinations for 14 years, accumulating 1.1 million miles. He holds a Class A CDL from Virginia. His driving record for the last 3 years shows one crash, for which he was cited, and no convictions for moving violations in a CMV.

Aaron M. Vernon

Mr. Vernon, 55, has had a prosthetic right eye since 2009. The visual acuity in his right eye is no light perception, and in his left eye, 20/20. Following an examination in 2013, his ophthalmologist noted, ''In my medical opinion, my patient has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Vernon reported that he has driven straight trucks for 28 years, accumulating 672,000 miles. He holds a Class B CDL from Ohio. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. The Agency will consider all comments received before the close of business September 5, 2013. Comments will be available for examination in the docket at the location listed under the **ADDRESSES** section of this notice. The Agency will file comments received after the comment closing date in the public docket, and will consider them to the extent practicable.

In addition to late comments, FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should monitor the public docket for new material.

Submitting Comments

You may submit your comments and material online or by fax, mail, or hand

delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov* and in the search box insert the docket number FMCSA–2013–0165 and click the search button. When the new screen appears, click on the blue ''Comment Now!'' button on the right hand side of the page. On the new page, enter information required including the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period and may change this proposed rule based on your comments. FMCSA may issue a final rule at any time after the close of the comment period.

Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble, To submit your comment online, go to *http://www.regulations.gov* and in the search box insert the docket number FMCSA–2013–0165 and click ''Search.'' Next, click ''Open Docket Folder'' and you will find all documents and comments related to the proposed rulemaking.

Issued on: July 30, 2013.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2013–18918 Filed 8–5–13; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2013–0082]

Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System

In accordance with Part 235 of Title 49 Code of Federal Regulations (CFR) and 49 U.S.C. 20502(a), this document provides the public notice that by a document dated July 16, 2013, the Long Island Rail Road (LIRR) and the New York & Atlantic Railway (NYA) jointly petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of a signal system. FRA assigned the petition Docket Number FRA–2013–0082.

Applicants:

Long Island Rail Road, Mr. Kevin Tomlinson, Chief Engineer, 93–59 183rd Street, Hollis, NY 11428;

New York & Atlantic Railway, Mr. Paul Victor, President, 68–1 Otto Road, Glendale, NY 11386.

LIRR and NYA jointly seek approval of the proposed discontinuance of the automatic block signal (ABS) system on Main Line #1 and #2, from Milepost (MP) 1.2 Bliss to MP 7.3 Jay Interlocking on LIRR's Montauk Branch. Signals S14,S18, S21, S24, S30, S31, S36, S39, S45, S51, S52, S59, S62, S67, S72, and S73 will be removed, as well as the pipe-connected center-lock crossover equipment on crossovers at MP 2.9, 4.2, 4.4, and 5.0. Switches will remain in service. Highway-rail grade crossings in the application area will have their warning distances revised to ''island only,'' with the exception of 88th Street, which will have its warning time shortened. The maximum authorized speed will be ''restricted speed,'' not to exceed 15 mph.

The reason given for the proposed changes is that the ABS system is no longer needed for freight switching operations. There are no through freight operations. Passenger service has been discontinued on the line.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the Department of Transportation's Docket Operations Facility, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov/.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by September 20, 2013 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). See *http://www.regulations.gov/#!privacyNotice* for the privacy notice of regulations.gov or interested parties may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477).

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2013–18826 Filed 8–5–13; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2013–0076]

Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System

In accordance with Part 235 of Title 49 Code of Federal Regulations (CFR) and 49 U.S.C. 20502(a), this document provides the public notice that by a document dated July 12, 2013, the Port of Los Angeles (POLA) petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of a signal system. FRA assigned the petition Docket Number FRA–2013–0076.

Applicant: Port of Los Angeles, Mr. Ron Groves, PE, Senior Civil Engineer, Engineering Division, 425 South Palos Verdes Street, San Pedro, CA 90731.

POLA seeks approval of the proposed discontinuance of Control Point (CP) Transfer Junction at Milepost 1.2 on the Pacific Harbor Line, San Pedro Subdivision. CP Transfer Junction will

be discontinued and all associated signal equipment consisting of Power Switch #1, Absolute Signals #2E, #2WA, and #2WC, and two ''D'' inoperative approach signals will be removed.

The reason given for the proposed changes is the construction of new yard storage tracks that will require the discontinuance of CP Transfer Junction.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov/.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by September 20, 2013 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). See *http://www.regulations.gov/#!privacyNotice* for the privacy notice of regulations.gov or interested parties may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477).

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2013–18828 Filed 8–5–13; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2009–0078]

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 of the Code of Federal Regulations (CFR), this document provides the public notice that by a document dated July 1, 2013, the American Short Line and Regional Railroad Association (ASLRRA), on behalf of the Canton Railroad Company, and the New York & Atlantic Railway Company, has petitioned the Federal Railroad Administration (FRA) for an amended waiver of compliance from certain provisions of the Federal hours of service laws contained at 49 U.S.C. 21103(a)(4) which, in part, require a train employee to receive 48 hours off duty after initiating an on-duty period for 6 consecutive days. FRA assigned the petition Docket Number FRA–2009–0078.

In its petition, ASLRRA seeks to amend its previously filed petition for an extension of a waiver to add the two railroads referenced above, which did not participate in ASLRRA's original petition for a waiver extension, to Exhibit A of ASLRRA's waiver. FRA had granted ASLRRA's petition for a waiver extension in a letter dated February 27, 2012. The waiver allows a train employee to initiate an on-duty period each day for 6 consecutive days followed by 24 hours, rather than 48 hours, off duty.

Each railroad that seeks to be added to the waiver has executed a compliance letter that attests that it has complied with all of the employee consent requirements that FRA originally set in its initial decision letter, dated March 5, 2010. In addition, each railroad will maintain in its files for FRA inspection the underlying employee consent or employee representative consent documents.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov/.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by September 20, 2013 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). See *http://www.regulations.gov/#!privacyNotice* for the privacy notice of regulations.gov or interested parties may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477).

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2013–18830 Filed 8–5–13; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2013–0069]

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 of the Code of Federal Regulations

(CFR), this document provides the public notice that by a document received on June 11, 2013, the Terminal Railroad Association of St. Louis (TRRA), has petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR Part 232, Brake System Safety Standards for Freight and Other Non-Passenger Trains and Equipment; End-of-Train Devices. FRA assigned the petition Docket Number FRA–2013–0069.

Specifically, TRRA seeks a permanent waiver of compliance from 49 CFR 232.215, *Transfer train brake tests,* for train BNSF BNORE when empty and departing the US Steel Granite City Works (the Works) located at Granite City, IL. Title 49 CFR 232.215 defines the brake test that shall be performed on trains that travel between a point of origin and a point of final destination not exceeding 20 miles. TRRA's reasons for its petition are the unsafe walking conditions at the Works' Tracks 27–31 and the potential of injury to TRRA employees. The condition cannot be corrected due to the large amount of ore pellets left after each train. Waiver of the transfer train brake test will prevent employees from having to walk in an unsafe area.

The BNSF BNORE train, once emptied, travels from the Works to a location between 22nd and 25th Streets, a distance of 2.95 miles over U.S. Steel industrial track, TRRA track, and Norfolk Southern Railway track.

TRRA therefore proposes an alternative compliance: When the train doubles up and departs the Works, the train's crew will perform an inspection mandated by 49 CFR 232.211, *Class III brake tests—train line continuity inspection,* and will perform a roll-by inspection. When the train is spotted to an outbound track between 22nd and 25th Streets, an inspection compliant with 49 CFR 232.205, *Class I brake test—initial terminal inspection,* will be performed.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Ave. SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by September 19, 2013 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). See *http://www.regulations.gov/#!privacyNotice* for the privacy notice of regulations.gov or interested parties may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477).

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2013–18829 Filed 8–5–13; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2013–0077]

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), this document provides the public notice that by a document dated July 16, 2013, the Association of American Railroads (AAR) has petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR 215.127(c)(1). FRA assigned the petition Docket Number FRA–2013–0077.

AAR has requested a waiver from the provisions of 49 CFR 215.127 that state that a railroad may not place or continue in service a car if an end of car cushioning unit is leaking clearly formed droplets. In its petition for relief, AAR has submitted a technical report that indicates that a unit condition indicator (UCI) may be a better way to determine the actual performance of a unit rather than clearly formed droplets. AAR requests a 3-year test period during which it may be shown that end of car cushioning units that are leaking droplets should be permitted to continue in service if cushion UCIs indicate that the unit is not defective.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov/.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by October 15, 2013, will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the

name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). See *http://www.regulations.gov/#!privacyNotice* for the privacy notice of regulations.gov or interested parties may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477).

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2013–18827 Filed 8–5–13; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2013 0091]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel SERENITY; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before September 5, 2013.

ADDRESSES: Comments should refer to docket number MARAD–2013–0091. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Linda Williams, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–0903, Email *Linda.Williams@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel SERENITY is:

Intended Commercial Use of Vessel: ''Coastwise charters, Sight seeing tours, sunset and overnight cruises. Extend geographic area of current waiver.''

Geographic Region: ''Maine, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, Washington, DC, North Carolina, South Carolina, Georgia, Florida, Louisiana, Mississippi, Alabama, and Texas.''

The complete application is given in DOT docket MARAD–2013–0091 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Dated: July 30, 2013.

By Order of the Maritime Administrator.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2013–18967 Filed 8–5–13; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2013 0089]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel LARGO LOOKER; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before September 5, 2013.

ADDRESSES: Comments should refer to docket number MARAD–2013–0089. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Linda Williams, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–0903, Email *Linda.Williams@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel LARGO LOOKER is:

Intended Commercial Use Of Vessel: ''Glass bottom boat tour''.

Geographic Region: ''Florida''.

The complete application is given in DOT docket MARAD–2013–0089 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders

or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.
Dated: July 30, 2013.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2013–18966 Filed 8–5–13; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2013 0090]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel JAMMIN; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before September 5, 2013.

ADDRESSES: Comments should refer to docket number MARAD–2013–0090. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Linda Williams, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–0903, Email *Linda.Williams@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel JAMMIN is:

Intended Commercial Use Of Vessel: ''Sunset and/or picnic cruises for very small groups''.

Geographic Region: ''Maryland, Virginia, Washington, DC, North Carolina, South Carolina, Georgia, Florida''.

The complete application is given in DOT docket MARAD–2013–0090 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.
Dated: July 30, 2013.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2013–18965 Filed 8–5–13; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD 2013 0088]

Information Collection Available for Public Comments and Recommendations

ACTION: Notice of intention to request extension of OMB approval and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Maritime Administration's (MARAD's) intention to request extension of approval for three years of a currently approved information collection.

DATES: Comments should be submitted on or before October 7, 2013.

FOR FURTHER INFORMATION CONTACT: Rodney McFadden, Maritime Administration, 1200 New Jersey Avenue SE., Washington, DC 20590. Telephone: 202–366–0029; or email: *rod.mcfadden@dot.gov.*

SUPPLEMENTARY INFORMATION: Maritime Administration (MARAD).

Title of Collection: Information to Determine Seamen's Re-employment Rights—National Emergency.

Type of Request: Extension of currently approved information collection.

OMB Control Number: 2133–0526.

Form Numbers: None.

Expiration Date of Approval: Three years from date of approval by the Office of Management and Budget.

Summary of Collection of Information: This collection is needed in order to implement provisions of the Maritime Security Act of 1996. These provisions grant re-employment rights and other benefits to certain merchant seamen serving aboard vessels used by the United States during times of national emergencies. The Maritime Security Act of 1996 establishes the procedures for obtaining the necessary MARAD certification for re-employment rights and other benefits.

Need and Use of the Information: MARAD will use the information to determine if U.S. civilian mariners are

eligible for re-employment rights under the Maritime Security Act of 1996.

Description of Respondents: U.S. merchant seamen who have completed designated national service during a time of maritime mobilization need and are seeking re-employment with a prior employer.

Annual Responses: 10 responses.

Annual Burden: 10 hours.

Comments: Comments should refer to the docket number that appears at the top of this document. Written comments may be submitted to the Docket Clerk, U.S. DOT Dockets, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. Comments also may be submitted by electronic means via the Internet at *http://www.regulations.gov.* Specifically address whether this information collection is necessary for proper performance of the functions of the agency and will have practical utility, accuracy of the burden estimates, ways to minimize this burden, and ways to enhance the quality, utility, and clarity of the information to be collected. All comments received will be available for examination at the above address between 10 a.m. and 5 p.m. EDT (or EST), Monday through Friday, except Federal Holidays. An electronic version of this document is available on the World Wide Web at *http://www.regulations.gov.*

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://www.regulations.gov.*

Authority: 49 CFR 1.93.

Dated: July 29, 2013.

By order of the Maritime Administrator.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2013–18957 Filed 8–5–13; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Unblocking of Specially Designated Nationals and Blocked Persons Pursuant to the Cuban Assets Control Regulations.

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (''OFAC'') is publishing the name of 26 vessels whose property and interests in property have been unblocked pursuant to the Cuban Assets Control Regulations, 31 CFR part 515.

DATES: The unblocking and removal from the list of Specially Designated Nationals and Blocked Persons (''SDN List'') by the Director of OFAC of the 26 vessels identified in this notice is effective July 30, 2013.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Sanctions Compliance & Evaluation, Office of Foreign Assets Control, Department of the Treasury, 1500 Pennsylvania Avenue NW. (Treasury Annex), Washington, DC 20220, Tel.: 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

The SDN List and additional information concerning OFAC are available from OFAC's Web site (*www.treas.gov/ofac*). Certain general information concerning OFAC is also available via facsimile through a 24-hour fax-on-demand service, Tel.: 202/622–0077.

Background

On July 30, 2013, the Director of OFAC removed from the list of Specially Designated Nationals and Blocked Persons the 26 vessels listed below, whose property and interests in property were blocked pursuant to the CACR.

1. ACECHILLY Unknown vessel type (Acechilly Navigation Co., Malta) (vessel) [CUBA].
2. ACEFROSTY Unknown vessel type (Acefrosty Shipping Co., Malta) (vessel) [CUBA].
3. ALAMINOS (f.k.a. RUBY ISLANDS) (P32C3) General Cargo 15,088DWT 8,909GRT Cyprus flag (Alaminos Shipping Co. Ltd.) (vessel) [CUBA].
4. CARIBBEAN PRINCESS (C4GL) General Cargo 24,155DWT 16,794GRT Cyprus flag (CARIBBEAN PRINCESS SHIPPING (SDN)) (vessel) [CUBA].
5. CARIBBEAN QUEEN (C4JO) General Cargo 24,106DWT 16,794GRT Cyprus flag (CARIBBEAN QUEEN SHIPPING (SDN)) (vessel) [CUBA].
6. CASABLANCA Unknown vessel type (Epamac Shipping Co., Ltd., Malta) (vessel) [CUBA].
7. COTTY Unknown vessel type (Heywood Navigation Corp., Panama) (vessel) [CUBA].
8. EMERALD ISLANDS (9HRP2) General Cargo 15,088DWT 8,909GRT Malta flag (BETTINA SHIPPING CO. LTD. (SDN)) (vessel) [CUBA].
9. FLYING DRAGON Unknown vessel type (Flight Dragon Shipping Ltd., Malta) (vessel) [CUBA].
10. FRIGO HISPANIA Unknown vessel type (Ace Indic Navigation Co., Malta) (vessel) [CUBA].
11. GRETE STAR (f.k.a. AVIS FAITH) (HOQD) Container Ship 17,820DWT 11,318GRT Panama flag (Avisfaith Shipping) (vessel) [CUBA].
12. HUNTSLAND Unknown vessel type (Huntsland Navigation Co., Ltd., Malta) (vessel) [CUBA].
13. HUNTSVILLE Unknown vessel type (Huntsville Navigation Co., Ltd., Malta) (vessel) [CUBA].
14. HURACAN Unknown vessel type (Senanque Shipping Co., Ltd., Cyprus) (vessel) [CUBA].
15. LAS COLORADOS Unknown vessel type (Naviera Maritima de Arosa, Spain) (vessel) [CUBA].
16. LAURA I (f.k.a. LAURA) (HP7988) Container Ship 2,213DWT 1,843GRT Panama flag (Naviera Polovina S.A.) (vessel) [CUBA].
17. LILAC ISLANDS (3FIM2) General Cargo 15,175DWT 8,976GRT Panama flag (VALETTA SHIPPING CORPORATION (SDN)) (vessel) [CUBA].
18. LOTUS ISLANDS (3FIL2) General Cargo 15,175DWT 8,976GRT Panama flag (WADENA SHIPPING CORPORATION (SDN)) (vessel) [CUBA].
19. NORTH ISLANDS (P3CH2) General Cargo 15,136DWT 8,996GRT Cyprus flag (NORTH ISLAND SHIPPING CO. LTD. (SDN)) (vessel) [CUBA].
20. ONYX ISLANDS Unknown vessel type (Maryol Enterprises, Inc., Panama) (vessel) [CUBA].
21. PALMA MOCHA Unknown vessel type (Naviera Maritima de Arosa, Spain) (vessel) [CUBA].
22. PINO DEL AGUA Unknown vessel type (Naviera Maritima de Arosa, Spain) (vessel) [CUBA].
23. RAHIM 3 Unknown vessel type (Pioneer Shipping Ltd., Malta) (vessel) [CUBA].
24. SENANQUE (5BJR) General Cargo 5,479DWT 2,974GRT Cyprus flag (SENANQUE SHIPPING CO. LTD. (SDN)) (vessel) [CUBA].
25. STANDWEAR (5BQH) Bulk Carrier 19,095DWT 12,147GRT Cyprus flag (STANDWEAR SHIPPING CO. LTD. (SDN)) (vessel) [CUBA].
26. TAMMANY H (f.k.a. PRIMROSE ISLANDS) (5BXG) Bulk Carrier 26,400DWT 15,864GRT Cyprus flag

(Odielo Shipping Co. Ltd.) (vessel) [CUBA].

Dated: July 30, 2013.

Adam Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2013–18958 Filed 8–5–13; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designations, Foreign Narcotics Kingpin Designation Act

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 three individuals and three entities whose property and interests in property have been blocked pursuant to the Foreign Narcotics Kingpin Designation Act (''Kingpin Act'') (21 U.S.C. 1901–1908, 8 U.S.C. 1182).

DATES: The designation by the Director of OFAC of the three individuals and three entities identified in this notice pursuant to section 805(b) of the Kingpin Act is effective on July 30, 2013.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Sanctions Compliance & Evaluation, Office of Foreign Assets Control, U.S. Department of the Treasury, Washington, DC 20220, Tel: (202) 622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available on OFAC's Web site at *http://www.treasury.gov/ofac* or via facsimile through a 24-hour fax-on-demand service at (202) 622–0077.

Background

The Kingpin Act became law on December 3, 1999. The Kingpin Act establishes a program targeting the activities of significant foreign narcotics traffickers and their organizations on a worldwide basis. It provides a statutory framework for the imposition of sanctions against significant foreign narcotics traffickers and their organizations on a worldwide basis, with the objective of denying their businesses and agents access to the U.S. financial system and the benefits of trade and transactions involving U.S. companies and individuals.

The Kingpin Act blocks all property and interests in property, subject to U.S. jurisdiction, owned or controlled by significant foreign narcotics traffickers as identified by the President. In addition, the Secretary of the Treasury, in consultation with the Attorney General, the Director of the Central Intelligence Agency, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of Defense, the Secretary of State, and the Secretary of Homeland Security may designate and block the property and interests in property, subject to U.S. jurisdiction, of persons who are found to be: (1) Materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a person designated pursuant to the Kingpin Act; (2) owned, controlled, or directed by, or acting for or on behalf of, a person designated pursuant to the Kingpin Act; or (3) playing a significant role in international narcotics trafficking.

On July 30, 2013, the Director of OFAC designated the following three individuals and three entities whose property and interests in property are blocked pursuant to section 805(b) of the Kingpin Act.

Individuals:

1. NUNEZ BEDOYA, Jose Antonio, Calle Lic. Benito Juarez No. 396, Interior No. 5, Colonia Centro, Culiacan, Sinaloa 80000, Mexico; DOB 21 Dec 1941; POB Sinaloa, Mexico; nationality Mexico; citizen Mexico; R.F.C. NUBA411221867 (Mexico); C.U.R.P. NUBA411221HSLXDN05 (Mexico) (individual) [SDNTK].
2. GARCIA RIOS, Tomasa, Cipriano Obeso 1520, Colonia Chapultepec, Culiacan, Sinaloa, Mexico; DOB 07 Mar 1971; POB Culiacan, Sinaloa, Mexico; nationality Mexico; citizen Mexico; C.U.R.P. GART710307MSLRSM00 (Mexico) (individual) [SDNTK].
3. VERDUGO GARCIA, Monica Janeth, Cipriano Obeso 1520, Colonia Chapultepec, Culiacan, Sinaloa, Mexico; DOB 31 Jul 1992; POB Culiacan, Sinaloa, Mexico; nationality Mexico; citizen Mexico; C.U.R.P. VEGM920731MSLRRN06 (Mexico) (individual) [SDNTK].

Entities:

4. CENTRO COMERCIAL Y HABITACIONAL LOMAS, S.A. DE C.V., Boulevard Emiliano Zapata #3125, Colonia Lomas Del Boulevard, Culiacan, Sinaloa 80110, Mexico [SDNTK].
5. PARQUE ACUATICO LOS CASCABELES, S.A. DE C.V., Carretera Interior a Costa Rica Km. 6, El Carrizal 2, Culiacan Rosales, Sinaloa 80430, Mexico; Folio Mercantil No. 75483 (Mexico) [SDNTK].
6. RANCHO AGRICOLA GANADERO LOS MEZQUITES, S.A. DE C.V., Entrada a los Cascabeles 2.8 Carretera Internacional Sur Km. 22, Culiacan, Sinaloa, Mexico; R.F.C. RAG000412BY5 (Mexico) [SDNTK].

Dated: July 30, 2013.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2013–18959 Filed 8–5–13; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 211

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 211, Application for Reward for Original Information.

DATES: Written comments should be received on or before October 4, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Katherine Dean, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington DC 20224, or through the Internet, at *Katherine.b.dean@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Form 211, Application for Reward for Original Information.

OMB Number: 1545–0409.

Form Number: Form 211.

Abstract: Form 211 is the official application form used by persons

requesting rewards for submitting information concerning alleged violations of the tax laws by other persons. Such rewards are authorized by Internal Revenue Code section 7623. The data is used to determine and pay rewards to those persons who voluntarily submit information.

Current Actions: There are no changes being made to form 211 at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Responses: 20,000.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 5,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 9, 2013.

Yvette Lawrence,

OMB Reports Clearance Officer.

[FR Doc. 2013–18846 Filed 8–5–13; 8:45 am]

BILLING CODE 4830–01–P

U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION

Notice of Open Meetings To Prepare 2013 Annual Report to Congress

Advisory Committee: U.S.-China Economic and Security Review Commission.

ACTION: Notice of open meetings to be held in Washington, DC as follows: (1) Review-Edit 2013 Annual Report to Congress—August 7, September 12–13, October 1–2, and October 21–22, 2013.

SUMMARY: Notice is hereby given of meetings of the U.S.-China Economic and Security Review Commission.

Name: William A. Reinsch, Chairman of the U.S.-China Economic and Security Review Commission.

The Commission is mandated by Congress to investigate, assess, evaluate and report to Congress annually on the U.S.-China economic and security relationship. The mandate specifically charges the Commission to prepare a report to Congress ''regarding the national security implications and impact of the bilateral trade and economic relationship between the United States and the People's Republic of China [that] shall include a full analysis, along with conclusions and recommendations for legislative and administrative actions . . .''

Purpose of Meetings:

Pursuant to this mandate, the Commission will meet in Washington, DC on August 7, September 12–13, October 1–2, and October 21–22, 2013 to consider drafts of material for its 2013 Annual Report to Congress that have been prepared for its consideration by the Commission staff, and to make modifications to those drafts that Commission members believe are needed.

The report review-editing sessions are for members of the Commission to review and edit staff drafts of sections of the Commission's 2013 Annual Report for submission to Congress. The Commission is subject to the Federal Advisory Committee Act (FACA) with the enactment of the Science, State, Justice, Commerce and Related Agencies Appropriations Act, 2006 that was signed into law on November 22, 2005 (Pub. L. 109–108). In accord with FACA's requirement, meetings of the Commission to make decisions concerning the substance and recommendations of its 2013 Annual Report to Congress are open to the public.

Topics To Be Discussed:

The Commissioners will be considering draft report sections addressing the following topics:

- The United States-China trade and economic relationship, including Chinese investment in the United States, government and accountability in China's financial system, and China's agriculture policy and U.S. access to China's markets.
- China's impact on U.S. security interests, including a military and security year in review, cyber activities and maritime disputes.
- China's foreign and regional activities and relationships, including those pertaining to Middle East, Taiwan, Macau and Hong Kong.
- China's foreign and national security policies.

Dates, Times, and Room Locations (Eastern Daylight Time):

- Wednesday, *August 7, 2013* (10:00 a.m. to 5:00 p.m.)—Room 231
- Thursday and Friday, *September 12–13, 2013* (9:00 a.m. to 5:00 p.m.)—Room 231
- Tuesday and Wednesday, *October 1–2, 2013* (9:00 a.m. to 5:00 p.m.)—Room 231
- Monday and Tuesday, *October 21–22, 2013* (9:00 a.m. to 5:00 p.m.)—Room 231

ADDRESSES: All report review-editing sessions will be held in The Hall of the States (North Bldg., 2nd Floor), located at 444 North Capitol Street NW., Washington, DC 20001.

Public seating is limited and will be available on a ''first-come, first-served'' basis. *Advanced reservations are not required. All participants must register at the front desk of the lobby.*

Required Accessibility Statement:

The entirety of these Commission editorial and drafting meetings will be open to the public. The Commission may recess the public editorial/drafting sessions to address administrative issues in closed session.

The open meetings will also be adjourned in the noon vicinity for a lunch break. At the beginning of the lunch break, the Chairman will announce the reconvening time for the Annual Report review and editing session so members of the public will know when they may return if they wish to do so.

FOR FURTHER INFORMATION CONTACT: Reed Eckhold, Congressional Liaison and Director of Communications, U.S.-China Economic and Security Review Commission, 444 North Capitol Street NW., Suite 602, Washington, DC 20001; Phone: (202) 624–1496; Email: *reckhold@uscc.gov.*

Authority: Congress created the U.S.-China Economic and Security Review Commission in 2000 in the National Defense Authorization Act (Pub. L. 106–398), as

amended by Division P of the Consolidated Appropriations Resolution, 2003 (Pub. L. 108–7), as amended by Public Law 109–108 (November 22, 2005).

Dated: July 31, 2013.

Michael Danis,

Executive Director, U.S.-China Economic and Security Review Commission.

[FR Doc. 2013–18833 Filed 8–5–13; 8:45 am]

BILLING CODE 1137–00–P

DEPARTMENT OF VETERANS AFFAIRS

Privacy Act of 1974; Report of Matching Program

AGENCY: Department of Veterans Affairs.

ACTION: Notice of Computer Matching Program.

SUMMARY: The Department of Veterans Affairs (VA) provides notice that it intends to conduct a recurring computer matching program matching Railroad Retirement Board (RRB) retirement and survivor benefit data with VA pension and dependency and indemnity compensation (DIC) records. The purpose of this match is to identify beneficiaries who are receiving both VA benefits and RRB retirement and survivor benefits, and to reduce or terminate VA benefits, if appropriate.

DATES: The match will start no sooner than 30 days after publication of this notice in the **Federal Register** (FR) or 40 days after copies of this notice and the agreement of the parties is submitted to Congress and the Office of Management and Budget, whichever is later, and end not more than 18 months after the agreement is properly implemented by the parties. The involved agencies' Data Integrity Boards (DIB) may extend this match for 12 months provided the agencies certify to their DIBs, within 3 months of the ending date of the original match, that the matching program will be conducted without change and that the matching program has been conducted in compliance with the original matching program.

ADDRESSES: Written comments may be submitted through *www.Regulations.gov;* by mail or hand-delivery to the Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8:00 a.m. and 4:30 p.m. Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *www.Regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Sharon Nicely, Pension Analyst, Pension and Fiduciary Service (21PF), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 632–8863.

SUPPLEMENTARY INFORMATION: VA will use this information to verify the income information submitted by beneficiaries of VA's needs-based benefit programs and adjust VA benefit payments as prescribed by law. The proposed matching program will enable VA to accurately identify beneficiaries who are in receipt of RRB benefits and have not reported the income as required by law and identify those beneficiaries whose RRB benefits have changed.

The legal authority to conduct this match is 38 U.S.C. 5106, which requires any Federal department or agency to provide VA such information as VA requests for the purposes of determining eligibility for benefits or verifying other information concerning payment of benefits.

The VA records involved in the match are in ''Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records—VA'' (58 VA 21/22/28), a system of records, which was first published at 41 FR 9294 (March 3, 1976) and amended and republished in its entirety at 77 FR 42593 (July 19, 2012). The routine use authorizing VA's disclosure of information in this program is number 39. RRB will disclose the necessary information from RRB–26: Payment, Rate, and Entitlement History File, published at 75 FR 43729 (July 26, 2010). The routine use for this match is ''b.''

In accordance with the Privacy Act, 5 U.S.C. 552a(o)(2) and (r), copies of the agreement are being sent to the Committee on Government Operations for both the House and Senate and to the Office of Management and Budget. This notice is provided in accordance with the provisions of the Privacy Act of 1974 as amended by Public Law 100–503.

Signing Authority: The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Jose D. Riojas, Interim Chief of Staff, approved this document on July 17, 2013, for publication.

Dated: July 31, 2013.

Robert C. McFetridge,

Director, Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

[FR Doc. 2013–18888 Filed 8–5–13; 8:45 am]

BILLING CODE 8320–01–P



FEDERAL REGISTER

Vol. 78 Tuesday,
No. 151 August 6, 2013

Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Graham's Beardtongue (Penstemon grahamii) and White River Beardtongue (Penstemon scariosus var. albifluvis); Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R6–ES–2013–0082; 4500030113]

RIN 1018–AZ61

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Graham's Beardtongue (≤ Penstemon grahamii) and White River Beardtongue (Penstemon scariosus var. albifluvis)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, propose to designate critical habitat for Graham's beardtongue (*Penstemon grahamii*) and White River beardtongue (*Penstemon scariosus* var. *albifluvis*) under the Endangered Species Act of 1973, as amended (Act). We are proposing approximately 27,502 hectares (67,959 acres) for designation as critical habitat for Graham's beardtongue in Duchesne and Uintah Counties in Utah and Rio Blanco County in Colorado. We are proposing approximately 6,036 hectares (14,914 acres) for designation as critical habitat for White River beardtongue in Duchesne and Uintah Counties in Utah and Rio Blanco County in Colorado. If we finalize this rule as proposed, it will extend the Act's protections to these species' critical habitats.

DATES: We will accept comments received or postmarked on or before October 7, 2013. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by September 20, 2013.

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

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* Search for Docket No. FWS–R6–ES–2013–0082, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R6–ES–2013–0082; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

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

The coordinates or plot points or both from which the maps are generated are included in the administrative record for this critical habitat designation and are available at *http://www.fws.gov/utahfieldoffice* under Latest News, *http://www.regulations.gov* at Docket No. FWS–R6–ES–2013–0082, and at the Utah Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that we may develop for this critical habitat designation will also be available at the Fish and Wildlife Service Web site and Field Office set out above, and may also be included in the preamble and/or at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Larry Crist, Field Supervisor, U.S. Fish and Wildlife Service, Utah Ecological Services Field Office, 2369 West Orton Circle, Suite 50, West Valley City, UT 84119; by telephone at 801–975–3330; or by facsimile at 801–975–3331. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. This is a proposed rule to designate critical habitat for two plant taxa, Graham's beardtongue (*Penstemon grahamii*) and White River beardtongue (*P. scariosus* var. *albifluvis*), which are proposed as threatened species under the Endangered Species Act (Act). A proposed rule to list Graham's beardtongue and White River beardtongue as threatened species is published elsewhere in today's **Federal Register**. Under the Act, any species that is determined to be an endangered or threatened species requires critical habitat to be designated, to the maximum extent prudent and determinable. Designations and revisions of critical habitat can only be completed by issuing a rule.

The basis for our action. Under the Endangered Species Act, any species that is determined to be an endangered or threatened species shall, to the maximum extent prudent and determinable, have habitat designated that is considered to be critical habitat.

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if she determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless she determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species.

We are preparing an economic analysis of the proposed designations of critical habitat. In order to consider economic impacts, we are preparing an analysis of the economic impacts of the proposed critical habitat designations and related factors. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek additional public review and comment.

We will seek peer review. We are seeking comments from independent specialists to ensure that our critical habitat proposal is based on scientifically sound data and analyses. We have invited these peer reviewers to comment on our specific assumptions and conclusions in this critical habitat proposal. Because we will consider all comments and information we receive during the comment period, our final rule may differ from this proposal.

Information Requested

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

(1) The reasons why we should or should not designate habitat as ''critical habitat'' under section 4 of the Act (16 U.S.C. 1531 *et seq.*) including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat may not be prudent.

(2) Specific information on:

(a) The amount and distribution of Graham's beardtongue and White River beardtongue occupied and suitable habitat;

(b) Areas that were occupied at the time of listing (or are currently occupied) and that contain features essential to the conservation of the species that should be included in the designation and why;

(c) What areas not occupied at the time of listing are essential for the conservation of the species and why;

(d) What may constitute ''physical or biological features essential to the conservation of the species,'' within the geographical range currently occupied by the species;

(e) Where the ''physical or biological features essential to the conservation of the species,'' features are currently found;

(f) Information indicating how these species respond to natural and anthropogenic disturbances; and

(g) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change.

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(4) Information on the projected and reasonably likely impacts of climate change on Graham's and White River beardtongues and proposed critical habitat.

(5) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation; in particular, we seek information on any impacts on small entities or families, and the benefits of including or excluding areas that exhibit these impacts.

(6) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(7) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

(8) The likelihood of adverse social reactions to the designation of critical habitat and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

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

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(2) of the Act directs that critical habitat designations be made based on the best scientific data available and after consideration of economic and other relevant impacts.

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

We will post your entire comment—including your personal identifying information—on *http://www.regulations.gov.* You may request at the top of your document that we withhold personal information such as your street address, phone number, or email address from public review; however, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Utah Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

Elsewhere in today's **Federal Register**, we propose to list Graham's beardtongue and White River beardtongue as threatened species under the Act. Please see this proposed listing rule for a complete history of previous Federal actions for these two plants.

Background

We intend to discuss only those topics directly relevant to the designation of critical habitat in this proposed rule. For more information on Graham's beardtongue and White River beardtongue, refer to the proposed rule to list these species, also published in today's **Federal Register**.

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

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

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

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

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

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or

biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical and biological features within an area, we focus on the principal biological or physical constituent elements (primary constituent elements such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. Primary constituent elements are those specific elements of the physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. For example, an area currently occupied by the species but that was not occupied at the time of listing may be essential to the conservation of the species and may be included in the critical habitat designation. We designate critical habitat in areas outside the geographical area occupied by a species only when a designation limited to its range would be inadequate to ensure the conservation of the species.

Section 4(b)(2) of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we determine which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

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

Prudency Determination

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

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

(2) Such designation of critical habitat would not be beneficial to the species.

There is no imminent threat of take attributed to collection or vandalism for either of these species, and identification and mapping of critical habitat is not expected to initiate any such threat. In the absence of finding that the designation of critical habitat would increase threats to a species, if there are any benefits to a critical habitat designation, then a prudent finding is warranted. Here, the potential benefits of designation include: (1) Triggering consultation under section 7 of the Act, for actions in which there may be a Federal nexus where it would not otherwise occur because, for example, the critical habitat has become unoccupied or the occupancy is in question; (2) focusing conservation activities on the species' most essential habitat features and areas; and (3) providing educational benefits to State or County governments or private entities. Therefore, because we determined that the designation of critical habitat will not likely increase the degree of threat to the species and may provide some measure of benefit, we find that designation of critical habitat is prudent for Graham's beardtongue and White River beardtongue.

Critical Habitat Determinability

Having determined that designation is prudent, under section 4(a)(3) of the Act we must find whether critical habitat for these two species is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of the species and habitat characteristics where these species are located. This and other information represent the best scientific data available and led us to conclude that the designation of critical habitat is determinable for Graham's beardtongue and White River beardtongue.

Physical or Biological Features

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological features that are essential to the conservation of the species and which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

We derive the specific physical and biological features essential for Graham's beardtongue and White River beardtongue from studies of these species' habitat, ecology, and life history as described in our proposal to list the species as threatened published elsewhere in today's **Federal Register**.

Graham's Beardtongue

We determined that Graham's beardtongue requires the physical and biological features described below.

Space for Individual and Population Growth and for Normal Behavior

Plant Community. Graham's beardtongue is associated with a suite of species similarly adapted to xeric growing conditions on highly basic calcareous (containing calcium carbonate) shale soils (for more discussion, see ''Soils'' below). The vascular plant species most frequently associated with Graham's beardtongue include saline wild-rye (*Leymus salina*), spiny greasebush (*Glossopetalon spinescens* var. *meionandra),* Utah juniper (*Juniperus osteosperma*), shadscale saltbush (*Atriplex confertifolia*), twoneedle piñon (*Pinus edulis*), mountain thistle (*Cirsium scopulorum*), ephedra buckwheat (*Eriogonum ephedroides*), sulfur flower buckwheat (*Eriogonum umbellatum*), Colorado feverfew (*Parthenium ligulatum*), and Fremont's wild-buckwheat (*Eriogonum corymbosum*) (UNHP 2013, entire). Graham's beardtongue sites at higher elevation can be found within sparse piñon-juniper woodland dominated by Utah juniper and piñon pine. Graham's beardtongue sites at lower elevations are occasionally within a sparse desert shrubland dominated by shadscale saltbush.

Within these plant communities, Graham's beardtongue is found in open or sparsely vegetated, raw shale areas. Dwarf shrubs and cushion-like herbs make up the distinctive plant community type occurring on these calcareous shale sites. The following species are in part co-occurring with Graham's beardtongue and are similarly endemic and totally restricted to the Green River Geologic Formation: Dragon milkvetch (*Astragalus lutosus*), oilshale columbine (*Aquilegia barnebyi*), Barneby's thistle (*Cirsium barnebyi*), oilshale cryptantha (*Cryptantha barnebyi*), Graham's cryptantha (*Cryptantha grahamii*), Rollins' cryptantha (*Cryptantha rollinsii*), ephedra buckwheat, and White River beardtongue. Intact native plant communities immediately adjacent to Graham's beardtongue shale habitat are also important to prevent the encroachment of invasive weeds into this habitat (Service 2012b, entire).

The long-term viability of Graham's beardtongue is dependent on having a diverse plant community that supports pollinators, even if that plant community is sparse (see *Reproduction,* below). Flowering in Graham's beardtongue can be highly unreliable year-to-year, so pollinators of this species are likely to rely on nearby plants as a food source in years when Graham's beardtongue does not flower very much (Dodge and Yates 2008, p. 30). Therefore, based on the information above, we identify sparsely vegetated, barren shales with a diverse plant community dominated by the dwarf shrubs, cushion-like plants, and endemic species listed above to be a physical or biological feature for this species.

Slope and Topography. Throughout this proposed rule, we will refer to points, which are data that represent a physical location where one or more plants were observed on the ground. Point data are usually collected by GPS and stored as a ''record'' in a geographic information system (GIS) database. We mapped all plant points and grouped them into populations following standardized methods used by the national network of Natural Heritage Programs (see the proposed listing rule published elsewhere in today's **Federal Register**). About a third of all known Graham's beardtongue point locations in our files grow on slopes that are 10 degrees or less, with an average slope across all known points of 17.6 degrees (Service 2013, p. 2). Graham's beardtongue grows on slopes ranging from 0 to 73 degrees, although occurrences on steeper slopes are rare. Ninety-five percent of the known points are on slopes that are 40 degrees or less (GIS analysis 2013). Individuals of Graham's beardtongue usually grow on southwest-facing exposures (GIS analysis 2013). Therefore, we identify southwest-facing slopes of less than 40 degrees to be a physical or biological feature for this species.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Soils and Geology. Graham's beardtongue is found on highly basic soils derived from strata of the Green River Formation (Shultz and Mutz 1979, p. 40; Neese and Smith 1982, p. 64). These soils provide the root microhabitat essential for the species' growth and reproduction. These soils are very shallow with virtually no soil horizon development. The little soil above the consolidated calcareous shale rock of its parent material is usually very light clay derived from thinly bedded shale. The soil surface is covered with shale channers (thin, flat fragments up to 15 cm (6 in) long, usually less than 5 cm (2 in) across), underlain with larger shale fragments to a depth of 5 to 10 cm (2 to 4 in). The shale channers usually weather to a light tan color. Freshly broken channers exhibit a very dark brown interior due to the high organic content of the kerogen (the hydrocarbons from plant material that are the main source of oil in oil shales).

The majority of Graham's beardtongue populations and those with the largest numbers of plants occur on the oil-shale-rich Mahogany ledge, which is the outcrop of the richest oil shale bed of the Parachute Creek Member of the Green River Formation (Cashion 1967, p. 1; Shultz and Mutz 1979, p. 40). Water can collect (called ''perching'') on the Mahogany zone, and Graham's beardtongue may be adapted to access water through this natural process (Shultz and Mutz 1979, p. 40; Service 2012b, entire). The remaining occurrences are associated with upper members of the Green River Formation as described by Weiss and Witkind (Weiss *et al.* 1990, entire; Remy 1992, p. BB18). Therefore, based on the information above, we identify the upper Green River Formation oil shale soils as a physical or biological feature for this species.

Climate. Graham's beardtongue is adapted to a cold desert climate, with

most precipitation occurring in the spring and fall, and snow cover from December through March (Western Regional Climate Center 2013, entire). Winter snow cover may be important for this species by preventing severe frost damage to plants during the coldest months (Bannister *et al.* 2005, pp. 250–1). Temperatures can be extreme, with average summer highs around 34 degrees Celsius (°C) (93 degrees Fahrenheit (°F)) and average winter lows around −14 °C (7 °F) (Western Regional Climate Center 2013, entire). Graham's beardtongue seeds need at least 45 to 90 consecutive days at less than 4 °C (40 °F) in order to germinate (Wilcox *et al.* undated, p. 5). Average annual precipitation across the range of this species varies from 15 to 30 cm (6 to 12 in) (GIS analysis 2013). Because Graham's beardtongue evolved under these climatic conditions, we identify suitable precipitation—15 to 30 cm (6 to 12 in) with most precipitation in spring and fall and snow cover from December through March—and suitable temperatures—average winter low temperature of −14 °C (7 °F) and average summer high of 34 °C (93 (°F)) with at least 45 to 90 consecutive days less than 4 °C (40 °F)—as physical or biological features for this plant. These climatic conditions are likely influenced, in part, by elevation.

Cover or Shelter

Seeds and seedlings of Graham's beardtongue require the right microclimate for germination and establishment. However, we do not know the specific requirements of Graham's beardtongue for suitable microsites, nor are these features likely to be manageable as a physical or biological feature for this species. Suitable conditions for seed germination and seedling establishment are further described in the *Plant Community* and *Soils and Geology* sections, above.

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

Reproduction. Graham's beardtongue can produce seeds through self-pollination, but is much more reproductively successful when it is cross-pollinated (Dodge and Yates 2009, p. 14). At least 11 different pollinator species visit Graham's beardtongue (England 2003, entire; Lewinsohn and Tepedino 2007, p. 235; Dodge and Yates 2008, p. 31), and there is no evidence of pollinator limitation for this species (Dodge and Yates 2008, p. 14). Pollinators include small to medium-sized solitary bees in the following genera: *Agopostemon, Anthophora, Lasioglossum,* and *Osmia.* A *Penstemon*-specializing wasp, *Pseudomasaris vespoides,* is likely the most common pollinator for *P.grahamii* (Lewinsohn and Tepedino 2005, p. 17). Larger bumblebees, such as *Bombus huntii* (Hunt's bumblebee), are also thought to pollinate Graham's beardtongue (England 2003, entire). These bees are mostly ground and twig-nesting bees (Dodge and Yates 2008, pp. 30–1).

Pollinators generally need a diversity of native plants whose blooming times overlap, nesting and egg-laying sites with appropriate nesting materials, undisturbed shelter for overwintering, and a landscape free of poisonous chemicals (Shepherd *et al.* 2003, pp. 49–50). Intact native plant communities that connect populations of rare plants are also important, as anthropogenic disturbances may be a barrier to pollinator movement (Bhattacharya *et al.* 2003, pp. 42–43). As previously described (see Space for Individual and Population Growth and for Normal Behavior, above), Graham's beardtongue individuals are sparsely distributed and flowering can be irregular. Populations of other beardtongue species in areas adjacent to Graham's beardtongue occupied habitat are essential to support the pollinating wasp's (*Pseudomasaris vespoides*) population during periods of poor Graham's beardtongue floral availability (Lewinsohn and Tepedino 2007, p. 236). Protecting these species and intact native plant communities maintains connectivity between areas, allowing pollinators to move between or within populations. These beardtongue species include thickleaf beardtongue (*Penstemon pachyphyllus*), Fremont's beardtongue (*P. fremontii*), Rocky Mountain beardtongue (*P. strictus*), and White River beardtongue (*P. scariosus,* not to be confused with *P. scariosus* var. *albifluvis*). Because the evidence presented above indicates that pollinators are necessary to maximize successful reproduction of Graham's beardtongue, we have identified pollinators and their associated habitats as a physical or biological feature for this species.

In general, pollinators will focus on small areas where floral resources are abundant; however, occasional longer distance pollination will occur. Typically, pollinators fly distances that are in relation to their body sizes, with smaller pollinators flying shorter distances than larger pollinators (Greenleaf *et al.* 2007, pp. 589–96). Using available information, we extrapolated likely travel distances of Graham's beardtongue pollinators based on their medium to large body sizes. The body size of Graham's beardtongue pollinators allows for travel distances of approximately 700 m (2,297 ft) (Service 2012a, p. 8).

If a pollinator can fly long distances, pollen transfer is also possible across these distances. In the interest of protecting pollinators of Graham's beardtongue, and thus genetic flow between individuals and reproduction for this species, we identified a 700-m (2,297-ft) area beyond occupied habitat to conserve the pollinators essential for plant reproduction. These pollinator habitat areas have the added benefit of potentially providing more habitat for Graham's beardtongue to expand into, and add protection against encroachment by invasive weeds or other disturbance effects.

Habitats Protected from Disturbance or Representative of the Historic Geographical and Ecological Distributions of the Species

Intact Soils. Anthropogenic habitat fragmentation within Graham's beardtongue occupied habitat has not been severe. However, fragmentation is likely to increase in the future without additional protection. As an oil shale endemic, Graham's beardtongue is limited to a specific soil type and structure (see *Soils and Geology,* above). It is likely that once Graham's beardtongue habitat is disturbed through soil-disturbing activities such as oil shale development (see I. Energy Exploration and Development in our proposed listing rule published elsewhere in today's **Federal Register**), it is essentially lost to the species. In addition, restoration of native species in arid climates is difficult (Monsen 2004, p. 29). Maintaining intact shale soils where Graham's beardtongue grows is important to ensure viability of the species. We have identified intact soils within Graham's beardtongue occupied habitat and nearby plant communities is an important physical or biological feature for this species.

White River Beardtongue

We have determined that White River beardtongue requires the physical and biological features described below.

Space for Individual and Population Growth and for Normal Behavior

Plant Community. White River beardtongue is found in semi-barren openings of mixed desert shrub and piñon-juniper communities. The vascular plant species most frequently associated with White River beardtongue include Barneby's thistle, saline wild-rye, spiny greasebush, Utah juniper, twoneedle piñon, shadscale saltbush, Dragon milkvetch, Barneby's

thistle, Barneby catseye, rayless tansy-aster (*Xanthisma grindelioides*), and Indian ricegrass (*Achnatherum hymenoides*) (UNHP 2013, entire).

Occasionally White River beardtongue is found with oilshale columbine and Graham's beardtongue (Franklin 1995, p. 5). Many of the other oil shale endemics found growing with Graham's beardtongue can be found with White River beardtongue, although White River beardtongue grows in slightly less sparse areas (see *Plant Community* for Graham's beardtongue, above, for a complete list (Neese and Smith 1982, p. 58)). We consider sparsely vegetated, barren shale dominated by the dwarf shrubs, cushion-like plants, and endemic species listed above to be a physical or biological feature for this species.

Slope and Topography. About one-fifth of all known point locations of White River beardtongue are on slopes of 10 degrees or less, with an average slope for all known points of 19.2 degrees (Service 2013, p. 3). This is somewhat steeper than the slopes on which Graham's beardtongue grows, although 95 percent of the known points are on slopes that are 33 degrees or less (GIS analysis 2013). Field observations also indicate that White River beardtongue grows on steeper slopes than Graham's beardtongue (Brunson 2012; Service 2012), but this hypothesis should be tested. White River beardtongue individuals usually grow on southwest-facing exposures (GIS analysis 2013). Therefore, we identify southwest-facing slope of less than 33 degrees to be a physical or biological feature for this species.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Soils and Geology. White River beardtongue is restricted to calcareous soils derived from oil shale barrens of the Parachute Creek Member and other members of the Green River Formation in the Uinta Basin of northeastern Utah and adjacent Colorado. White River beardtongue is also associated with the Mahogany ledge (see *Soils and Geology* for Graham's beardtongue, above, for more details). White River beardtongue overlaps with Graham's beardtongue at some locations, and the soil types are basically the same, although White River beardtongue can also be found in red, fine-textured, shallow, soils. Based on the information above, we identify the Green River Formation oil shale soils as a physical or biological feature for this species.

Climate. White River beardtongue is adapted to the same climate as Graham's beardtongue—a cold desert climate, with most precipitation occurring in the spring and fall, and snow cover from December through March (Western Regional Climate Center 2013, entire). Winter snow cover may be important for this species as it can prevent severe frost damage to plants during the winter months (Bannister *et al.* 2005, p. 250–1). Temperatures can be extreme, with average summer highs around 34 degrees Celsius (°C) (93 degrees Fahrenheit (°F)) and average winter lows around −14 °C (7 °F) (Western Regional Climate Center 2013, entire). White River beardtongue seeds need at least 45 to 90 consecutive days at less than 4 °C (40 °F) to germinate (Wilcox *et al.* undated, p. 5). Average annual precipitation across the range of this species varies from 15 to 30 cm (6 to 12 in) (GIS analysis 2013). Because White River beardtongue evolved under these climatic conditions, we identify suitable precipitation—15 to 30 cm (6 to 12 in) with most precipitation in spring and fall and snow cover from December through March—and suitable temperatures—average winter low temperature of −14 °C (7 °F) and average summer high of 34 °C (93 (°F)) with at least 45 to 90 consecutive days less than 4 °C (40 °F)—as physical or biological features for this plant. These climatic conditions are likely influenced, in part, by elevation.

Cover or Shelter

Seeds and seedlings of White River beardtongue require the right microclimate for germination and establishment. However, we do not know the specific requirements of White River beardtongue for suitable microsites, nor are these features likely to be manageable as a physical or biological feature for this species. Suitable conditions for seed germination and seedling establishment are further described in the *Plant Community* and *Soils and Geology* sections, above.

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

Reproduction. Although White River beardtongue can produce seed through self-pollination, cross-pollination produces the most seed and fruits (Lewinsohn and Tepedino 2007, p. 234). At least 15 different pollinator species visit White River beardtongue, and there is no evidence of pollinator limitation for this species (Lewinsohn and Tepedino 2007). Pollinators include small to medium native solitary bees including *Anthophora, Ceratina* (carpenter bees), *Halictus* (sweat bees), *Lasioglossum,* and *Osmia* species. *Pseudomasaris vespoides* (wasp) also pollinates White River beardtongue. These bees are mostly ground and twig-nesting bees (Dodge and Yates 2008, p. 30–1).

Pollinators generally need a diversity of native plants whose blooming times overlap, nesting and egg-laying sites with appropriate nesting materials, undisturbed shelter for overwintering, and a landscape free of poisonous chemicals (Shepherd *et al.* 2003, pp. 49–50). Intact native plant communities that connect populations of rare plants are also important, as anthropogenic disturbances may be a barrier to pollinator movement (Bhattacharya *et al.* 2003, p. 42–3). Flowering in White River beardtongue is not as unreliable as that for Graham's beardtongue, although maintaining plant communities adjacent to occupied habitat are still important to maintain a diversity of pollinators (Tepedino et al. 1997, p. 246) and to maintain connectivity between areas, allowing pollinators to move between sites within each population. Because the evidence presented above indicates that pollinators are necessary to maximize successful reproduction of White River beardtongue, we consider pollinators and their associated habitats as a physical or biological feature for this species.

Like Graham's beardtongue, we extrapolated likely travel distances of White River beardtongue pollinators based on their small to medium body sizes. A notable exception to pollinators observed on White River beardtongue is that *Bombus* spp. and other large bees do not visit these flowers. This observation is not surprising given the relatively smaller size of the flower compared to other beardtongues like Graham's beardtongue. In the interest of protecting pollinators of White River beardtongue, and thus genetic flow between individuals and reproduction for this species, we identified a 500-m (1,640-ft) area beyond occupied habitat to conserve the pollinators essential for plant reproduction. We based this distance on the fact that small to medium species visit White River beardtongue, and these species are likely capable of travelling a distance of 500 m (1,640 ft) between plants or from nesting sites to plants. These pollinator habitat areas have the added benefit of potentially providing more habitat for White River beardtongue to expand into, and add protection against encroachment by invasive weeds or other disturbance effects.

Habitats Protected From Disturbance or Representative of the Historic Geographical and Ecological Distributions of the Species

Intact Soils. Anthropogenic habitat fragmentation within White River beardtongue occupied habitat has not been severe. However, fragmentation is likely to increase in the future without sufficient protection. As an oil shale endemic, White River beardtongue is limited to a specific soil type and structure (see *Soils and Geology,* above). It is likely that once White River beardtongue's habitat is disturbed through soil-removing activities such as oil shale development, it is essentially lost to the species (see I. Energy Exploration and Development in our proposed listing rule published elsewhere in today's **Federal Register**). In addition, restoration of native species in arid climates is difficult (Monsen 2004, p. 29). Maintaining intact shale soils where White River beardtongue grows is important to ensure viability of the species. We have identified intact soils within White River beardtongue occupied habitat and nearby plant communities as an important physical or biological feature for this species.

Primary Constituent Elements for Graham's Beardtongue

Under the Act and its implementing regulations, we are required to identify the physical or biological features essential to the conservation of Graham's beardtongue in areas occupied at the time of listing, focusing on the features' primary constituent elements. We consider primary constituent elements to be those specific elements of the physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes, we determine that the primary constituent elements specific to Graham's beardtongue are:

(1) *Plant community.*

a. Barren areas with little, but diverse, plant cover.

b. Presence of dwarf shrubs and cushion-like, oil shale endemic plants, including Dragon milkvetch (*Astragalus lutosus*), oilshale columbine (*Aquilegia barnebyi*), Barneby's thistle (*Cirsium barnebyi*), oilshale cryptantha (*Cryptantha barnebyi*), Graham's cryptantha (*Cryptantha grahamii*), Rollins' cryptantha (*Cryptantha rollinsii*), ephedra buckwheat (*Eriogonum ephedroides*), and White River beardtongue (*Penstemon scariosus* var. *albifluvis*).

c. Intact, surrounding, native plant community to support pollinators and protect from the encroachment of invasive weeds and other potential threats.

(2) *Slopes and topography.*

a. Southwest- to western-facing slopes.

b. Slopes of less than 40 degrees; average slope of 17.6 degrees.

(3) *Soils and geology.*

a. Parachute Creek Member and other upper members of the Green River Geologic Formation.

b. Appropriate soil morphology characterized by shallow soils with virtually no soil horizon development, with a surface usually covered by broken shale channers or light clay derived from the thinly bedded shale.

c. Intact soils with minimal anthropogenic disturbance (at or below current levels) within Graham's beardtongue occupied habitat and nearby plant communities.

(4) *Climate.* A cold desert climate with the same conditions under which the species evolved and is typical for the area. Annual precipitation of 15 to 30 cm (6 to 12 inches) with most precipitation in spring and fall and snow cover from December through March. Average winter low temperature of −14 °C (7 °F) and average summer high of 34 °C (93 (°F)) with at least 45 to 90 consecutive days less than 4 °C (40 °F).

(5) *Habitat for pollinators.*

a. Ground and twig nesting areas for pollinators. A diverse mosaic of native plant communities that include flowering plants that provide nectar and pollen for a wide array of pollinator species.

b. Connectivity between areas allowing pollinators to move from one site to the next within each population.

c. A 700-m (2,297-ft) area beyond occupied habitat to conserve the pollinators essential for plant reproduction.

Primary Constituent Elements for White River Beardtongue

Under the Act and its implementing regulations, we are required to identify the physical or biological features essential to the conservation of White River beardtongue in areas occupied at the time of listing, focusing on the features' primary constituent elements. We consider primary constituent elements to be those specific elements of the physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species. In addition, primary constituent elements for White River beardtongue are nearly identical in some cases to those for Graham's beardtongue. We note explicitly where differences exist.

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes, we determine that the primary constituent elements specific to White River beardtongue are:

(1) *Plant community.*

a. Barren areas with little, but diverse, plant cover.

b. Presence of dwarf shrubs and cushion-like, oil shale endemic plants, including Dragon milkvetch (*Astragalus lutosus*), oilshale columbine (*Aquilegia barnebyi*), Barneby's thistle (*Cirsium barnebyi*), oilshale cryptantha (*Cryptantha barnebyi*), Graham's cryptantha (*Cryptantha grahamii*), Rollins' cryptantha (*Cryptantha rollinsii*), ephedra buckwheat (*Eriogonum ephedroides*), and occasionally Graham's beardtongue (*Penstemon grahamii*).

c. Intact, surrounding, native plant community to support pollinators and protect from the encroachment of invasive weeds and other potential threats.

(2) *Slopes and topography.*

a. South- to southwest-facing slopes.

b. Slopes of less than 33 degrees; average slope of 19.2 degrees.

(3) *Soils and geology.*

a. Parachute Creek Member and other upper members of the Green River Geologic Formation.

b. Appropriate soil morphology characterized by shallow soils with virtually no soil horizon development, with a surface usually covered by broken shale channers or light clay derived from the thinly bedded shale.

c. Intact soils with minimal anthropogenic disturbance (at or below current levels) within White River beardtongue occupied habitat and nearby plant communities.

(4) *Climate.* A cold desert climate with the same conditions under which the species evolved and is typical for the area. Annual precipitation of 15 to 30 cm (6 to 12 inches) with most precipitation in spring and fall and snow cover from December through March. Average winter low temperature of −14 °C (7 °F) and average summer high of 34 °C (93 (°F)) with at least 45 to 90 consecutive days less than 4 °C (40 °F).

(5) *Habitat for pollinators.*

a. Ground and twig nesting areas for pollinators. A diverse mosaic of native plant communities that include flowering plants that provide nectar and

pollen for a wide array of pollinator species.

b. Connectivity between areas allowing pollinators to move from one site to the next within each population.

c. A 500-m (1,640-ft) area beyond occupied habitat to conserve the pollinators essential for plant reproduction.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection. A detailed discussion of the current and future threats to Graham's beardtongue and White River beardtongue can be found in the proposed listing rule, which is published elsewhere in today's **Federal Register**. The primary threats impacting the physical and biological features essential to the conservation of Graham's beardtongue and White River beardtongue that may require special management considerations or protection within the proposed critical habitat include, but are not limited to, energy exploration and development, the cumulative impacts of increased energy development, livestock grazing, invasive weeds, small population sizes, and climate change (for a complete discussion, please see our proposed listing rule published elsewhere in today's **Federal Register**).

Special management considerations or protections are required within critical habitat areas to address these threats. Management activities that could ameliorate these threats include (but are not limited to): Develop regulations and agreements to balance conservation with energy development and minimize its effects in Graham's beardtongue and White River beardtongue habitat; avoid placing roads and energy facilities in habitats that would affect these species or their pollinators; minimize livestock use that disturb the soil or seeds; minimize habitat fragmentation; establish permanent conservation easements or land acquisitions to protect the species on non-federal lands; and eliminate or avoid activities that alter the morphology of shale slopes.

These management activities will protect the primary constituent elements for the species by preventing the loss of habitat and individuals, preserving these species' habitats and soils, maintaining native plant communities and natural levels of competition, and protecting these species' reproduction by protecting their pollinators.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. We review available information pertaining to the habitat requirements of the species. In accordance with the Act and its implementing regulation at 50 CFR 424.12(e), we consider whether designating additional areas—outside those currently occupied as well as those occupied at the time of listing—are necessary to ensure the conservation of the species. We are not proposing to designate any areas outside the geographical area currently occupied by Graham's beardtongue or White River beardtongue because occupied areas are sufficient for the conservation of these species.

Conserving imperiled species can be accomplished by following the three Rs: representation, resiliency, and redundancy (Shaffer and Stein 2000). Representation, or preserving some of everything, means conserving not just a species but its associated plant communities, pollinators, and pollinator habitats. We addressed representation through our primary constituent elements for each species as discussed above, specifically by ensuring sufficient habitat for their pollinators. Resiliency and redundancy ensure there is enough of a species so that it can survive into the future. Resiliency means ensuring that the habitat is adequate for a species and its representative components. Redundancy ensures an adequate number of sites and individuals. This methodology has been widely accepted as a reasonable conservation methodology (Tear *et al.* 2005, p. 841).

Critical habitat was identified by compiling all known locations for each species and delineating suitable habitat adjacent to the known locations to provide a sufficient area for pollinator habitat. Pollinator habitat areas for Graham's beardtongue were delineated using a 700-m (2,297-ft) distance from known locations. Pollinator habitat areas for White River beardtongue were delineated using a 500-m (1,640-ft) distance from known locations. These distances were based on how far the primary pollinators can travel for each of the species (see *Reproduction* above for each species for more information).

Given the total population numbers of each species, we believe the areas we propose to designate as critical habitat for Graham's beardtongue and White River beardtongue would also preserve redundancy and resilience. As described in our listing proposed rule, published elsewhere in today's **Federal Register**, White River beardtongue has 11,423 known plants distributed in 7 populations, and Graham's beardtongue has 31,702 known plants distributed in 24 populations. We conclude that both species are currently viable, but that their viability will be substantially decreased in the future, mainly because of the threat of energy development. We consider a species viable if it can persist over the long term, thus avoiding extinction. A species can be conserved (and is thus viable) if it has representation, resiliency, and redundancy (Shaffer and Stein 2000), as explained earlier.

As described in our listing proposed rule, published elsewhere in today's **Federal Register**, the total population of White River beardtongue may be as high as 25,000 plants (Franklin 1995, entire); additional surveys are likely to locate more plants and additional populations within the boundaries of the proposed critical habitat. Our proposed critical habitat includes all verified populations of both species and additional suitable habitats into which the species populations can expand. Therefore, we conclude that our proposed critical habitat boundaries would be sufficient to ensure species viability for both species over the long term.

When determining proposed critical habitat boundaries, we did not attempt to avoid developed areas such as lands covered by buildings, pavement, and other structures because minimal development exists within habitat for these two species. Although any developed areas lack the physical or biological features necessary for Graham's and White River beardtongues, both of these species grow in remote areas that have not yet experienced considerable development and, for the most part, have few developed roads crossing through them at this time. However, any developed lands occurring inside the critical habitat boundaries shown on the maps of this proposed rule are excluded by text in this proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a federal action involving already developed areas would not, in most cases, trigger section 7 consultation.

We delineated the proposed critical habitat unit boundaries for Graham's beardtongue and White River beardtongue using the following steps:

(1) We mapped all plant points on file (using ArcMap 10.0) at the Utah Natural

Heritage Program (UNHP), Colorado Natural Heritage Program (CNHP), and the BLM (see the proposed listing rule published elsewhere in today's **Federal Register** for more details). These data consist of point locations collected over several decades by organizations, agencies, or consultants.

(2) For Graham's beardtongue, we examined Bing Maps Aerial imagery (provided with ArcMap 10.0 software) and excluded all GIS locations that were collected prior to the year 2000, and that were farther than 50 m (164 ft) from suitable habitat. Locations collected prior to 2000 within 50 m (164 ft) of suitable habitat were retained in our dataset (GIS analysis 2013). If it was not clear from looking at the aerial imagery whether the point was in suitable habitat, we erred on the side of the species and included the point in our proposed critical habitat areas.

Through this process, we removed 15 point locations from our Graham's beardtongue dataset. Most of the historical points that we removed overlapped or were very close to recently collected data. We removed a historical point from Carbon County from our proposed critical habitat area that has not been revisited for more than 30 years, even though this is the only point in that county. We acknowledge that there is potential habitat in the area, but this point needs to be revisited to confirm whether the species is present near this location.

For White River beardtongue, we did not remove any historical points because they all appeared to be within or adjacent to suitable habitat. The exception is 16 points from herbaria records ranging from the vicinity of Bitter Creek west to Willow Creek, which we have not confirmed as White River beardtongue and therefore do not include in proposed critical habitat for this plant.

(3) For Graham's beardtongue data from Utah, we created proposed critical habitat areas by including all pollinator habitat within 700 m (2,297 ft) around each point. We then dissolved boundaries between the overlapping polygons. We did not have as complete a dataset for Colorado as for Utah, so we combined all of the point and polygon data we received from the CNHP, and calculated pollinator habitat areas within 700 m (2,297 ft) (see Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring, above). We also created our own polygon to incorporate suitable habitat on Raven Ridge, which we identified via aerial imagery.

We followed a similar protocol for White River beardtongue, but instead created pollinator habitat areas within 500 m (1,640 ft) around all points. We did this for both Utah and Colorado points.

(4) Critical habitat units are not one contiguous unit; rather, each contains several polygons. Each polygon is a subunit containing the PCEs within the larger unit that contain the essential features and are occupied. Proposed units are separated from each other by either relatively great distance or by geographic features. Units for Graham's beardtongue are essentially the same as in the January 19, 2006, proposed rule (71 FR 3158), although the proposed unit boundaries are expanded slightly to include new data. Proposed units for White River beardtongue are delineated based on geographic features that separated polygons.

We are proposing for designation as critical habitat lands that we have determined are occupied and contain sufficient elements of physical or biological features to support life-history processes essential for the conservation of Graham's and White River beardtongues.

The proposed critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document in the rule portion. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points that the maps are based on available to the public at *http://www.regulations.gov* at Docket No. FWS–R6–ES–2013–0082, on our Internet site at *http://www.fws.gov/utahfieldoffice,* and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT** above).

Proposed Critical Habitat Designation

Graham's beardtongue

We are proposing five units as critical habitat for Graham's beardtongue, which are the same units we proposed in 2006, although the boundaries of each unit have changed (71 FR 3158, January 19, 2006). The critical habitat units we describe below constitute our best assessment of areas that meet the definition of critical habitat for Graham's beardtongue. The five units we propose as critical habitat are: (1) Sand Wash, (2) Seep Ridge, (3) Evacuation Creek, (4) White River, and (5) Raven Ridge. All of these units contain occupied Graham's beardtongue habitat. The approximate acreage and land ownership status of each proposed critical habitat unit is shown in Table 1.

TABLE 1—ACREAGE AND LAND OWNERSHIP STATUS FOR THE PROPOSED CRITICAL HABITAT UNITS FOR GRAHAM'S BEARDTONGUE.

Area Estimates Reflect All Land Within Critical Habitat Unit Boundaries.

Critical habitat unit	Land ownership	Size of unit
1. Sand Wash	BLM	3,056 ha (7,550 ac).
	State	27 ha (66 ac).
	Private	76 ha (189 ac).
	Total	3,159 ha (7,805 ac).
2. Seep Ridge	BLM	6,649 ha (16,430 ac).
	State	2,650 ha (6,549 ac).
	Private	862 ha (2,131 ac).
	Total	10,162 ha (25,110 ac).
3. Evacuation Creek	BLM	3,879 ha (9,586 ac).
	State	1,417 ha (3,502 ac).
	Private	1,632 ha (4,033 ac).
	Total	6,929 ha (17,122 ac).
4. White River	BLM	2,243 ha (5,542 ac).

TABLE 1—ACREAGE AND LAND OWNERSHIP STATUS FOR THE PROPOSED CRITICAL HABITAT UNITS FOR GRAHAM'S BEARDTONGUE.—Continued

Area Estimates Reflect All Land Within Critical Habitat Unit Boundaries.

Critical habitat unit	Land ownership	Size of unit
	State	401 ha (991 ac).
	Private	2,047 ha (5,059 ac).
	Total	4,691 ha (11,592 ac).
5. Raven Ridge	BLM	2,257 ha (5,578 ac).
	Private	304 ha (752 ac).
	Total	2,562 ha (6,330 ac).
Total Across All Units	BLM	18,084 ha (44,686 ac).
	State	4,495 ha (11,108 ac).
	Private	4,921 ha (12,164 ac).
	Total	27,502 ha (67,959 ac)

Note: Area sizes may not sum due to rounding.

We present brief descriptions of the proposed units, and reasons why they meet the definition of critical habitat for Graham's beardtongue, below. The units are listed in order geographically west to east, and north to south.

Unit 1: Sand Wash

The Sand Wash Unit is the westernmost proposed critical habitat unit found in the vicinity of Sand Wash in southwestern Uintah County and adjacent Duchesne County, Utah. This unit contains nine subunits, and each subunit is occupied and contains all of the physical and biological features essential to the conservation of the species, including outcrops of the Parachute Creek member and other upper members of the Green River Geologic Formation, the appropriate plant community including other oil shale endemics, a climate with 15 to 30 cm (6 to 12 in.) in annual precipitation, and intact pollinator habitat. This unit is occupied and includes approximately 62 Graham's beardtongue locations representing at least 1,156 plants and seven populations. This unit is the most geographically isolated from the other units and has minor differences in flower and vegetation color from the remainder of Graham's beardtongue populations (Shultz and Mutz 1979, p. 41). These color differences may indicate that this unit, due to geographic isolation, is genetically divergent from the remainder of the species' population.

Factors affecting Graham's beardtongue within this unit, regardless of land ownership, include energy development, domestic livestock and native grazing and trampling, and road impacts, including road maintenance, increased fugitive dust, and spreading invasive weeds. A majority of this unit is managed by the BLM, where Graham's beardtongue receives some protection via a signed conservation agreement and as a BLM special status species (see Factor D in our proposed listing rule published elsewhere in today's **Federal Register** for more details).

No oil and gas wells are located within the Sand Wash Unit, although 66 percent of the area is leased for oil and gas. Private mineral rights do not require leases to develop and so are not included in the total. Oil shale and tar sand leases discussed include only Federal leases of oil shale and tar sands. None of the critical habitat in this unit falls within designated oil shale or tar sands areas. Nearly the entire unit is leased as grazing allotments. At least one class B (graveled) road and several class D roads pass through this unit. Class B roads are highways, roads, or streets designated and maintained by a county. Class D roads are unmaintained. OHV use and unauthorized collection have not been documented within the Sand Wash unit, although a major road runs through this unit and these stressors could potentially occur here. A cohesive management strategy will be necessary to reduce threats and protect the physical and biological features essential to the conservation of the species.

Unit 2: Seep Ridge

The Seep Ridge Unit occurs approximately 17 miles east of the Sand Wash Unit, in the vicinity of Buck, Sunday School, and Klondike Canyons near the Seep Ridge Road in south central Uintah County, Utah. This unit contains ten subunits, and each subunit is occupied and contains all of the physical and biological features essential to the conservation of the species including outcrops of the Parachute Creek member and other upper members of the Green River Geologic Formation, the appropriate plant community including other oil shale endemics, a climate with 20 to 30 cm (8 to 12 in) in annual precipitation, and intact pollinator habitat. This unit is occupied and includes approximately 1,442 Graham's beardtongue points representing at least 8,017 plants and seven populations.

Factors affecting Graham's beardtongue within this unit include energy development, domestic livestock and native grazing and trampling, and road impacts, including road maintenance, increased fugitive dust, and spreading invasive weeds. The Seep Ridge Unit is managed mostly by the BLM, although it includes the most State and Institutional Trust Lands (SITLA) lands managed by the State of Utah of any of the proposed units. The SITLA land in this unit contains occupied and suitable habitat (GIS analysis 2013). To date, SITLA has not provided protection to Graham's beardtongue on the lands it manages in the Uinta Basin where energy development exists.

Four producing gas wells occur across all ownerships within the Seep Ridge Unit (GIS analysis 2013). An additional 13 gas wells are in various states of abandonment (plugged and abandoned, operations suspended, or shut-in) but may have resulted in the loss of plants and their habitat when they were active. Approximately 30 percent of the Seep Ridge Unit is leased for traditional oil and gas development, and 38 percent falls within oil shale and tar sands lease areas (some of these lease areas overlap current oil and gas leases). Combined, about 56 percent of the Seep Ridge Unit is leased or open for leasing for energy development.

Several roads cross through the Seep Ridge Unit, including four class B (graveled) roads and at least eight class D roads. Seep Ridge Road crosses through a portion of one population of

Graham's beardtongue. This road was paved and widened within occupied Graham's beardtongue habitat in 2012, and 33 Graham's beardtongue individuals were salvaged or transplanted as a result (see our proposed listing rule published elsewhere in today's **Federal Register** for more details). The entirety of this unit is leased as grazing allotments. OHV use and unauthorized collection have not been documented within the Seep Ridge unit, although several major roads run through this unit and these stressors could potentially occur here. A cohesive management strategy will be necessary to reduce threats and protect the physical and biological features essential to the conservation of the species.

Unit 3: Evacuation Creek

The Evacuation Creek Unit occurs approximately 6 miles east of the Seep Ridge Unit, in the Asphalt Wash and Evacuation Creek drainages near the abandoned Gilsonite mining towns of Dragon and Rainbow. This unit is in southeastern Uintah County, Utah, and adjacent Rio Blanco County, Colorado. The Evacuation Creek Unit is occupied and contains the most individuals of Graham's beardtongue: Approximately 1,375 points representing at least 15,077 plants and three populations. This unit contains four subunits, and each subunit is occupied and contains all of the physical and biological features essential to the conservation of the species including outcrops of the Parachute Creek member and other upper members of the Green River Geologic Formation, the appropriate plant community including other oil shale endemics, a climate with 20 to 30 cm (8 to 12 in) in annual precipitation, and intact pollinator habitat.

Factors affecting Graham's beardtongue within this unit include energy development, domestic livestock and native grazing and trampling, and road impacts, including road maintenance, increased fugitive dust, and spreading invasive weeds. Most of this unit is managed by the BLM, with some private and State lands. One producing gas well lies within the Evacuation Creek unit. An additional 17 wells are plugged and abandoned but may have resulted in the loss of plants and their habitat when they were active. Approximately 36 percent of the Evacuation Creek Unit is leased for traditional oil and gas development, and 39 percent falls within oil shale and tar sands lease areas (some of these lease areas overlap current oil and gas leases). Combined, about 69 percent of the Evacuation Creek Unit is leased or open for leasing for energy development. The entire unit is leased as grazing allotments. Several roads cross through the Evacuation Creek Unit, including three class B (graveled) roads and at least eight class D roads. A cohesive management strategy will be necessary to reduce threats and protect the physical and biological features essential to the conservation of the species.

Unit 4: White River

The White River Unit occurs approximately 3 miles north of the Evacuation Creek unit in Hells Hole and Weaver Canyons immediately south of the White River. This unit in eastern Uintah County, Utah, includes approximately 1,565 points representing at least 7,385 plants and one population. This unit contains four subunits, and each subunit is occupied and contains all of the physical and biological features essential to the conservation of the species including outcrops of the Parachute Creek member and other upper members of the Green River Geologic Formation, the appropriate plant community including other oil shale endemics, suitable elevation ranges of 1,484 to 2,113 m (4,869 to 6,932 ft), a climate with 20 to 30 cm (8 to 12 in.) in annual precipitation, and intact pollinator habitat.

Factors affecting Graham's beardtongue within this unit include energy development, domestic livestock and native grazing and trampling, and road impacts, including road maintenance, increased fugitive dust, and spreading invasive weeds. Approximately 50 percent of this unit is managed by the BLM. The other 50 percent is privately and State owned. No producing wells occur within the White River Unit. Approximately 27 percent of the White River Unit is leased for traditional oil and gas development, and 22 percent falls within oil shale and tar sands lease areas (some of these lease areas overlap current oil and gas leases). Combined, about 43 percent of the White River Unit is leased or open for leasing for energy development. Although this critical habitat unit has less area available for oil shale and tar sands leasing than other critical habitat units, this unit includes a proposed oil shale mining project (Enefit) that is likely to impact 20 percent of the known individuals of Graham's beardtongue (see our proposed listing rule published elsewhere in today's **Federal Register** for more details).

Overall, the most substantial threat within the White River Unit is oil shale development. About half of this unit is in private or State ownership that is likely to be mined for oil shale in the future. Direct loss of habitat or individuals within this critical habitat unit is also likely to have impacts on the Evacuation Creek and Raven Ridge Units, as the White River Unit serves as an important connection between the Utah and Colorado populations of Graham's beardtongue.

This entire unit is leased as grazing allotments. A small portion of a class B (graveled) road and several class D roads pass through the White River Unit, but this unit is more remote than the other critical habitat units. A cohesive management strategy will be necessary to reduce threats and protect the physical and biological features essential to the conservation of the species.

Unit 5: Raven Ridge

The Raven Ridge Unit occurs approximately 4 miles northeast of the White River Unit along the west flank of Raven Ridge and north of the White River between Raven Ridge and the Utah border in extreme western Rio Blanco County, Colorado. This unit includes approximately 11 points representing at least 33 plants and four populations. Although population estimates within this unit in 2006 were 200 plants, more recent surveys have not located as many individuals. This unit contains three subunits, and each subunit is occupied and contains all of the physical and biological features essential to the conservation of the species including outcrops of the Parachute Creek member and other upper members of the Green River Geologic Formation, the appropriate plant community including other oil shale endemics, a climate with 15 to 30 cm (6 to 12 in.) in annual precipitation, and intact pollinator habitat.

Factors affecting Graham's beardtongue within this unit include energy development, domestic livestock and native grazing and trampling, and road impacts, including road maintenance, increased fugitive dust, and spreading invasive weeds. This unit is primarily managed by the BLM, with some private lands.

Sixty percent of this unit is within the BLM Raven Ridge Area of Critical Environmental Concern (ACEC), which was established to protect listed, candidate, and BLM-sensitive species. The ACEC restricts motorized travel to existing roads and trails and includes a no surface occupancy (NSO) stipulation for new oil and gas leases within the ACEC (BLM 1997, p. 2–19, 2–44). Although the Raven Ridge ACEC sets out goals for a management plan for the

area, BLM has not completed a formal management plan for this area.

No producing wells occur within the Raven Ridge Unit, although two abandoned wells may have resulted in the loss of plants and their habitat when they were active. Approximately 27 percent of the Raven Ridge Unit is leased for traditional oil and gas development, but none of this unit falls within oil shale and tar sands lease areas. An additional 30 percent of the Raven Ridge ACEC was proposed for leasing in 2013, but the lease sale is now deferred for further analysis (BLM 2013, entire). The entirety of this unit is leased as grazing allotments. One class B road passes through the Raven Ridge Unit. Overall, a cohesive, unit-wide management strategy is still needed to protect Graham's beardtongue across the entire unit.

White River Beardtongue

We are proposing three units as critical habitat for White River beardtongue. The critical habitat areas we describe below constitute our best assessment of areas that meet the definition of critical habitat for White River beardtongue. The three units we propose as critical habitat are: (1) North Evacuation Creek, (2) Weaver Ridge, and (3) South Raven Ridge. All of these units are occupied by White River beardtongue. The approximate acreage of each proposed critical habitat unit is shown in Table 2.

TABLE 2—ACREAGE AND LAND OWNERSHIP STATUS FOR THE PROPOSED CRITICAL HABITAT UNITS FOR WHITE RIVER BEARDTONGUE.

Area Estimates Reflect All Land Within Critical Habitat Unit Boundaries.

Critical habitat unit	Land ownership	Size of unit
1. North Evacuation Creek	BLM	1,368 ha (3,382 ac).
	State	185 ha (457 ac).
	Private	1,415 ha (3,498 ac).
	Total	2,969 ha (7,336 ac).
2. Weaver Ridge	BLM	788 ha (1,946 ac).
	State	651 ha (1,608 ac).
	Private	1,397 ha (3,452 ac).
	Total	2,836 ha (7,006 ac).
3. South Raven Ridge	BLM	191 ha (472 ac).
	Private	41 ha (101 ac).
	Total	232 ha (573 ac).
Total Across All Units	BLM	2,347 ha (573 ac).
	State	836 ha (2,853 ac).
	Private	2,853 ha (7,051 ac).
	Total	6,036 ha (14,914 ac).

Note: Area sizes may not sum due to rounding.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for White River beardtongue, below. The units are listed in order geographically south to north. There is no obvious geographical or biological barrier between the Evacuation Creek and White River critical habitat units. We chose to separate these units based on splitting the known Utah populations into a northern half and a southern half. We also discuss where White River beardtongue critical habitat overlaps Graham's beardtongue critical habitat—approximately 54 percent of all proposed White River beardtongue critical habitat overlaps with Graham's beardtongue's proposed critical habitat.

Unit 1: North Evacuation Creek

The North Evacuation Creek Unit occurs about 11 km (7 miles) south and east of Bonanza, Utah, in the Asphalt Wash and Evacuation Creek drainages near the abandoned Gilsonite mining towns of Dragon and Rainbow. This unit is in southeastern Uintah County, Utah, and adjacent Rio Blanco County, Colorado. The North Evacuation Creek Unit contains approximately 259 points representing at least 6,820 plants and three populations. Fifty-three percent of this unit overlaps with Graham's beardtongue proposed critical habitat. This unit contains nine subunits, and each subunit is occupied and contains all of the physical and biological features essential to the conservation of the species including outcrops of the Parachute Creek member and other upper members of the Green River Geologic Formation, the appropriate plant community including other oil shale endemics, a climate with 20 to 30 cm (8 to 12 in) in annual precipitation, and intact pollinator habitat.

Factors affecting White River beardtongue within this unit include energy development, domestic livestock and native grazing and trampling, and road impacts, including road maintenance, increased fugitive dust, and spreading invasive weeds. This unit is split almost evenly by BLM and private landownership, with a small amount of State land. Four plugged and abandoned wells are located within the North Evacuation Creek Unit but may have resulted in the loss of plants and their habitat when they were active. Approximately 10 percent of the North Evacuation Creek Unit is leased for traditional oil and gas development, and 39 percent falls within oil shale and tar sands lease areas, with very little overlap between the two lease types. Additionally, a majority of the critical habitat areas included in this unit occurs on private land and is therefore not included in these lease totals. Combined, about 49 percent of the North Evacuation Creek unit is leased or open for leasing for energy development. The entire portion of this unit on BLM land is grazed. Several roads cross through the North Evacuation Creek unit, including four graveled, class B roads. A cohesive management strategy will be necessary

to reduce threats and protect the physical and biological features essential to the conservation of the species.

Unit 2: Weaver Ridge

The Weaver Ridge Unit occurs directly east and southeast of Bonanza, Utah, and immediately north of the North Evacuation Creek Unit. This unit is in southeastern Uintah County, Utah, and adjacent Rio Blanco County, Colorado. The Weaver Ridge Unit includes approximately 319 points representing at least 4,575 plants and 3 populations. Fifty-five percent of this unit overlaps with proposed Graham's beardtongue critical habitat. This unit contains thirteen subunits, and each subunit is occupied and contains all of the physical and biological features essential to the conservation of the species including outcrops of the Parachute Creek member and other upper members of the Green River Geologic Formation, the appropriate plant community including other oil shale endemics, a climate with 15 to 30 cm (6 to 12 in.) in annual precipitation, and intact pollinator habitat.

Factors affecting White River beardtongue within this unit include energy development, domestic livestock and native grazing and trampling, and road impacts, including road maintenance, increased fugitive dust, and spreading invasive weeds. Most of this unit is privately owned, with some BLM and State land. Although most of the critical habitat within this unit occurs on private land, most of the known plant points occur on Federal lands. This is not surprising, as private lands are not typically surveyed, and we expect that additional surveys conducted on private lands would count many more individuals of White River beardtongue within this unit.

Two producing wells and three approved well locations are located within the Weaver Ridge Unit. Approximately 31 percent of the Weaver Ridge Unit is leased for traditional oil and gas development, and 19 percent falls within oil shale and tar sands lease areas. Combined, about 45 percent of the Weaver Ridge Unit is leased or, in the case of oil shale and tar sands development, designated for leasing for energy development. The entire portion of the unit on BLM lands is grazed. A paved State road, the Bonanza Highway, crosses just through the edge of a critical habitat area within the Weaver Ridge Unit, and another paved class B road skirts another area. A cohesive management strategy will be necessary to reduce threats and protect the physical and biological features essential to the conservation of the species.

Unit 3: South Raven Ridge

The South Raven Ridge Unit occurs about 10 km northeast of the Weaver Ridge Unit and about 11 km west of Rangely, Colorado, on the southern portion of Raven Ridge overlooking the White River. This unit is entirely within Rio Blanco County, Colorado. The South Raven Ridge Unit is the smallest unit for this species and contains 6 points representing at least 28 plants and 1 population. Fifty-nine percent of this unit overlaps with Graham's beardtongue critical habitat. This unit has all the physical and biological features essential to the conservation of the species including outcrops of the Parachute Creek member and other upper members of the Green River Geologic Formation, the appropriate plant community including other oil shale endemics, a climate with 15 to 30 cm (6 to 12 in) in annual precipitation, and intact pollinator habitat.

Factors affecting White River beardtongue within this unit include domestic livestock and native grazing and trampling, and some road impacts, including road maintenance, increased fugitive dust, and spreading invasive weeds. No oil or gas wells are located within the South Raven Ridge Unit. This unit is mostly on BLM lands with some private lands. Approximately 20 percent of the South Raven Ridge Unit is leased for traditional oil and gas development. None of this unit falls within oil shale and tar sands lease areas. All of the BLM-managed lands in this unit are grazed. No major roads cross through this unit. Sixty-four percent of this unit is within the Raven Ridge ACEC (discussed above), with restricted motorized travel and NSO stipulations (BLM 1997, p. 2–19, 2–44). As described above, although the Raven Ridge ACEC sets out goals for a management plan for the area, BLM has not completed a formal management plan for this area. Overall, threats occur across the entire unit, and thus a cohesive management strategy will be necessary to reduce threats and protect the physical and biological features essential to the conservation of the species.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our regulatory definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F.3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.,* 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical or biological features to an extent that appreciably reduces the conservation value of critical habitat for Graham's beardtongue and White River beardtongue. As discussed above, the role of critical habitat is to support life-history needs of the species and provide for the conservation of these species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for Graham's beardtongue or White River beardtongue. These activities include, but are not limited to:

(1) Actions that have the potential to appreciably degrade or destroy Graham's beardtongue or White River beardtongue habitat and primary constituent elements. Such activities could include, but are not limited to, energy development, road construction and maintenance, OHV use, and intensive livestock grazing. These activities could eliminate or reduce the habitat necessary for the growth, reproduction, and establishment of these species;

(2) Alteration of naturally existing hydrology by redirection of sheet flow or water ''perching'' (to which the species may be adapted, discussed above in *Soils and Geology* for Graham's beardtongue) from areas adjacent to occupied habitat;

(3) Compaction of soil through the establishment of new wellpads, roads, pipelines, or trails;

(4) Activities that foster the introduction of nonnative vegetation, particularly noxious weeds, or create conditions that encourage the growth of nonnatives. These activities could include, but are not limited to: Supplemental feeding of livestock, ground disturbance associated with energy development, roads, and other soil-disturbing activities; and

(5) Indirect effects that appreciably decrease habitat value or quality (e.g., energy development near critical habitat that leads to disturbance, erosion, herbicide and pesticide use that could impair pollinators, and changes to drainage patterns, soil stability, and vegetative community composition).

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. The INRMPs must to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws. There are no Department of Defense lands within our proposed critical habitat designation.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if she determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless she determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, we may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise her discretion to exclude the area only if such exclusion would not result in the extinction of the species.

Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we are preparing an analysis of the economic impacts of the proposed critical habitat designation and related factors. All of the proposed critical habitat units contain private lands, Federal lands with oil and gas leases, and grazing permits. Several State-owned parcels are included in some units where oil and gas development occurs. The economic analysis will estimate the economic impact of a potential designation of critical habitat on these activities.

During the development of a final designation, we will consider economic impacts based on information in our economic analysis, public comments, and other new information, and areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are where a national security impact might exist. In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for Graham's beardtongue and White River beardtongue are not owned or managed by the Department of Defense or Department of Homeland Security, and, therefore, we anticipate no impact on national security. Consequently, the Secretary is not intending to exercise her discretion to exclude any areas from the final designation based on impacts on national security.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors, including whether the landowners have developed any habitat conservation plans (HCPs) or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation. There are no tribal lands included in our proposed critical habitat designation.

In preparing this proposal, we have determined that there are no HCPs or other management plans for Graham's beardtongue and White River beardtongue, and the proposed designation does not include any tribal lands or trust resources. We anticipate no impact on tribal lands, partnerships, or HCPs from this proposed critical habitat designation. Accordingly, the Secretary does not intend to exercise her discretion to exclude any areas from the final designation based on other relevant impacts.

Peer Review

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our critical habitat designation is based on scientifically sound data, and analyses. We have invited these peer reviewers to comment during this public comment period.

We will consider all comments and information received during this comment period on this proposed rule during our preparation of a final determination. Accordingly, the final decision may differ from this proposal.

Public Hearings

Section 4(b)(5) of the Act provides for one or more public hearings on this proposal, if requested. Requests must be received within 45 days after the date of publication of this proposed rule in the **Federal Register**. Such requests must be sent to the address shown in the **FOR FURTHER INFORMATION CONTACT** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include such businesses as manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and forestry and logging operations with fewer than 500 employees and annual business less than $7 million. To determine whether small entities may be affected, we will consider the types

of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

Importantly, the incremental impacts of a rule must be both significant and substantial to prevent certification of the rule under the RFA and to require the preparation of an initial regulatory flexibility analysis. If a substantial number of small entities are affected by the proposed critical habitat designation, but the per-entity economic impact is not significant, the Service may certify. Likewise, if the per-entity economic impact is likely to be significant, but the number of affected entities is not substantial, the Service may also certify.

Under the RFA, as amended, and following recent court decisions, Federal agencies are only required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself, and not the potential impacts to indirectly affected entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried by the Agency is not likely to adversely modify critical habitat. Therefore, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Under these circumstances, it is our position that only Federal action agencies will be directly regulated by this designation. Therefore, because Federal agencies are not small entities, the Service may certify that the proposed critical habitat rule will not have a significant economic impact on a substantial number of small entities.

We acknowledge, however, that in some cases, third-party proponents of the action subject to permitting or funding may participate in a section 7 consultation, and thus may be indirectly affected. We believe it is good policy to assess these impacts if we have sufficient data before us to complete the necessary analysis, whether or not this analysis is strictly required by the RFA. While this regulation does not directly regulate these entities, in our draft economic analysis we will conduct a brief evaluation of the potential number of third parties participating in consultations on an annual basis in order to ensure a more complete examination of the incremental effects of this proposed rule in the context of the RFA.

In conclusion, we believe that, based on our interpretation of directly regulated entities under the RFA and relevant case law, this designation of critical habitat will only directly regulate Federal agencies which are not by definition small business entities. As such, we certify that, if promulgated, this designation of critical habitat would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required. However, though not necessarily required by the RFA, in our draft economic analysis for this proposal, we will consider and evaluate the potential effects to third parties that may be involved with consultations with Federal action agencies related to this action.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Graham's beardtongue and White River beardtongue both occur in areas with energy development activity. Existing well pads and proposed oil shale development projects are within proposed critical habitat units. On Federal lands, entities conducting energy-related activities would need to consult within areas designated as critical habitat. We are deferring our finding until the draft economic analysis has been completed. We will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule would significantly or uniquely affect small governments. Small governments will be affected only to the extent that any programs having Federal funds, permits, or other authorized activities must ensure that their actions will not adversely affect the critical habitat. Therefore, a Small Government Agency

Plan is not required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment if appropriate.

Takings—Executive Order 12630

In accordance with Executive Order 12630 (''Government Actions and Interference with Constitutionally Protected Private Property Rights''), we have analyzed the potential takings implications of designating critical habitat for the Graham's beardtongue and White River beardtongue in a takings implications assessment. Based on the best available information, the takings implications assessment concludes that this designation of critical habitat for the Graham's beardtongue and the White River beardtongue does not pose significant takings implications. However, we will further evaluate this issue as we develop our final designation, and review and revise this assessment as warranted.

Federalism—Executive Order 13132

In accordance with Executive Order 13132 (Federalism), this proposed rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in Utah and Colorado. The designation of critical habitat in areas occupied by Graham's beardtongue and White River beardtongue may impose nominal additional regulatory restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments because the areas that contain the physical and biological features essential to the conservation of the species are more clearly defined, and the elements of the features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in along-range planning (rather than having them wait for case-by-case section 7 consultation to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, the rule identifies the elements of physical or biological features essential to the conservation of the species. The designated areas of critical habitat are presented on maps, and the rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. 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.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).] However, when the range of the species includes States within the Tenth Circuit, such as that of Graham's beardtongue and White River beardtongue, under the Tenth Circuit ruling in *Catron County Board of Commissioners* v. *U.S. Fish and Wildlife Service,* 75 F.3d 1429 (10th Cir. 1996), we will undertake a NEPA analysis for critical habitat designation and notify the public of the availability of the draft environmental assessment for this proposal when it is finished.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

We determined that there are no tribal lands that were occupied by Graham's beardtongue or White River beardtongue at the time of listing that contain the features essential for conservation of the species, and no tribal lands unoccupied by Graham's beardtongue or White River beardtongue that are essential for the conservation of these species. Therefore, we are not proposing to designate critical habitat for Graham's beardtongue or White River beardtongue on tribal lands.

Clarity of the Rule

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

(1) Be logically organized;

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

(3) Use clear language rather than jargon;

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

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES**

section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

References Cited

A complete list of references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* under Docket No. FWS–R6–ES–2013–0082 and upon request from the Utah Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this package are the staff members of the Utah Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

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

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

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

■ 2. In § 17.96, amend paragraph (a) by adding entries for ''*Penstemon grahamii* (Graham's beardtongue)'' and ''*Penstemon scariosus* var. *albifluvis* (White River beardtongue)'' in alphabetical order under Family Plantaginaceae, to read as follows:

§ 17.96 Critical habitat—plants.

* * * * *

(a) *Flowering plants.*

* * * * *

Family Plantaginaceae: *Penstemon grahamii* (Graham's beardtongue)

(1) Critical habitat units are depicted for Uintah and Duchesne Counties, Utah, and Rio Blanco County, Colorado, on the maps below.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of Graham's beardtongue consist of:

(i) *Plant community.*

(A) Barren areas with little, but diverse, plant cover.

(B) Presence of dwarf shrubs and cushion-like, oil shale endemic plants, including Dragon milkvetch (*Astragalus lutosus*), oilshale columbine (*Aquilegia barnebyi*), Barneby's thistle (*Cirsium barnebyi*), oilshale cryptantha (*Cryptantha barnebyi*), Graham's cryptantha (*Cryptantha grahamii*), Rollins' cryptantha (*Cryptantha rollinsii*), ephedra buckwheat (*Eriogonum ephedroides*), and White River beardtongue (*Pensemon scariosus* var. *albifluvis*).

(C) Intact, surrounding, native plant community to support pollinators and protect from the encroachment of invasive weeds and other potential threats.

(ii) *Slopes and topography.*

(A) Southwest- to western-facing slopes.

(B) Slopes of less than 40 degrees; average slope of 17.6 degrees.

(iii) *Soils and geology.*

(A) Parachute Creek Member and other upper members of the Green River Geologic Formation.

(B) Appropriate soil morphology characterized by shallow soils with virtually no soil horizon development, with a surface usually covered by broken shale channers or light clay derived from the thinly bedded shale.

(C) Intact soils with minimal anthropogenic disturbance (at or below current levels) within Graham's beardtongue occupied habitat and nearby plant communities.

(iv) *Climate.* A cold desert climate with the same conditions under which the species evolved and is typical for the area. Annual precipitation of 15 to 30 cm (6 to 12 inches) with most precipitation in spring and fall and snow cover from December through March. Average winter low temperature of −14 °C (7 °F) and average summer high of 34 °C (93 (°F)) with at least 45 to 90 consecutive days less than 4 °C (40 °F).

(v) *Habitat for pollinators.*

(A) Ground and twig nesting areas for pollinators. A diverse mosaic of native plant communities that include flowering plants that provide nectar and pollen for a wide array of pollinator species.

(B) Connectivity between areas allowing pollinators to move from one site to the next within each population.

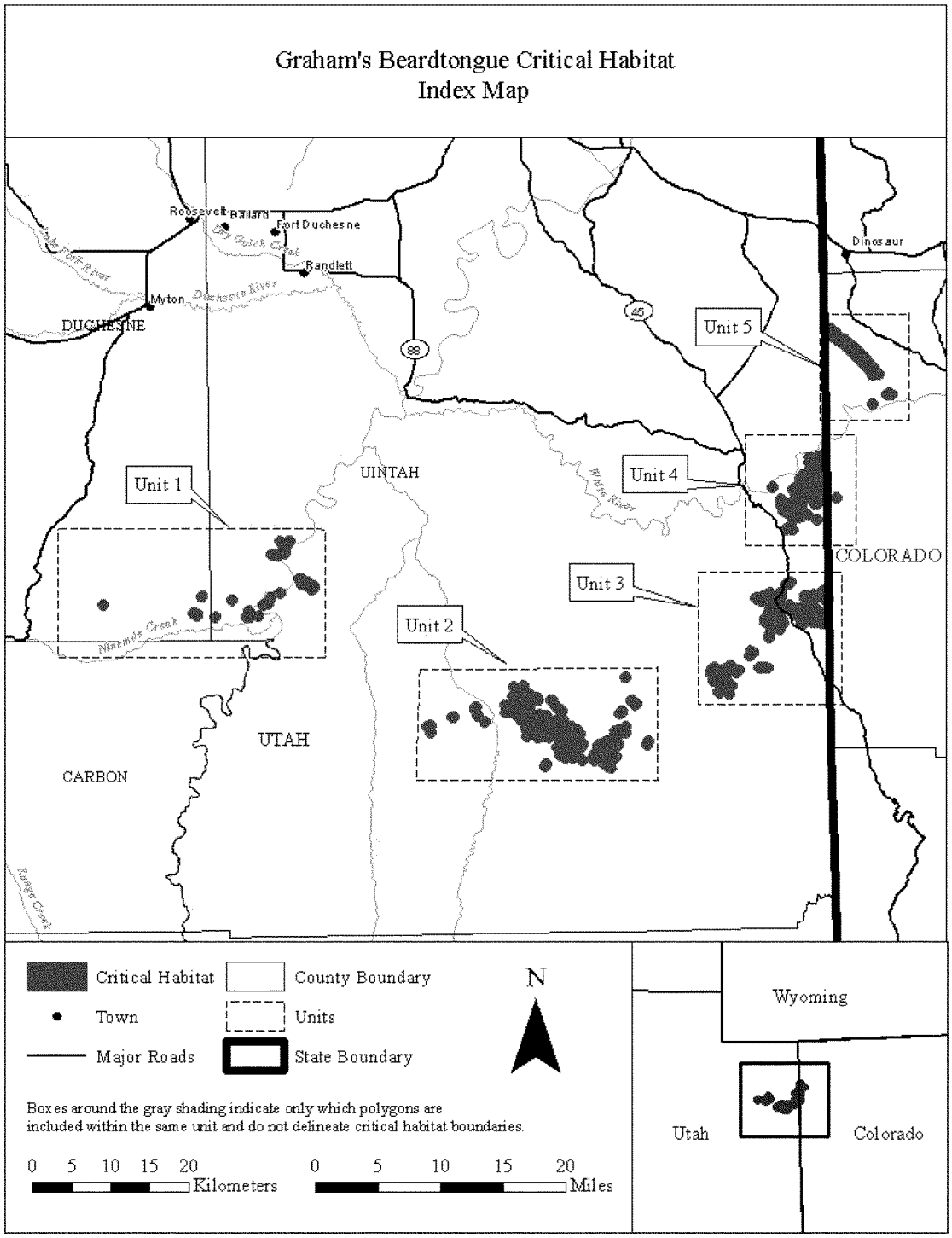
(C) A 700-m (2,297-ft) area beyond occupied habitat to conserve the pollinators essential for plant reproduction.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this entry.

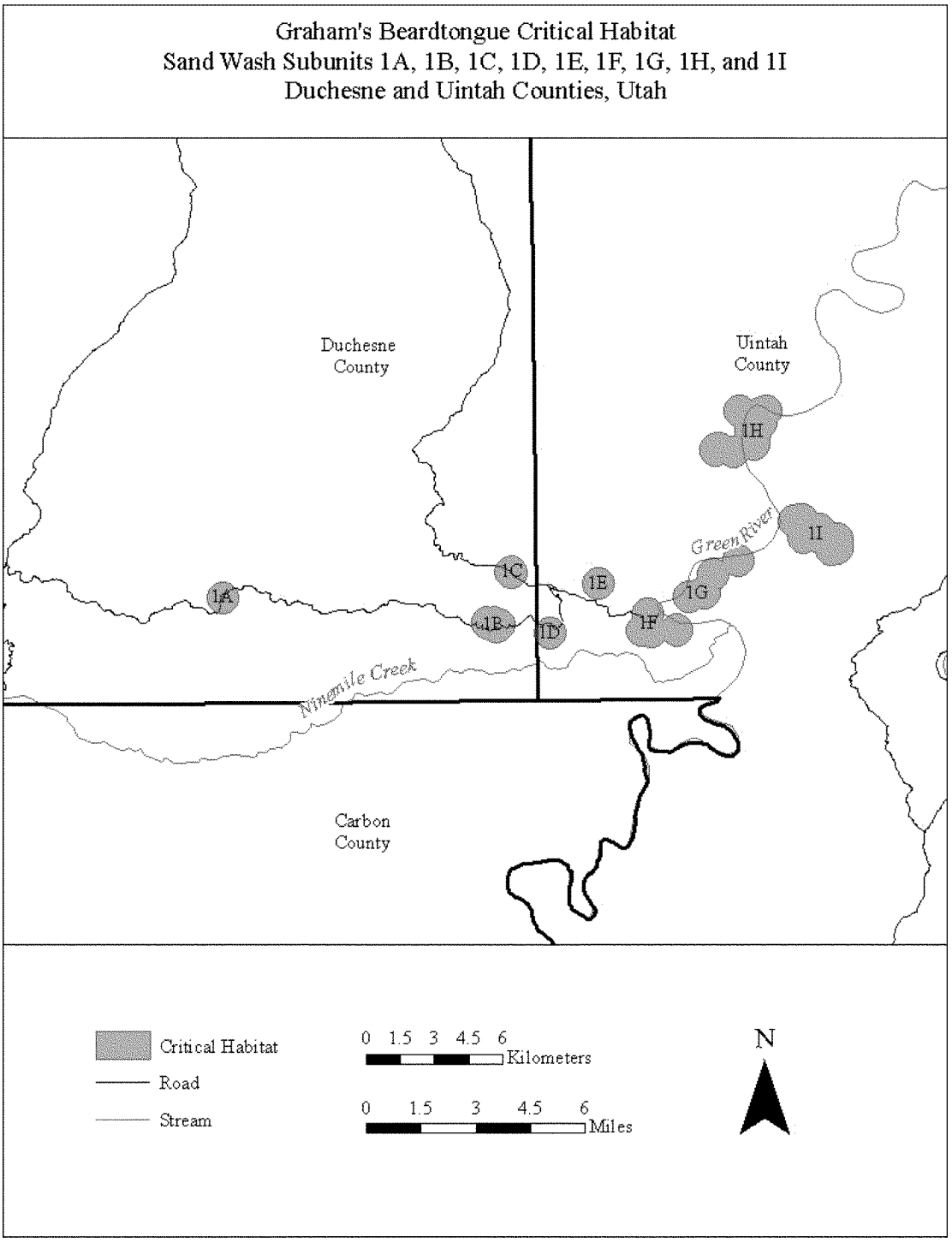
(4) *Critical habitat map units.* Data layers defining map units were created by using satellite imagery (Bing 2012 Aerial Imagery basemap provided with ArcMap10, NAIP 2011 imagery). Units were mapped using NAD 83 Universal Transverse Mercatore (UTM), Zone 12 N coordinates. Location information came from a wide array of sources. A habitat model created by the Colorado Natural Heritage Program was also used. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. On the index map, critical habitat is delineated by gray shading. Boxes around the gray shading indicate only which polygons are included within the same unit and do not delineate critical habitat boundaries. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet site (*http://www.fws.gov/utahfieldoffice/*), on *http://www.regulations.gov* at Docket No. FWS–R6–ES–2013–0082, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Index map follows:

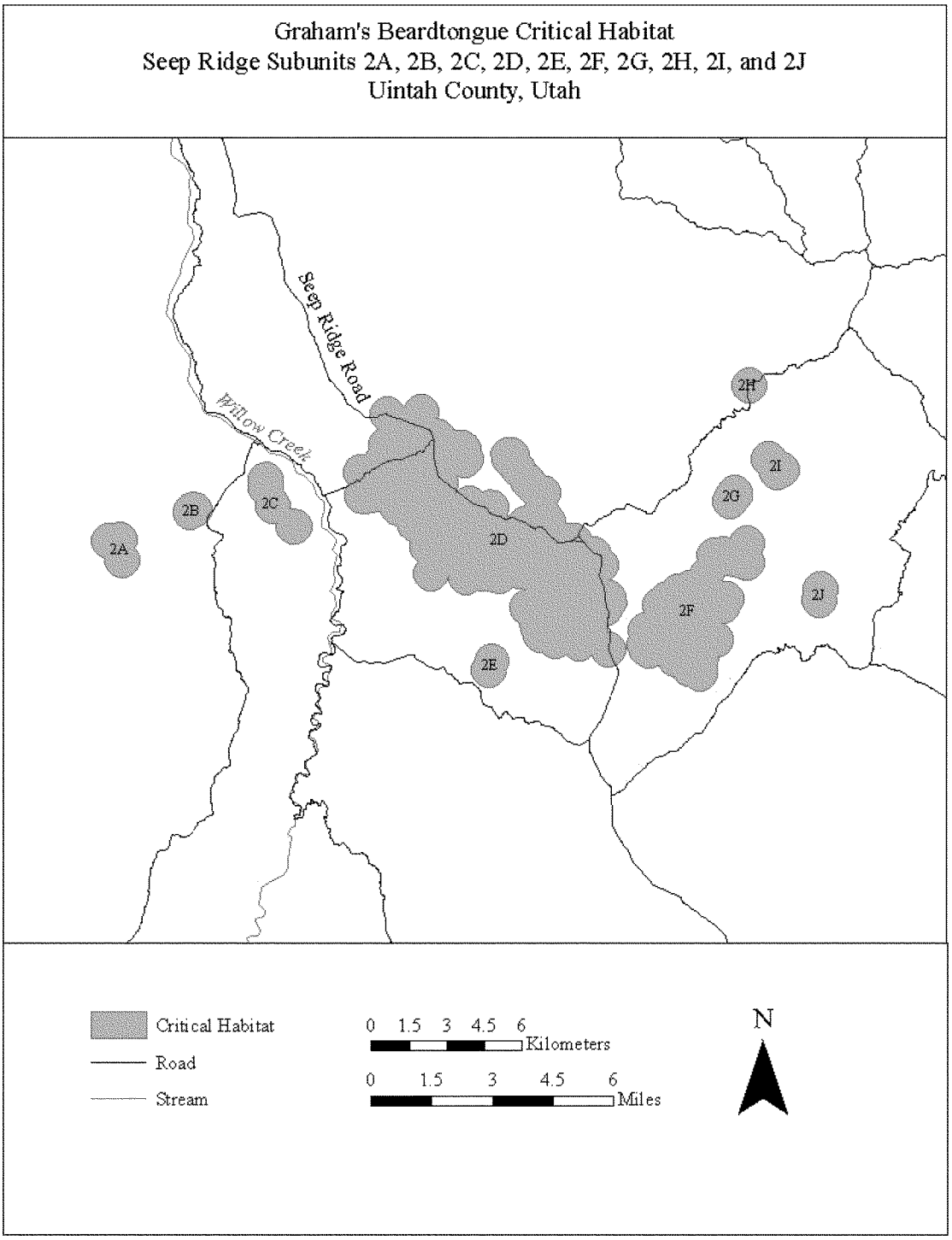
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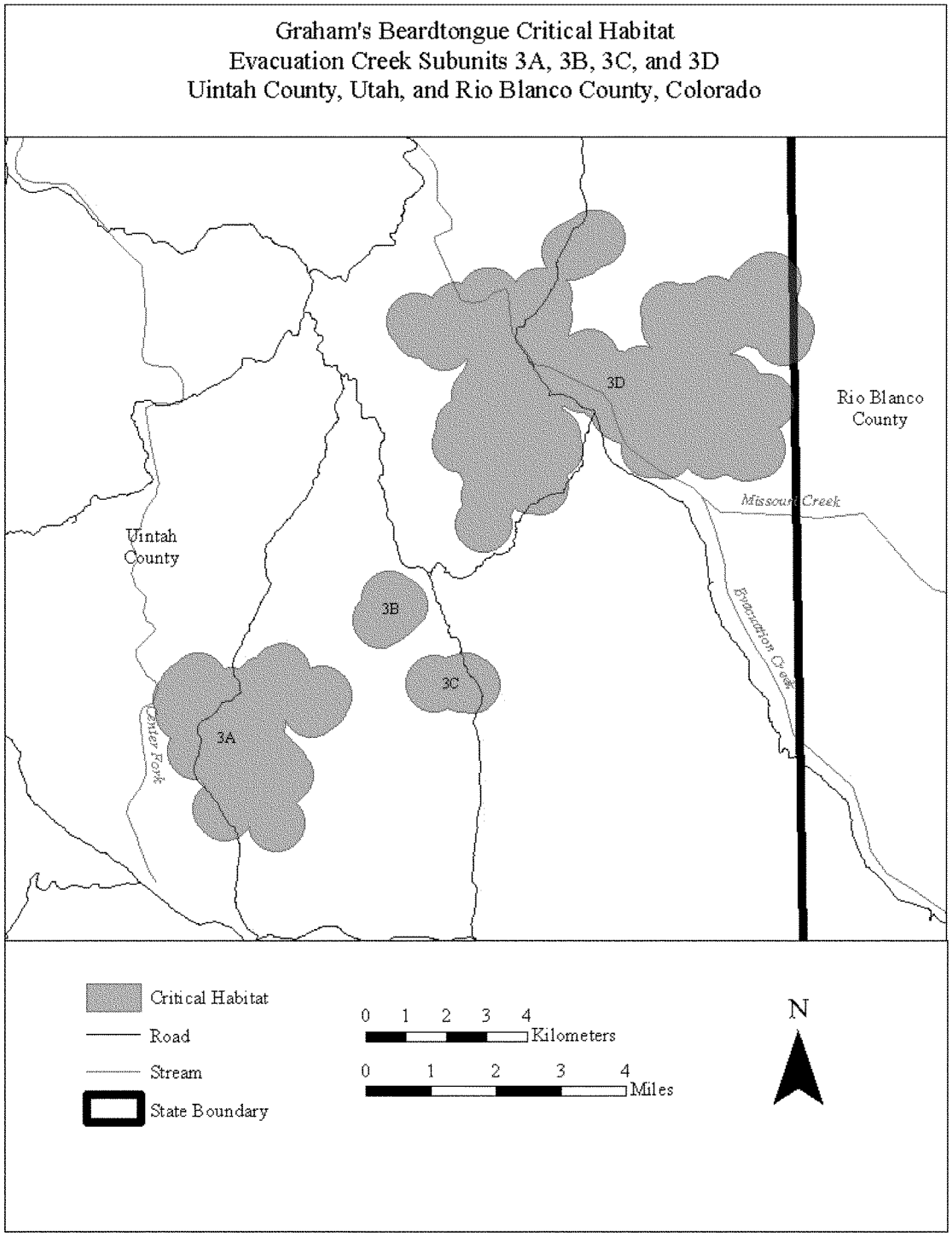
(6) Unit 1: Sand Wash, Duchesne and Uintah Counties, Utah. Map of Subunits 1A, 1B, 1C, 1D, 1E, 1F, 1G, 1H, and 1I follows:



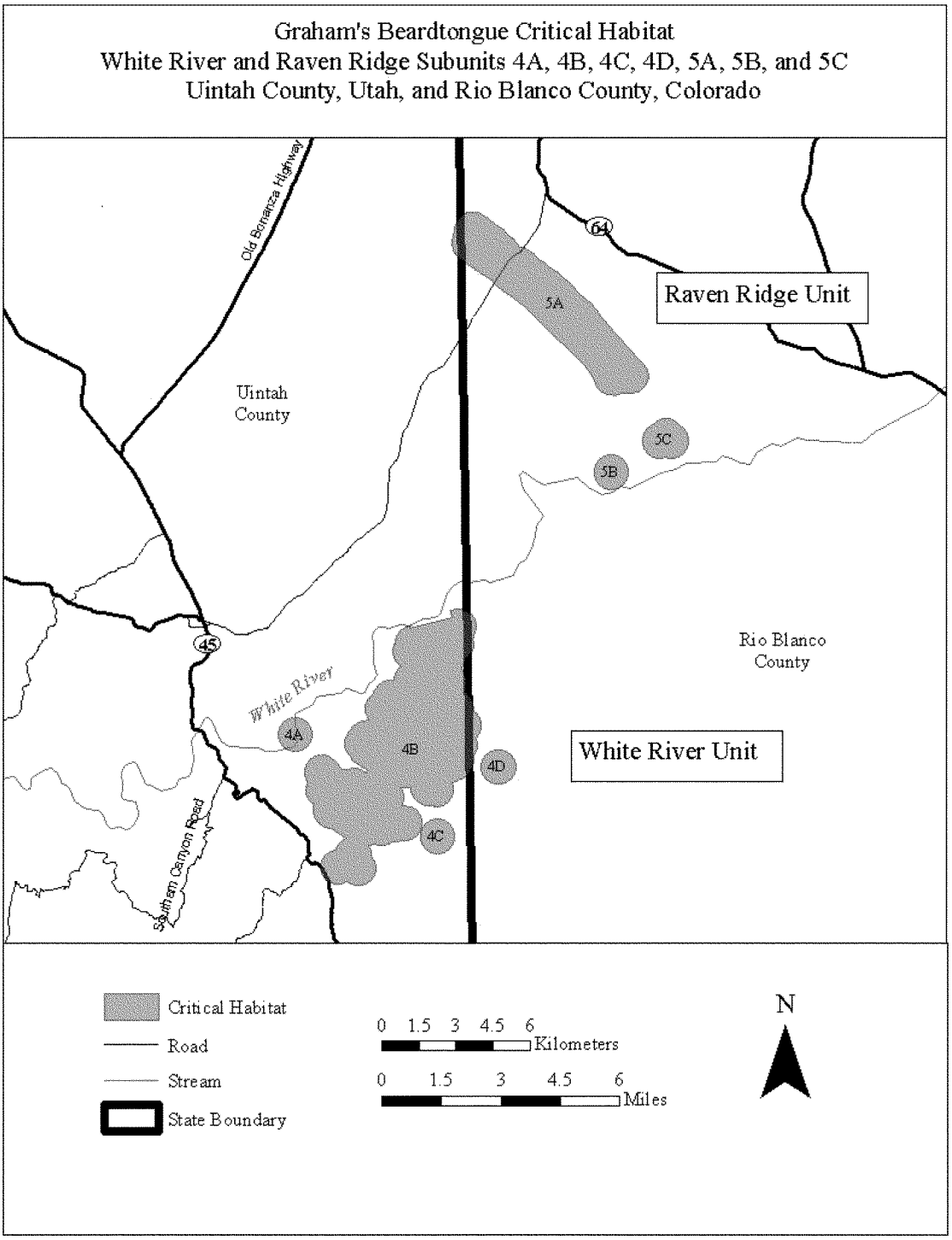
(7) Unit 2: Seep Ridge, Uintah County, Utah. Map of Subunits 2A, 2B, 2C, 2D, 2E, 2F, 2G, 2H, 2I, and 2J follows:



(8) Unit 3: Evacuation Creek, Uintah County, Utah, and Rio Blanco County, Colorado. Map of Subunits 3A, 3B, 3C, and 3D follows:



(9) Unit 4: White River, Uintah County, Utah. Map of Subunits 4A, 4B, 4C, 4D, 5A, 5B, and 5C follows:



(10) Unit 5: Raven Ridge, Rio Blanco County, Colorado. Map of Unit 5 is provided at paragraph (a)(9) of this entry.

Family Plantaginaceae: *Penstemon scariosus* var. *albifluvis* (White River beardtongue)

(1) Critical habitat units are depicted for Uintah County, Utah, and Rio Blanco County, Colorado, on the maps below.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of White River beardtongue consist of:

(i) *Plant community.*

(A) Barren areas with little, but diverse, plant cover.

(B) Presence of dwarf shrubs and cushion-like, oil shale endemic plants, including Dragon milkvetch (*Astragalus lutosus*), oilshale columbine (*Aquilegia barnebyi*), Barneby's thistle (*Cirsium barnebyi*), oilshale cryptantha (*Cryptantha barnebyi*), Graham's cryptantha (*Cryptantha grahamii*), Rollins' cryptantha (*Cryptantha rollinsii*), ephedra buckwheat (*Eriogonum ephedroides*), and occasionally Graham's beardtongue (*Penstemon grahamii*).

(C) Intact, surrounding, native plant community to support pollinators and protect from the encroachment of

invasive weeds and other potential threats.

(ii) *Slopes and topography.*

(A) South- to southwest-facing slopes.

(B) Slopes of less than 33 degrees; average slope of 19.2 degrees.

(iii) *Soils and geology.*

(A) Parachute Creek Member and other upper members of the Green River Geologic Formation.

(B) Appropriate soil morphology characterized by shallow soils with virtually no soil horizon development, with a surface usually covered by broken shale channers or light clay derived from the thinly bedded shale.

(C) Intact soils with minimal anthropogenic disturbance (at or below current levels) within White River beardtongue occupied habitat and nearby plant communities.

(iv) *Climate.* A cold desert climate with the same conditions under which the species evolved and is typical for the area. Annual precipitation of 15 to 30 cm (6 to 12 inches) with most precipitation in spring and fall and snow cover from December through March. Average winter low temperature of −14 °C (7 °F) and average summer high of 34 °C (93 (°F)) with at least 45 to 90 consecutive days less than 4 °C (40 °F).

(v) *Habitat for pollinators.*

(A) Ground and twig nesting areas for pollinators. A diverse mosaic of native plant communities that include flowering plants that provide nectar and pollen for a wide array of pollinator species.

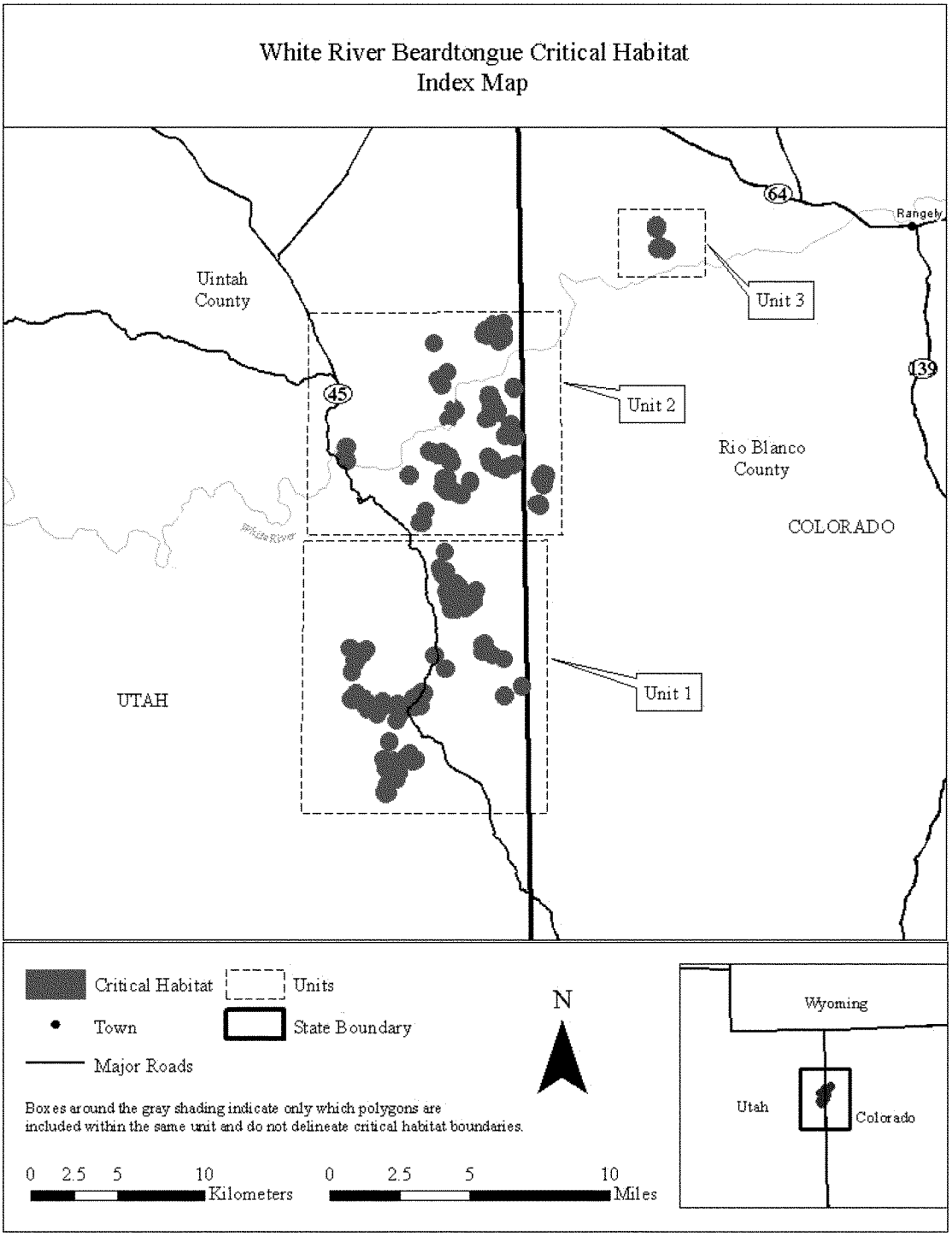
(B) Connectivity between areas allowing pollinators to move from one site to the next within each population.

(C) A 500-m (1,640-ft) area beyond occupied habitat to conserve the pollinators essential for plant reproduction.

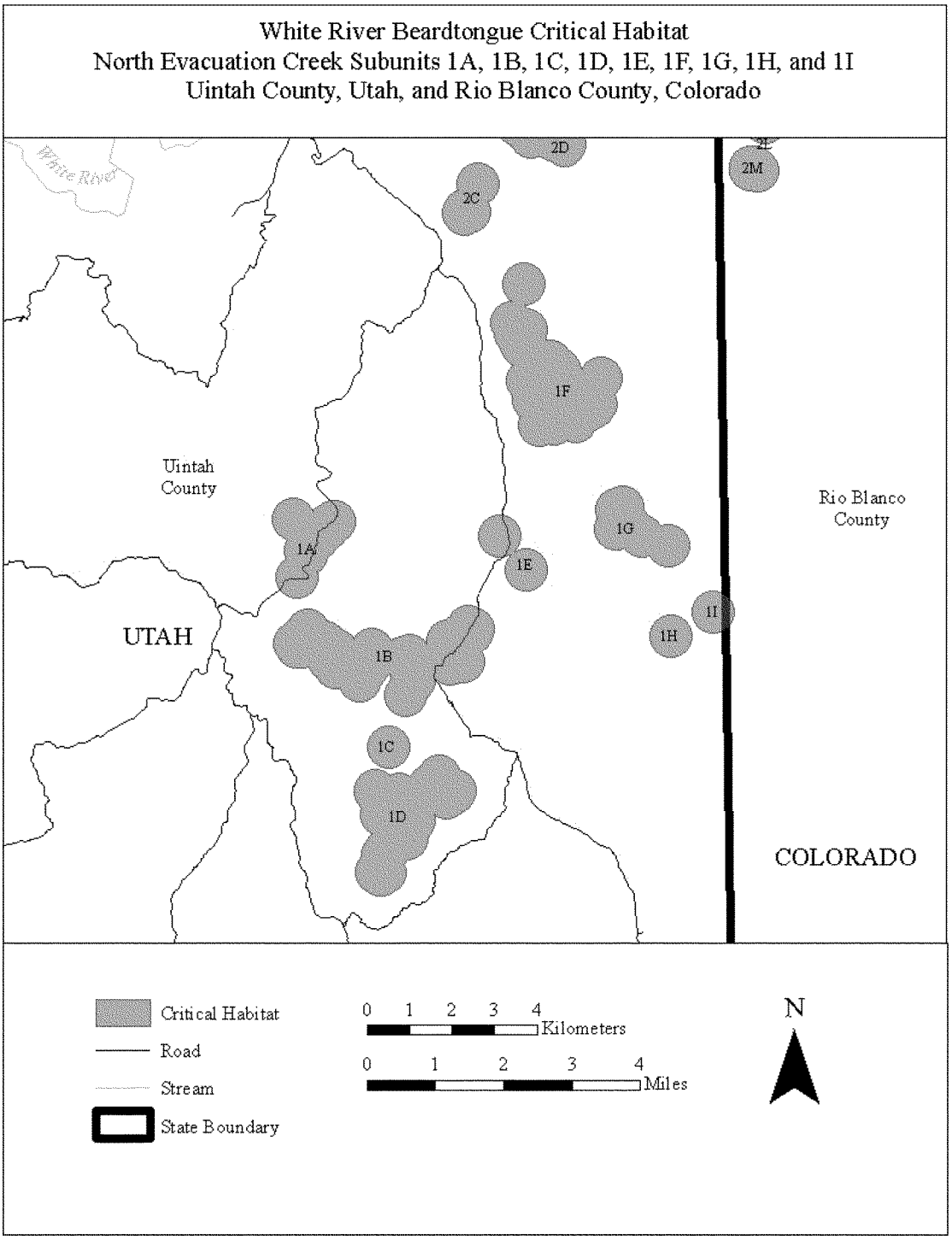
(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this entry.

(4) *Critical habitat map units.* Data layers defining map units were created by using satellite imagery (Bing 2012 Aerial Imagery basemap provided with ArcMap10, NAIP 2011 imagery). Units were mapped using NAD 83 Universal Transverse Mercatore (UTM), Zone 12 N coordinates. Location information came from a wide array of sources. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. On the index map, critical habitat is delineated by gray shading. Boxes around the gray shading indicate only which polygons are included within the same unit and do not delineate critical habitat boundaries. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet site (*http://www.fws.gov/utahfieldoffice/*), on *http://www.regulations.gov* at Docket No. FWS–R6–ES–2013–0082, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

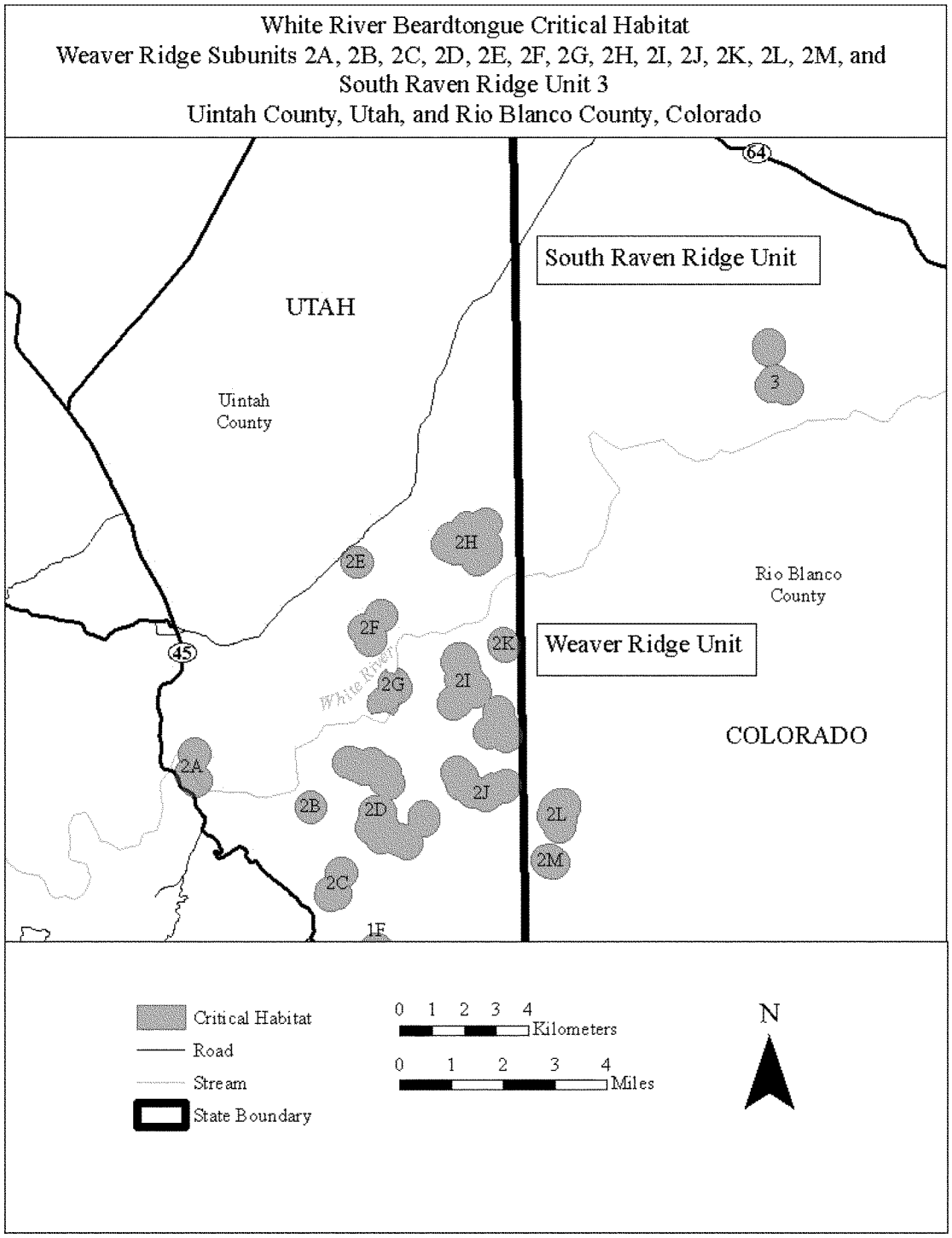
(5) Index map follows:



(6) Unit 1: North Evacuation Creek, Uintah County, Utah, and Rio Blanco County, Colorado. Map of Subunits 1A, 1B, 1C, 1D, 1E, 1F, 1G, 1H, and 1I follows:



(7) Unit 2: Weaver Ridge, Uintah County, Utah, and Rio Blanco County, Colorado. Map of Subunits 2A, 2B, 2C, 2D, 2E, 2F, 2G, 2H, 2I, 2J, 2K, 2L, 2M and Unit 3 follows:



(8) Unit 3: South Raven Ridge, Rio Blanco County, Colorado. Map of Unit 3 is provided at paragraph (a)(7) of this entry.

* * * * *

Dated: July 18, 2013.

Rachel Jacobson,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2013–18335 Filed 8–5–13; 8:45 am]

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FEDERAL REGISTER

Vol. 78 Tuesday,
No. 151 August 6, 2013

Part III

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 412

Medicare Program; Inpatient Rehabilitation Facility Prospective Payment System for Federal Fiscal Year 2014; Rules

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 412

[CMS–1448–F]

RIN 0938–AR66

Medicare Program; Inpatient Rehabilitation Facility Prospective Payment System for Federal Fiscal Year 2014

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: This final rule updates the prospective payment rates for inpatient rehabilitation facilities (IRFs) for federal fiscal year (FY) 2014 (for discharges occurring on or after October 1, 2013 and on or before September 30, 2014) as required by the statute. This final rule also revised the list of diagnosis codes that may be counted toward an IRF's ''60 percent rule'' compliance calculation to determine ''presumptive compliance,'' update the IRF facility-level adjustment factors using an enhanced estimation methodology, revise sections of the Inpatient Rehabilitation Facility-Patient Assessment Instrument, revise requirements for acute care hospitals that have IRF units, clarify the IRF regulation text regarding limitation of review, update references to previously changed sections in the regulations text, and revise and update quality measures and reporting requirements under the IRF quality reporting program.

DATES: *Effective Dates:* The regulatory amendments in this rule are effective October 1, 2013, except for the amendment to § 412.25 which is effective October 1, 2014.

Applicability Dates: The revisions to the list of diagnosis codes that are used to determine presumptive compliance under the ''60 percent rule'' are applicable for compliance review periods beginning on or after October 1, 2014. The updated IRF prospective payment rates are applicable for IRF discharges occurring on or after October 1, 2013 and on or before September 30, 2014 (FY 2014). The changes to the Inpatient Rehabilitation Facility-Patient Assessment Instrument, the amendments to § 412.25, and the revised and updated quality measures and reporting requirements under the IRF quality reporting program are applicable for IRF discharges occurring on or after October 1, 2014.

FOR FURTHER INFORMATION CONTACT: Gwendolyn Johnson, (410) 786–6954, for general information.

Caroline Gallaher, (410) 786–8705, for information about the quality reporting program.

Susanne Seagrave, (410) 786–0044 or Kadie Thomas, (410) 786–0468, for information about the payment policies and the proposed payment rates.

SUPPLEMENTARY INFORMATION: The IRF PPS Addenda along with other supporting documents and tables referenced in this final rule are available through the Internet on the CMS Web site at *http://www.cms.hhs.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/.*

Executive Summary

A. Purpose

This final rule updates the payment rates for inpatient rehabilitation facilities (IRFs) for federal fiscal year (FY) 2014 (that is, for discharges occurring on or after October 1, 2013 and on or before September 30, 2014) as required under section 1886(j)(3)(C) of the Social Security Act (the Act). Section 1886(j)(5) of the Act requires the Secretary to publish in the **Federal Register** on or before the August 1 that precedes the start of each fiscal year, the classification and weighting factors for the IRF prospective payment system's (PPS) case-mix groups and a description of the methodology and data used in computing the prospective payment rates for that fiscal year.

B. Summary of Major Provisions

In this final rule, we use the methods described in the July 30, 2012 FY 2013 IRF PPS notice (77 FR 44618) to update the federal prospective payment rates for FY 2014 using updated FY 2012 IRF claims and the most recent available IRF cost report data. We are also revising the list of diagnosis codes that are used to determine presumptive compliance under the ''60 percent rule,'' updating the IRF facility-level adjustment factors using an enhanced estimation methodology, revising sections of the Inpatient Rehabilitation Facility-Patient Assessment Instrument, revising requirements for acute care hospitals that have IRF units, clarifying the IRF regulation text regarding limitation of review, updating references to previously changed sections in the regulations text, and revising and updating quality measures and reporting requirements under the IRF quality reporting program.

C. Summary of Costs, Benefits and Transfers

Provision description	Transfers
FY 2014 IRF PPS payment rate update	The overall economic impact of this final rule is an estimated $170 million in increased payments from the Federal government to IRFs during FY 2014.
Refinements to the presumptive compliance method under the '60 percent rule'.	The estimated FY 2015 impact of the refinements to the presumptive compliance method reflects a decrease of payments between $0 to $520 million, depending on the IRFs' behavioral responses to the changes, with $520 million representing the upper bound.
Provision description	**Costs**
New quality reporting program requirements	The total costs in FY 2015 for IRFs as a result of the new quality reporting requirements are estimated to be $9.2 million.

To assist readers in referencing sections contained in this document, we are providing the following Table of Contents..

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I. Background

A. Historical Overview of the Inpatient Rehabilitation Facility Prospective Payment System (IRF PPS)

Section 1886(j) of the Act provides for the implementation of a per-discharge prospective payment system (PPS) for inpatient rehabilitation hospitals and inpatient rehabilitation units of a hospital (hereinafter referred to as IRFs).

Payments under the IRF PPS encompass inpatient operating and capital costs of furnishing covered rehabilitation services (that is, routine, ancillary, and capital costs), but not direct graduate medical education costs, costs of approved nursing and allied health education activities, bad debts, and other services or items outside the scope of the IRF PPS. Although a complete discussion of the IRF PPS provisions appears in the original FY 2002 IRF PPS final rule (66 FR 41316) and the FY 2006 IRF PPS final rule (70 FR 47880), we are providing below a general description of the IRF PPS for fiscal years (FYs) 2002 through 2013.

Under the IRF PPS from FY 2002 through FY 2005, as described in the FY 2002 IRF PPS final rule (66 FR 41316), the federal prospective payment rates were computed across 100 distinct case-mix groups (CMGs). We constructed 95 CMGs using rehabilitation impairment categories (RICs), functional status (both motor and cognitive), and age (in some cases, cognitive status and age may not be a factor in defining a CMG). In addition, we constructed five special CMGs to account for very short stays and for patients who expire in the IRF.

For each of the CMGs, we developed relative weighting factors to account for a patient's clinical characteristics and expected resource needs. Thus, the weighting factors accounted for the relative difference in resource use across all CMGs. Within each CMG, we created tiers based on the estimated effects that certain comorbidities would have on resource use.

We established the federal PPS rates using a standardized payment conversion factor (formerly referred to as the budget-neutral conversion factor). For a detailed discussion of the budget-neutral conversion factor, please refer to our FY 2004 IRF PPS final rule (68 FR 45684 through 45685). In the FY 2006 IRF PPS final rule (70 FR 47880), we discussed in detail the methodology for determining the standard payment conversion factor.

We applied the relative weighting factors to the standard payment conversion factor to compute the unadjusted federal prospective payment rates under the IRF PPS from FYs 2002 through 2005. Within the structure of the payment system, we then made adjustments to account for interrupted stays, transfers, short stays, and deaths. Finally, we applied the applicable adjustments to account for geographic variations in wages (wage index), the percentage of low-income patients, location in a rural area (if applicable), and outlier payments (if applicable) to the IRF's unadjusted federal prospective payment rates.

For cost reporting periods that began on or after January 1, 2002 and before October 1, 2002, we determined the final prospective payment amounts using the transition methodology prescribed in section 1886(j)(1) of the Act. Under this provision, IRFs transitioning into the PPS were paid a blend of the federal IRF PPS rate and the payment that the IRF would have received had the IRF PPS not been implemented. This provision also allowed IRFs to elect to bypass this blended payment and immediately be paid 100 percent of the federal IRF PPS rate. The transition methodology expired as of cost reporting periods beginning on or after October 1, 2002 (FY 2003), and payments for all IRFs now consist of 100 percent of the federal IRF PPS rate.

We established a CMS Web site as a primary information resource for the IRF PPS. The Web site is: *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/index.html.* The Web site may be accessed to download or view publications, software, data specifications, educational materials, and other information pertinent to the IRF PPS.

Section 1886(j) of the Act confers broad statutory authority upon the Secretary to propose refinements to the IRF PPS. In the FY 2006 IRF PPS final rule (70 FR 47880) and in correcting amendments to the FY 2006 IRF PPS

final rule (70 FR 57166) that we published on September 30, 2005, we finalized a number of refinements to the IRF PPS case-mix classification system (the CMGs and the corresponding relative weights) and the case-level and facility-level adjustments. These refinements included the adoption of the Office of Management and Budget's (OMB) Core-Based Statistical Area (CBSA) market definitions, modifications to the CMGs, tier comorbidities, and CMG relative weights, implementation of a new teaching status adjustment for IRFs, revision and rebasing of the market basket index used to update IRF payments, and updates to the rural, low-income percentage (LIP), and high-cost outlier adjustments. Beginning with the FY 2006 IRF PPS final rule (70 FR 47908 through 47917), the market basket index used to update IRF payments is a market basket reflecting the operating and capital cost structures for freestanding IRFs, freestanding inpatient psychiatric facilities (IPFs), and long-term care hospitals (LTCHs) (hereafter referred to as the rehabilitation, psychiatric, and long-term care (RPL) market basket). Any reference to the FY 2006 IRF PPS final rule in this final rule also includes the provisions effective in the correcting amendments. For a detailed discussion of the final key policy changes for FY 2006, please refer to the FY 2006 IRF PPS final rule (70 FR 47880 and 70 FR 57166).

In the FY 2007 IRF PPS final rule (71 FR 48354), we further refined the IRF PPS case-mix classification system (the CMG relative weights) and the case-level adjustments, to ensure that IRF PPS payments would continue to reflect as accurately as possible the costs of care. For a detailed discussion of the FY 2007 policy revisions, please refer to the FY 2007 IRF PPS final rule (71 FR 48354).

In the FY 2008 IRF PPS final rule (72 FR 44284), we updated the federal prospective payment rates and the outlier threshold, revised the IRF wage index policy, and clarified how we determine high-cost outlier payments for transfer cases. For more information on the policy changes implemented for FY 2008, please refer to the FY 2008 IRF PPS final rule (72 FR 44284), in which we published the final FY 2008 IRF federal prospective payment rates.

After publication of the FY 2008 IRF PPS final rule (72 FR 44284), section 115 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (Pub. L. 110–173, enacted on December 29, 2007) (MMSEA), amended section 1886(j)(3)(C) of the Act to apply a zero percent increase factor for FYs 2008 and 2009, effective for IRF discharges occurring on or after April 1, 2008. Section 1886(j)(3)(C) of the Act required the Secretary to develop an increase factor to update the IRF federal prospective payment rates for each FY. Based on the legislative change to the increase factor, we revised the FY 2008 federal prospective payment rates for IRF discharges occurring on or after April 1, 2008. Thus, the final FY 2008 IRF federal prospective payment rates that were published in the FY 2008 IRF PPS final rule (72 FR 44284) were effective for discharges occurring on or after October 1, 2007 and on or before March 31, 2008; and the revised FY 2008 IRF federal prospective payment rates were effective for discharges occurring on or after April 1, 2008 and on or before September 30, 2008. The revised FY 2008 federal prospective payment rates are available on the CMS Web site at: *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Data-Files.html.*

In the FY 2009 IRF PPS final rule (73 FR 46370), we updated the CMG relative weights, the average length of stay values, and the outlier threshold; clarified IRF wage index policies regarding the treatment of ''New England deemed'' counties and multi-campus hospitals; and revised the regulation text in response to section 115 of the MMSEA to set the IRF compliance percentage at 60 percent (the ''60 percent rule'') and continue the practice of including comorbidities in the calculation of compliance percentages. We also applied a zero percent market basket increase factor for FY 2009 in accordance with section 115 of the MMSEA. For more information on the policy changes implemented for FY 2009, please refer to the FY 2009 IRF PPS final rule (73 FR 46370), in which we published the final FY 2009 IRF federal prospective payment rates.

In the FY 2010 IRF PPS final rule (74 FR 39762) and in correcting amendments to the FY 2010 IRF PPS final rule (74 FR 50712) that we published on October 1, 2009, we updated the federal prospective payment rates, the CMG relative weights, the average length of stay values, the rural, LIP, and teaching status adjustment factors, and the outlier threshold; implemented new IRF coverage requirements for determining whether an IRF claim is reasonable and necessary; and revised the regulation text to require IRFs to submit patient assessments on Medicare Advantage (MA) (Medicare Part C) patients for use in the 60 percent rule calculations. Any reference to the FY 2010 IRF PPS final rule in this final rule also includes the provisions effective in the correcting amendments. For more information on the policy changes implemented for FY 2010, please refer to the FY 2010 IRF PPS final rule (74 FR 39762 and 74 FR 50712), in which we published the final FY 2010 IRF federal prospective payment rates.

After publication of the FY 2010 IRF PPS final rule (74 FR 39762), section 3401(d) of the Patient Protection and Affordable Care Act (Pub. L. 111–148, enacted on March 23, 2010), as amended by section 10319 of the same Act and by section 1105 of the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152, enacted on March 30, 2010) (collectively, hereafter referred to as ''The Affordable Care Act''), amended section 1886(j)(3)(C) of the Act and added section 1886(j)(3)(D) of the Act. Section 1886(j)(3)(C) of the Act requires the Secretary to estimate a multi-factor productivity adjustment to the market basket increase factor, and to apply other adjustments as defined by the Act. The productivity adjustment applies to FYs from 2012 forward. The other adjustments apply to FYs 2010 to 2019.

Sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(i) of the Act defined the adjustments that were to be applied to the market basket increase factors in FYs 2010 and 2011. Under these provisions, the Secretary was required to reduce the market basket increase factor in FY 2010 by a 0.25 percentage point adjustment. Notwithstanding this provision, in accordance with section 3401(p) of the Affordable Care Act, the adjusted FY 2010 rate was only to be applied to discharges occurring on or after April 1, 2010. Based on the self-implementing legislative changes to section 1886(j)(3) of the Act, we adjusted the FY 2010 federal prospective payment rates as required, and applied these rates to IRF discharges occurring on or after April 1, 2010 and on or before September 30, 2010. Thus, the final FY 2010 IRF federal prospective payment rates that were published in the FY 2010 IRF PPS final rule (74 FR 39762) were used for discharges occurring on or after October 1, 2009 and on or before March 31, 2010; and the adjusted FY 2010 IRF federal prospective payment rates applied to discharges occurring on or after April 1, 2010 and on or before September 30, 2010. The adjusted FY 2010 federal prospective payment rates are available on the CMS Web site at: *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Data-Files.html.*

In addition, sections 1886(j)(3)(C) and (D) of the Act also affected the FY 2010 IRF outlier threshold amount because they required an adjustment to the FY 2010 RPL market basket increase factor, which changed the standard payment conversion factor for FY 2010. Specifically, the original FY 2010 IRF outlier threshold amount was determined based on the original estimated FY 2010 RPL market basket increase factor of 2.5 percent and the standard payment conversion factor of $13,661. However, as adjusted, the IRF prospective payments are based on the adjusted RPL market basket increase factor of 2.25 percent and the revised standard payment conversion factor of $13,627. To maintain estimated outlier payments for FY 2010 equal to the established standard of 3 percent of total estimated IRF PPS payments for FY 2010, we revised the IRF outlier threshold amount for FY 2010 for discharges occurring on or after April 1, 2010 and on or before September 30, 2010. The revised IRF outlier threshold amount for FY 2010 was $10,721.

Sections 1886(j)(3)(c)(ii)(II) and 1886(j)(3)(D)(i) of the Act also required the Secretary to reduce the market basket increase factor in FY 2011 by a 0.25 percentage point adjustment. The FY 2011 IRF PPS notice (75 FR 42836) and the correcting amendments to the FY 2011 IRF PPS notice (75 FR 70013, November 16, 2010) described the required adjustments to the FY 2011 and FY 2010 IRF PPS federal prospective payment rates and outlier threshold amount for IRF discharges occurring on or after April 1, 2010 and on or before September 30, 2011. It also updated the FY 2011 federal prospective payment rates, the CMG relative weights, and the average length of stay values. Any reference to the FY 2011 IRF PPS notice in this final rule also includes the provisions effective in the correcting amendments. For more information on the FY 2010 and FY 2011 adjustments or the updates for FY 2011, please refer to the FY 2011 IRF PPS notice (75 FR 42836 and 75 FR 70013).

In the FY 2012 IRF PPS final rule (76 FR 47836), we updated the IRF federal prospective payment rates, rebased and revised the RPL market basket, and established a new quality reporting program for IRFs in accordance with section 1886(j)(7) of the Act. We also revised regulation text for the purpose of updating and providing greater clarity. For more information on the policy changes implemented for FY 2012, please refer to the FY 2012 IRF PPS final rule (76 FR 47836), in which we published the final FY 2012 IRF federal prospective payment rates.

The July 30, 2012 FY 2013 IRF PPS notice (77 FR 44618) described the required adjustments to the FY 2013 federal prospective payment rates and outlier threshold amount for IRF discharges occurring on or after October 1, 2012 and on or before September 30, 2013. It also updated the FY 2013 federal prospective payment rates, the CMG relative weights, and the average length of stay values. For more information on the updates for FY 2013, please refer to the July 30, 2012 FY 2013 IRF PPS notice (77 FR 44618).

B. Provisions of the Affordable Care Act Affecting the IRF PPS in FY 2012 and Beyond

The Affordable Care Act included several provisions that affect the IRF PPS in FYs 2012 and beyond. In addition to what was discussed above, section 3401(d) of the Affordable Care Act also added section 1886(j)(3)(C)(ii)(I) (providing for a ''productivity adjustment'' for fiscal year 2012 and each subsequent fiscal year). The productivity adjustment for FY 2014 is discussed in section VI.A. of this final rule. Section 3401(d) of the Affordable Care Act requires an additional 0.3 percentage point adjustment to the IRF increase factor for FY 2014, as discussed in section VI.A. of this final rule. Section 1886(j)(3)(C)(ii)(II) of the Act notes that the application of these adjustments to the market basket update may result in an update that is less than 0.0 for a fiscal year and in payment rates for a fiscal year being less than such payment rates for the preceding fiscal year.

Section 3004(b) of the Affordable Care Act also addressed the IRF PPS program. It reassigned the previously designated section 1886(j)(7) of the Act to section 1886(j)(8) and inserted a new section 1886(j)(7), which contains new requirements for the Secretary to establish a quality reporting program for IRFs. Under that program, data must be submitted in a form and manner, and at a time specified by the Secretary. Beginning in FY 2014, section 1886(j)(7)(A)(i) of the Act will require application of a 2 percentage point reduction of the applicable market basket increase factor for IRFs that fail to comply with the quality data submission requirements. Application of the 2 percentage point reduction may result in an update that is less than 0.0 for a fiscal year and in payment rates for a fiscal year being less than such payment rates for the preceding fiscal year. Reporting-based reductions to the market basket increase factor will not be cumulative; they will only apply for the FY involved.

Under section 1886(j)(7)(D)(i) and (ii) of the Act, the Secretary is generally required to select quality measures for the IRF quality reporting program from those that have been endorsed by the consensus-based entity which holds a performance measurement contract under section 1890(a) of the Act. This contract is currently held by the National Quality Forum (NQF). So long as due consideration is given to measures that have been endorsed or adopted by a consensus-based organization, section 1886(j)(7)(D)(ii) of the Act authorizes the Secretary to select non-endorsed measures for specified areas or medical topics when there are no feasible or practical endorsed measure(s). Under section 1886(j)(7)(D)(iii) of the Act, the Secretary is required to publish the measures that will be used in FY 2014 no later than October 1, 2012.

Section 1886(j)(7)(E) of the Act requires the Secretary to establish procedures for making the IRF PPS quality reporting data available to the public. In so doing, the Secretary must ensure that IRFs have the opportunity to review any such data prior to its release to the public. Future rulemaking will address these public reporting obligations.

C. Operational Overview of the Current IRF PPS

As described in the FY 2002 IRF PPS final rule, upon the admission and discharge of a Medicare Part A Fee-for-Service patient, the IRF is required to complete the appropriate sections of a patient assessment instrument (PAI), designated as the Inpatient Rehabilitation Facility-Patient Assessment Instrument (IRF–PAI). In addition, beginning with IRF discharges occurring on or after October 1, 2009, the IRF is also required to complete the appropriate sections of the IRF–PAI upon the admission and discharge of each Medicare Part C (Medicare Advantage) patient, as described in the FY 2010 IRF PPS final rule. All required data must be electronically encoded into the IRF–PAI software product. Generally, the software product includes patient classification programming called the GROUPER software. The GROUPER software uses specific IRF–PAI data elements to classify (or group) patients into distinct CMGs and account for the existence of any relevant comorbidities.

The GROUPER software produces a 5-digit CMG number. The first digit is an alpha-character that indicates the comorbidity tier. The last 4 digits

represent the distinct CMG number. Free downloads of the Inpatient Rehabilitation Validation and Entry (IRVEN) software product, including the GROUPER software, are available on the CMS Web site at: *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Software.html.*

Once a Medicare Fee-for-Service Part A patient is discharged, the IRF submits a Medicare claim as a Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104–191, enacted on August 21, 1996) (HIPAA) compliant electronic claim or, if the Administrative Simplification Compliance Act of 2002 (Pub. L. 107–105, enacted on December 27, 2002) (ASCA) permits, a paper claim (a UB–04 or a CMS–1450 as appropriate) using the five-digit CMG number and sends it to the appropriate Medicare Administrative Contractor (MAC). In addition, once a Medicare Advantage patient is discharged, in accordance with the Medicare Claims Processing Manual chapter 3 section 20.3 (Pub. 100–04), hospitals (including IRFs) must submit an informational-only bill (TOB 111) which includes Condition Code 04 to their Medicare contractor. This will ensure that the Medicare Advantage days are included in the hospital's Supplemental Security Income (SSI) ratio (used in calculating the IRF low-income percentage adjustment) for Fiscal Year 2007 and beyond. Claims submitted to Medicare must comply with both ASCA and HIPAA.

Section 3 of the ASCA amends section 1862(a) of the Act by adding paragraph (22) which requires the Medicare program, subject to section 1862(h) of the Act, to deny payment under Part A or Part B for any expenses for items or services ''for which a claim is submitted other than in an electronic form specified by the Secretary.'' Section 1862(h) of the Act, in turn, provides that the Secretary shall waive such denial in situations in which there is no method available for the submission of claims in an electronic form or the entity submitting the claim is a small provider. In addition, the Secretary also has the authority to waive such denial ''in such unusual cases as the Secretary finds appropriate.'' For more information, see the ''Medicare Program; Electronic Submission of Medicare Claims'' final rule (70 FR 71008, November 25, 2005). Our instructions for the limited number of Medicare claims submitted on paper are available at *http://www.cms.gov/manuals/downloads/clm104c25.pdf.*

Section 3 of the ASCA operates in the context of the administrative simplification provisions of HIPAA, which include, among others, the requirements for transaction standards and code sets codified in 45 CFR, parts 160 and 162, subparts A and I through R (generally known as the Transactions Rule). The Transactions Rule requires covered entities, including covered healthcare providers, to conduct covered electronic transactions according to the applicable transaction standards. (See the CMS program claim memoranda at *http://www.cms.gov/ElectronicBillingEDITrans/* and listed in the addenda to the Medicare Intermediary Manual, Part 3, section 3600).

The MAC processes the claim through its software system. This software system includes pricing programming called the ''PRICER'' software. The PRICER software uses the CMG number, along with other specific claim data elements and provider-specific data, to adjust the IRF's prospective payment for interrupted stays, transfers, short stays, and deaths, and then applies the applicable adjustments to account for the IRF's wage index, percentage of low-income patients, rural location, and outlier payments. For discharges occurring on or after October 1, 2005, the IRF PPS payment also reflects the teaching status adjustment that became effective as of FY 2006, as discussed in the FY 2006 IRF PPS final rule (70 FR 47880).

II. Summary of Provisions of the Proposed Rule

In the FY 2014 IRF PPS proposed rule (78 FR 26880), we proposed to update the IRF Federal prospective payment rates, to revise the list of eligible International Classification of Diseases, Ninth Revision, Clinical Modification (ICD–9–CM) diagnosis codes that are used to determine presumptive compliance under the ''60 percent rule,'' to update the IRF facility-level adjustment factors, to revise the Inpatient Rehabilitation Facility-Patient Assessment Instrument (IRF–PAI), to revise requirements for acute care hospitals that have IRF units, clarify the IRF regulation text regarding limitation of review, and to revise and update quality measures and reporting requirements under the quality reporting program for IRFs. We also proposed to revise existing regulations text for the purpose of updating and providing greater clarity. These proposals were as follows:

A. Proposed Updates to the IRF Federal Prospective Payment Rates for Federal Fiscal Year (FY) 2014

The proposed updates to the IRF federal prospective payment rates for FY 2014 were as follows:

- Update the FY 2014 IRF PPS relative weights and average length of stay values using the most current and complete Medicare claims and cost report data in a budget-neutral manner, as discussed in section III. of the FY 2014 IRF PPS proposed rule (78 FR 26880, 26885 through 26888).
- Update the FY 2014 IRF PPS facility-level adjustment factors, using the most current and complete Medicare claims and cost report data with an enhanced estimation methodology, in a budget-neutral manner, as discussed in section IV of the FY 2014 IRF PPS proposed rule (78 FR 26880, 26888 through 26890).
- Update the FY 2014 IRF PPS payment rates by the proposed market basket increase factor, based upon the most current data available, with a 0.3 percentage point reduction as required by sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(iii) of the Act and a proposed productivity adjustment required by section 1886(j)(3)(C)(ii)(I) of the Act, as described in section V of the FY 2014 IRF PPS proposed rule (78 FR 26880, 26890 through 26891).
- Discuss the Secretary's Proposed Recommendation for updating IRF PPS payments for FY 2014, in accordance with the statutory requirements, as described in section V of the FY 2014 IRF PPS proposed rule (78 FR 26880 at 26891).
- Update the FY 2014 IRF PPS payment rates by the FY 2014 wage index and the labor-related share in a budget-neutral manner, as discussed in section V of the FY 2014 IRF PPS proposed rule (78 FR 26880, 26891 through 26892).
- Describe the calculation of the IRF Standard Payment Conversion Factor for FY 2014, as discussed in section V of the FY 2014 IRF PPS proposed rule (78 FR 26880 at 26892).
- Update the outlier threshold amount for FY 2014, as discussed in section VI of the FY 2014 IRF PPS proposed rule (78 FR 26880 at 26895).
- Update the cost-to-charge ratio (CCR) ceiling and urban/rural average CCRs for FY 2014, as discussed in section VI of the FY 2014 IRF PPS proposed rule (78 FR 26880 at 26895).
- Describe proposed revisions to the list of eligible ICD–9–CM diagnosis codes that are used to determine presumptive compliance under the 60 percent rule in section VII of the FY

2014 IRF PPS proposed rule (78 FR 26880, 26895 through 26906).

- Describe proposed non-quality-related revisions to IRF–PAI sections in section VIII of the FY 2014 IRF PPS proposed rule (78 FR 26880, 26906 through 26907).
- Describe proposed revisions and updates to quality measures and reporting requirements under the quality reporting program for IRFs in accordance with section 1886(j)(7) of the Act, as discussed in section XIII of the FY 2014 IRF PPS proposed rule (78 FR 26880, 26909 through 26922).

B. Proposed Revisions to Existing Regulation Text

In the FY 2014 IRF PPS proposed rule (78 FR 26880), we also proposed the following revisions to the existing regulations:

- Revisions to § 412.25(a)(1)(iii) to specify a minimum required number of beds that are not excluded from the inpatient prospective payment system (IPPS) for a hospital that has an IRF unit, as described in section X of the FY 2014 IRF PPS proposed rule (78 FR 26880 at 26908).
- Technical corrections to § 412.130, to reflect prior changes to the regulations at § 412.29 and § 412.30 that we made in the FY 2012 IRF PPS final rule (76 FR 47836), as described in section IX of the FY 2014 IRF PPS proposed rule (78 FR 26880, 26907 through 26908).
- Clarifications to § 412.630, to reflect the scope of section 1886(j)(8) of the Act, as described in section XI. of the FY 2014 IRF PPS proposed rule (78 FR 26880 at 26908).
- Revision to § 412.29(d), to clarify that Medicare requires the rehabilitation physician's review and concurrence on the preadmission screening for Medicare Part A Fee-for-Service patients only, as described in section XII of the FY 2014 IRF PPS proposed rule (78 FR 26880, 26908 through 26909).

III. Analysis and Responses to Public Comments

We received 47 timely responses from the public, many of which contained multiple comments on the FY 2014 IRF PPS proposed rule (78 FR 26880). We received comments from various trade associations, inpatient rehabilitation facilities, individual physicians, therapists, clinicians, health care industry organizations, law firms and health care consulting firms. The following sections, arranged by subject area, include a summary of the public comments that we received, and our responses.

IV. Update to the Case-Mix Group (CMG) Relative Weights and Average Length of Stay Values for FY 2014

As specified in § 412.620(b)(1), we calculate a relative weight for each CMG that is proportional to the resources needed by an average inpatient rehabilitation case in that CMG. For example, cases in a CMG with a relative weight of 2, on average, will cost twice as much as cases in a CMG with a relative weight of 1. Relative weights account for the variance in cost per discharge due to the variance in resource utilization among the payment groups, and their use helps to ensure that IRF PPS payments support beneficiary access to care, as well as provider efficiency.

In the FY 2014 IRF PPS proposed rule (78 FR 26880, 26885 through 26888), we proposed to update the CMG relative weights and average length of stay values for FY 2014. As required by statute, we always use the most recent available data to update the CMG relative weights and average lengths of stay. For FY 2014, we proposed to use the FY 2012 IRF claims and FY 2011 IRF cost report data. These data are the most current and complete data available at this time. Currently, only a small portion of the FY 2012 IRF cost report data are available for analysis, but the majority of the FY 2012 IRF claims data are available for analysis.

In the FY 2014 IRF PPS proposed rule (78 FR 26880, 26885 through 26888), we proposed to apply these data using the same methodologies that we have used to update the CMG relative weights and average length of stay values in the FY 2011 notice (75 FR 42836), the FY 2012 final rule (76 FR 47836), and the FY 2013 notice (77 FR 44618). In calculating the CMG relative weights, we use a hospital-specific relative value method to estimate operating (routine and ancillary services) and capital costs of IRFs. The process used to calculate the CMG relative weights is as follows:

Step 1. We estimate the effects that comorbidities have on costs.

Step 2. We adjust the cost of each Medicare discharge (case) to reflect the effects found in the first step.

Step 3. We use the adjusted costs from the second step to calculate CMG relative weights, using the hospital-specific relative value method.

Step 4. We normalize the FY 2014 CMG relative weights to the same average CMG relative weight from the CMG relative weights implemented in the July 30, 2012 FY 2013 IRF PPS notice (77 FR 44618).

Consistent with the methodology that we have used to update the IRF classification system in each instance in the past, we proposed to update the CMG relative weights for FY 2014 in such a way that total estimated aggregate payments to IRFs for FY 2014 are the same with or without the changes (that is, in a budget-neutral manner) by applying a budget neutrality factor to the standard payment amount. To calculate the appropriate budget neutrality factor for use in updating the FY 2014 CMG relative weights, we use the following steps:

Step 1. Calculate the estimated total amount of IRF PPS payments for FY 2014 (with no changes to the CMG relative weights).

Step 2. Calculate the estimated total amount of IRF PPS payments for FY 2014 by applying the changes to the CMG relative weights (as discussed above).

Step 3. Divide the amount calculated in step 1 by the amount calculated in step 2 to determine the budget neutrality factor (1.0000) that would maintain the same total estimated aggregate payments in FY 2014 with and without the changes to the CMG relative weights.

Step 4. Apply the budget neutrality factor (1.0000) to the FY 2013 IRF PPS standard payment amount after the application of the budget-neutral wage adjustment factor.

In section VI.E. of this final rule, we discuss the use of the existing methodology to calculate the standard payment conversion factor for FY 2014.

Table 1, ''Relative Weights and Average Length of Stay Values for Case-Mix Groups,'' presents the CMGs, the comorbidity tiers, the corresponding relative weights, and the average length of stay values for each CMG and tier for FY 2014. The average length of stay for each CMG is used to determine when an IRF discharge meets the definition of a short-stay transfer, which results in a per diem case level adjustment.

TABLE 1—RELATIVE WEIGHTS AND AVERAGE LENGTH OF STAY VALUES FOR CASE-MIX GROUPS

CMG	CMG Description (M = motor, C = cognitive, A = age)	Relative weight				Average length of stay			
		Tier 1	Tier 2	Tier 3	None	Tier 1	Tier 2	Tier 3	None
0101	Stroke M > 51.05	0.7983	0.7151	0.6539	0.6239	9	9	9	8
0102	Stroke M > 44.45 and M < 51.05 and C > 18.5.	0.9911	0.8878	0.8118	0.7745	11	12	10	10
0103	Stroke M > 44.45 and M < 51.05 and C < 18.5.	1.1608	1.0398	0.9508	0.9071	13	13	12	11
0104	Stroke M > 38.85 and M < 44.45	1.2212	1.0939	1.0002	0.9543	13	12	12	12
0105	Stroke M > 34.25 and M < 38.85	1.4275	1.2787	1.1692	1.1155	15	15	14	14
0106	Stroke M > 30.05 and M < 34.25	1.6285	1.4588	1.3339	1.2726	16	17	16	15
0107	Stroke M > 26.15 and M < 30.05	1.8385	1.6468	1.5059	1.4367	19	20	17	17
0108	Stroke M < 26.15 and A > 84.5	2.3157	2.0743	1.8967	1.8096	22	24	22	21
0109	Stroke M > 22.35 and M < 26.15 and A < 84.5.	2.0990	1.8802	1.7192	1.6403	21	21	19	20
0110	Stroke M < 22.35 and A < 84.5	2.7382	2.4527	2.2427	2.1398	29	28	25	25
0201	Traumatic brain injury M > 53.35 and C > 23.5.	0.8252	0.6953	0.6182	0.5757	10	10	8	8
0202	Traumatic brain injury M > 44.25 and M < 53.35 and C > 23.5.	1.0549	0.8889	0.7904	0.7360	12	10	10	10
0203	Traumatic brain injury M > 44.25 and C < 23.5.	1.2520	1.0550	0.9380	0.8735	15	13	12	11
0204	Traumatic brain injury M > 40.65 and M < 44.25.	1.3077	1.1020	0.9798	0.9124	12	13	12	12
0205	Traumatic brain injury M > 28.75 and M < 40.65.	1.5791	1.3307	1.1831	1.1017	17	16	14	14
0206	Traumatic brain injury M > 22.05 and M < 28.75.	1.9472	1.6409	1.4589	1.3585	18	19	18	16
0207	Traumatic brain injury M < 22.05	2.5767	2.1713	1.9305	1.7977	33	26	21	20
0301	Non-traumatic brain injury M > 41.05	1.0984	0.9453	0.8469	0.7832	10	11	11	10
0302	Non-traumatic brain injury M > 35.05 and M < 41.05.	1.3755	1.1838	1.0606	0.9808	13	14	12	12
0303	Non-traumatic brain injury M > 26.15 and M < 35.05.	1.6219	1.3958	1.2506	1.1565	17	16	14	14
0304	Non-traumatic brain injury M < 26.15	2.1792	1.8755	1.6803	1.5539	24	21	19	18
0401	Traumatic spinal cord injury M > 48.45	1.1342	0.9427	0.8778	0.7849	12	12	11	10
0402	Traumatic spinal cord injury M > 30.35 and M < 48.45.	1.4129	1.1744	1.0936	0.9778	18	14	15	12
0403	Traumatic spinal cord injury M > 16.05 and M < 30.35.	2.3155	1.9246	1.7921	1.6024	26	24	20	20
0404	Traumatic spinal cord injury M < 16.05 and A > 63.5.	4.2535	3.5355	3.2921	2.9436	47	41	36	35
0405	Traumatic spinal cord injury M < 16.05 and A < 63.5.	3.4992	2.9086	2.7083	2.4216	37	32	33	27
0501	Non-traumatic spinal cord injury M > 51.35	0.8384	0.6587	0.6208	0.5653	9	9	8	8
0502	Non-traumatic spinal cord injury M > 40.15 and M < 51.35.	1.1090	0.8712	0.8211	0.7477	12	11	10	10
0503	Non-traumatic spinal cord injury M > 31.25 and M < 40.15.	1.4334	1.1261	1.0613	0.9664	15	13	13	12
0504	Non-traumatic spinal cord injury M > 29.25 and M < 31.25.	1.6565	1.3014	1.2265	1.1168	14	16	14	14
0505	Non-traumatic spinal cord injury M > 23.75 and M < 29.25.	1.9708	1.5483	1.4592	1.3287	21	18	17	16
0506	Non-traumatic spinal cord injury M < 23.75	2.7518	2.1619	2.0375	1.8553	30	25	23	22
0601	Neurological M > 47.75	0.9645	0.7830	0.7227	0.6551	10	10	9	9
0602	Neurological M > 37.35 and M < 47.75	1.2974	1.0533	0.9721	0.8811	12	12	11	11
0603	Neurological M > 25.85 and M < 37.35	1.6228	1.3174	1.2159	1.1021	15	15	14	13
0604	Neurological M < 25.85	2.1683	1.7603	1.6246	1.4726	22	19	18	17
0701	Fracture of lower extremity M > 42.15	0.9369	0.7995	0.7648	0.6945	10	10	10	9
0702	Fracture of lower extremity M > 34.15 and M < 42.15.	1.2132	1.0353	0.9904	0.8993	12	12	12	11
0703	Fracture of lower extremity M > 28.15 and M < 34.15.	1.4741	1.2579	1.2033	1.0927	15	15	14	13
0704	Fracture of lower extremity M < 28.15	1.8716	1.5971	1.5278	1.3874	18	18	18	17
0801	Replacement of lower extremity joint M > 49.55.	0.7037	0.6193	0.5667	0.5186	7	8	7	7
0802	Replacement of lower extremity joint M > 37.05 and M < 49.55.	0.9255	0.8145	0.7454	0.6821	10	10	9	9
0803	Replacement of lower extremity joint M > 28.65 and M < 37.05 and A > 83.5.	1.2589	1.1078	1.0138	0.9277	12	14	13	12
0804	Replacement of lower extremity joint M > 28.65 and M < 37.05 and A < 83.5.	1.1139	0.9803	0.8971	0.8209	11	12	11	10

TABLE 1—RELATIVE WEIGHTS AND AVERAGE LENGTH OF STAY VALUES FOR CASE-MIX GROUPS—Continued

CMG	CMG Description (M = motor, C = cognitive, A = age)	Relative weight				Average length of stay			
		Tier 1	Tier 2	Tier 3	None	Tier 1	Tier 2	Tier 3	None
0805	Replacement of lower extremity joint M > 22.05 and M < 28.65.	1.3754	1.2104	1.1077	1.0136	15	15	13	12
0806	Replacement of lower extremity joint M < 22.05.	1.6683	1.4682	1.3435	1.2294	17	17	15	15
0901	Other orthopedic M > 44.75	0.9010	0.7452	0.6891	0.6241	10	9	9	8
0902	Other orthopedic M > 34.35 and M < 44.75	1.2081	0.9992	0.9241	0.8369	13	12	11	11
0903	Other orthopedic M > 24.15 and M < 34.35	1.5080	1.2472	1.1534	1.0446	15	15	14	13
0904	Other orthopedic M < 24.15	1.9669	1.6268	1.5045	1.3626	20	19	17	16
1001	Amputation, lower extremity M > 47.65	1.0276	0.9345	0.8023	0.7417	12	11	10	10
1002	Amputation, lower extremity M > 36.25 and M < 47.65.	1.3077	1.1892	1.0210	0.9439	13	13	12	12
1003	Amputation, lower extremity M < 36.25	1.9362	1.7608	1.5117	1.3975	19	20	17	16
1101	Amputation, non-lower extremity M > 36.35	1.2199	1.1157	1.0302	1.0056	13	13	12	12
1102	Amputation, non-lower extremity M < 36.35	1.7115	1.5652	1.4454	1.4107	16	17	16	17
1201	Osteoarthritis M > 37.65	0.9454	0.9411	0.8445	0.7724	9	11	10	10
1202	Osteoarthritis M > 30.75 and M < 37.65	1.1749	1.1695	1.0495	0.9599	14	14	13	12
1203	Osteoarthritis M < 30.75	1.4677	1.4609	1.3110	1.1991	13	18	15	14
1301	Rheumatoid, other arthritis M > 36.35	1.1678	0.9974	0.9062	0.8219	12	10	11	10
1302	Rheumatoid, other arthritis M > 26.15 and M < 36.35.	1.5025	1.2832	1.1659	1.0575	16	15	14	13
1303	Rheumatoid, other arthritis M < 26.15	1.9254	1.6444	1.4941	1.3551	18	18	17	16
1401	Cardiac M > 48.85	0.8869	0.7263	0.6555	0.5937	9	9	8	8
1402	Cardiac M > 38.55 and M < 48.85	1.1928	0.9768	0.8816	0.7985	12	11	11	10
1403	Cardiac M > 31.15 and M < 38.55	1.4581	1.1941	1.0777	0.9761	14	14	12	12
1404	Cardiac M < 31.15	1.8587	1.5222	1.3738	1.2443	19	17	15	14
1501	Pulmonary M > 49.25	1.0128	0.8635	0.7803	0.7474	10	9	9	9
1502	Pulmonary M > 39.05 and M < 49.25	1.2651	1.0787	0.9747	0.9336	12	12	11	11
1503	Pulmonary M > 29.15 and M < 39.05	1.5357	1.3094	1.1832	1.1333	15	14	13	13
1504	Pulmonary M < 29.15	1.9057	1.6248	1.4683	1.4063	21	17	16	15
1601	Pain syndrome M > 37.15	1.0707	0.8883	0.8327	0.7639	9	10	10	9
1602	Pain syndrome M > 26.75 and M < 37.15	1.3889	1.1523	1.0802	0.9909	12	14	12	12
1603	Pain syndrome M < 26.75	1.7566	1.4573	1.3662	1.2533	18	17	15	15
1701	Major multiple trauma without brain or spinal cord injury M > 39.25.	1.1053	0.9551	0.8619	0.7769	11	12	11	10
1702	Major multiple trauma without brain or spinal cord injury M > 31.05 and M < 39.25.	1.3905	1.2016	1.0843	0.9774	13	15	13	12
1703	Major multiple trauma without brain or spinal cord injury M > 25.55 and M < 31.05.	1.6553	1.4304	1.2908	1.1635	17	16	15	14
1704	Major multiple trauma without brain or spinal cord injury M < 25.55.	2.1005	1.8152	1.6380	1.4764	24	20	18	18
1801	Major multiple trauma with brain or spinal cord injury M > 40.85.	1.1378	1.0183	0.9216	0.7648	13	12	12	10
1802	Major multiple trauma with brain or spinal cord injury M > 23.05 and M < 40.85.	1.7508	1.5669	1.4182	1.1769	18	19	17	14
1803	Major multiple trauma with brain or spinal cord injury M < 23.05.	2.7973	2.5035	2.2659	1.8804	33	28	24	22
1901	Guillain Barre M > 35.95	1.0836	0.9288	0.8847	0.8716	14	10	11	11
1902	Guillain Barre M > 18.05 and M < 35.95	2.1258	1.8221	1.7355	1.7097	23	21	19	20
1903	Guillain Barre M < 18.05	3.5333	3.0287	2.8846	2.8418	56	32	31	30
2001	Miscellaneous M > 49.15	0.8877	0.7267	0.6691	0.6107	9	9	8	8
2002	Miscellaneous M > 38.75 and M < 49.15	1.1867	0.9714	0.8945	0.8164	12	11	11	10
2003	Miscellaneous M > 27.85 and M < 38.75	1.4947	1.2235	1.1266	1.0283	15	14	13	12
2004	Miscellaneous M < 27.85	1.9610	1.6051	1.4780	1.3490	20	18	17	15
2101	Burns M > 0	2.1953	1.5624	1.5111	1.4146	24	21	17	17
5001	Short-stay cases, length of stay is 3 days or fewer.	.....	.....	.....	0.1538	.....	.....	.....	3
5101	Expired, orthopedic, length of stay is 13 days or fewer.	.....	.....	.....	0.6617	.....	.....	.....	8
5102	Expired, orthopedic, length of stay is 14 days or more.	.....	.....	.....	1.4346	.....	.....	.....	17
5103	Expired, not orthopedic, length of stay is 15 days or fewer.	.....	.....	.....	0.7653	.....	.....	.....	8
5104	Expired, not orthopedic, length of stay is 16 days or more.	.....	.....	.....	1.9685	.....	.....	.....	21

Generally, updates to the CMG relative weights result in some increases and some decreases to the CMG relative weight values. Table 2 shows how the application of the revisions for FY 2014 will affect particular CMG relative

weight values, which affect the overall distribution of payments within CMGs and tiers. Note that, because we are implementing the CMG relative weight revisions in a budget-neutral manner (as described above), total estimated aggregate payments to IRFs for FY 2014 will not be affected as a result of the CMG relative weight revisions. However, the revisions will affect the distribution of payments within CMGs and tiers.

TABLE 2—DISTRIBUTIONAL EFFECTS OF THE CHANGES TO THE CMG RELATIVE WEIGHTS (FY 2013 VALUES COMPARED WITH FY 2014 VALUES)

Percentage change	Number of cases affected	Percentage of cases affected
Increased by 15% or more	0	0.0
Increased by between 5% and 15%	2,492	0.7
Changed by less than 5%	363,629	98.7
Decreased by between 5% and 15%	2,118	0.6
Decreased by 15% or more	97	0.0

As Table 2 shows, almost 99 percent of all IRF cases are in CMGs and tiers that will experience less than a 5 percent change (either increase or decrease) in the CMG relative weight value as a result of the revisions for FY 2014. The largest increase in the CMG relative weight values that affects a particularly large number of IRF discharges is a 0.8 percent increase in the CMG relative weight value for CMG 0704—Fracture of Lower Extremity, with a motor score less than 28.15—in the ''no comorbidity'' tier. In the FY 2012 data, 19,981 IRF discharges (5.4 percent of all IRF discharges) were classified into this CMG and tier.

The largest decrease in a CMG relative weight value affecting the most cases is a 2.1 percent decrease in the CMG relative weight for CMG 0903—Other Orthopedic with a motor score between 24.15 and 34.35—in the no comorbidity tier. In the FY 2012 IRF claims data, this change affects 7,047 cases (1.9 percent of all IRF cases).

The changes in the average length of stay values for FY 2014, compared with the FY 2013 average length of stay values, are small and do not show any particular trends in IRF length of stay patterns.

We received 3 comments on the proposed updates to the CMG relative weights and average length of stay values for FY 2014, which are summarized below.

Comment: Several commenters supported the use of the same methodology that we used in the FY 2011 notice, the FY 2012 final rule, and the FY 2013 notice to update the CMG relative weights and average length of stay values for FY 2014, using the most recent available data. However, one commenter expressed concern about changes to some of the specific CMG relative weights, indicating that some of the changes were not necessary and that others might affect whether or not the CMGs would be adequately compensating providers for treating certain types of patients requiring unusually high-cost treatments.

Response: We believe that updating the relative weights using the most recent available data ensures that the payments per case continue to accurately reflect the costs of care provided in IRFs. Although we acknowledge the commenter's concerns with some of the specific CMG relative weight changes, these changes are based on IRFs' reported costs of care for these types of cases, and we believe that it is essential to recognize these reported costs to ensure that the CMG relative weights reflect as closely as possible the relative costs of treating different types of patients in IRFs. Further, we note that the IRF PPS high-cost outlier policy is designed to compensate IRFs for providing care to patients whose costs greatly exceed the average cost of a case in a particular CMG and tier.

Comment: A few commenters requested that we outline the methodology used to calculate the average length of stay values. These same commenters agreed that the average length of stay values should only be used to determine when an IRF discharge meets the definition of a short-stay transfer, which results in a per diem case level adjustment, and are not intended to be used as clinical guidelines for patients' lengths of stay in an IRF.

Response: We will post our methodology for calculating the average length of stay values on the IRF PPS Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Research.html* in conjunction with the publication of this final rule.

We continue to support the commenters' position that the average length of stay values in the rule are not intended as ''targets'' or as clinical guidelines for determining a patient's length of stay in the IRF. A patient's length of stay in the IRF should be determined by the patient's individual care needs.

Final Decision: After careful consideration of the public comments, we are finalizing our proposal to update the CMG relative weight and average length of stay values for FY 2014. These updates are effective October 1, 2013.

V. Updates to the Facility-Level Adjustment Factors for FY 2014

A. Background on Facility-Level Adjustments

Section 1886(j)(3)(A)(v) of the Act confers broad authority upon the Secretary to adjust the per unit payment rate ''by such . . . factors as the Secretary determines are necessary to properly reflect variations in necessary costs of treatment among rehabilitation facilities.'' For example, we adjust the federal prospective payment amount associated with a CMG to account for facility-level characteristics such as an IRF's LIP, teaching status, and location in a rural area, if applicable, as described in § 412.624(e).

In the FY 2010 IRF PPS final rule (74 FR 39762), we updated the adjustment factors for calculating the rural, LIP, and teaching status adjustments based on the most recent three consecutive years' worth of IRF claims data (at that time, FY 2006, FY 2007, and FY 2008) and the most recent available corresponding IRF cost report data. As discussed in the FY 2010 IRF PPS proposed rule (74 FR 21060 through 21061), we observed relatively large year-to-year fluctuations in the underlying data used to compute the adjustment factors, especially the teaching status adjustment factor. Therefore, we implemented a 3-year moving average approach to updating the facility-level adjustment factors in the FY 2010 IRF PPS final rule (74 FR 39762) to provide greater stability and predictability of Medicare payments for IRFs.

Each year, we review the major components of the IRF PPS to maintain and enhance the accuracy of the payment system. For FY 2010, we implemented a change to our methodology that was designed to decrease the IRF PPS volatility by using a 3-year moving average to calculate the facility-level adjustment factors. For FY 2011, we issued a notice to update the payment rates, which did not include any policy changes or changes to the IRF facility-level adjustments. As we found that the implementation of the 3-year moving average did not fully address year-to-year fluctuations, in the FY 2012 IRF PPS proposed rule (76 FR 24214 at 24225 through 24226) we analyzed the effects of having used a weighting methodology. The methodology assigned greater weight to some facilities than to others in the regression analysis used to estimate the facility-level adjustment factors. As we found that this weighting methodology inappropriately exaggerated the cost differences among different types of IRF facilities, we proposed to remove the weighting factor from our analysis and update the IRF facility-level adjustment factors for FY 2012 using an un-weighted regression analysis. However, after carefully considering all of the comments that we received on the proposed FY 2012 updates to the facility-level adjustment factors, we decided to hold the facility-level adjustment factors at FY 2011 levels for FY 2012 to conduct further research on the underlying data and the best methodology for calculating the facility-level adjustment factors. We based this decision, in part, on comments we received about the financial hardships that the proposed updates would create for facilities with teaching programs and a higher disproportionate share of low-income patients.

B. Updates to the IRF Facility-Level Adjustment Factors

Since the FY 2012 final rule (76 FR 47836), we have conducted further research into the best methodology to use to estimate the IRF facility-level adjustment factors, to ensure that the adjustment factors reflect as accurately as possible the costs of providing IRF care across the full spectrum of IRF providers. Our recent research efforts have shown that significant differences exist between the cost structures of freestanding IRFs and the cost structures of IRF units of acute care hospitals (and critical access hospitals, otherwise known as ''CAHs''). We have found that these cost structure differences substantially influence the estimates of the adjustment factors. Therefore, we believe that it is important to control for these cost structure differences between hospital-based and freestanding IRFs in our regression analysis, so that these differences do not inappropriately influence the adjustment factor estimates. In Medicare's payment system for the treatment of end-stage renal disease (ESRD), we already control for the cost structure differences between hospital-based and freestanding facilities in the regression analyses that are used to set payment rates. Also, we received comments from an IRF industry association on the FY 2012 IRF PPS proposed rule suggesting that the addition of this particular control variable to the model could improve the methodology for estimating the IRF facility-level adjustment factors.

Thus, in the FY 2014 IRF PPS proposed rule, we proposed to add an indicator variable to our 3-year moving average methodology for updating the IRF facility-level adjustments that would have an assigned value of ''1'' if the facility is a freestanding IRF hospital and have an assigned value of ''0'' if the facility is an IRF unit of an acute care hospital (or CAH). Adding this variable to the regression analysis enables us to control for the differences in costs that are primarily due to the differences in cost structures between freestanding and hospital-based IRFs, so that those differences do not become inappropriately intertwined with our estimates of the differences in costs between rural and urban facilities, high LIP percentage and low LIP percentage facilities, and teaching and non-teaching facilities. Further, by including this variable in the regression analysis, we greatly improve our ability to predict an IRF's average cost per case (that is, the R-squared of the regression model increases from about 11 percent to about 41 percent). In this way, it enhances the precision with which we can estimate the IRF facility-level adjustments.

Therefore, in the FY 2014 IRF PPS proposed rule, we proposed to use the same methodology used in the FY 2010 IRF PPS final rule (74 FR 39762), including the 3-year moving average approach, with the addition of this new control variable, which equals ''1'' if the facility is a freestanding IRF hospital and ''0'' if it is an IRF unit of an acute care hospital (or a CAH). We proposed to update the adjustment factors using the most recent three years' worth of IRF claims data (FY 2010, FY 2011, and FY 2012) and the most recent available corresponding IRF cost report data. As we did in the FY 2010 IRF PPS final rule (74 FR 39762), we also proposed to use the cost report data that corresponds with each IRF claim, when available. In the rare instances in which the corresponding year's cost report data are not available, we proposed to use the most recent available cost report data, as we also did in the FY 2010 IRF PPS final rule (74 FR 39762).

To calculate the updates to the rural, LIP, and teaching status adjustment factors for FY 2014, we use the following steps:

[Steps 1 and 2 are performed independently for each of three years of IRF claims data: FY 2010, FY 2011, and FY 2012.]

Step 1. Calculate the average cost per case for each IRF in the IRF claims data.

Step 2. Use logarithmic regression analysis on average cost per case to compute the coefficients for the rural, LIP, and teaching status adjustments. We proposed to incorporate an additional indicator variable to account for whether a facility is a freestanding IRF hospital or a unit of an acute care hospital (or a CAH).

Step 3. Calculate a simple mean for each of the coefficients across the three years of data (using logarithms for the LIP and teaching status adjustment coefficients (because they are continuous variables), but not for the rural adjustment coefficient (because the rural variable is either zero (if not rural) or 1 (if rural)). To compute the LIP and teaching status adjustment factors, we convert these factors back out of the logarithmic form.

Based on this methodology, we proposed to update the rural adjustment factor for FY 2014 from 18.4 percent to 14.9 percent. We proposed to update the LIP adjustment factor for FY 2014 from 0.4613 to 0.3177 and the teaching status adjustment factor for FY 2014 from 0.6876 to 1.0163.

C. Budget Neutrality Methodology for the Updates to the IRF Facility-Level Adjustment Factors

Consistent with the way that we implemented changes to the IRF facility-level adjustment factors (the rural, LIP, and teaching status adjustments factors) in the FY 2006 IRF PPS final rule (70 FR 47880 and 70 FR 57166), which was the only year in which we updated these adjustment factors, we proposed to make changes to the rural, LIP, and teaching status adjustment factors for FY 2014 in such a way that total estimated aggregate payments to IRFs for FY 2014 would be the same with or without the proposed changes (that is, in a budget-neutral manner) by applying budget neutrality factors for each of these three changes to the standard payment amount. To calculate the budget neutrality factors used to update the rural, LIP, and teaching status

adjustment factors, we use the following steps:

Step 1. Using the most recent available data (currently FY 2012), calculate the estimated total amount of IRF PPS payments that would be made in FY 2014 (without applying the changes to the rural, LIP, or teaching status adjustment factors).

Step 2. Calculate the estimated total amount of IRF PPS payments that will be made in FY 2014 if the update to the rural adjustment factor were applied.

Step 3. Divide the amount calculated in step 1 by the amount calculated in step 2 to determine the budget neutrality factor (1.0025) that will maintain the same total estimated aggregate payments in FY 2014 with and without the change to the rural adjustment factor.

Step 4. Calculate the estimated total amount of IRF PPS payments that will be made in FY 2014 if the update to the LIP adjustment factor were applied.

Step 5. Divide the amount calculated in step 1 by the amount calculated in step 4 to determine the budget neutrality factor (1.0171) that will maintain the same total estimated aggregate payments in FY 2014 with and without the change to the LIP adjustment factor.

Step 6. Calculate the estimated total amount of IRF PPS payments that will be made in FY 2014 if the update to the teaching status adjustment factor were applied.

Step 7. Divide the amount calculated in step 1 by the amount calculated in step 6 to determine the budget neutrality factor (0.9962) that will maintain the same total estimated aggregate payments in FY 2014 with and without the change to the teaching status adjustment factor.

Step 8. Apply the budget neutrality factors for the updates to the rural, LIP, and teaching status adjustment factors to the FY 2013 IRF PPS standard payment amount after the application of the budget neutrality factors for the wage adjustment and the CMG relative weights.

In section VI.E. of this final rule, we discuss the methodology for calculating the standard payment conversion factor for FY 2014.

We received 19 comments on the proposed updates to the facility-level adjustment factors, which are summarized below.

Comment: Several commenters expressed concerns about the financial impact that the reductions to the rural and LIP adjustments would have on individual IRFs. These commenters also expressed concerns about the potential effects of this policy change combined with possible state Medicaid expansions under the Affordable Care Act. These commenters suggested that we delay implementation until FY 2015, phase in the updates over multiple years, or implement a stop-loss policy to mitigate the financial impact of the changes.

Response: Although we are mindful of the significant financial impacts on a small number of individual IRFs of finalizing these proposals, we believe that updating the facility level adjustments as proposed is necessary at this time to ensure that the adjustment factors reflect as accurately as possible the costs of providing IRF care across the full spectrum of IRF providers. In addition, we estimate that the maximum financial impact on any one facility from these proposed policy changes is similar to the financial impact that can result from annual fluctuations in the geographic wage index values, and we do not typically implement a delay or phase-in period to account for annual wage index fluctuations.

Although we understand that providers are subject to multiple financial pressures in today's economic climate, the policies established by this final rule are focused on providing accurate payment for Medicare Part A services provided in an IRF setting. However, we note that, to the extent that Medicaid coverage is expanded under the Affordable Care Act provisions, we believe that this could increase IRFs' LIP percentages, potentially leading to higher LIP adjustment payments under the IRF PPS. We do not believe that such potential increases in spending for the LIP adjustment undercut the need to ensure that LIP adjustment payments are as fair and accurate as possible for FY 2014.

Further, whereas the proposed updates to the facility-level adjustment factors would decrease payments to some IRFs, they would increase payments to other IRFs, by as much as 16.8 percent. By updating the facility-level adjustment factors with the proposed methodology, we ensure that the adjustment factors reflect as accurately as possible the costs of providing IRF care across the full spectrum of IRF providers where individual providers may see an increase or decrease. In addition, because we update the rural and LIP adjustments in a budget-neutral manner, decreases to these adjustments result in increases to the base payment rates for all IRF providers, partially offsetting some of the decreases in the rural and LIP adjustment payments for the affected providers. Thus, we believe it is necessary to update the adjustments at this time, using the proposed new enhancement to the methodology, to pay providers as accurately and fairly as possible.

Comment: Several commenters did not support our proposal to include an indicator variable for an IRF's freestanding/hospital-based status in the regression model, based on their belief that such variables should only be included if they are used as payment adjusters. These commenters further suggested that CMS pursue further analysis to explain the fluctuations in the teaching status adjustment factor over time. One commenter recommended that CMS cap the IRF teaching status adjustment factor at the same level as the IPPS IME adjustment, the IPF teaching status adjustment, or some combination of these adjustments.

Response: We appreciate the commenters' concerns and recommendations. However, given that our analysis showed large differences in cost structures between freestanding and hospital-based IRFs, and that a significant amount of the differences in costs between different types of IRFs (for example, urban/rural, teaching/non-teaching, and high LIP percentage/low LIP percentage) can be attributed instead to a facility's freestanding/hospital-based status, we believe that we would be remiss in not accounting for this indicator variable in the regression analysis. Thus, we believe that the inclusion of the indicator variable enables us to more precisely and accurately calculate each of the facility-level adjustment factors.

For several reasons, however, we do not believe that a facility's freestanding/hospital-based status can be used as a payment adjuster at this time. First, we do not know how much of the higher costs we observe in hospital-based IRFs can be attributed to the actual costs of treating patients in hospital-based settings (versus freestanding settings) and how much of the higher costs result from a hospital's decisions about allocating costs among its different components. Secondly, the IRF PPS has traditionally treated freestanding IRF hospitals and IRF units of acute care hospitals (or CAHs) the same for Medicare payment purposes. Thus, we do not believe it is appropriate to introduce a freestanding/hospital-based payment adjuster for the IRF PPS without substantial evidence that a change in policy is warranted at this time. However, we do believe that it is necessary to recognize the important differences in cost structures of the two types of facilities in order to pay IRFs as accurately and fairly as possible under the IRF PPS.

As one commenter suggested, we have done extensive analysis to uncover the reasons for the fluctuations in the IRF teaching status adjustment factor over time. Our analysis shows that such fluctuations are related primarily to the fact that there are relatively few IRF teaching facilities (around 110 in each year), and therefore fluctuations in the teaching status of one or two of these IRFs will be evident in overall fluctuations in the teaching adjustment factor over time. Specifically, we found that one IRF did not report training any interns and residents from 2007 through 2009, then reported relatively large intern and resident to average daily census ratios in 2010 and 2011, and then did not report training any interns and residents after 2011. This one provider appears to have contributed to swings in the overall teaching status adjustment factor over time. However, we have no reason to believe that any of the teaching status information for this provider is incorrect, and therefore believe that including this data is appropriate.

Further, our analysis of the IRF teaching adjustment trends shows no significant cause for concern in terms of unusually high or increasing Medicare payments for this adjustment over time. We found that the number of IRFs receiving this adjustment and the Medicare payments per IRF for this adjustment have remained very stable over time. Total Medicare spending for the IRF teaching adjustment peaked at $78 million (almost 9 percent of total IRF PPS payments) for 124 facilities in FY 2006, and fell to $56 million (6 percent of total IRF PPS payments) for 111 facilities in FY 2012. The average Medicare payment to an individual IRF for the teaching status adjustment decreased from $773,000 in FY 2006 to $508,000 in FY 2012. The average number of interns and residents relative to an IRF's average daily census (the factor on which an IRF's teaching status adjustment is based) was 0.12 in FY 2006, and declined to 0.11 in FY 2012. Given the small magnitude of the IRF teaching status adjustment relative to total IRF expenditures, the lack of growth in spending for this adjustment, and the need to ensure that IRFs are adequately compensated for training a new generation of physicians in the rehabilitation of Medicare beneficiaries in the IRF setting, we believe that continued funding of this adjustment is beneficial to the Medicare program and Medicare beneficiaries.

As one commenter suggested, we explored the possibility of capping the IRF teaching status adjustment at the level of either the IPPS capital or operating IME adjustments. However, either of these options would decrease the IRF teaching status adjustment factor to such an extremely low level (0.03 or 0.04 compared with the current 0.6876) that the additional payment per facility would not be enough to adequately compensate or encourage the training of a new generation of physicians in the rehabilitation of Medicare beneficiaries in the IRF setting. While capping the adjustment at the amount currently reflected in the inpatient psychiatric facility teaching status adjustment (0.5150) would seem to provide greater compensation than capping at either the IPPS capital or operating IME adjustment levels, at this time there is not enough evidence to believe that teaching costs or compensation should be the same for these settings. In fact, inpatient psychiatric facilities are not similar to IRFs in the types of patients they treat or the types of services they provide, so we cannot find any logical justification for capping the IRF teaching status adjustment factor at the teaching status adjustment factor used in the IPF PPS.

Comment: One commenter requested clarification on the 3-year moving average approach, including how the approach is used and whether or not the IRF area wage index adjustment is included as one of the adjustments that we estimate using this approach.

Response: The 3-year moving average approach was implemented to decrease year-to-year fluctuations in the facility-level adjustment factors. The IRF area wage index adjustment is not included in the facility-level adjustments that we estimate using a 3-year moving average approach.

Comment: Several commenters requested more information about the methodology used to compute the IRF facility-level adjustments, and the data to enable providers to replicate our analysis. In addition, one commenter requested that we provide the estimates that were averaged over the 3-year period to obtain the facility-level adjustment factors, and that we run our regression analysis on three years' worth of pooled discharge data instead of averaging each year's regression coefficients over three years.

Response: Our regression analysis for computing the IRF facility-level adjustments was posted on the IRF PPS Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Downloads/Facility-Payment-Adjustment_KJS.pdf* in 2011. As we discussed in the proposed rule, the only change to this regression analysis would be the addition of an indicator variable for an IRF's freestanding/hospital-based status, which would equal ''1'' if the IRF was a freestanding facility and ''0'' if the IRF was a hospital-based facility. The data that we used to analyze the adjustments is available from the IRF rate-setting files on the IRF PPS Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Data-Files.html.* The annual IRF facility-level adjustment factor estimates are presented below in Table 3. For this final rule, we averaged the estimates for FY 2010, FY 2011, and FY 2012.

TABLE 3—ANNUAL IRF FACILITY-LEVEL ADJUSTMENT FACTOR ESTIMATES

	FY 05	FY 06	FY 07	FY 08	FY 09	FY 10	FY 11	FY 12
LIP	0.4172	0.5107	0.3865	0.4898	0.4866	0.1594	0.2702	0.5538
Teaching	1.5155	0.6732	1.0451	0.4045	1.5678	0.3597	0.6326	2.6930
Rural	0.1860	0.1856	0.1765	0.1898	0.2123	0.1608	0.1516	0.1356

Additionally, we investigated another commenter's suggestion that we reduce the annual fluctuation in the adjustment factors by performing the regression analysis on three years' worth of pooled discharge data instead of averaging each year's regression coefficients over three years. We tried the approach that the commenter suggested, and it did not materially change our estimates.

Final Decision: After careful consideration of the public comments, we are finalizing our proposal to add an indicator variable for a facility's freestanding/hospital-based status to the payment regression, and, with that change, to update the IRF facility-level adjustment factors for FY 2014 using the same methodology, with the exception of adding the indicator variable, that we used in updating the FY 2010 IRF

facility-level adjustment factors, including the 3-year moving average approach. This results in a rural adjustment of 14.9 percent, a LIP adjustment factor of 0.3177, and a teaching status adjustment factor of 1.0163 for FY 2014. These updates are effective October 1, 2013.

VI. FY 2014 IRF PPS Federal Prospective Payment Rates

A. Market Basket Increase Factor, Productivity Adjustment, and Other Adjustment for FY 2014

Section 1886(j)(3)(C) of the Act requires the Secretary to establish an increase factor that reflects changes over time in the prices of an appropriate mix of goods and services included in the covered IRF services, which is referred to as a market basket index. According to section 1886(j)(3)(A)(i) of the Act, the increase factor shall be used to update the IRF federal prospective payment rates for each FY. Sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(iii) of the Act required the application of a 0.3 percentage point reduction to the market basket increase factor for FY 2014. In addition, section 1886(j)(3)(C)(ii)(I) of the Act requires the application of a productivity adjustment, as described below. Thus, in the FY 2014 IRF PPS proposed rule, we proposed to update the IRF PPS payments for FY 2014 by a market basket increase factor based upon the most current data available, with a productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act as described below and a 0.3 percentage point reduction as required by sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(iii) of the Act.

For this final rule, we use the same methodology described in the FY 2012 IRF PPS final rule (76 FR 47836 at 47848 through 47863) to compute the FY 2014 market basket increase factor and labor-related share. In that final rule, we rebased the RPL market basket from a 2002 base year to a 2008 base year. Based on IHS Global Insight's second quarter 2013 forecast, the most recent estimate of the 2008-based RPL market basket increase factor for FY 2014 is 2.6 percent. IHS Global Insight (IGI) is an economic and financial forecasting firm that contracts with CMS to forecast the components of providers' market baskets.

In accordance with section 1886(j)(3)(C)(ii)(I) of the Act, and using the methodology described in the FY 2012 IRF PPS final rule (76 FR 47836, 47858 through 47859), we apply a productivity adjustment to the FY 2014 RPL market basket increase factor. The statute defines the productivity adjustment to be equal to the 10-year moving average of changes in annual economy-wide private nonfarm business multifactor productivity (MFP) (as projected by the Secretary for the 10-year period ending with the applicable FY cost reporting period, or other annual period) (the ''MFP adjustment''). The Bureau of Labor Statistics (BLS) is the agency that publishes the official measure of private nonfarm business MFP. We refer readers to the BLS Web site at *http://www.bls.gov/mfp* to obtain the historical BLS-published MFP data. The projection of MFP is currently produced by IGI, using the methodology described in the FY 2012 IRF PPS final rule (76 FR 47836, 47859). The most recent estimate of the MFP adjustment for FY 2014 (the 10-year moving average of MFP for the period ending FY 2014) is 0.5 percent, which was calculated using the methodology described in the FY 2012 IRF PPS final rule (76 FR 47836, 47858 through 47859) and is based on IGI's second quarter 2013 forecast.

Thus, in accordance with section 1886(j)(3)(C) of the Act, we base the FY 2014 market basket update, which is used to determine the applicable percentage increase for the IRF payments, on the most recent estimate of the FY 2008-based RPL market basket (currently estimated to be 2.6 percent based on IGI's second quarter 2013 forecast). We then reduce this percentage increase by the current estimate of the MFP adjustment for FY 2014 of 0.5 percentage point (the 10-year moving average of MFP for the period ending FY 2014 based on IGI's second quarter 2013 forecast), which was calculated as described in the FY 2012 IRF PPS final rule (76 FR 47836, 47859). Following application of the MFP, we further reduce the applicable percentage increase by 0.3 percentage point, as required by sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(iii) of the Act. Therefore, the current estimate of the FY 2014 IRF update is 1.8 percent (2.6 percent market basket update, less 0.5 percentage point MFP adjustment, less 0.3 percentage point legislative adjustment).

B. Secretary's Final Recommendation

For FY 2014, the Medicare Payment Advisory Commission (MedPAC) recommends that a 0 percent update be applied to IRF PPS payment rates. As discussed above, and in accordance with sections 1886(j)(3)(C) and 1886(j)(3)(D) of the Act, the Secretary is proposing to update IRF PPS payment rates for FY 2014 by an adjusted market basket increase factor of 1.8 percent, as section 1886(j)(3)(C) of the Act does not provide the Secretary with the authority to apply a different update factor to IRF PPS payment rates for FY 2014.

We received 5 comments on the proposed market basket increase factor, MFP adjustment, other adjustments for FY 2014, and the Secretary's proposed recommendation, which are summarized below.

Comment: One commenter supported our proposal to update the IRF PPS payment rates for FY 2014 by the adjusted market basket estimate. Another commenter noted that MedPAC recommended a 0 percent update for IRFs for FY 2014, but recognized that CMS does not have the statutory authority to apply a different update factor to IRF PPS payment rates than is specified in statute. Several other commenters expressed concerns about the applicability of the MFP adjustment to the IRF setting, indicating that the unique services provided in IRFs do not lend themselves to the efficiency gains that are implied by the application of a MFP adjustment. These commenters recommended that we continue to monitor the impact of the MFP adjustment on IRFs and communicate our findings to the Congress.

Response: We appreciate the commenters' concerns. As these commenters noted, we are bound in these matters by the statute. However, we will continue to monitor the effects of the annual updates to the IRF PPS payment rates, and will communicate our findings as appropriate.

Comment: One commenter expressed concern about our use of some of the underlying cost categories, weights, and price proxies from the acute care hospital data, when the necessary RPL-specific data are not available, and suggested that we consider collecting additional information on the IRF cost reports prior to our next rebasing of the RPL market basket, so that we will not have to use the IPPS data for this purpose anymore.

Response: As stated in the FY 2012 IRF final rule (76 FR 47836, 47851), effective for cost reports beginning on or after May 1, 2010, we finalized a revised Hospital and Hospital Health Care Complex Cost Report, Form CMS 2552–10, which includes a new worksheet (Worksheet S–3, part V) which identifies the contract labor costs and benefit costs for the hospital complex and is applicable to sub-providers and units. Prior to any future rebasings, we plan to review any contract labor and benefit cost data submitted by RPL providers to determine the appropriateness of using this

information in the derivation of updated market basket cost weights.

Final Decision: After careful consideration of the public comments, we are finalizing our decision to update IRF PPS payment rates for FY 2014 based on the most recent estimate of the FY 2008-based RPL market basket (currently estimated to be 2.6 percent based on IGI's second quarter 2013 forecast). We then reduce this percentage increase by the current estimate of the MFP adjustment for FY 2014 of 0.5 percentage point (the 10-year moving average of MFP for the period ending FY 2014 based on IGI's second quarter 2013 forecast), which was calculated as described in the FY 2012 IRF PPS final rule (76 FR 47836, 47859). Following application of the MFP adjustment, we further reduce the applicable percentage increase by 0.3 percentage point, as required by sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(iii) of the Act. Therefore, the FY 2014 IRF update is 1.8 percent (2.6 percent market basket update, less 0.5 percentage point MFP adjustment, less 0.3 percentage point legislative adjustment).

C. Labor-Related Share for FY 2014

The labor-related share for FY 2014 is updated using the methodology described in the FY 2012 IRF PPS final rule (76 FR 47836, 47860 through 47863). Using this method and IGI's second quarter 2013 forecast of the 2008-based RPL market basket, the IRF labor-related share for FY 2014 is the sum of the FY 2014 relative importance of each labor-related cost category. This figure reflects the different rates of price change for these cost categories between the base year (FY 2008) and FY 2014. As shown in Table 4, the FY 2014 labor-related share is 69.494 percent.

TABLE 4—FY 2014 IRF RPL LABOR-RELATED SHARE RELATIVE IMPORTANCE

	FY 2014 Relative importance labor-related share
Wages and Salaries	48.394
Employee Benefits	12.963
Professional Fees: Labor-Related	2.065
Administrative and Business Support Services	0.415
All Other: Labor-Related Services	2.080
Subtotal	65.917
Labor-Related Portion of Capital Costs (.46)	3.577
Total Labor-Related Share	69.494

Source: IHS Global Insight, Inc. 2nd quarter 2013 forecast; Historical Data through 1st quarter, 2013.

We received 1 comment on the proposed update to the IRF labor-related share, which is summarized below.

Comment: One commenter expressed general concern with the proposed decrease in the IRF labor-related share from FY 2013 to FY 2014.

Response: We believe that the methodology for determining the labor-related share is technically appropriate, as it estimates the proportion of IRF costs that are labor-intensive and vary with, or are influenced by, the local labor market. The methodology for determining the proposed IRF labor-related share for FY 2014 is the same general method that was used to derive the FY 2013 IRF PPS labor-related share. That is, the labor-related share is equal to the sum of the relative importance of each labor-related cost category in the RPL market basket. We calculate the labor-related relative importance for FY 2014 in four steps. First, we compute the FY 2014 price index level for the total market basket and each cost category of the market basket. Second, we calculate a ratio for each cost category by dividing the FY 2014 price index level for that cost category by the total market basket price index level. Third, we determine the FY 2014 relative importance for each cost category by multiplying this ratio by the base year (FY 2008) weight. Finally, we add the FY 2014 relative importance for each of the labor-related cost categories. The purpose of the relative importance is to capture the different rates of price change for each of the market basket cost categories between the base year (FY 2008 for IRFs) and FY 2014. Therefore, to the extent an individual price proxy for a specific cost category is projected to grow faster from FY 2008 to FY 2014 relative to the proxies for other cost categories, the relative importance for that category in FY 2014 will be higher than the base year cost weight in FY 2008.

Final Decision: After consideration of the public comments received, we are finalizing our decision to update IRF labor-related share for FY 2014 using the methodology described in the FY 2012 IRF PPS final rule (76 FR 47836, 47860 through 47863) and IGI's second quarter 2013 forecast of the 2008-based RPL market basket. The FY 2014 labor-related share is 69.494 percent.

D. Wage Adjustment

Section 1886(j)(6) of the Act requires the Secretary to adjust the proportion of rehabilitation facilities' costs attributable to wages and wage related costs (as estimated by the Secretary from time to time) by a factor (established by the Secretary) reflecting the relative hospital wage level in the geographic area of the rehabilitation facility compared to the national average wage level for those facilities. The Secretary is required to update the IRF PPS wage index on the basis of information available to the Secretary on the wages and wage-related costs to furnish rehabilitation services. Any adjustment or updates made under section 1886(j)(6) of the Act for a FY are made in a budget-neutral manner.

For FY 2014, we are maintaining the policies and methodologies described in the FY 2012 IRF PPS final rule (76 FR 47836, at 47863 through 47865) relating to the labor market area definitions and the wage index methodology for areas with wage data. Thus, we are using the CBSA labor market area definitions and the FY 2013 pre-reclassification and pre-floor hospital wage index data. In accordance with section 1886(d)(3)(E) of the Act, the FY 2013 pre-reclassification and pre-floor hospital wage index is based on data submitted for hospital cost reporting periods beginning on or after October 1, 2008, and before October 1, 2009 (that is, FY 2009 cost report data).

The labor market designations made by the OMB include some geographic areas where there are no hospitals and, thus, no hospital wage index data on

which to base the calculation of the IRF PPS wage index. We will continue to use the same methodology discussed in the FY 2008 IRF PPS final rule (72 FR 44299) to address those geographic areas where there are no hospitals and, thus, no hospital wage index data in which to base the calculation for the FY 2014 IRF PPS wage index.

In accordance with our established methodology, we have historically adopted any CBSA changes that are published in the OMB bulletin that corresponds with the hospital wage data used to determine the IRF PPS wage index. The OMB bulletins are available at *http://www.whitehouse.gov/omb/bulletins/index.html.*

In keeping with the established IRF PPS wage index policy, we will use the prior year's (FY 2013) pre-floor, pre-reclassified hospital wage index data to derive the FY 2014 applicable IRF PPS wage index. We anticipate using the FY 2014 pre-floor, pre-reclassified hospital wage index data to derive the applicable IRF PPS wage index for FY 2015. We note, however, that the FY 2014 pre-floor, pre-reclassified hospital wage index does not use OMB's new 2010 Census-based area delineations, which were outlined in the February 28, 2013 OMB Bulletin 13–01. This bulletin contains a number of significant changes. For example, there are new CBSAs, counties that change from urban to rural, counties that change from rural to urban, and existing CBSAs that are being split apart. The OMB Bulletin with these changes was not published in time for incorporation into the FY 2014 pre-floor, pre-reclassified hospital wage index, since the proposed rule was already in the advanced stages of development at that time and the changes and their ramifications would need to be extensively reviewed and verified prior to their inclusion in the rule. We therefore intend to consider the incorporation of these CBSA changes during the development of the FY 2015 hospital wage index. Assuming that we would continue to follow our established methodology for the IRF PPS wage index, this means that the 2010 Census-based CBSA changes would not be considered for inclusion in the IRF PPS wage index until FY 2016.

To calculate the wage-adjusted facility payment for the payment rates set forth in this final rule, we multiply the unadjusted Federal payment rate for IRFs by the FY 2014 labor-related share based on the FY 2008-based RPL market basket (69.494 percent) to determine the labor-related portion of the standard payment amount. We then multiply the labor-related portion by the applicable IRF wage index from the tables in the addendum to this final rule. These tables are available through the Internet on the CMS Web site at *http://www.cms.hhs.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/.* Table A is for urban areas, and Table B is for rural areas.

Adjustments or updates to the IRF wage index made under section 1886(j)(6) of the Act must be made in a budget-neutral manner. We calculate a budget-neutral wage adjustment factor as established in the FY 2004 IRF PPS final rule (68 FR 45689), codified at § 412.624(e)(1), as described in the steps below. We use the listed steps to ensure that the FY 2014 IRF standard payment conversion factor reflects the update to the wage indexes (based on the FY 2009 hospital cost report data) and the labor-related share in a budget-neutral manner:

Step 1. Determine the total amount of the estimated FY 2013 IRF PPS rates, using the FY 2013 standard payment conversion factor and the labor-related share and the wage indexes from FY 2013 (as published in the July 30, 2012 FY 2013 IRF PPS notice (77 FR 44618)).

Step 2. Calculate the total amount of estimated IRF PPS payments using the FY 2013 standard payment conversion factor and the FY 2014 labor-related share and CBSA urban and rural wage indexes.

Step 3. Divide the amount calculated in step 1 by the amount calculated in step 2. The resulting quotient is the FY 2014 budget-neutral wage adjustment factor of 1.0010.

Step 4. Apply the FY 2014 budget-neutral wage adjustment factor from step 3 to the FY 2013 IRF PPS standard payment conversion factor after the application of the adjusted market basket update to determine the FY 2014 standard payment conversion factor.

We received 3 comments on the proposed FY 2014 IRF PPS wage index, which are summarized below.

Comment: Several commenters recommended that we develop a new methodology for area wage adjustment that eliminates hospital wage index reclassifications for all hospitals and reduces the problems associated with annual fluctuations in wage indices and across geographic boundaries. These commenters also recommended that we consider wage index policies under the current IPPS because IRFs compete in a similar labor pool as acute care hospitals. The commenters suggested that the IPPS wage index policies would allow IRFs to benefit from the IPPS reclassification and/or floor policies. The commenters further recommended that until a new wage index system is implemented, we institute a ''smoothing'' variable to the current process to reduce the fluctuations IRFs annually experience.

Response: We note that the IRF PPS does not account for geographic reclassification under sections 1886(d)(8) and (d)(10) of the Act, and does not apply the ''rural floor'' under section 4410 of Public Law 105–33 (BBA). Furthermore, as we do not have an IRF-specific wage index, we are unable to determine at this time the degree, if any, to which a geographic reclassification adjustment or a ''rural floor'' policy under the IRF PPS would be appropriate. The rationale for our current wage index policies is fully described in the FY 2006 final rule (70 FR 47880, 47926 through 47928).

Finally, although some commenters recommended that we adopt the IPPS wage index policies such as reclassification and floor policies, we note that the Medicare Payment Advisory Commission (MedPAC's) June 2007 report to the Congress, titled ''Report to Congress: Promoting Greater Efficiency in Medicare,'' recommends that Congress ''repeal the existing hospital wage index statute, including reclassification and exceptions, and give the Secretary authority to establish new wage index systems.'' We continue to believe that adopting the IPPS wage index policies, such as reclassification or floor, would not be prudent at this time because MedPAC suggests that the reclassification and exception policies in the IPPS wage index alter the wage index values for one-third of IPPS hospitals. As one commenter noted, we have research currently under way to examine alternatives to the wage index methodology, including the issues the commenters mentioned about ensuring that the wage index minimizes fluctuations, matches the costs of labor in the market, and provides for a single wage index policy. Section 3137(b) of the Affordable Care Act required us to submit a report to the Congress by December 31, 2011 that includes a plan to reform the hospital wage index system. The report that we submitted is available online at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/Wage-Index-Reform.html.*

We enlisted the help of Acumen, LLC to assist us in meeting the requirements of section 106(b)(2), Division B, Title I of the Tax Relief and Health Care Act of 2006 (Pub. L. 109–432, enacted on December 20, 2006) (TRCA). Acumen, LLC conducted a study of both the current methodology used to construct the Medicare wage index and the

recommendations reported to Congress by MedPAC. Parts 1 and 2 of Acumen's final report, which analyzes the strengths and weaknesses of the data sources used to construct the CMS and MedPAC indexes, is available online at *http://www.acumenllc.com/reports/cms.* The report took MedPAC's 2009 recommendations on the Medicare wage index classification system into account, and includes a proposal to revise the IPPS wage index system. MedPAC's recommendations were noted in the FY 2009 IPPS final rule (75 FR 48434 at 48563). The proposal considered each of the following:

- The use of Bureau of Labor Statistics data or other data or methodologies to calculate relative wages for each geographic area.
- Minimizing variations in wage index adjustments between and within MSAs and statewide rural areas.
- Methods to minimize the volatility of wage index adjustments while maintaining the principle of budget neutrality.
- The effect that the implementation of the proposal would have on health care providers in each region of the county.
- Issues relating to occupational mix, such as staffing practices and any evidence on quality of care and patient safety, including any recommendations for alternative calculations to the occupational mix.
- The provision of a transition period.

We plan to monitor the efforts to develop an alternative wage index system for the IPPS closely and determine the impact or influence they may have on the IRF PPS wage index.

Final Decision: After consideration of the public comments received, we have decided to continue to use the policies and methodologies described in the FY 2008 IRF PPS final rule relating to the wage index methodology for areas without wage data. For FY 2014, we are maintaining the policies and methodologies described in the FY 2012 IRF PPS final rule (76 FR 47836, at 47836 through 47865) relating to the labor market area definitions and the wage index methodology for areas with wage data. Therefore, this final rule continues to use the Core-Based Statistical Area (CBSA) labor market area definitions and the pre-reclassification and pre-floor hospital wage index data based on 2009 cost report data. However, we will continue to monitor the IPPS wage index to identify any policy changes that may be appropriate for IRFs.

We discuss the calculation of the standard payment conversion factor for FY 2014 in section VI.E. of this final rule.

E. Description of the IRF Standard Conversion Factor and Payment Rates for FY 2014

To calculate the standard payment conversion factor for FY 2014, as illustrated in Table 5, we begin by applying the adjusted market basket increase factor for FY 2014 that was adjusted in accordance with sections 1886(j)(3)(C) and (D) of the Act, to the standard payment conversion factor for FY 2013 ($14,343). Applying the 1.8 percent adjusted market basket increase factor for FY 2014 to the revised standard payment conversion factor for FY 2013 of $14,343 yields a standard payment amount of $14,601. Then, we apply the budget neutrality factor for the FY 2014 wage index and labor-related share of 1.0010, which results in a standard payment amount of $14,616. We next apply the budget neutrality factors for the revised CMG relative weights of 1.0000, which results in a standard payment conversion factor of $14,616 for FY 2014.

We then apply the budget neutrality factors for the facility adjustments. Applying the budget neutrality factor for the revised rural adjustment of 1.0025 results in a standard payment conversion factor of $14,652. We then apply the budget neutrality factor for the revised LIP adjustment of 1.0171 resulting in a standard payment conversion factor of $14,903. Lastly, we apply the budget neutrality factor for the revised teaching adjustment of 0.9962 which results in a final standard payment conversion factor for FY 2014 of $14,846.

TABLE 5—CALCULATIONS TO DETERMINE THE FY 2014 STANDARD PAYMENT CONVERSION FACTOR

Explanation for adjustment	Calculations	
Standard Payment Conversion Factor for FY 2013		$14,343
Market Basket Increase Factor for FY 2014 (2.6 percent), reduced by 0.3 percentage point in accordance with sections 1886(j)(3)(C) and (D) of the Act and a 0.5 percentage point reduction for the productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act	×	1.018
Budget Neutrality Factor for the Wage Index and Labor-Related Share	×	1.0010
Budget Neutrality Factor for the Revisions to the CMG Relative Weights	×	1.0000
Budget Neutrality Factor for the Update to the Rural Adjustment Factor	×	1.0025
Budget Neutrality Factor for the Update to the LIP Adjustment Factor	×	1.0171
Budget Neutrality Factor for the Update to the Teaching Status Adjustment Factor	×	0.9962
FY 2014 Standard Payment Conversion Factor	=	$14,846

After the application of the CMG relative weights described in Section IV of this final rule, to the FY 2014 standard payment conversion factor ($14,846), the resulting unadjusted IRF prospective payment rates for FY 2014 are shown in Table 6.

TABLE 6—FY 2014 PAYMENT RATES

CMG	Payment rate Tier 1	Payment rate Tier 2	Payment rate Tier 3	Payment rate no comorbidity
0101	$11,851.56	$10,616.37	$9,707.80	$9,262.42
0102	14,713.87	13,180.28	12,051.98	11,498.23
0103	17,233.24	15,436.87	14,115.58	13,466.81
0104	18,129.94	16,240.04	14,848.97	14,167.54
0105	21,192.67	18,983.58	17,357.94	16,560.71
0106	24,176.71	21,657.34	19,803.08	18,893.02
0107	27,294.37	24,448.39	22,356.59	21,329.25
0108	34,378.88	30,795.06	28,158.41	26,865.32

TABLE 6—FY 2014 PAYMENT RATES—Continued

CMG	Payment rate Tier 1	Payment rate Tier 2	Payment rate Tier 3	Payment rate no comorbidity
0109	31,161.75	27,913.45	25,523.24	24,351.89
0110	40,651.32	36,412.78	33,295.12	31,767.47
0201	12,250.92	10,322.42	9,177.80	8,546.84
0202	15,661.05	13,196.61	11,734.28	10,926.66
0203	18,587.19	15,662.53	13,925.55	12,967.98
0204	19,414.11	16,360.29	14,546.11	13,545.49
0205	23,443.32	19,755.57	17,564.30	16,355.84
0206	28,908.13	24,360.80	21,658.83	20,168.29
0207	38,253.69	32,235.12	28,660.20	26,688.65
0301	16,306.85	14,033.92	12,573.08	11,627.39
0302	20,420.67	17,574.69	15,745.67	14,560.96
0303	24,078.73	20,722.05	18,566.41	17,169.40
0304	32,352.40	27,843.67	24,945.73	23,069.20
0401	16,838.33	13,995.32	13,031.82	11,652.63
0402	20,975.91	17,435.14	16,235.59	14,516.42
0403	34,375.91	28,572.61	26,605.52	23,789.23
0404	63,147.46	52,488.03	48,874.52	43,700.69
0405	51,949.12	43,181.08	40,207.42	35,951.07
0501	12,446.89	9,779.06	9,216.40	8,392.44
0502	16,464.21	12,933.84	12,190.05	11,100.35
0503	21,280.26	16,718.08	15,756.06	14,347.17
0504	24,592.40	19,320.58	18,208.62	16,580.01
0505	29,258.50	22,986.06	21,663.28	19,725.88
0506	40,853.22	32,095.57	30,248.73	27,543.78
0601	14,318.97	11,624.42	10,729.20	9,725.61
0602	19,261.20	15,637.29	14,431.80	13,080.81
0603	24,092.09	19,558.12	18,051.25	16,361.78
0604	32,190.58	26,133.41	24,118.81	21,862.22
0701	13,909.22	11,869.38	11,354.22	10,310.55
0702	18,011.17	15,370.06	14,703.48	13,351.01
0703	21,884.49	18,674.78	17,864.19	16,222.22
0704	27,785.77	23,710.55	22,681.72	20,597.34
0801	10,447.13	9,194.13	8,413.23	7,699.14
0802	13,739.97	12,092.07	11,066.21	10,126.46
0803	18,689.63	16,446.40	15,050.87	13,772.63
0804	16,536.96	14,553.53	13,318.35	12,187.08
0805	20,419.19	17,969.60	16,444.91	15,047.91
0806	24,767.58	21,796.90	19,945.60	18,251.67
0901	13,376.25	11,063.24	10,230.38	9,265.39
0902	17,935.45	14,834.12	13,719.19	12,424.62
0903	22,387.77	18,515.93	17,123.38	15,508.13
0904	29,200.60	24,151.47	22,335.81	20,229.16
1001	15,255.75	13,873.59	11,910.95	11,011.28
1002	19,414.11	17,654.86	15,157.77	14,013.14
1003	28,744.83	26,140.84	22,442.70	20,747.29
1101	18,110.64	16,563.68	15,294.35	14,929.14
1102	25,408.93	23,236.96	21,458.41	20,943.25
1201	14,035.41	13,971.57	12,537.45	11,467.05
1202	17,442.57	17,362.40	15,580.88	14,250.68
1203	21,789.47	21,688.52	19,463.11	17,801.84
1301	17,337.16	14,807.40	13,453.45	12,201.93
1302	22,306.12	19,050.39	17,308.95	15,699.65
1303	28,584.49	24,412.76	22,181.41	20,117.81
1401	13,166.92	10,782.65	9,731.55	8,814.07
1402	17,708.31	14,501.57	13,088.23	11,854.53
1403	21,646.95	17,727.61	15,999.53	14,491.18
1404	27,594.26	22,598.58	20,395.43	18,472.88
1501	15,036.03	12,819.52	11,584.33	11,095.90
1502	18,781.67	16,014.38	14,470.40	13,860.23
1503	22,799.00	19,439.35	17,565.79	16,824.97
1504	28,292.02	24,121.78	21,798.38	20,877.93
1601	15,895.61	13,187.70	12,362.26	11,340.86
1602	20,619.61	17,107.05	16,036.65	14,710.90
1603	26,078.48	21,635.08	20,282.61	18,606.49
1701	16,409.28	14,179.41	12,795.77	11,533.86
1702	20,643.36	17,838.95	16,097.52	14,510.48
1703	24,574.58	21,235.72	19,163.22	17,273.32
1704	31,184.02	26,948.46	24,317.75	21,918.63
1801	16,891.78	15,117.68	13,682.07	11,354.22
1802	25,992.38	23,262.20	21,054.60	17,472.26
1803	41,528.72	37,166.96	33,639.55	27,916.42
1901	16,087.13	13,788.96	13,134.26	12,939.77

TABLE 6—FY 2014 PAYMENT RATES—Continued

CMG	Payment rate Tier 1	Payment rate Tier 2	Payment rate Tier 3	Payment rate no comorbidity
1902	31,559.63	27,050.90	25,765.23	25,382.21
1903	52,455.37	44,964.08	42,824.77	42,189.36
2001	13,178.79	10,788.59	9,933.46	9,066.45
2002	17,617.75	14,421.40	13,279.75	12,120.27
2003	22,190.32	18,164.08	16,725.50	15,266.14
2004	29,113.01	23,829.31	21,942.39	20,027.25
2101	32,591.42	23,195.39	22,433.79	21,001.15
5001				2,283.31
5101				9,823.60
5102				21,298.07
5103				11,361.64
5104				29,224.35

F. Example of the Methodology for Adjusting the Federal Prospective Payment Rates

Table 7 illustrates the methodology for adjusting the federal prospective payments (as described in sections VI.A. through VI.D. of this final rule). The following examples are based on two hypothetical Medicare beneficiaries, both classified into CMG 0110 (without comorbidities). The unadjusted federal prospective payment rate for CMG 0110 (without comorbidities) appears in Table 6.

Example: One beneficiary is in Facility A, an IRF located in rural Spencer County, Indiana, and another beneficiary is in Facility B, an IRF located in urban Harrison County, Indiana. Facility A, a rural non-teaching hospital has a Disproportionate Share Hospital (DSH) percentage of 5 percent (which would result in a LIP adjustment of 1.0156), a wage index of 0.8472, and a rural adjustment of 14.9 percent. Facility B, an urban teaching hospital, has a DSH percentage of 15 percent (which would result in a LIP adjustment of 1.0454 percent), a wage index of 0.8862, and a teaching status adjustment of 0.0784.

To calculate each IRF's labor and non-labor portion of the Federal prospective payment, we begin by taking the unadjusted Federal prospective payment rate for CMG 0110 (without comorbidities) from Table 6. Then, we multiply the labor-related share for FY 2014 (69.494 percent) described in section VI.C. of this final rule by the unadjusted federal prospective payment rate. To determine the non-labor portion of the federal prospective payment rate, we subtract the labor portion of the federal payment from the unadjusted Federal prospective payment.

To compute the wage-adjusted federal prospective payment, we multiply the labor portion of the federal payment by the appropriate wage index found in tables A and B. These tables are available through the Internet on the CMS Web site at *http://www.cms.hhs.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/*. The resulting figure is the wage-adjusted labor amount. Next, we compute the wage-adjusted federal payment by adding the wage-adjusted labor amount to the non-labor portion.

Adjusting the wage-adjusted federal payment by the facility-level adjustments involves several steps. First, we take the wage-adjusted Federal prospective payment and multiply it by the appropriate rural and LIP adjustments (if applicable). Second, to determine the appropriate amount of additional payment for the teaching status adjustment (if applicable), we multiply the teaching status adjustment (0.0784, in this example) by the wage-adjusted and rural-adjusted amount (if applicable). Finally, we add the additional teaching status payments (if applicable) to the wage, rural, and LIP-adjusted federal prospective payment rates. Table 7 illustrates the components of the adjusted payment calculation.

TABLE 7—EXAMPLE OF COMPUTING THE IRF FY 2014 FEDERAL PROSPECTIVE PAYMENT

Steps		Rural facility A (Spencer Co., IN)		Urban facility B (Harrison Co., IN)	
1	Unadjusted Federal Prospective Payment		$31,767.47		$31,767.47
2	Labor Share	×	0.69494	×	0.69494
3	Labor Portion of Federal Payment	=	$22,076.49	=	$22,076.49
4	CBSA Based Wage Index (shown in the Addendum, Tables 1 and 2)	×	0.8472	×	0.8862
5	Wage-Adjusted Amount	=	$18,703.20	=	$19,564.19
6	Non-labor Amount	+	$9,690.98	+	$9,690.98
7	Wage-Adjusted Federal Payment	=	$28,394.18	=	$29,255.17
8	Rural Adjustment	×	1.1493	×	1.000
9	Wage- and Rural-Adjusted Federal Payment	=	$32,633.43	=	$29,255.17
10	LIP Adjustment	×	1.0156	×	1.0454
11	FY 2014 Wage-, Rural- and LIP-Adjusted Federal Prospective Payment Rate	=	$33,142.51	=	$30,583.35
12	FY 2014 Wage- and Rural-Adjusted Federal Prospective Payment		$32,633.43		$29,255.17
13	Teaching Status Adjustment	×	0	×	0.0784
14	Teaching Status Adjustment Amount	=	$0.00	=	$2,293.61
15	FY 2014 Wage-, Rural-, and LIP-Adjusted Federal Prospective Payment Rate	+	$33,142.51	+	$30,583.35
16	Total FY 2014 Adjusted Federal Prospective Payment	=	$33,142.51	=	$32,876.96

Thus, the adjusted payment for Facility A would be $33,142.51, and the adjusted payment for Facility B would be $32,876.96.

We did not receive any comments specifically on the FY 2014 IRF PPS Federal prospective payment rates.

VII. Update to Payments for High-Cost Outliers Under the IRF PPS

A. Update to the Outlier Threshold Amount for FY 2014

Section 1886(j)(4) of the Act provides the Secretary with the authority to make payments in addition to the basic IRF prospective payments for cases incurring extraordinarily high costs. A case qualifies for an outlier payment if the estimated cost of the case exceeds the adjusted outlier threshold. We calculate the adjusted outlier threshold by adding the IRF PPS payment for the case (that is, the CMG payment adjusted by all of the relevant facility-level adjustments) and the adjusted threshold amount (also adjusted by all of the relevant facility-level adjustments). Then, we calculate the estimated cost of a case by multiplying the IRF's overall CCR by the Medicare allowable covered charge. If the estimated cost of the case is higher than the adjusted outlier threshold, we make an outlier payment for the case equal to 80 percent of the difference between the estimated cost of the case and the outlier threshold.

In the FY 2002 IRF PPS final rule (66 FR 41362 through 41363), we discussed our rationale for setting the outlier threshold amount for the IRF PPS so that estimated outlier payments would equal 3 percent of total estimated payments. For the 2002 IRF PPS final rule, we analyzed various outlier policies using 3, 4, and 5 percent of the total estimated payments, and we concluded that an outlier policy set at 3 percent of total estimated payments would optimize the extent to which we could reduce the financial risk to IRFs of caring for high-cost patients, while still providing for adequate payments for all other (non-high cost outlier) cases.

Subsequently, we updated the IRF outlier threshold amount in the FYs 2006 through 2012 IRF PPS final rules and the FY 2011 and FY 2013 notices (70 FR 47880, 71 FR 48354, 72 FR 44284, 73 FR 46370, 74 FR 39762, 75 FR 42836, 76 FR 47836, 76 FR 59256, and 77 FR 44618, respectively) to maintain estimated outlier payments at 3 percent of total estimated payments. We also stated in the FY 2009 final rule (73 FR 46370 at 46385) that we would continue to analyze the estimated outlier payments for subsequent years and adjust the outlier threshold amount as appropriate to maintain the 3 percent target.

To update the IRF outlier threshold amount for FY 2014, we proposed to use FY 2012 claims data and the same methodology that we used to set the initial outlier threshold amount in the FY 2002 IRF PPS final rule (66 FR 41316 and 41362 through 41363), which is also the same methodology that we used to update the outlier threshold amounts for FYs 2006 through 2013. Based on an analysis of this updated data, we estimate that IRF outlier payments as a percentage of total estimated payments are approximately 2.5 percent in FY 2014. This estimated percentage changed more than usual between the proposed rule and the final rule due to the use of updated data for the final rule (from 2.8 percent in the proposed rule to 2.5 percent in the final rule). Our analysis indicates that this change was due to a larger-than-usual change in individual IRFs' CCRs between the proposed rule and the final rule. This may be the result of outlier reconciliation policies that we recently implemented for the IRF PPS that result in more current CCRs being used to calculate the outlier payments. Based on our updated estimates, then, we update the outlier threshold amount to $9,272 to maintain estimated outlier payments at approximately 3 percent of total estimated aggregate IRF payments for FY 2014.

We received 4 comments on the update to the outlier threshold amount for FY 2014, which are summarized below.

Comment: Several commenters expressed support for the proposed update to the outlier threshold amount to maintain estimated IRF outlier payments for FY 2014 at 3 percent of total IRF PPS payments. However, several other commenters expressed concerns that actual IRF outlier payments in recent years have tended to fall below 3 percent of total IRF PPS payments. These commenters requested that we evaluate the IRF PPS outlier policy to ensure that it is working as intended, adopt similar changes in the IRF PPS outlier calculation that are proposed for the FY 2014 IPPS outlier calculation, and incorporate any unused outlier payments from years in which aggregate outlier payments are below the 3 percent target back into the IRF PPS base payments for subsequent years. One commenter also suggested that we lower the outlier pool from 3 percent to 1.5 or 2 percent, and add the money back into the IRF PPS base payment amount.

Response: We will continue to monitor our IRF outlier policies to ensure that they continue to compensate IRFs for treating unusually high-cost patients and, thereby, promote access to care for patients who are likely to require unusually high-cost care. At this time, we do not have any indications to suggest that the outlier pool would be better set at 1.5 or 2 percent than at 3 percent.

We do not make adjustments to IRF PPS payment rates for the sole purpose of accounting for differences between projected and actual outlier payments. We use the best available data at the time to establish an outlier threshold for IRF PPS payments prior to the beginning of each fiscal year so that estimated outlier payments for that fiscal year will equal 3 percent of total estimated total IRF PPS payments. We evaluate the status of our outlier expenditures annually and if there is a difference from our projection, that information is used to make a prospective adjustment to lower or raise the outlier threshold for the upcoming fiscal year. We do not make retrospective adjustments. If outlier payments for a given year turn out to be greater than projected, we do not recoup money from hospitals; if outlier payments for a given year are lower than projected, we do not make an adjustment to account for the difference. Payments for a given discharge in a given fiscal year are generally intended to reflect or address the average costs of that discharge in that year; that goal would be undermined if we adjusted IRF PPS payments to account for ''underpayments'' or ''overpayments'' in IRF outliers in previous years.

We also note that the IPPS outlier payments are not calculated using the same methodology as the IRF PPS outlier calculations, so recently implemented and proposed changes to the IPPS methodology for calculating outlier payments would not be applicable for the IRF PPS unless we were to change our entire methodology for calculating IRF outlier payments to mirror the IPPS methodology, which we are not considering at this time.

Final Decision: Having carefully considered the public comments received, we are reducing the outlier threshold amount to $9,272 to maintain estimated outlier payments at 3 percent of total estimated aggregate IRF payments for FY 2014. This update is effective October 1, 2013. We will continue to monitor trends in IRF outlier payments to ensure that they are working as intended to compensate IRFs for treating exceptionally high-cost IRF patients.

B. Update to the IRF Cost-to-Charge Ratio Ceiling and Urban/Rural Averages

In accordance with the methodology stated in the FY 2004 IRF PPS final rule (68 FR 45674, 45692 through 45694), we apply a ceiling to IRFs' CCRs. Using the methodology described in that final rule, we update the national urban and

rural CCRs for IRFs, as well as the national CCR ceiling for FY 2014, based on analysis of the most recent data that is available. We apply the national urban and rural CCRs in the following situations:

- New IRFs that have not yet submitted their first Medicare cost report.
- IRFs whose overall CCR is in excess of the national CCR ceiling for FY 2014, as discussed below.
- Other IRFs for which accurate data to calculate an overall CCR are not available.

Specifically, for FY 2014, we estimate a national average CCR of 0.643 for rural IRFs, which we calculate by taking an average of the CCRs for all rural IRFs using their most recently submitted cost report data. Similarly, we estimate a national average CCR of 0.516 for urban IRFs, which we calculate by taking an average of the CCRs for all urban IRFs using their most recently submitted cost report data. We apply weights to both of these averages using the IRFs' estimated costs, meaning that the CCRs of IRFs with higher costs factor more heavily into the averages than the CCRs of IRFs with lower costs. For this final rule, we have used the most recent available cost report data (FY 2011). This includes all IRFs whose cost reporting periods begin on or after October 1, 2010, and before October 1, 2011. If, for any IRF, the FY 2011 cost report was missing or had an ''as submitted'' status, we used data from a previous fiscal year's (that is, FY 2004 through FY 2010) settled cost report for that IRF. We do not use cost report data from before FY 2004 for any IRF because changes in IRF utilization since FY 2004 resulting from the 60 percent rule and IRF medical review activities suggest that these older data do not adequately reflect the current cost of care.

In accordance with past practice, we will set the national CCR ceiling at 3 standard deviations above the mean CCR. Using this method, the national CCR ceiling is set at 1.57 for FY 2014. This means that, if an individual IRF's CCR exceeds this ceiling of 1.57 for FY 2014, we will replace the IRF's CCR with the appropriate national average CCR (either rural or urban, depending on the geographic location of the IRF). We estimate the national CCR ceiling by:

Step 1. Taking the national average CCR (weighted by each IRF's total costs, as discussed above) of all IRFs for which we have sufficient cost report data (both rural and urban IRFs combined).

Step 2. Estimating the standard deviation of the national average CCR computed in step 1.

Step 3. Multiplying the standard deviation of the national average CCR computed in step 2 by a factor of 3 to compute a statistically significant reliable ceiling.

Step 4. Adding the result from step 3 to the national average CCR of all IRFs for which we have sufficient cost report data, from step 1.

We did not receive any comments on the proposed updates to the IRF CCR ceilings and urban/rural averages.

Final Decision: We did not receive any comments on the IRF CCR ceiling or urban/rural averages. Therefore, we are finalizing the national average urban CCR at 0.516, the national average rural CCR at 0.643, and the national CCR ceiling at 1.57 percent for FY 2014. These updates are effective October 1, 2013.

VIII. Refinements to the Presumptive Compliance Methodology

A. Background on the Compliance Percentage

The compliance percentage has been part of the criteria for defining IRFs since implementation of the IPPS in 1983. In the September 1, 1983 interim final rule with comment period (48 FR 39752) which allowed IRFs to be paid separately from the IPPS, the initial compliance percentage was set at 75 percent. The 1983 interim rule stipulated that in accordance with sections 1886(d)(1)(B) and 1886(d)(1)(B)(ii) of the Act, a rehabilitation hospital and a rehabilitation unit were excluded from the IPPS. Sections 1886(d)(1)(B) and 1886(d)(1)(B)(ii) of the Act also give the Secretary the discretion to define a rehabilitation hospital and unit.

A hospital or unit deemed excluded from the IPPS and paid under the IRF PPS must meet the general requirements in subpart B and subpart P of part 412. Subject to the special payment provisions of § 412.22(c), a hospital or unit must meet the general criteria set forth in § 412.22 and in the regulations at § 412.23(b), § 412.25, and § 412.29 that specify the criteria for a provider to be classified as a rehabilitation hospital or unit. Hospitals and units meeting these criteria are eligible to be paid on a prospective payment basis as an IRF under the IRF PPS.

The 1983 interim final rule stipulated that one of the criteria for being classified as an IRF was that, during the facility's most recently completed 12-month cost reporting period, the hospital must be primarily engaged in furnishing intensive rehabilitation services, as demonstrated by patient medical records, indicating that at least 75 percent of the IRF's patient population were treated for one or more of the 10 medical conditions specified in the regulation that typically required the intensive inpatient rehabilitation treatment provided in an IRF. These criteria, along with other related criteria, distinguished an inpatient rehabilitation hospital or unit from a hospital that furnished general medical or surgical services, as well as rehabilitation services. We believed then, as we do now, that by examining the types of conditions for which a hospital's inpatients are treated, and the proportion of patients treated for conditions that typically require intensive inpatient rehabilitation, we would be able to distinguish those hospitals in which the provision of rehabilitation services was primary rather than secondary. Thus, Medicare pays for rehabilitation services at IRFs at a higher rate than other hospitals because IRFs are designed to offer specialized inpatient rehabilitation care to patients with intensive needs.

The original medical conditions specified under the compliance percentage, or ''75 percent rule,'' were stroke, spinal cord injury, congenital deformity, amputation, major multiple trauma, fracture of femur (hip fracture), brain injury, and polyarthritis (including rheumatoid arthritis). In the January 3, 1984 final rule (49 FR 234), we expanded the list of eligible medical conditions to include neurological disorders (including multiple sclerosis, motor neuron diseases, polyneuropathy, muscular dystrophy, and Parkinson's disease) and burns. In the May 7, 2004 final rule (69 FR 25752), we modified and expanded the list of eligible medical conditions by removing polyarthritis and substituting three more clearly defined arthritis-related conditions. The three conditions that replaced polyarthritis included the following:

- Active, polyarticular rheumatoid arthritis, psoriatic arthritis, and seronegative arthropathies resulting in significant functional impairment of ambulation and other activities of daily living, which has not improved after an appropriate, aggressive, and sustained course of outpatient therapy services or services in other less intensive rehabilitation settings immediately preceding the inpatient rehabilitation admission or which results from a systemic disease activation immediately before admission, but has the potential to improve with more intensive rehabilitation.
- Systemic vasculidities with joint inflammation, resulting in significant functional impairment of ambulation

and other activities of daily living, which has not improved after an appropriate, aggressive, and sustained course of outpatient therapy services or services in other less intensive rehabilitation settings immediately preceding the inpatient rehabilitation admission or which results from a systemic disease activation immediately before admission, but has the potential to improve with more intensive rehabilitation.

• Severe or advanced osteoarthritis (osteoarthrosis or degenerative joint disease) involving three or more major joints (elbow, shoulders, hips, or knees) with joint deformity and substantial loss of range of motion, atrophy, significant functional impairment of ambulation and other activities of daily living, which has not improved after an appropriate, aggressive, and sustained course of outpatient therapy services or services in other less intensive rehabilitation settings immediately preceding the inpatient rehabilitation admission but has the potential to improve with more intensive rehabilitation. (A joint replaced by a prosthesis is no longer considered to have osteoarthritis, or other arthritis, even though this condition was the reason for the joint replacement.)

In the May 7, 2004 final rule (69 FR 25752), a 13th condition was also added to include patients who undergo knee and/or hip joint replacement during an acute hospitalization immediately preceding the inpatient rehabilitation stay and also meet at least one of the following specific criteria:

• Underwent bilateral knee or hip joint replacement surgery during the acute hospitalization immediately preceding the IRF admission.

• Are extremely obese patients as measured by the patient's Body Mass Index (BMI) of at least 50, at the time of admission to the IRF.

• Are patients considered to be ''frail elderly,'' as determined by a patient's age of 85 or older, at the time of admission to the IRF (the provision currently states only that the patients be age 85 or older at the time of admission to the IRF)

In 2002, we surveyed Medicare fiscal intermediaries to determine how they were enforcing the 75 percent rule. Although the 75 percent rule was one of the criteria that were used to distinguish an IRF from an acute care hospital from 1983 to 2004, we found evidence that different fiscal intermediaries were enforcing the rule differently. We found fiscal intermediaries were using inconsistent methods to determine whether IRFs were in compliance with the regulation, and that some IRFs were not being reviewed for compliance at all. This led to concerns that some IRFs might have been out of compliance with the regulation and inappropriately classified as IRFs, while other IRFs may have been held to overly high standards. Because of these concerns we sought to establish a more uniform enforcement of the 75 percent rule.

In the May 16, 2003 IRF PPS proposed rule (68 FR 26786), we solicited comments on the regulatory requirements of the 75 percent rule. Though we did not, at that time, propose amending the regulatory requirements for the 75 percent rule located in then § 412.23(b)(2), we did propose to amend these requirements in the September 9, 2003 proposed rule titled, ''Medicare Program; Changes to the Criteria for Being Classified as an Inpatient Rehabilitation Facility'' (68 FR 53266). In that rule, we proposed some revisions to the 75 percent rule, including lowering the compliance percentage to 65 percent during a 3-year transition period for cost reporting periods between January 1, 2004 and January 1, 2007. Also, in response to comments on the September 9, 2003 proposed rule and as stated above, the May 7, 2004 final rule (69 FR 25752) expanded the number of medical conditions that would meet the compliance percentage from 10 to 13 and provided that patient comorbidities may also be included in determining an IRF's compliance with the requirements during the transition period.

In the September 9, 2003 proposed rule, we defined a ''comorbidity'' as a specific patient condition that is secondary to the patient's principal diagnosis or impairment that is the primary reason for the inpatient rehabilitation stay. In the May 7, 2004 rule, we adopted the provision to use a patient with a comorbidity counting towards the compliance threshold during the transition period. In the determination of the compliance percentage, a patient comorbidity counts toward the percentage if the comorbidity falls in one of the conditions specified at § 412.29(b)(2) *and* has caused significant decline in functional ability in the individual that even in the absence of the admitting condition, the individual would require the intensive rehabilitation treatment that is unique to IRFs.

Anticipating that IRFs needed some time to adjust and adapt their processes to the changes in the enforcement of the 75 percent rule, in the May 7, 2004 final rule, we provided IRFs with a 3-year phase-in period (cost reporting periods beginning on or after July 1, 2004 through July 1, 2007) to establish the compliance threshold of 75 percent of the IRF's total patient population. The 3-year phase-in period was intended to begin with cost reporting periods on or after July 1, 2004 with the threshold at 50 percent of the IRF's population and gradually increase to 60 percent, then to 65 percent, and then to expire with cost reporting periods beginning on or after July 1, 2007, when the compliance percentage would once again be at 75 percent.

Section 5005 of the Deficit Reduction Act of 2005 (DRA, Pub. L. 109–171, enacted February 8, 2006) and section 1886(d)(1)(B) of the Act modified the provisions of the 75 percent rule originally specified in the May 7, 2004 final rule. To reflect these statutory changes, in the August 7, 2007 final rule (72 FR 44284), we revised the regulations to prolong the overall duration of the phased transition to the full 75 percent threshold by stipulating that an IRF must meet the full 75 percent compliance threshold as of its first cost reporting period that starts on or after July 1, 2008. We also extended the policy of using a patient's comorbidities to the extent they met the conditions as outlined in the regulations to determine compliance with the classification criteria at then § 412.23(b)(2)(1) to the first cost reporting period that starts on or after July 1, 2008.

Subsequently, section 115 of the MMSEA amended section 5005 of the DRA to revise elements of the 75 percent rule that are used to classify IRFs. In accordance with the statute, in the August 8, 2008 final rule (73 FR 46370), we revised the compliance rate that IRFs must meet to be excluded from the IPPS and be paid under the IRF PPS to 60 percent for cost reporting periods beginning in or after July 1, 2006. Also, in accordance with the statute, we required that patient comorbidities that satisfy the criteria as specified at then § 412.23(b)(2)(i) [now located at § 412.29(b)(1) and § 412.29(b)(2)] be included in calculations used to determine whether an IRF meets the 60 percent compliance percentage for cost reporting periods beginning on or after July 1, 2007. As a result of these changes, the requirements started being referred to as the ''60 percent rule,'' instead of the ''75 percent rule.'' The regulations finalized in the FY 2009 IRF PPS Final Rule (73 FR 46370) continue to be in effect.

Though an IRF must serve an inpatient population of whom at least 60 percent meet the compliance percentage criteria specified at § 412.29(b), the existing regulation allows for 40 percent of reasonable and

necessary admissions to an IRF to fall outside of the 13 qualifying medical conditions. Still, the ''60 percent rule'' is one of the primary ways we distinguish an IRF from an acute care hospital. As Medicare payments for IRF services are generally significantly higher than Medicare payments for similar services provided in acute care hospital settings, we believe that it is important to maintain and enforce the criteria for medical conditions that may be counted toward an IRF's compliance calculation for the 60 percent rule to ensure that the higher Medicare payments are appropriately allocated to those providers that are providing IRF-level services.

B. Changes to the ICD–9–CM Codes That Are Used To Determine Presumptive Compliance

The presumptive compliance method is one of two ways that Medicare's contractors may evaluate an IRF's compliance with the 60 percent rule (the other method is called the medical review method). IRFs may only be evaluated using the presumptive compliance method if their Medicare Fee-for-Service and Medicare Advantage patient populations make up over half of their total patient population, so that the Medicare populations can be presumed to be representative of the IRF's total patient population. If an IRF is eligible to have its compliance under the 60 percent rule measured using the presumptive compliance method, under the rule, it is given the option of whether the Medicare contractor will review all of the IRF's discharges from that period, or all admissions from that period. All of its IRF–PAI assessments in the chosen category from the most recently completed 12 month compliance review period are then examined (with the use of a computer program) to determine whether they contain any of the ICD–9–CM diagnosis codes that are listed in the ''ICD–9–CM Codes That Meet Presumptive Compliance Criteria'' (which is also known as the presumptive methodology list). Each selected assessment is categorized as either meeting or not meeting the criteria for the medical conditions that may be counted towards the IRF's 60 percent rule compliance calculation based on coded information about the primary reason the patient was admitted to the IRF (the impairment group) and the ICD–9–CM codes listed as either the etiologic diagnosis (the etiologic problem that led to the condition for which the patient is receiving rehabilitation) or one of the comorbidities listed on the assessment. An impairment group code is not an ICD–9–CM code, but part of a separate unique set of codes specifically developed for the IRF PPS for assigning the primary reason for admission to an IRF. Those ICD–9–CM diagnosis codes that appear on the patient's IRF–PAI assessment as either the etiologic diagnosis or comorbid conditions that are also listed in ''ICD–9–CM Codes That Meet Presumptive Compliance Criteria'' are deemed to demonstrate that the patient meets the criteria for the medical conditions that may be counted toward the IRF's compliance percentage under the presumptive compliance method of calculating the compliance percentage. The current presumptive compliance list can be downloaded from the October 1, 2007 IRF Compliance Rule Specification Files on the Medicare IRF PPS Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Criteria.html.* The ICD–9–CM Codes That Meet Presumptive Compliance Criteria that takes what we are finalizing in this rule into account can be downloaded from the Medicare IRF PPS Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Data-Files.html.* We will build our ICD–10–CM version of the presumptive methodology list off of this document.

The underlying premise of the presumptive methodology list is that it represents particular diagnosis codes that, if applicable to a given patient, would more than likely mean that the patient required intensive rehabilitation services for treatment of one or more of the conditions specified at § 412.29(b)(2) or that they had a comorbidity that caused significant decline in functional ability such that, even in the absence of the admitting condition, the patient would require the intensive rehabilitation treatment that is unique to inpatient rehabilitation facilities and cannot be appropriately performed in another care setting.

Recently, we began a close examination of the list of ICD–9–CM codes that are currently deemed to meet the criteria for the medical conditions that may be counted toward an IRF's compliance with the 60 percent rule under the presumptive compliance method to begin the process of converting this code list to ICD–10–CM. Upon this examination, we found that changes over time (including changes in the use of the individual codes, changes in clinical practice, changes in the frequency of various types of illness and disability, and changes to the application of 60 percent rule itself) supported our updating the ICD–9–CM codes that are deemed appropriate to count toward a facility's 60 percent rule compliance calculation. Such updates would ensure that the codes better reflect the regulations at § 412.29(b).

Our review included taking a fresh look at the regulations in § 412.29(b), which revealed that the following parts of the regulation were not being adequately addressed in the current application of the presumptive method of calculating compliance with the IRF 60 percent rule:

- The details of the requirements in paragraph § 412.29(b)(1), which specify that the IRF must serve ''an inpatient population of whom at least 60 percent required intensive rehabilitation services for treatment of one or more of the conditions specified . . .'', and
- The details of the requirements regarding the specific conditions under which a patient's comorbidity may be used to show that a patient meets the 60 percent rule criteria, specifically that, ''The comorbidity has caused significant decline in functional ability in the individual that, even in the absence of the admitting condition, the individual would require the intensive rehabilitation treatment that is unique to inpatient rehabilitation facilities . . .and that cannot be appropriately performed in another care setting . . .''

These requirements must be met in conjunction with a patient having one of the 13 conditions listed in § 412.29(b)(2) for the case to meet the 60 percent rule compliance criteria. It is not enough for the patient to just have one of the 13 conditions. Mindful of these requirements, we took a fresh look at the ICD–9–CM codes on the presumptive methodology list.

Further, the regulations in § 412.29 also specify that the arthritis conditions only meet the 60 percent rule compliance criteria if certain severity and prior treatment criteria are met. It is impossible to discern from the ICD–9–CM codes alone whether or not the required severity and prior treatment criteria are met for those patients being treated for arthritis conditions. This type of information can only be assessed on medical review. Thus, we found that the presence of the ICD–9–CM code, by itself, cannot always allow us to presume that patients meet all of the requirements for being counted toward a facility's meeting the 60 percent rule requirements. As such, we believe that certain ICD–9–CM codes currently on the presumptive methodology list do not necessarily demonstrate a patient's meeting the medical condition (including severity and prior treatment) requirements for inclusion in a facility's

60 percent compliance calculation under the presumptive compliance method, and, as such, should be removed from the presumptive methodology list to better reflect the regulations.

Therefore, we performed a clinical analysis of the ICD–9–CM code list to determine the clinical appropriateness of each individual ICD–9–CM code's inclusion on the list, and a statistical analysis of the ICD–9–CM diagnoses code list to enhance our understanding of how individual ICD–9–CM codes are being used by IRFs. Based on these analyses, we proposed specific revisions to the ICD–9–CM code list that are described below in sections VIII.B.1 through VIII.B.6 of this final rule.

We received 39 public comments on the proposed changes to the presumptive methodology list, which are summarized below.

Comment: Several commenters stated that section 5005 of the DRA of 2005, and section 115 of the MMSEA of 2007 ''codified'' the 13 qualifying medical conditions that were originally adopted in our May 7, 2004 final rule and that were still in the regulations in effect as of January 1, 2007, and froze the compliance threshold at 60 percent. These commenters also expressed the belief that CMS does not have the legal authority to make changes to the presumptive methodology list as proposed and must appeal to Congress to make such changes. One commenter stated that Congress ''was clear in the statute'' that for purposes of determining a facility's compliance under the presumptive compliance method, that CMS should utilize the May 7, 2004 final rule and the 13 qualifying medical conditions described in that final rule.

Response: While the commenters are correct that the DRA of 2005 and the MMSEA of 2007 both referenced the regulatory text that was adopted in the May 7, 2004 final rule, or the rule itself, we disagree with the assertion that the proposed changes to the ''ICD–9–CM Codes That Meet Presumptive Compliance Criteria'' list are in contravention of section 5005 of the DRA as amended by section 115 of MMSEA. Additionally, as we did not propose any changes to the compliance threshold (it remains at 60 percent), the comments regarding the 60 percent threshold are outside the scope of this rule.

Subsection (a) of section 5005 of the DRA stipulated that the Secretary should apply the applicable percent ''in the classification criterion used under the IRF regulation (as defined in subsection (c)) to determine whether a hospital or unit of a hospital is an inpatient rehabilitation facility under the Medicare program under title XVIII of the Social Security Act.'' Subsection (c) of section 5005 of the DRA then stated that ''[f]or purposes of subsection (a), the term ''IRF regulation'' means the rule published in the **Federal Register** on May 7, 2004. . . .''

Even if we were to agree with commenters' assertions that this cross-reference froze the medical conditions that could be considered for the 75-percent compliance rule to the 13 medical conditions listed in the May 7, 2004 final rule, however, it would not follow that Congress froze the sub-regulatory means of verifying compliance with the severity and prior treatment requirements that were contained in that final rule. We disagree with any assertion that the proposed removal of certain ICD–9–CM codes from the sub-regulatory listing of codes that presumptively count toward the IRF compliance calculation under the presumptive compliance method would, in fact or effect, remove any of the 13 qualifying medical conditions under the classification criteria established in our May 7, 2004 final rule (69 FR 25752). Rather, it merely means that the medical review method would need to be used.

For example, the ''arthritis'' categories in the May 7, 2004 final rule only included those arthritis patients that meet the severity and pretreatment conditions specified in the regulations prior to the patient's admission to the IRF. See, the former 42 CFR § 412.23(b)(2)(iii)(L), which can be found at 69 FR 25772. As such, the severity and pretreatment requirements were part of the defined condition, and any sub-regulatory procedures to implement these regulatory conditions would have to take into account the need to ensure compliance with these severity and pretreatment requirements.

Furthermore, while the May 7, 2004 final rule noted that CMS would be issuing sub-regulatory guidance to its contractors that were to be tasked with the administration of the verification process for these requirements, the substance of such processes is not in the final rule. What are in the rule, however, are multiple statements that ICD–9–CM diagnosis codes alone would not, in the absence of additional clinical data, demonstrate compliance with the severity and pre-treatment requirements. Some other mechanism, such as medical review, was contemplated from the outset for these conditions (69 FR 25752, 25755 and 25761).

Thus, we have not proposed changes to the criteria established in the May 7, 2004 final rule. It remains as a list of 13 medical conditions, at times, paired with additional severity and prior treatment requirements. And, with the exception of discussion about imputing the Medicare portion of a facility's patient population compliance percentage to the entire population when the Medicare population represents the majority of that facility's patients, it did not discuss, let alone ''codify'' the methods we would use to verify IRFs' compliance percentages. Rather, we merely stated in that rule that we would issue instructions to the FIs that serve as the Medicare contractors and provide guidance to the clinical/medical FI personnel responsible for performing the compliance reviews to ensure that they use a method that consistently counts only cases with a diagnosis that both serves as the basis for intensive rehabilitation services and meets one of the 13 qualifying medical conditions; noted that we were still determining how best to provide guidance to the FIs on how to identify patients that fall into the 13 medical conditions; noted that we would not be providing ICD–9–CM codes in response to a commenter because diagnosis would be only one aspect of the FI's determination; and stated that FIs would also ''review information to assess (1) the medical necessity of rehabilitation in an inpatient setting; (2) the severity of the specific condition(s); (3) the patient's function; and (4) the capacity of the patient to participate in intensive rehabilitation and benefit from it.''

As such, we believe that the proposed removal of some of the ICD–9–CM codes in our sub-regulatory presumptive methodology list is consistent with the legislation and the May 7, 2004 regulation. We have not proposed the revision of the list of 13 medical conditions or the severity and prior treatment requirements that were paired with those conditions. For example, consistent with the severity and pretreatment requirements defined in the regulations (which are currently located at § 412.29(b)(2)(x) through § 412.29(b)(2)(xiii), we proposed the removal of the ''arthritis'' ICD–9–CM codes because those codes do not provide the pertinent information necessary to assess whether the applicable severity and prior treatment requirements for those conditions have been met. If and when the severity and pretreatment requirements are confirmed using the medical review method, however, patients with those arthritis conditions will be counted toward the IRF's compliance threshold.

In this manner, we administratively apply the regulation as codified and as outlined in the May 7, 2004 final rule. Ultimately, the code refinements to the ICD–9–CM Codes That Meet Presumptive Compliance Criteria list will ensure that the codes represent the types of medical conditions that we believe clearly, and without further evidence, can be found to indicate that the criteria for the medical conditions that may be counted toward the 60 percent rule compliance calculation have been met, and, therefore, that the presumptive compliance method can be used to include that individual in the IRF's compliance percentage.

Comment: Several commenters suggested that we delay these refinements to the presumptive compliance list until next year when the implementation of ICD–10–CM is planned. Commenters also stated that making these changes effective for discharges on or after October 1, 2013 will cause significant disruption for providers. One commenter asked for clarification regarding how the proposed changes would be implemented, specifically whether the prior list would be applied for the first part of a facility's fiscal year and the new list be applied for the second part. Several commenters asked that we provide a 6-month transition period to implement these changes.

Response: We considered the impact that our proposals would have on IRF providers if we were to make the changes effective for FY 2014 instead of in FY 2015 when we plan to move to ICD–10–CM. We believed that a gradual approach allowing IRF providers time to adjust their coding practices in response to the specific changes made to the presumptive methodology list before also moving to ICD–10–CM was the appropriate course of action. However, we recognize that IRFs may need more time to adjust to the changes to the presumptive methodology list. In recognition of these concerns, we will adopt these changes, but only apply the revised list to compliance review periods beginning on or after October 1, 2014. This will eliminate any problems associated with changing lists in the middle of a fiscal year.

Comment: One commenter supported our efforts to refine the list of ICD–9–CM codes in the presumptive methodology list. But, the commenter also stated that a better overall system would be one in which payment systems would be focused on patient-based criteria at the level of the episode of care or other broader site-neutral systems; however, within the current payment system, they supported CMS' efforts to improve accuracy in determining the need for the intensive inpatient rehabilitation services that IRFs provide. Further, the commenter stated that by ''requiring IRFs to use more detailed coding, we could potentially collect information on IRF patients that would differentiate them from patients with similar conditions who are treated in other settings (for example, skilled nursing facilities, home health agencies, or outpatient therapy providers).''

Response: We thank the commenter for their support of our efforts to refine the presumptive methodology list so that it reflects codes that truly indicate compliance with the 60 percent rule criteria for inclusion in the compliance calculation. Additionally, we thank the commenter for their suggestions as the agency continues research efforts into broader site-neutral payment systems.

Comment: Several commenters stated that they had concerns about the viability of the ''60 percent rule.'' One commenter stated that the 60 percent rule should be repealed or modified in that the current classification criteria do not reflect the full range of factors that contribute to a patient's need for intensive inpatient rehabilitation. The commenter also stated that if we continue to use the 60 percent rule, then the list of 13 qualifying medical conditions under the 60 percent rule should be expanded to include patients with the following conditions: orthopedic/joint/limb replacement patients, post-transplant patients, patients with chronic pulmonary and cardiac conditions, and medically complex patients.

Response: We appreciate the commenters' suggestions, and will take these suggestions into account in future analyses. However, since we did not propose any modifications to the qualifying medical conditions for the 60 percent rule, these comments are beyond the scope of this final rule.

Comment: One commenter stated that we should clarify the alphabet designations for appendices associated with IRF–PAI completion because in our rules (this year and in past rulemakings) we have used the same alphabet character for more than one list.

Response: We agree that the alphabet designations used for appendices in the IRF PPS may lead to confusion because appendices for several tables are listed with the same alphabet character. *Appendix C: ICD–9–CM Codes That Meet Presumptive Compliance Criteria* is used to determine an IRF's presumptive compliance with the 60 percent rule. However, there is also the list of comorbidities (ICD–9–CM codes) that is used to determine placement in tiers, *Appendix C—List of Comorbidities*. Beginning with the publication of this rule, we will no longer use alphabet characters to identify these appendices. Beginning with this final rule and related sub-regulatory guidance, we will refer to the two lists by their titles, without the Appendix labels.

Comment: One commenter recommended that in lieu of removing the ICD–9–CM codes from the ICD–9–CM Codes That Meet Presumptive Compliance Criteria, CMS should establish modifiers that could be entered on the IRF–PAI to indicate that the patient meets the requirements for the medical conditions that may be included in the IRF's presumptive compliance method's compliance calculation. The commenter offered the following example that is used on claims: the KX modifier with respect to outpatient therapy services to indicate that a patient qualifies for an exception to the therapy caps on the claim. The commenter stated that using modifiers would ensure that ''clinically appropriate'' records would count under the presumptive compliance method compliance calculations without having to do medical review.

Response: We appreciate the commenter's suggestion. However, we note that the presumptive compliance method relies on information recorded on the IRF–PAI, rather than information from the IRF claim. The purpose of the IRF–PAI is to collect the clinical characteristics of the patient for use in care planning, payment, and quality reporting and therefore we believe it presents a more accurate and comprehensive record of the medical conditions of the patient, which is important when the record is then used to calculate the presumptive compliance percentage. Thus, we do not currently use and are not planning in the future to use, the IRF claim for the presumptive compliance method. Thus, a modifier applied to the coding on the claim, similar to the KX modifier for outpatient therapy services, is not useful in this context, and we do not currently have a similar mechanism for modifying codes on the IRF–PAI. However, we will take the commenter's suggestions into consideration. We believe that a delayed implementation of the changes to the presumptive compliance list of ICD–9–CM codes will allow us additional time to study ways to minimize the burden of the operational aspects of the changes to the presumptive compliance methodology.

Comment: Several commenters stated that we have incorrectly applied a medical necessity measurement (the coverage criteria) to the 60 percent rule. One commenter stated that we conflated individualized medical necessity review with the presumptive compliance method's review. Another commenter requested that we distinguish between the policies for IRF classification criteria and medical necessity coverage criteria in the final rule.

Response: We disagree with the commenters; we are not conflating the criteria for the medical conditions that may be counted under the presumptive method to determine compliance with the 60 percent rule with the coverage criteria. IRF coverage criteria are not used to determine IRF classification. As we stated in the August 7, 2009 final rule (74 FR 39762), we do not intend for any IRF to lose its classification status because an individual patient does not meet the coverage criteria. Failure to meet the coverage criteria in a particular case will only result in the denial of the IRF's claim for the services provided to that patient, not in a change in the classification of the facility.

Comment: Several commenters expressed concerns that, in the proposed rule, we changed our policy articulated in previous rules of distinguishing IRFs from other care settings by identifying certain conditions that ''typically require'' intensive inpatient rehabilitation. Specifically, commenters asserted that we have deviated from the policy standard of serving those with conditions that ''typically required'' an IRF-level of service. The commenters point to our statement in the proposed rule that ''[i]t is not enough for the patient to just have one of the 13 conditions'' to indicate that we proposed adding additional criteria to the medical conditions that may be counted under the presumptive compliance method. For example, the commenters believed that we had proposed adding a new criterion by indicating that beyond having one of the 13 medical conditions, we now proposed to require that patients need intensive inpatient rehabilitation services. According to the commenters, this is inconsistent with the history of the 60 percent rule and our own interpretations of the policy in previous rulemaking.

Response: We disagree with the commenters' assertions that we have introduced new criteria to the presumptive compliance method of determining whether an IRF has met the criteria for a given medical condition such that the individual with that condition may be counted toward the IRF's 60 percent rule compliance percentage. Section 412.29 outlines the requirements for a facility to be classified for payment under the IRF PPS. Within this section, the regulations at § 412.29(b)(1) require the IRF to demonstrate that it ''served an inpatient population of whom at least 60 percent *required* intensive rehabilitation services for treatment of one or more of the conditions specified at paragraph (b)(2) . . . (emphasis added). As such, the ''intensive rehabilitation service needs'' criterion is part of the original criteria for the medical conditions that can be counted toward an IRF's 60 percent rule compliance rate. We also point out that this particular part of the regulation read the same in the May 7, 2004 final rule (then codified in § 412.23(b)(2)(i), now codified in § 412.29(b)(1)). Thus, our statement in the proposed rule was consistent with what has been our stated policy since the May 7, 2004 final rule.

We also disagree with any assertion that the proposed changes to the presumptive methodology list are an indication that we have departed from historical discussions outlined in the preamble of previous rules. As we stated previously, we are not revising the criteria that govern the 13 medical conditions that may be counted toward an IRF's 60 percent rule compliance percentage. In the preamble of the May 7, 2004 final rule, when discussing how CMS contractors would administratively identify patients with the 13 medical conditions, we specifically declined to provide a list of ICD–9–CM codes because ICD–9–CM codes alone are not always enough to ascertain whether someone falls into one of the 13 medical condition categories. As such, the regulations have never included such a list. Rather, we use a bifurcated sub-regulatory approach with a presumptive compliance method and a medical review compliance method. We continue to believe that the 13 medical conditions that are listed in regulation at § 412.29(b)(2) are conditions that ''typically'' require the level of intensive rehabilitation that provide the basis of need to differentiate the services offered in IRFs from those offered in other care settings.

Comment: One commenter requested that we make available the methodology that was used to assess the ''clinical appropriateness'' determinations for the ICD–9–CM codes that were proposed for removal.

Response: To analyze the ''clinical appropriateness'' of the ICD–9–CM codes on the list used to determine compliance under the presumptive compliance method, we used the extensive clinical and coding expertise available within CMS's staff. Our clinical staff went through the current list code-by-code to determine whether, in their professional judgment, a particular ICD–9–CM code's use would indicate a patient's presumptive need for intensive inpatient rehabilitation for one of the 13 medical conditions listed in 412.29(b)(2), absent additional information about a particular patient's clinical condition and rehabilitation needs. The details of our clinical rationale for each of the proposed changes to the ICD–9–CM codes used to determine compliance percentages under the presumptive compliance method were presented in the FY 2014 IRF PPS proposed rule (78 FR 26880 at 26895 through 26906) and are further reflected in this final rule. We also used the public comments we received on the FY 2014 IRF PPS proposed rule (78 FR 26880) to further refine our clinical analysis, in that we used a lot of the input from commenters in forming our final decisions regarding which ICD–9–CM codes to retain on the list and which to proceed to remove from the list. As discussed in detail below, in some cases we agreed with the commenter's input and have added codes back to the list, as appropriate.

Comment: Several commenters requested that we make an IRF's presumptive testing data available to that IRF to allow the IRF to monitor its presumptive compliance with the 60 percent rule.

Response: Until now, we did not have the capability within our data system for securely communicating information about an IRF's individual IRF–PAI submissions back to that IRF. We are in the process of developing such a system, and will consider the feasibility of incorporating a report of an IRF's compliance percentage into this new system.

1. Non-Specific Diagnosis Codes

We believe that highly descriptive coding provides the best and clearest way to document the appropriateness of a given patient's admission, and would improve our ability to use the presumptive compliance method of calculating a facility's 60 percent rule compliance percentage. Therefore, whenever possible, we believe that the most specific code that describes a medical disease, condition, or injury should be used to document diagnoses on the IRF–PAI. Generally, ''unspecified'' codes are used when there is a lack of information about location or severity of medical conditions in the medical record.

However, site and/or severity of condition is often an important determinant in assessing whether a patient's principal or secondary diagnosis falls into the 13 qualifying medical conditions that may be counted toward the facility's 60 percent rule compliance percentage under the presumptive compliance method. For this reason, we believe that specific diagnosis codes that narrowly identify anatomical sites where disease, injury, or condition exist should be used when coding patients' conditions on the IRF–PAI whenever such codes are available. Furthermore, on the same note, we believe that one should also include on the IRF–PAI the more descriptive ICD–9–CM code that indicates the degree of injury in instances of burns. In accordance with these principles, we proposed to remove non-specific codes from the list, ICD–9–CM Codes That Meet Presumptive Compliance Criteria, in instances in which more specific codes are available as we believe imprecise codes would inappropriately categorize an overly broad segment of the patient population as having the conditions required for inclusion in a facility's presumptive compliance calculation, which would result in an inflated compliance percentage. If the IRF does not have enough information about the patient's condition to code the more specific codes on the IRF–PAI, we would expect the IRF to seek out additional information from the patient's acute care hospital medical record to determine the appropriate, more specific code to use. The list of ICD–9–CM codes that we proposed removing can be found in the May 8, 2013 proposed rule at 78 FR 26880, 26901 through 26906.

We received 18 comments on the proposed changes to the non-specific diagnosis codes listed in ICD–9–CM Codes That Meet Presumptive Compliance Criteria, which are summarized below.

Comment: Several commenters noted that IRFs are post-acute settings and that etiological documentation is based on the data received from the acute care hospital. They argued that, in some cases, the specificity demanded in coding as described in the proposed rule cannot be achieved because the information is not in the records that IRFs receive from the acute care setting. For example, for ICD–9–CM codes 433.91—Occlusion and stenosis of unspecified pre-cerebral artery with cerebral infarction—and 434.91—Cerebral artery occlusion, unspecified with cerebral infarction—, several commenters stated that a large proportion of ischemic strokes may not be able to be identified as thrombotic or embolic. Several commenters stated that the ICD–9–CM code 434.91—Cerebral artery occlusion, unspecified with cerebral infarction—should not be removed from the presumptive methodology list because in order to be more specific the physiatrist would need to note whether the stroke was embolic or thrombotic in nature. The commenters stated that this is often unknown, even after radiological results.

Response: We recognize that the IRF builds its understanding of its patients that are admitted to the IRF from the acute care hospital in part from the acute care medical records, and that sometimes the information needed to code a more specific diagnosis is not available in those records. In the case of certain ICD–9–CM codes that we had proposed to remove from the presumptive compliance list, we agree with the commenters and have determined that the information necessary to appropriately code certain conditions may not always be available. To avoid diagnostic misclassification, we are revising our proposals in Table 7 of the proposed rule and will retain codes 433.91 and 434.91 on the list of codes that meet the presumptive compliance criteria. We may revisit this decision in the future, if information to code the more specific diagnosis codes becomes more readily available.

Though we agree with commenters that some information is either not available or may not always be found in the documentation sent by the acute care hospital and that this impacts the coding of some diagnoses, we do not agree that this is the case for all the diagnosis codes proposed for removal in Table 7 of the proposed rule or that the IRF would not be able to obtain the necessary information through other means in many instances. IRFs are required under the IRF coverage requirements to conduct thorough preadmission screenings on all prospective IRF patients prior to each IRF admission. During the preadmission screenings, a complete medical chart review is required, unless the patient is being assessed in person by the IRF personnel conducting the preadmission screening. Even if the patient is being assessed in person, a medical chart review is typically needed to gather all of the pertinent information to complete a thorough preadmission screening. Generally, diagnostic reports, radiological reports, and consultation notes, among other informational documentation are available in the acute care medical record to assist IRF staff in building a more complete clinical picture so that diagnostic coding, whenever possible, can be more specific. Even if such information is not available in the acute care medical record, however, we believe that the IRF should make every effort to obtain the necessary information to code more specifically.

Comment: We received several comments on various non-specific diagnosis codes that the commenters stated should not be removed from the list. The commenters provided a variety of rationales for the continued use of these codes to meet the presumptive compliance criteria. For example, several commenters stated that the ICD–9–CM codes related to hip fracture should not be excluded from the list. The commenters stated that the specific information required to provide where the fracture occurred on the neck of the femur is often not available to IRF staff that do not have access to x-ray reports and that such specificity would not impact the type of treatment in the IRF. Several other commenters stated that we should reconsider the proposed removal of some non-specific traumatic brain injury codes. The commenters stated that the removal of these codes is ''administratively unrealistic.'' The commenters also stated that for incidents of loss of consciousness of short duration this information, usually documented by on-site emergency technicians (when known), is no longer in the records by the time the patient is admitted to the IRF. One commenter argued that in cases of unobserved traumatic brain injury the duration of a patient's loss of consciousness may never be specifically determined. This commenter further stated that despite the absence of this information, the patient may still be clinically appropriate for intensive inpatient rehabilitation services.

Several commenters also argued that the identity of virus or bacteria associated with diagnoses such as ICD–9–CM codes 049.9—Unspecified non-arthropod-borne viral diseases of central nervous system—, 320.9—Meningitis due to unspecified bacterium—, 322.9—Meningitis, unspecified—, 323.9—Unspecified causes of encephalitis, myelitis, and encephalomyelitis cannot frequently be found in the medical records from the transferring hospital or in some cases may never be known. As such, the commenters suggest that these codes not be removed from the presumptive methodology list.

Several commenters stated that ICD–9–CM codes 343.9—Infantile cerebral palsy, unspecified should not be removed from the presumptive methodology list because many times

these patients are seen in IRFs as adults, when the patient's current clinical presentation may be different from their original presentation as infants. Moreover, the commenters argue, the adults may have no available medical records that state the appropriate cerebral palsy type. Similarly, these commenters argue that ICD–9–CM code 344.00—Quadriplegia, unspecified should not be removed from the presumptive methodology list because of the potential for a change from the original presentation that was the basis of appropriate classification of the level of completeness of the injury.

Response: Upon further review and after thoughtful consideration of the comments we received, we have determined that several codes that we proposed to remove from the ICD–9–CM Codes That Meet Presumptive Compliance Criteria list should be retained. Thus, in this final rule we will not remove these codes from the presumptive methodology list. The ICD–9–CM codes that we proposed for removal from the ICD–9–CM Codes That Meet Presumptive Compliance Criteria list, but we have determined should be retained, are listed in Table 8. We also note here that we inadvertently included 4 codes in Table 7 of the proposed rule that were never on the ICD–9–CM Codes That Meet Presumptive Compliance Criteria list. The codes are as follows: 804.00—Closed fractures involving skull or face with other bones, without mention of intracranial injury, unspecified state of consciousness—, 804.09—Closed fractures involving skull of face with other bones, without mention of intracranial injury, with concussion, unspecified—, 851.90—Other and unspecified cerebral laceration and contusion, with open intracranial wound, unspecified state of consciousness—, 851.99—Other and unspecified cerebral laceration and contusion, with open intracranial wound, with concussion, unspecified.

Comment: Several commenters expressed concerns about our proposal to remove ICD–9–CM code 356.9—Unspecified hereditary and idiopathic peripheral neuropathy (IPN) from the ICD–9–CM Codes That Meet Presumptive Compliance Criteria list because ''IPN is one of the most common chronic neurologic disorders in America.'' One commenter further stated that the precise etiology of a neuropathy has little effect on a patient's rehabilitation, and that there are a limited number of codes that can be used to specify the type of neuropathy.

Response: We believe that the fact that ICD–9–CM code 356.9—Unspecified hereditary and idiopathic peripheral neuropathy (IPN)—is such a commonly used code for multiple types of chronic neurological disorders in the U.S. means that it is too broad a diagnosis to enable us to determine whether a patient coded with this code meets the criteria for the medical conditions that may be counted toward an IRF's 60 percent rule compliance percentage or not. We believe that some patients coded with this code could meet the requirements in 412.29(b)(1), but others would not. That is, we believe that it is impossible to tell from the possible application of this code to such a broad and diverse population of patients whether patients coded with this diagnosis code require intensive rehabilitation services for treatment of one or more of the conditions specified at 42 CFR 412.29(b)(2). Our analysis shows that the percent of patients in IRFs that are coded with this diagnosis code has increased substantially over time (from 2.7 percent of all IRF patients in FY 2004 to 4.5 percent in FY 2012), with more dramatic increases occurring within specific IRF providers. This finding may be the result of an increase in the patient population for which this code applies, an increase in the percent of patients with these conditions being admitted to the IRF, or upcoding on the part of IRFs. Regardless, we believe that this code does not provide enough information for us to determine whether a patient coded with this diagnosis code would meet the requirements at 42 CFR 412.29(b). Thus, we believe that the most appropriate course of action at this time is to remove this code from the presumptive methodology list. However, we note that patients that are coded with this diagnosis code may, where appropriate upon medical review, be found to meet the criteria for the medical conditions that may be counted toward a facility's 60 percent rule compliance percentage.

TABLE 8—ICD–9–CM CODES RETAINED IN ''ICD–9–CM CODES THAT MEET PRESUMPTIVE COMPLIANCE CRITERIA'' **

ICD–9–CM Code	Diagnosis
049.9	Unspecified non-arthropod-borne viral diseases of central nervous system.
320.9	Meningitis due to unspecified bacterium.
322.9	Meningitis, unspecified.
323.9	Unspecified causes of encephalitis, myelitis, and encephalomyelitis.
343.9	Infantile cerebral palsy, unspecified.
344.00	Quadriplegia, unspecified.
433.91	Occlusion and stenosis of unspecified precerebral artery with cerebral infarction.
434.91	Cerebral artery occlusion, unspecified with cerebral infarction.
800.00	Closed fracture of vault of skull without mention of intracranial injury, unspecified state of consciousness.
800.10	Closed fracture of vault of skull with cerebral laceration and contusion, unspecified state of consciousness.
800.20	Closed fracture of vault of skull with subarachnoid, subdural, and extradural hemorrhage, unspecified state of consciousness.
800.30	Closed fracture of vault of skull with other and unspecified intracranial hemorrhage, unspecified state of consciousness.
800.40	Closed fracture of vault of skull with intracranial injury of other and unspecified nature, unspecified state of consciousness.
800.50	Open fracture of vault of skull without mention of intracranial injury, unspecified state of consciousness.
800.60	Open fracture of vault of skull with cerebral laceration and contusion, unspecified state of consciousness.
800.70	Open fracture of vault of skull with subarachnoid, subdural, and extradural hemorrhage, unspecified state of consciousness.
800.80	Open fracture of vault of skull with other and unspecified intracranial hemorrhage, unspecified state of consciousness.
800.90	Open fracture of vault of skull with intracranial injury of other and unspecified nature, unspecified state of consciousness.
801.00	Closed fracture of base of skull without mention of intra cranial injury, unspecified state of consciousness.
801.10	Closed fracture of base of skull with cerebral laceration and contusion, unspecified state of consciousness.
801.20	Closed fracture of base of skull with subarachnoid, subdural, and extradural hemorrhage, unspecified state of consciousness.
801.30	Closed fracture of base of skull with other and unspecified intracranial hemorrhage, unspecified state of consciousness.
801.40	Closed fracture of base of skull with intracranial injury of other and unspecified nature, unspecified state of consciousness.
801.50	Open fracture of base of skull without mention of intracranial injury, unspecified state of consciousness.
801.60	Open fracture of base of skull with cerebral laceration and contusion, unspecified state of consciousness.

TABLE 8—ICD–9–CM CODES RETAINED IN "ICD–9–CM CODES THAT MEET PRESUMPTIVE COMPLIANCE CRITERIA" **—Continued

ICD–9–CM Code	Diagnosis
801.70	Open fracture of base of skull with subarachnoid, subdural, and extradural hemorrhage, unspecified state of consciousness.
801.80	Open fracture of base of skull with other and unspecified intracranial hemorrhage, unspecified state of consciousness.
801.90	Open fracture of base of skull with intracranial injury of other and unspecified nature, unspecified state of consciousness.
803.00	Other closed skull fracture without mention of intracranial injury, unspecified state of consciousness.
803.10	Other closed skull fracture with cerebral laceration and contusion, unspecified state of consciousness.
803.20	Other closed skull fracture with subarachnoid, subdural, and extradural hemorrhage, unspecified state of consciousness.
803.30	Other closed skull fracture with other and unspecified intracranial hemorrhage, unspecified state of unconsciousness.
803.40	Other closed skull fracture with intracranial injury of other and unspecified nature, unspecified state of consciousness.
803.50	Other open skull fracture without mention of injury, unspecified state of consciousness.
803.60	Other open skull fracture with cerebral laceration and contusion, unspecified state of consciousness.
803.70	Other open skull fracture with subarachnoid, subdural, and extradural hemorrhage, unspecified state of consciousness.
803.80	Other open skull fracture with other and unspecified intracranial hemorrhage, unspecified state of consciousness.
803.90	Other open skull fracture with intracranial injury of other and unspecified nature, unspecified state of consciousness.
804.10	Closed fractures involving skull or face with other bones, with cerebral laceration and contusion, unspecified state of consciousness.
804.20	Closed fractures involving skull or face with other bones with subarachnoid, subdural, and extradural hemorrhage, unspecified state of consciousness.
804.30	Closed fractures involving skull or face with other bones, with other and unspecified intracranial hemorrhage, unspecified state of consciousness.
804.40	Closed fractures involving skull or face with other bones, with intracranial injury of other and unspecified nature, unspecified state of consciousness.
804.60	Open fractures involving skull or face with other bones, with cerebral laceration and contusion, unspecified state of consciousness.
804.70	Open fractures involving skull or face with other bones with subarachnoid, subdural, and extradural hemorrhage, unspecified state of consciousness.
804.80	Open fractures involving skull or face with other bones, with other and unspecified intracranial hemorrhage, unspecified state of consciousness.
804.90	Open fractures involving skull or face with other bones, with intracranial injury of other and unspecified nature, unspecified state of consciousness.
820.00	Closed fracture of intracapsular section of neck of femur, unspecified.
820.10	Open fracture of intracapsular section of neck of femur, unspecified.
820.30	Open fracture of trochanteric section of neck of femur, unspecified.
851.00	Cortex (cerebral) contusion without mention of open intracranial wound, unspecified state of consciousness.
851.10	Cortex (cerebral) contusion with open intracranial wound, unspecified state of consciousness.
851.20	Cortex (cerebral) laceration without mention of open intracranial wound, unspecified state of consciousness.
851.30	Cortex (cerebral) laceration with open intracranial wound, unspecified state of consciousness.
851.40	Cerebellar or brain stem contusion without mention of open intracranial wound, unspecified state of consciousness.
851.50	Cerebellar or brain stem contusion with open intracranial wound, unspecified state of consciousness.
851.60	Cerebellar or brain stem laceration without mention of open intracranial wound, unspecified state of consciousness.
851.70	Cerebellar or brain stem laceration with open intracranial wound, unspecified state of consciousness.
851.80	Other and unspecified cerebral laceration and contusion, without mention of open intracranial wound, unspecified state of consciousness.
852.00	Subarachnoid hemorrhage following injury without mention of open intracranial wound, unspecified state of consciousness.
852.10	Subarachnoid hemorrhage following injury with open intracranial wound, unspecified state of consciousness.
852.20	Subdural hemorrhage following injury without mention of open intracranial wound, unspecified state of consciousness.
852.30	Subdural hemorrhage following injury with open intracranial wound, unspecified state of consciousness.
852.40	Extradural hemorrhage following injury without mention of open intracranial wound, unspecified state of consciousness.
852.50	Extradural hemorrhage following injury with open intracranial wound, unspecified state of consciousness.
853.00	Other and unspecified intracranial hemorrhage following injury without mention of open intracranial wound, unspecified state of consciousness.
853.10	Other and unspecified intracranial hemorrhage following injury with open intracranial wound, unspecified state of consciousness.
854.00	Intracranial injury of other and unspecified nature without mention of open intracranial wound, unspecified state of consciousness.
854.10	Intracranial injury of other and unspecified nature with open intracranial wound, unspecified state of consciousness.

** This table includes ICD–9–CM codes that were proposed (Table 7) in the May 8, 2013 proposed rule for removal from "ICD–9–CM Codes That Meet Presumptive Compliance Criteria," but we have determined should be retained.

2. Arthritis Codes

Our analysis of the list of ICD–9–CM codes that are currently included in the presumptive methodology list revealed utilization patterns that indicated that these codes were used far more frequently than we had anticipated. We also realized that such codes did not provide any information as to whether the patients met the severity and prior treatment requirement portions of the criteria for the medical conditions that may be counted toward an IRF's compliance percentage under the presumptive compliance method. We did not adopt any and all arthritis conditions in the May 7, 2004 final rule (69 FR 25752). Rather, we only provided for those patients with certain kinds of arthritic conditions that met defined severity and prior treatment requirements. We anticipated that less severe arthritic conditions could be satisfactorily managed outside of IRFs since these cases would not require the intensive therapy provided in the

inpatient rehabilitation setting. As we realized on reflection that there is no way to tell base on an arthritis ICD–9–CM code alone whether an individual met the severity and prior treatment requirements outlined in regulation, we realized that factors beyond the ICD–9–CM code would need to be reviewed to establish whether these IRF patients should be included in the IRF's compliance percentage.

Specifically, the regulations under § 412.29(b)(2)(x) through § 412.29(b)(2)(xii), describe the following three (3) ''arthritis'' medical conditions that, if present, and all of the described circumstances are met, would make a patient eligible for inclusion in the presumptive compliance calculation of the IRF's compliance percentage. The 3 medical conditions are as follows:

- Active, polyarticular rheumatoid arthritis, psoriatic arthritis, and seronegative arthropathies resulting in significant functional impairment of ambulation and other activities of daily living that have not improved after an appropriate, aggressive, and sustained course of outpatient therapy services or services in other less intensive rehabilitation settings immediately preceding the inpatient rehabilitation admission or that result from a systemic disease activation immediately before admission, but have the potential to improve with more intensive rehabilitation.
- Systemic vasculidities with joint inflammation, resulting in significant functional impairment of ambulation and other activities of daily living that have not improved after an appropriate, aggressive, and sustained course of outpatient therapy services or services in other less intensive rehabilitation settings immediately preceding the inpatient rehabilitation admission or that result from a systemic disease activation immediately before admission, but have the potential to improve with more intensive rehabilitation.
- Severe or advanced osteoarthritis (osteoarthrosis or degenerative joint disease) involving two or more major weight bearing joints (elbow, shoulders, hips, or knees, but not counting a joint with a prosthesis) with joint deformity and substantial loss of range of motion, atrophy of muscles surrounding the joint, significant functional impairment of ambulation and other activities of daily living that have not improved after the patient has participated in an appropriate, aggressive, and sustained course of outpatient therapy services or services in other less intensive rehabilitation settings immediately preceding the inpatient rehabilitation admission but have the potential to improve with more intensive rehabilitation. (A joint replaced by a prosthesis is no longer is considered to have osteoarthritis, or other arthritis, even though this condition was the reason for the joint replacement.)

As stated above, the inclusion of patients with these medical conditions in the presumptive compliance calculation of the IRF's compliance percentage is conditioned on those patients meeting the described severity and prior treatment requirements. However, the ICD–9–CM diagnosis codes that reflect these arthritis and arthropathy conditions do not provide any information about whether these additional elements of the regulatory criteria were met. We therefore believe that additional information beyond the presence of the code is necessary to determine if the medical record would support inclusion of individuals with the arthritis and arthropathy conditions outlined in our regulations under § 412.29(b)(2)(x) through § 412.29(b)(2)(xii) in the presumptive compliance calculation of the facility's compliance percentage. Thus, we proposed to remove the ICD–9–CM diagnosis codes associated with the medical conditions outlined in our regulations under § 412.29(b)(2)(x) through § 412.29(b)(2)(xii) from the presumptive methodology list.

We expect that the MACs will be able, upon medical review, to include those patients in a facility's 60 percent rule compliance after it has confirmed the severity and prior treatment portions of the criteria. As such, IRFs would continue to be able to have these individuals included in the medical review calculation of their compliance percentages. In Table 9, we list the ICD–9–CM codes associated with the medical conditions listed under § 412.29(b)(2)(x) through § 412.29(b)(2)(xii) that we will remove from the list, ICD–9–CM Codes That Meet Presumptive Compliance Criteria.

We received 11 comments on the proposed changes to arthritis diagnosis codes listed in ICD–9–CM Codes That Meet Presumptive Compliance Criteria, which are summarized below.

Comment: One commenter suggested that the proposed changes to the presumptive methodology list and the removal of the arthritis codes will increase the use of the medical review method, which is more burdensome for both CMS and for IRFs. Several commenters suggested that the facility should not have to undergo a ''full medical review'' if it failed to meet the required compliance percentage using the presumptive compliance method. Instead, they suggested use of a ''limited medical review'' in which only arthritis and systemic vasculidities cases would be reviewed. The commenters further stated that, should a sufficient number of cases from the ''limited review'' be determined to meet criteria, these ''passing'' records would be added to the ''numerator'' of the presumptive calculation result to arrive at a compliance percentage equal at least 60 percent. In this manner the facility would be deemed compliant without needing a ''full medical review.'' However, if the IRF failed to meet criteria with this ''limited review,'' the MAC could then perform a ''full medical review.''

Response: We acknowledge that because of the removal of the arthritis codes from the list of codes that are used to determine presumptive compliance under the ''60 percent'' rule, some facilities may not be able to reach the minimum compliance percentage using presumptive compliance method. In the May 8, 2013 proposed rule, we suggested that upon medical review (in accordance with chapter 3, section 140.1.4 of the Medicare Claims Processing Manual (Pub. 100–04)), after which the MAC will have been able to determine that severity and pretreatment requirements have been met, these patients would be included in the calculation of a facility's 60 percent rule compliance percentage. Assuming providers make no other changes, we estimate that the removal of the arthritis and arthropathy codes will result in approximately 40 facilities failing to meet the 60 percent threshold using the presumptive compliance method, and would have to instead be evaluated under the medical review method. We assume that all of these facilities would obtain a satisfactory compliance percentage after medical review, as we assume that the patients that will be coded with the to-be removed arthritis and arthropathy codes will meet the severity and prior treatment requirements. Thus, we believe that few, if any facilities will ultimately lose their IRF classification by virtue of these changes.

We appreciate the commenter's suggestions regarding the use of a modified medical review limited to only arthritis and systemic vasculidities cases to determine if patients have met severity and pretreatment requirements, in lieu of full medical review carried out in accordance with chapter 3, section 140.1.3(D), of the Medicare Claims Processing Manual (Pub. 100–04). We will use the time afforded by our one-year delay (that is, the application of the changes to the list will not apply to

compliance review periods beginning before October 1, 2014) to consider the feasibility of minimizing any burdens created by the operational aspects of this policy.

Comment: One commenter expressed concern that in response to our proposal to remove arthritis codes from the ICD–9–CM Codes That Meet Presumptive Compliance Criteria list and no longer count them as part of the presumptive methodology, IRFs will seek to avoid ''unnecessary'' medical review by modifying their admission criteria so as to limit the admission of patients with arthritis conditions. The commenter also stated that our proposed removal of the arthritis codes from the list of presumptive ICD–9–CM codes that meet compliance criteria ''was as if'' we removed arthritis and arthropathy conditions from the 13 qualifying medical conditions outlined in regulation.

Response: Although we agree that it is plausible that some IRFs might seek to avoid the possibility of medical review by limiting admission of patients with arthritis conditions, this is not our intent. Our intent behind this policy is to ensure that we have enough information to ensure patients with arthritis conditions who are counted as meeting the compliance criteria in 412.29(b) are appropriately meeting the severity and prior treatment requirements, as per the regulation. We disagree that the proposed changes to the presumptive methodology list equates with the removal of arthritis and arthropathy conditions from the 13 qualifying medical conditions outlined in regulation. As discussed in the proposed rule's preamble and in prior discussion in this preamble, when we adopted the arthritis and arthropathy conditions in the May 7, 2004 final rule, we limited the conditions to those that met defined severity and prior treatment requirements, and that were sufficiently severe as to require intensive inpatient rehabilitation services. As discussed above, ICD–9–CM diagnosis codes alone do not provide sufficient information to establish whether these pretreatment and severity requirements have been met. More detailed information is necessary to determine if the patient meets the pretreatment and severity requirements. Verification using the medical review compliance method will allow an IRF to have these patients included in their compliance percentage. Thus, arthritis conditions will continue to be included in the calculation of compliance percentages in accordance with the 13 qualifying medical conditions in the regulations.

3. Some Congenital Anomaly Diagnosis Codes

Though congenital deformity is one of the 13 medical conditions that may, subject to the limitations spelled out in the regulations, qualify for inclusion in the calculation of an IRF's compliance percentage under the 60 percent rule, certain congenital anomalies represent such serious conditions that a patient with one of these conditions would generally not be expected to be able to meaningfully participate in an intensive rehabilitation therapy program. For example, Craniorachischisis (ICD–9–CM code 740.1) is a congenital malformation where the neural tube from the midbrain down to the upper sacral region of the spinal cord remains open. The neural tube is the embryo's precursor to the central nervous system, which comprises the brain and spinal cord. Similarly, Iniencephaly (ICD–9–CD code 740.2) is a congenital malformation in which parts of the brain do not form and the patient does not have a neck. Because beneficiaries with these diagnoses likely would generally not be expected to be able to actively participate in an intensive rehabilitation program, we do not believe that we can include such cases in an IRF's presumptive compliance percentage. That said, as we noted in the proposed rule, if a patient with one of these conditions were able to participate in the intensive rehabilitation services provided in an IRF, then the MAC would be able to count that case toward an IRF's 60 percent rule compliance percentage upon medical review. Thus, we proposed the removal of these congenital deformity codes, and others that present similar concerns that were discussed in the proposed rule from the presumptive compliance list.

We received 4 comments on the proposed changes to the congenital anomaly diagnosis codes, which are summarized below.

Comment: The commenters supported our proposal to remove the specified congenital anomaly conditions from the presumptive methodology list. These commenters noted that these conditions are rare and agreed that patients with these conditions would be unlikely to require or to meaningfully participate in intensive inpatient rehabilitation services.

Response: We thank the commenters for supporting our efforts to refine the presumptive methodology list so that the list truly represents diagnoses that would be expected to indicate that an individual meets the medical condition criteria, and that they should be included in an IRF's compliance percentage under the presumptive compliance method of calculating a compliance percentage. All of the congenital anomaly diagnosis codes that we are removing from ICD–9–CM Codes That Meet Presumptive Compliance Criteria list are listed in Table 9.

4. Unilateral Upper Extremity Amputations Diagnosis Codes

Though amputation is generally one of the 13 medical conditions that qualify for inclusion in the an IRF's compliance calculation for the 60 percent rule, we proposed the removal of certain ICD–9–CM codes for unilateral upper extremity amputations from the presumptive methodology list, ICD–9–CM Codes That Meet Presumptive Compliance Criteria, because we believe that it is impossible to determine, from the presence of such ICD–9–CM codes alone, whether a patient with such a unilateral upper extremity amputation has a condition for which he or she would need intensive rehabilitation services for treatment of one or more of the conditions specified in § 412.29(b)(2). We expect that some patients with these upper extremity amputations will not require close medical supervision by a physician or weekly interdisciplinary team conferences to achieve their goals, while others may require these services. But we generally believe that rehabilitation associated with unilateral upper extremity amputations would not need to be accompanied by the close medical management provided in IRFs, as long as the patient does not have any additional comorbidities that have caused significant decline in his or her functional ability that, in the absence of the unilateral upper extremity amputation, would necessitate treatment in an IRF. That is to say, a patient's need for intensive rehabilitation services provided in an IRF depends on other conditions which cannot be solely identified through the presence of a unilateral upper extremity amputation ICD–9–CM code. If the patient has comorbidities that would necessitate treatment in an IRF, then those comorbidities would qualify the patient for inclusion under the presumptive compliance method of calculating compliance with the 60 percent rule if one or more of the comorbidities are on the presumptive methodology list. If the codes for such a patient's comorbidities do not appear in the presumptive compliance list, the patient can still be considered for inclusion in the IRF's compliance percentage following medical review and confirmation that they meet the

criteria for one or more of the medical conditions in the regulations. Thus, we proposed to remove the unilateral upper extremity amputation from the presumptive methodology list.

We received 5 comments on the proposed changes to unilateral upper extremity amputation diagnosis codes listed in ICD–9–CM Codes That Meet Presumptive Compliance Criteria, which are summarized below.

Comment: Several commenters supported our proposal to remove unilateral upper extremity amputation codes from ICD–9–CM Codes That Meet Presumptive Compliance. The commenters agreed with our assessment that a patient's need for intensive inpatient rehabilitative services for the treatment of one or more of these conditions would depend on the presence of additional comorbidities that caused significant decline in his or her functional ability to the extent that the patient would necessitate treatment in an IRF. However, one commenter disagreed with the proposal because an inpatient setting offering an intensive rehabilitation therapy program would be appropriate for the acute phase of wound healing, edema control, and desensitization and pain control that these patients may require.

Response: We agree that unilateral upper extremity amputation patients have ongoing therapy needs and may require medical aftercare once discharged from an acute hospital stay. However, as long as the patient does not have any other comorbidities that have caused significant decline in his or her functional ability that, in the absence of the unilateral upper extremity amputation, would require treatment in an IRF, we do not believe that the patient could be presumed to meet the regulatory requirements for inclusion in an IRF's compliance percentage.

5. Miscellaneous Diagnosis Codes That Do Not Require Intensive Rehabilitation Services for Treatment

We have identified additional ICD–9–CM diagnosis codes in the presumptive methodology list, ICD–9–CM Codes That Meet Presumptive Compliance Criteria, which do not, in the absence of additional confirmatory information, indicate a patient's need for intensive rehabilitation services or that they have met any severity or prerequisite treatment requirements for the medical conditions that may be counted toward an IRF's compliance percentage. We therefore proposed removal of the following ICD–9–CM codes from the list, ICD–9–CM Codes That Meet Presumptive Compliance Criteria.

- *Tuberculous (abscess, meningitis, and encephalitis or myelitis) and Tuberculoma (of the meninges, brain, or spinal cord) where a bacterial or histological examination is unspecified or was not done (see Table 7 in the proposed rule for a list of the specific codes)*—Appropriate patient care dictates that the IRF physician must attempt to ascertain the means by which the organism, whether it be bacteriologic or histologic, was tested. We expect the IRF physician to make a good faith effort to determine the type of diagnostic test which identified the tuberculous organism. In the circumstances where this is impossible (that is, documentation no longer exists), appropriate codes remain on the presumptive methodology list. However, we expect the IRF physician to make a good faith effort to determine the type of diagnostic test which identified the tuberculous organism. We therefore proposed to remove these unspecified codes from the list, ICD–9–CM Codes That Meet Presumptive Compliance Criteria.
- *Postherpetic polyneuropathy* (053.13)—This is a condition characterized by severe pain, which typically requires pain medication or other pain control therapies but does not typically require the intensive inpatient rehabilitation services of an IRF. In fact, the prescriptive hands-on therapeutic interventions provided in an IRF could exacerbate the patient's pain. For these reasons, we proposed the removal of this code from ICD–9–CM Codes That Meet Presumptive Compliance Criteria.
- *Louping ill* (063.1)—This ICD–9–CM code refers to an acute viral disease primarily of sheep that is not endemic to the United States. Louping ill disease has been recognized in Scotland for centuries, but only 39 cases of human infection have been described and none of these cases have been observed in the United States. Louping ill is a disease which has many manifestations, not all requiring inpatient rehabilitation hospital services. We believe that the ICD–9–CM code for this diagnosis does not provide the information necessary for us to determine presumptively whether the patient has met the criteria for the medical conditions that may be counted toward an IRF's compliance percentage. However, as with all of the codes that we proposed removing from the list, ICD–9–CM Codes That Meet Presumptive Compliance Criteria, if someone with this diagnosis were to be admitted to an IRF, medical review could be used to confirm whether the regulatory criteria have been met.
- *Brain death* (348.82)—We believe that it is unlikely that a patient with this condition would require the intensive inpatient rehabilitation services provided in an IRF. For this reason, we proposed the removal of this code from ICD–9–CM Codes That Meet Presumptive Compliance Criteria.
- *Myasthenia gravis without (acute) exacerbation* (358.00)—Although we believe that a patient experiencing an acute attack of Myasthenia Gravis could potentially require the intensive inpatient rehabilitative services of an IRF (these individuals are coded with ICD–9 code 358.01 ''Myasthenia gravis with (acute) exacerbation''), we proposed the removal of non-acute myasthenia gravis from the list, ICD–9–CM Codes That Meet Presumptive Compliance Criteria because such patients would not be experiencing an acute exacerbation of the condition and most likely would not require the intensive inpatient rehabilitation services provided in an IRF.
- *Other specified myotonic disorder* (359.29)—codes patients with Myotonia fluctuans, myotonia permanens, and paramyotonia congenital which are conditions that are exacerbated by exercise. The intensive inpatient rehabilitation services of an IRF would be expected to exacerbate these conditions, so such care would likely be contraindicated. Therefore, we proposed the removal of this code from the list, ICD–9–CM Codes That Meet Presumptive Compliance Criteria.
- *Periodic paralysis* (359.3)—The treatment for periodic paralysis involves pharmaceutical interventions and lifestyle changes that control exercise and activity, but patients with this condition do not generally require the intensive inpatient rehabilitation services of an IRF. In fact, it is unclear how the intensive inpatient rehabilitation services provided in an IRF would effectively treat this condition. Thus, we proposed the removal of this code from the list, ICD–9–CM Codes That Meet Presumptive Compliance Criteria.
- *Brachial plexus lesions* (353.0)—Care and treatment for this condition, which affects an upper extremity in a manner that typically does not require close medical supervision by a physician or weekly interdisciplinary team meetings to reach the patient's goals, would not be expect to require the intensive inpatient rehabilitation services provided in an IRF. Therefore, we proposed the removal of this code from the list, ICD–9–CM Codes That Meet Presumptive Compliance Criteria.
- *Neuralgic amyothrophy* (353.5)—This condition is also known as

Parsonage-Turner syndrome or brachial plexus neuritis. It is a distinct peripheral nervous system disorder characterized by attacks of extreme neuropathic pain and rapid multifocal weakness and atrophy in the upper limbs. Patients with this condition do not typically require close medical supervision by a physician or weekly interdisciplinary team meetings to reach the patient's therapy goals. Thus, patients with this condition do not typically require the intensive inpatient rehabilitation services provided in an IRF. Therefore, we proposed the removal of this code from the list, ICD–9–CM Codes That Meet Presumptive Compliance Criteria.

• *Other nerve root and plexus disorders* (353.8)—This code does not, in the absence of additional information, reveal whether a patient is in need of intensive rehabilitation services for treatment of one or more of the conditions specified in the regulations. More descriptive codes should be used so as to document the appropriateness of a patient's IRF admission, and potentially, their inclusion in the IRF's compliance percentage. For example, Lumbosacral plexus lesions (353.1) could substitute for Other nerve root and plexus disorders (353.8). Patients with lumbosacral plexus lesions, however, do not typically require the intensive inpatient rehabilitation services provided in an IRF. Therefore, we proposed the removal of this code from the list, ICD–9–CM Codes That Meet Presumptive Compliance Criteria.

We received 3 comments on the proposed changes to the miscellaneous diagnosis codes that we proposed removing from the presumptive methodology list in the proposed rule. These are summarized below.

Comment: The commenters agreed with the proposed removal of the miscellaneous diagnosis codes that were discussed in the May 8, 2013 proposed rule.

Response: We appreciate the commenters support and thank them for their comments.

6. Additional Diagnosis Codes

During our review of the diagnosis codes on the presumptive methodology list we did not identify any ICD–9–CM codes that would be appropriate to add to the list. However, we welcomed public comment regarding ICD–9–CM diagnosis codes that are not currently on the presumptive methodology list that stakeholders believe should be added. We noted that any such suggested codes would have to code for one of the medical conditions listed at § 412.29(b)(2) (including any severity or pretreatment requirements), and require intensive inpatient rehabilitation.

We received one comment suggesting additional diagnosis codes not currently listed in ICD–9–CM Codes That Meet Presumptive Compliance Criteria..

Comment: The commenter suggested that we add ICD–9–CM code 348.31—Metabolic encephalopathy and ICD–9–CM code 331.83—Parkinson's Dementia—to the list of qualifying codes.

Response: We agree that code ICD–9–CM code 348.31—Metabolic encephalopathy— should be added to the list with the other toxic encephalopathy codes to ensure that IRFs can code to the highest level of specificity. We will add this code to the list of ICD–9–CM Codes That Meet Presumptive Compliance Criteria. However, we disagree with the commenter's suggestion to add Parkinson's Dementia to the list of codes because we cannot determine ''presumptively'' whether these patients would be able to meaningfully participate in an intensive inpatient rehabilitation program.

Final Decision: After carefully considering the comments that we received on the proposed changes to the ICD–9–CM in the presumptive methodology list, we are revising the list of ICD–9–CM codes to be removed from ''ICD–9–CM Codes That Meet Presumptive Compliance Criteria'' as follows: We are removing the codes listed in Table 9 of this final rule. We are also adding ICD–9–CM code 348.31—Metabolic encephalopathy to the presumptive methodology list. The revisions to the list of diagnosis codes that are used to determine presumptive compliance under the ''60 percent rule'' are effective for compliance review periods beginning on or after October 1, 2014.

TABLE 9—ICD–9–CM CODES REMOVED FROM ''ICD–9–CM CODES THAT MEET PRESUMPTIVE COMPLIANCE CRITERIA''

ICD–9–CM Code	Diagnosis
013.00	Tuberculous meningitis, unspecified.
013.01	Tuberculous meningitis, bacteriological or histological examination not done.
013.10	Tuberculoma of meninges, unspecified.
013.11	Tuberculoma of meninges, bacteriological or histological examination not done.
013.20	Tuberculoma of brain, unspecified.
013.21	Tuberculoma of brain, bacteriological or histological examination not done.
013.30	Tuberculous abscess of brain, unspecified.
013.31	Tuberculous abscess of brain, bacteriological or histological examination not done.
013.40	Tuberculoma of spinal cord, unspecified.
013.41	Tuberculoma of spinal cord, bacteriological or histological examination not done.
013.50	Tuberculous abscess of spinal cord, unspecified.
013.51	Tuberculous abscess of spinal cord, bacteriological or histological examination not done.
013.60	Tuberculous encephalitis or myelitis, unspecified.
013.61	Tuberculous encephalitis or myelitis, bacteriological or histological examination not done.
047.9	Unspecified viral meningitis.
053.13	Postherpetic polyneuropathy.
062.9	Mosquito-borne viral encephalitis, unspecified.
063.1	Louping ill.
063.9	Tick-borne viral encephalitis, unspecified.
324.9	Intracranial and intraspinal abscess of unspecified site.
335.10	Spinal muscular atrophy, unspecified.
335.9	Anterior horn cell disease, unspecified.
336.9	Unspecified disease of spinal cord.
341.9	Demyelinating disease of central nervous system, unspecified.
342.00	Flaccid hemiplegia and hemiparesis affecting unspecified side.
342.10	Spastic hemiplegia and hemiparesis affecting unspecified side.

TABLE 9—ICD–9–CM CODES REMOVED FROM "ICD–9–CM CODES THAT MEET PRESUMPTIVE COMPLIANCE CRITERIA"—Continued

ICD–9–CM Code	Diagnosis
342.80	Other specified hemiplegia and hemiparesis affecting unspecified side.
342.90	Hemiplegia, unspecified, affecting unspecified side.
342.91	Hemiplegia, unspecified, affecting dominant side.
342.92	Hemiplegia, unspecified, affecting nondominant side.
343.3	Congenital monoplegia.
344.5	Unspecified monoplegia.
348.82	Brain death.
353.0	Brachial plexus lesions.
353.2	Cervical root lesions, not elsewhere classified.
353.3	Thoracic root lesions, not elsewhere classified.
353.4	Lumbosacral root lesions, not elsewhere classified.
353.5	Neuralgic amyotrophy.
353.8	Other nerve root and plexus disorders.
354.5	Mononeuritis multiplex.
356.9	Unspecified hereditary and idiopathic peripheral neuropathy.
358.00	Myasthenia gravis without (acute) exacerbation.
359.29	Other specified myotonic disorder.
359.3	Periodic paralysis.
432.9	Unspecified intracranial hemorrhage.
438.20	Late effects of cerebrovascular disease, hemiplegia affecting unspecified side.
438.30	Late effects of cerebrovascular disease, monoplegia of upper limb affecting unspecified side.
438.31	Late effects of cerebrovascular disease, monoplegia of upper limb affecting dominant side.
438.32	Late effects of cerebrovascular disease, monoplegia of upper limb affecting nondominant side.
438.40	Late effects of cerebrovascular disease, monoplegia of lower limb affecting unspecified side.
438.50	Late effects of cerebrovascular disease, other paralytic syndrome affecting unspecified side.
446.0	Polyarteritis nodosa.
711.20	Arthropathy in Behcet's syndrome, site unspecified.
711.21	Arthropathy in Behcet's syndrome, shoulder region.
711.22	Arthropathy in Behcet's syndrome, upper arm.
711.23	Arthropathy in Behcet's syndrome, forearm.
711.24	Arthropathy in Behcet's syndrome, hand.
711.25	Arthropathy in Behcet's syndrome, pelvic region and thigh.
711.26	Arthropathy in Behcet's syndrome, lower leg.
711.27	Arthropathy in Behcet's syndrome, ankle and foot.
711.28	Arthropathy in Behcet's syndrome, other specified sites.
711.29	Arthropathy in Behcet's syndrome, multiple sites.
713.0	Arthropathy associated with other endocrine and metabolic disorders.
713.1	Arthropathy associated with gastrointestinal conditions other than infections.
713.2	Arthropathy associated with hematological disorders.
713.3	Arthropathy associated with dermatological disorders.
713.4	Arthropathy associated with respiratory disorders.
713.6	Arthropathy associated with hypersensitivity reaction.
713.7	Other general diseases with articular involvement.
714.0	Rheumatoid arthritis.
714.1	Felty's syndrome.
714.2	Other rheumatoid arthritis with visceral or systemic involvement.
714.32	Pauciarticular juvenile rheumatoid arthritis.
714.81	Rheumatoid lung.
714.89	Other specified inflammatory polyarthropathies.
714.9	Unspecified inflammatory polyarthropathy.
715.11	Osteoarthrosis, localized, primary, shoulder region.
715.12	Osteoarthrosis, localized, primary, upper arm.
715.15	Osteoarthrosis, localized, primary, pelvic region and thigh.
715.16	Osteoarthrosis, localized, primary, lower leg.
715.21	Osteoarthrosis, localized, secondary, shoulder region.
715.22	Osteoarthrosis, localized, secondary, upper arm.
715.25	Osteoarthrosis, localized, secondary, pelvic region and thigh.
715.26	Osteoarthrosis, localized, secondary, lower leg.
715.31	Osteoarthrosis, localized, not specified whether primary or secondary, shoulder region.
715.32	Osteoarthrosis, localized, not specified whether primary or secondary, upper arm.
715.35	Osteoarthrosis, localized, not specified whether primary or secondary, pelvic region and thigh.
715.36	Osteoarthrosis, localized, not specified whether primary or secondary, lower leg.
716.01	Kaschin-Beck disease, shoulder region.
716.02	Kaschin-Beck disease, upper arm.
716.05	Kaschin-Beck disease, pelvic region and thigh.
716.06	Kaschin-Beck disease, lower leg.
716.11	Traumatic arthropathy, shoulder region.
716.12	Traumatic arthropathy, upper arm.
716.15	Traumatic arthropathy, pelvic region and thigh.
716.16	Traumatic arthropathy, lower leg.

TABLE 9—ICD–9–CM CODES REMOVED FROM "ICD–9–CM CODES THAT MEET PRESUMPTIVE COMPLIANCE CRITERIA"—Continued

ICD–9–CM Code	Diagnosis
716.21	Allergic arthritis, shoulder region.
716.22	Allergic arthritis, upper arm.
716.25	Allergic arthritis, pelvic region and thigh.
716.26	Allergic arthritis, lower leg.
716.51	Unspecified polyarthropathy or polyarthritis, shoulder region.
716.52	Unspecified polyarthropathy or polyarthritis, upper arm.
716.55	Unspecified polyarthropathy or polyarthritis, pelvic region and thigh.
716.56	Unspecified polyarthropathy or polyarthritis, lower leg.
719.30	Palindromic rheumatism, site unspecified.
719.31	Palindromic rheumatism, shoulder region.
719.32	Palindromic rheumatism, upper arm.
719.33	Palindromic rheumatism, forearm.
719.34	Palindromic rheumatism, hand.
719.35	Palindromic rheumatism, pelvic region and thigh.
719.36	Palindromic rheumatism, lower leg.
719.37	Palindromic rheumatism, ankle and foot.
719.38	Palindromic rheumatism, other specified sites.
719.39	Palindromic rheumatism, multiple sites.
720.0	Ankylosing spondylitis.
720.81	Inflammatory spondylopathies in diseases classified elsewhere.
720.89	Other inflammatory spondylopathies.
721.91	Spondylosis of unspecified site, with myelopathy.
722.70	Intervertebral disc disorder with myelopathy, unspecified region.
740.1	Craniorachischisis.
740.2	Iniencephaly.
741.00	Spina bifida with hydrocephalus, unspecified region.
741.90	Spina bifida without mention of hydrocephalus, unspecified region.
742.1	Microcephalus.
754.30	Congenital dislocation of hip, unilateral.
754.31	Congenital dislocation of hip, bilateral.
754.32	Congenital subluxation of hip, unilateral.
755.20	Unspecified reduction deformity of upper limb.
755.21	Transverse deficiency of upper limb.
755.22	Longitudinal deficiency of upper limb, not elsewhere classified.
755.23	Longitudinal deficiency, combined, involving humerus, radius, and ulna (complete or incomplete).
755.24	Longitudinal deficiency, humeral, complete or partial (with or without distal deficiencies, incomplete).
755.25	Longitudinal deficiency, radioulnar, complete or partial (with or without distal deficiencies, incomplete).
755.26	Longitudinal deficiency, radial, complete or partial (with or without distal deficiencies, incomplete).
755.27	Longitudinal deficiency, ulnar, complete or partial (with or without distal deficiencies, incomplete).
755.28	Longitudinal deficiency, carpals or metacarpals, complete or partial (with or without incomplete phalangeal deficiency).
755.30	Unspecified reduction deformity of lower limb.
755.4	Reduction deformities, unspecified limb.
755.51	Congenital deformity of clavicle.
755.53	Radioulnar synostosis.
755.61	Coxa valga, congenital.
755.62	Coxa vara, congenital.
755.63	Other congenital deformity of hip (joint).
756.50	Congenital osteodystrophy, unspecified.
800.09	Closed fracture of vault of skull without mention of intracranial injury, with concussion, unspecified.
800.19	Closed fracture of vault of skull with cerebral laceration and contusion, with concussion, unspecified.
800.29	Closed fracture of vault of skull with subarachnoid, subdural, and extradural hemorrhage, with concussion, unspecified.
800.39	Closed fracture of vault of skull with other and unspecified intracranial hemorrhage, with concussion, unspecified.
800.49	Closed fracture of vault of skull with intracranial injury of other and unspecified nature, with concussion, unspecified.
800.59	Open fracture of vault of skull without mention of intracranial injury, with concussion, unspecified.
800.69	Open fracture of vault of skull with cerebral laceration and contusion, with concussion, unspecified.
800.79	Open fracture of vault of skull with subarachnoid, subdural, and extradural hemorrhage, with concussion, unspecified.
800.89	Open fracture of vault of skull with other and unspecified intracranial hemorrhage, with concussion, unspecified.
800.99	Open fracture of vault of skull with intracranial injury of other and unspecified nature, with concussion, unspecified.
801.09	Closed fracture of base of skull without mention of intra cranial injury, with concussion, unspecified.
801.19	Closed fracture of base of skull with cerebral laceration and contusion, with concussion, unspecified.
801.29	Closed fracture of base of skull with subarachnoid, subdural, and extradural hemorrhage, with concussion, unspecified.
801.39	Closed fracture of base of skull with other and unspecified intracranial hemorrhage, with concussion, unspecified.
801.49	Closed fracture of base of skull with intracranial injury of other and unspecified nature, with concussion, unspecified.
801.59	Open fracture of base of skull without mention of intracranial injury, with concussion, unspecified.
801.69	Open fracture of base of skull with cerebral laceration and contusion, with concussion, unspecified.
801.79	Open fracture of base of skull with subarachnoid, subdural, and extradural hemorrhage, with concussion, unspecified.
801.89	Open fracture of base of skull with other and unspecified intracranial hemorrhage, with concussion, unspecified.
801.99	Open fracture of base of skull with intracranial injury of other and unspecified nature, with concussion, unspecified.
803.09	Other closed skull fracture without mention of intracranial injury, with concussion, unspecified.
803.19	Other closed skull fracture with cerebral laceration and contusion, with concussion, unspecified.

TABLE 9—ICD–9–CM CODES REMOVED FROM "ICD–9–CM CODES THAT MEET PRESUMPTIVE COMPLIANCE CRITERIA"—Continued

ICD–9–CM Code	Diagnosis
803.29	Other closed skull fracture with subarachnoid, subdural, and extradural hemorrhage, with concussion, unspecified.
803.39	Other closed skull fracture with other and unspecified intracranial hemorrhage, with concussion, unspecified.
803.49	Other closed skull fracture with intracranial injury of other and unspecified nature, with concussion, unspecified.
803.59	Other open skull fracture without mention of intracranial injury, with concussion, unspecified.
803.69	Other open skull fracture with cerebral laceration and contusion, with concussion, unspecified.
803.79	Other open skull fracture with subarachnoid, subdural, and extradural hemorrhage, with concussion, unspecified.
803.89	Other open skull fracture with other and unspecified intracranial hemorrhage, with concussion, unspecified.
803.99	Other open skull fracture with intracranial injury of other and unspecified nature, with concussion, unspecified.
804.19	Closed fractures involving skull or face with other bones, with cerebral laceration and contusion, with concussion, unspecified.
804.29	Closed fractures involving skull or face with other bones with subarachnoid, subdural, and extradural hemorrhage, with concussion, unspecified.
804.39	Closed fractures involving skull or face with other bones, with other and unspecified intracranial hemorrhage, with concussion, unspecified.
804.49	Closed fractures involving skull or face with other bones, with intracranial injury of other and unspecified nature, with concussion, unspecified.
804.69	Open fractures involving skull or face with other bones, with cerebral laceration and contusion, with concussion, unspecified.
804.79	Open fractures involving skull or face with other bones with subarachnoid, subdural, and extradural hemorrhage, with concussion, unspecified.
804.89	Open fractures involving skull or face with other bones, with other and unspecified intracranial hemorrhage, with concussion, unspecified.
804.99	Open fractures involving skull or face with other bones, with intracranial injury of other and unspecified nature, with concussion, unspecified.
806.00	Closed fracture of C1–C4 level with unspecified spinal cord injury.
806.05	Closed fracture of C5–C7 level with unspecified spinal cord injury.
806.10	Open fracture of C1–C4 level with unspecified spinal cord injury.
806.15	Open fracture of C5–C7 level with unspecified spinal cord injury.
806.20	Closed fracture of T1–T6 level with unspecified spinal cord injury.
806.25	Closed fracture of T7–T12 level with unspecified spinal cord injury.
806.30	Open fracture of T1–T6 level with unspecified spinal cord injury.
806.35	Open fracture of T7–T12 level with unspecified spinal cord injury.
806.60	Closed fracture of sacrum and coccyx with unspecified spinal cord injury.
806.70	Open fracture of sacrum and coccyx with unspecified spinal cord injury.
820.8	Closed fracture of unspecified part of neck of femur.
820.9	Open fracture of unspecified part of neck of femur.
839.10	Open dislocation, cervical vertebra, unspecified.
850.5	Concussion with loss of consciousness of unspecified duration.
851.09	Cortex (cerebral) contusion without mention of open intracranial wound, with concussion, unspecified.
851.19	Cortex (cerebral) contusion with open intracranial wound, with concussion, unspecified.
851.29	Cortex (cerebral) laceration without mention of open intracranial wound, with concussion, unspecified.
851.39	Cortex (cerebral) laceration with open intracranial wound, with concussion, unspecified.
851.49	Cerebellar or brain stem contusion without mention of open intracranial wound, with concussion, unspecified.
851.59	Cerebellar or brain stem contusion with open intracranial wound, with concussion, unspecified.
851.69	Cerebellar or brain stem laceration without mention of open intracranial wound, with concussion, unspecified.
851.79	Cerebellar or brain stem laceration with open intracranial wound, with concussion, unspecified.
851.89	Other and unspecified cerebral laceration and contusion, without mention of open intracranial wound, with concussion, unspecified.
852.09	Subarachnoid hemorrhage following injury without mention of open intracranial wound, with concussion, unspecified.
852.19	Subarachnoid hemorrhage following injury with open intracranial wound, with concussion, unspecified.
852.29	Subdural hemorrhage following injury without mention of open intracranial wound, with concussion, unspecified.
852.39	Subdural hemorrhage following injury with open intracranial wound, with concussion, unspecified.
852.49	Extradural hemorrhage following injury without mention of open intracranial wound, with concussion, unspecified.
852.59	Extradural hemorrhage following injury with open intracranial wound, with concussion, unspecified.
853.09	Other and unspecified intracranial hemorrhage following injury without mention of open intracranial wound, with concussion, unspecified.
853.19	Other and unspecified intracranial hemorrhage following injury with open intracranial wound, with concussion, unspecified.
854.09	Intracranial injury of other and unspecified nature without mention of open intracranial wound, with concussion, unspecified.
854.19	Intracranial injury of other and unspecified nature with open intracranial wound, with concussion, unspecified.
887.0	Traumatic amputation of arm and hand (complete) (partial), unilateral, below elbow, without mention of complication.
887.1	Traumatic amputation of arm and hand (complete) (partial), unilateral, below elbow, complicated.
887.2	Traumatic amputation of arm and hand (complete) (partial), unilateral, at or above elbow, without mention of complication.
887.3	Traumatic amputation of arm and hand (complete) (partial), unilateral, at or above elbow, complicated.
887.4	Traumatic amputation of arm and hand (complete) (partial), unilateral, level not specified, without mention of complication.
887.5	Traumatic amputation of arm and hand (complete) (partial), unilateral, level not specified, complicated.
941.00	Burn of unspecified degree of face and head, unspecified site.
941.02	Burn of unspecified degree of eye (with other parts of face, head, and neck).
941.09	Burn of unspecified degree of multiple sites [except with eye] of face, head, and neck.
942.00	Burn of unspecified degree of trunk, unspecified site.
942.01	Burn of unspecified degree of breast.
942.02	Burn of unspecified degree of chest wall, excluding breast and nipple.
942.03	Burn of unspecified degree of abdominal wall.

TABLE 9—ICD–9–CM CODES REMOVED FROM "ICD–9–CM CODES THAT MEET PRESUMPTIVE COMPLIANCE CRITERIA"—Continued

ICD–9–CM Code	Diagnosis
942.04	Burn of unspecified degree of back [any part].
942.05	Burn of unspecified degree of genitalia.
942.09	Burn of unspecified degree of other and multiple sites of trunk.
943.00	Burn of unspecified degree of upper limb, except wrist and hand, unspecified site.
943.01	Burn of unspecified degree of forearm.
943.02	Burn of unspecified degree of elbow.
943.03	Burn of unspecified degree of upper arm.
943.04	Burn of unspecified degree of axilla.
943.05	Burn of unspecified degree of shoulder.
943.06	Burn of unspecified degree of scapular region.
943.09	Burn of unspecified degree of multiple sites of upper limb, except wrist and hand.
943.30	Full-thickness skin [third degree, not otherwise specified] of upper limb, unspecified site.
943.40	Deep necrosis of underlying tissues [deep third degree] without mention of loss of a body part, of upper limb, unspecified site.
943.50	Deep necrosis of underlying tissues [deep third degree] with loss of a body part, of upper limb, unspecified site.
944.30	Full-thickness skin loss [third degree, not otherwise specified] of hand, unspecified site.
944.40	Deep necrosis of underlying tissues [deep third degree] without mention of loss of a body part, hand, unspecified site.
944.50	Deep necrosis of underlying tissues [deep third degree] with loss of a body part, of hand, unspecified site.
945.00	Burn of unspecified degree of lower limb [leg], unspecified site.
945.01	Burn of unspecified degree of toe(s) (nail).
945.02	Burn of unspecified degree of foot.
945.03	Burn of unspecified degree of ankle.
945.04	Burn of unspecified degree of lower leg.
945.05	Burn of unspecified degree of knee.
945.06	Burn of unspecified degree of thigh [any part].
945.09	Burn of unspecified degree of multiple sites of lower limb(s).
945.20	Blisters, epidermal loss [second degree] of lower limb [leg], unspecified site.
945.40	Deep necrosis of underlying tissues [deep third degree] without mention of loss of a body part, lower limb [leg], unspecified site.
945.50	Deep necrosis of underlying tissues [deep third degree] with loss of a body part, of lower limb [leg], unspecified site.
949.4	Deep necrosis of underlying tissue [deep third degree] without mention of loss of a body part, unspecified.
949.5	Deep necrosis of underlying tissues [deep third degree] with loss of a body part, unspecified.
997.60	Unspecified complication of amputation stump.

IX. Non-Quality Related Revisions to IRF–PAI Sections

Under section 1886(j)(2)(D) of the Act, the Secretary is authorized to require rehabilitation facilities that provide inpatient hospital services to submit such data as the Secretary deems necessary to establish and administer the prospective payment system under subsection P. The collection of patient data is indispensable for the successful development and implementation of the IRF payment system. In the August 7, 2001 final rule, the inpatient rehabilitation facility patient assessment instrument (IRF–PAI) was adopted as the standardized patient assessment instrument under the IRF prospective payment system (PPS). The IRF–PAI was established, and is still used to gather data to classify patients for payment under the IRF PPS. As discussed in section XIV of this final rule, it is also now used to collect certain data for the IRF Quality Reporting Program. IRFs are currently required to complete an IRF–PAI for every Medicare Part A or C patient who is admitted to, or discharged from an IRF. (We note that Medicare Part B was inappropriately listed in the proposed rule. We are clarifying that IRFs are not required to submit the IRF–PAI for Medicare Part B patients.)

Although there have been significant advancements in the industry, no IRF PPS payment-related changes have been made to the IRF–PAI form since its implementation in FY 2002. In the FY 2014 IRF PPS proposed rule, we proposed amending certain response code options, adding additional data points, removing certain outdated items and changing certain references to ensure that our policies reflect the current data needs of the IRF PPS program.

A. Revisions

We proposed to amend the response codes on the following items in the IRF–PAI:

- Item 15A: Admit From (Formerly item 15)
- Item 16A: Pre-Hospital Living Situation (Formerly item 16)
- Item 44D: Patient's Discharge Destination/Living Setting (Formerly item 44A)

To minimize possible confusion due to the use of different sets of status codes on the IRF–PAI and the CMS–1450 (also referred to as the UB–04) claim form, we believe that the IRF–PAI status codes should be updated to mirror those used on the UB–04 claim form. We also believed this update would help with consistency, ultimately decreasing the rate of coding submission errors on the UB–04 claim form. We believed that would provide response options that mirror other commonly used instruments in the Medicare context allowing providers to use only one common set of response codes. We proposed to amend the response options for the three items listed above to:

- 01—Home (private home/apt., board/care, assisted living, group home)
- 02—Short-term General Hospital
- 03—Skilled Nursing Facility (SNF)
- 50—Hospice
- 62—Another Inpatient Rehabilitation Facility
- 63—Long-Term Care Hospital (LTCH)
- 64—Medicaid Nursing Facility
- 65—Inpatient Psychiatric Facility
- 66—Critical Access Hospital
- 99—Not Listed

We also proposed to update the options for responding to item 20B: Secondary Source. While not expressly stated in the preamble, but evident from

the web-posted draft of the IRF–PAI that was cross-referenced in the proposed rule, we also proposed to amend the response codes for 20A: Primary Source as well. As we noted in the proposed rule, we find that the current response options for these data elements result in the collection of patient information that we do not currently need to operate the IRF PPS and the IRF quality programs. Therefore, we limit our data collections to those which are currently needed, and in an effort to decrease burden on IRFs through the implementation of simplified response options, we proposed to limit the secondary source response options to the following:

- 02—Medicare—Fee for Service
- 51—Medicare—Medicare Advantage
- 99—Not Listed

B. Additions

Further, we proposed to add (or expand) the following items to the IRF–PAI:

- Item 25A: Height
- Item 26A: Weight
- Item 24: Comorbid Conditions (15 additional spaces)
- Item 44C: Was the patient discharged alive?
- Signature of Persons Completing the IRF–PAI

Items 25A: Height and 26A: Weight, are important items to collect for using in the classification of facilities for payment under the IRF–PPS as well as for the risk adjustment of quality measures (as described in section XIV of this final rule). In the regulations at section 412.29(b)(2), we specify a list of comorbid conditions that, if certain conditions are met, may qualify a patient for inclusion in an IRF's 60 percent rule compliance percentage. For example, a patient with a lower-extremity joint replacement comorbidity could qualify as an IRF patient under the 60 percent rule compliance percentage if they have one or more of the following:

- A bilateral joint replacement
- Is over the age of 85
- Has a BMI greater than 50.

The patient's BMI is calculated using height and weight. By adding a patient's height and weight information to the IRF–PAI, we will for the first time have enough information on the number and types of patients being treated for a lower-extremity joint replacement with a BMI greater than 50 for purposes of analyzing the effects of the 60 percent rule.

We also proposed to add 15 additional spaces for providers to document patients' comorbid medical conditions at item 24: Comorbid Conditions (located in the medical information section of the IRF–PAI). The IRF–PAI currently has ten spaces available for providers to enter ICD codes for comorbid conditions. Including the 15 additional proposed spaces for this item will give providers a total of 25 spaces on the IRF–PAI. Such expansion will enable IRFs to code with greater specificity which may result in accounting for additional comorbidities. Further identification of patient characteristics may assist in care planning, payment assignment, and presumptive compliance method compliance calculations. Furthermore, in order to stay aligned, we believe that the number of data elements allowed on the IRF–PAI for item 24: Comorbid Conditions, should mirror the number of spaces currently available for providers to document patients' comorbidities on the UB–04 claim. Additionally, the ICD–10 coding scheme will become effective on October 1, 2014, and is much more specific than the current ICD–9 coding. Therefore, when the agency moves from ICD–9 to ICD–10 coding, providers may need the additional spaces to code because of the greater specificity under ICD–10.

Furthermore, we proposed to add a new item 44C: ''Was the patient discharged alive?'' to the discharge information section on the IRF–PAI. Adding this item as a standalone item would allow facilities that reply ''no'' to 44C to skip items 44D, 44E, and 45, which describe a living patient's discharge destination. This will also reduce the burden on the time it takes providers to complete the IRF–PAI. Facilities that respond ''yes'' to item 44C will complete items 44D, 44E and 45 as they apply to the patient. We believe that adding this question as a standalone item would provide greater clarity for providers when documenting patient information on the IRF–PAI.

We also proposed to add a page to the IRF–PAI dedicated as the signature page for persons completing the IRF–PAI. As of the effective date of the IRF Coverage Requirements (see the August 7, 2009 FY 2010 IRF PPS final rule (74 FR 39762)) a patient's IRF–PAI must be maintained in their medical record at the IRF (electronic or paper format), and the information in the IRF–PAI must correspond with all of the information provided in the patient's IRF medical record. We received multiple public comments on the FY 2010 IRF PPS proposed rule regarding the requirement to include the IRF–PAI in the medical record. Commenters questioned whether IRFs would need to adhere to the conditions of participation in § 482.24(c)(1) that require all patient medical record entries must be legible, complete, dated, timed, and authenticated in written or electronic form by the person responsible for providing or evaluating the service provided, consistent with hospital policies and procedures. When we responded (at *http://cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Downloads/IRF-Training-call_version_1.pdf*) that IRFs would need to adhere to § 482.24(c)(1), providers responded by asking for a place on the IRF–PAI where they would be able to document the required authentication. The addition of a signature page for persons completing the IRF–PAI would fulfill providers' request to have an organized way to document who in the IRF has completed an IRF–PAI item and/or section when the information was completed. We also believe that the addition of a signature page for those completing the IRF–PAI will ensure that providers are satisfying both the IRF coverage requirements and the conditions of participation requirements.

C. Deletions

We proposed to delete the following items from the IRF–PAI:

- Item 18: Pre-Hospital Vocational Category
- Item 19: Pre-Hospital Vocational Effort
- Item 25: Is patient comatose at admission?
- Item 26: Is patient delirious at admission?
- Item 28: Clinical signs of dehydration

Because we no longer believe that these items are necessary and in the interest of reducing burden on providers, we would like to delete them.

Items 18: Pre-Hospital Vocational Category and 19: Pre-Hospital Vocational Effort (currently located in the admission identification section on the IRF–PAI) are not used for payment or quality purposes. While these items will be removed from the IRF–PAI, we note that these data elements could be significant in a treatment context. For example, we believe that these data elements could be relevant during the care planning/discharge process, as well as during interdisciplinary team meetings. Therefore, we would expect them to appear in the patient's medical record.

We also note, that items 25: Is patient comatose at admission, 26: Is patient delirious at admission, and 28: Clinical signs of dehydration (currently located in the medical information section on the IRF–PAI) are voluntary items that

are not used for our payment or quality program purposes. Therefore, we do not believe it is necessary to collect this information on the IRF–PAI. Furthermore, to the extent such information would be relevant to the provision of patient care; this information should be captured in either the transfer documentation from the referring physician, or the patients' initial assessment documentation. As such, continuing to require this information on the IRF–PAI would be duplicative since the items should be well documented in the patients' medical record from their stay at the facility.

D. Changes

We proposed to replace all references to the ICD–9–CM code(s) in the IRF–PAI with references to ICD code(s). This change would allow CMS to forgo making additional changes to the IRF–PAI when the adopted ICD code(s) change.

Proposed Technical Correction

We proposed technical corrections at items 44D, 44E and 45 to conform to the additions above. We believe that adding language to these items indicating that the question can be skipped depending upon how item 44C is answered, will help reduce submission errors for providers when filling out the IRF–PAI.

A draft of the IRF–PAI, with the revisions proposed in the proposed rule was made available for download on the IRF PPS Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/IRFPAI.html.*

We received 18 comments on the proposed changes to the non-quality related revisions to IRF–PAI sections, which are summarized below.

Comment: Overall, the majority of commenters commended CMS for assessing the non-quality related portions of the IRF–PAI for refinements.

Response: We appreciate the support from the commenters regarding the changes to the IRF–PAI. We believe that the IRF–PAI changes will promote efficiency and clarity for providers as well as ensure that our policies reflect the current data needs required to support the IRF PPS program.

Comment: Many of the commenters supported our proposal to align the status codes on the IRF–PAI with those used on the UB–04 claim form. Commenters agreed that the proposed changes would help providers avoid coding errors. More specifically, two commenters commended our proposed removal of the status code 13 (sub-acute care) stating that the term is not clearly defined and is more commonly used as a marketing term.

Response: We appreciate the support from commenters regarding the proposed changes to the IRF–PAI. We believe that streamlining claim submission codes and IRF–PAI status codes will ease the administrative burden for providers as well as reduce coding errors.

Comment: One commenter suggested that we should delete item 44E: Was patient discharged with Home Health Services, and instead add code 06-Home under care of organized home health service organization, to item 44D: Patient's discharge destination/living setting. Likewise, another commenter recommended that we remove the proposed new item 44C: Was the patient discharged alive and add the status code option 20-Expired. Additionally, another commenter supported our proposal to add 50-Hospice as a status code option, however, suggested that CMS should add the status code option 51-Hospice (Institutional Facility). The commenters suggested that these status code options would more accurately reflect the UB–04 claim form.

Response: As we mentioned in the proposed rule, many of the changes we made on the non-quality related IRF–PAI items were to initiate standardization between IRF claims and the IRF–PAI when coding patients. Our intent in mirroring the IRF–PAI status codes with the UB–04 claim form codes was to help providers avoid future coding errors. After reviewing the comments submitted, we agree with most of the commenters suggestions to add several status code options to further mirror the UB–04 claim form. In addition to finalizing the proposed status code changes, we will also add the following status code options, which are identical to the options on the UB–04 claim form to items 15A: Admit From; 16A: Pre-hospital Living Setting; and 44D: Patient's discharge destination/living setting:

04—Intermediate Care Facility
06—Home under care of organized home health service organization
51—Hospice (Institutional Facility)
61—Within institution to swing bed

We do not agree with the commenters suggestion to remove item 44C: Was the patient discharged alive, and add 20-Expired as a status code option. Although the status code would mirror the UB–04 claim form, we do not believe ''expired'' is an adequate response when providers are answering a question regarding the patient's discharge destination. If a patient expires while in the IRF, they are not discharged from the facility therefore, we would still need item 44C: Was the patient discharged alive. Additionally, adding this item as a standalone item allows clear delineation of a section of the IRF–PAI that providers would not have to report if the reply to 44C is ''no''. Items 44D and 45, which describe a living patient's discharge destination, can then be skipped. Finally, in light of the addition of status code option 06—Home under care of organized home health service organization; we will remove item 44E: Was patient discharged with Home Health Services live, as this item would be redundant for providers to answer.

Comment: One commenter suggested that we should consider creating a new status code option 08-subacute (SNF with continued therapy plan of care/skilled needs).

Response: We appreciate the commenter's suggestion and will consider creating a new status code option 08-Subacute (SNF with continued therapy plan of care/skilled needs) during future rulemaking. However, our intentions of changing the status code options on the IRF–PAI were to mirror those on the UB–04 claim form, and this suggestion does not conform to those changes as it is not currently necessary for IRF payment or quality reporting.

Comment: Several commenters expressed concern that the coding changes to the IRF–PAI for items 15A: Admitted From; 16A: Pre-Hospital Living Situation; and 44D: Patient's Discharge Destination, are not optimal and suggested that we retain the current IRF–PAI coding options for these items. The commenters stated that the data collected by IRFs in response to these items provide valuable information for quality review and operational management. Limiting the response options too severely, the commenters indicated, would impair an IRF's ability to collect and retain valuable information for payers other than Medicare.

Response: We appreciate the commenters suggestion as we continue to believe that the status code changes are necessary to provide better clarity and alignment with the UB–04 claim form, ultimately reducing coding submission errors. Although we have removed some status code options, we do not believe that we are preventing or deterring IRFs from continuing to collect patient information and document it within the medical record.

Comment: One commenter disagreed with our proposal to group the existing status codes for private home, board/care, assisted living and group home

together under the proposed status code 01—Home (private home/apt., board/care, assisted living, group home) and to completely remove the code options for transitional living and intermediate care from items 15A: Admitted From; 16A: Pre-Hospital Living Situation; and 44D: Patient's Discharge Destination. The commenter recommended that if the proposed status code changes are finalized, we should consider adding transitional living and intermediate care under the status code 01—Home.

Response: As we have previously mentioned, our goal in proposing to change some of the status code options on the IRF–PAI is to be as consistent as possible with the UB–04 claim form. Therefore, we disagree with the commenters' suggestion to ungroup the existing status codes for private home, board/care, assisted living, and group home under the proposed status code 01—Home. But we do agree with the commenter that intermediate care and transitional living are status code options that should be included in the IRF–PAI. Therefore, we will add status code 04—Intermediate care. Furthermore, we will include transitional living as one of the locations listed in status code 01—Home to the response options.

Comment: Several commenters expressed concerns with our proposed change to limit the status code options in item 22B: Secondary Source, to only 02—Medicare-Fee For Service; 51 Medicare-Medicare Advantage; and 99 Not Listed, stating that IRFs would lose the ability to track other payer sources beyond Medicare. One commenter suggested that if we remove the majority of the code options in item 20B: Secondary Source, then we should display the current comprehensive list of payment sources under item 20A: Primary Source. Additionally, the commenter recommended that we add Medicaid Expansion and the Health Insurance Marketplace as status code options. Another commenter stated that decreasing the number of code options will not really save time and burden for providers.

Response: We respectfully disagree with the commenters and continue to believe that decreasing the number of code options will allow providers to code more accurately and reduce burden. However, even if this is not the case, we do not have authority to collect the various information requests the commenters suggested since the information is not currently relevant for administration of the IRF PPS or for the IRF Quality Reporting Program. According to the Privacy Act at 5 U.S.C. 552a(e)(1), an ''agency that maintains a system of records shall—(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or executive order of the President.'' When an IRF uploads the IRF–PAI data, it is entered into CMS's Privacy Act System of Records. As the status code options removed from the secondary source item are currently irrelevant to both the IRF payment system and the IRF Quality Reporting Program, we do not have statutory authority to continue to collect this information. Furthermore, we do not believe that we are limiting IRFs from continuing to collect and document payer source information by way of their own internal mechanisms. Furthermore, as we previously mentioned, it was our intent to include item 20A: Primary Source regarding this update, as the list of status code options identified in the Payer Information section relates to both items 20A and 20B. Additionally, the draft version of the IRF–PAI that went on display with the proposed rule very clearly depicts the changes; therefore, we will finalize our proposals as they were described in the proposed rule and the draft IRF–PAI

Comment: The majority of commenters supported the additional 15 extra spaces in item 24: Comorbid Conditions, and the new items 25A: Height and 26A Weight. One commenter suggested that items 25A and 26A would be more beneficial if time parameters such as ''admission'' or ''discharge'' were placed on the measure. One commenter suggested that adding items 25A: Height; 26A Weight; and 27: Swallowing Status, to the IRF–PAI would be redundant, as this information is already in the patient's medical record. This commenter also requested clarification as to whether these items would be mandatory or optional requirements on the IRF–PAI.

Response: We appreciate the support from the commenters regarding the proposed addition of the 15 extra spaces in item 24: Comorbid Conditions, and the new items 25A: Height and 26A Weight. We believe these items are pertinent information to add to the IRF–PAI and allow additional information to be collected after the transition to the more specific ICD–10–CM codes. We note that the proposed items 25A: Height and 26A: Weight already indicate ''on admission'' as a time parameter. Additionally, items 25A: Height and 26A: Weight will be mandatory items on the IRF–PAI, as these items are needed for payment and quality measurement purposes. CMS did not propose any changes to item 27: Swallowing Status, therefore, it will remain a voluntary item.

We disagree with the commenter's statement that items 25A and 26A are redundant, as all of the information on the IRF–PAI must also be included in some form in the medical record. We require this information on the IRF–PAI so that it may be submitted to us to enable the implementation of the IRF PPS and the IRF quality reporting program. Therefore, we are finalizing both of these items as they were proposed.

Comment: The majority of commenters supported the addition of a signature page to the IRF–PAI. A few commenters suggested that we allow an electronic signature to satisfy this new requirement. One commenter suggested that we add a prompt on the signature page for ''time'' in order to comply with the requirements at 482.24(c)(1).

Response: We appreciate the commenters' suggestions regarding the proposed signature page in the IRF–PAI. In order to stay consistent with our current procedures, providers should reference the clarification to our coverage requirements regarding the use of electronic signatures located at (*http://cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Downloads/ElecSysClar.pdf*).

Should a formal policy be established for the development of Medicare's formal electronic signature policies, we may need to revise or further clarify these criteria to ensure that it is in accordance with those policies.

Additionally, we agree with the commenters' suggestion that a ''time'' prompt should be added to the signature page. Therefore, we will add an additional column for providers to indicate the time that they completed an item and/or section of the IRF–PAI.

Comment: A few commenters requested that we clarify and/or provide more specific instructions for completing the proposed signature page in the IRF–PAI. One commenter was unclear as to why multiple signatures are required, as the information on the IRF–PAI is documented and authenticated within the medical record documentation. Another commenter requested clarification regarding the use of the word ''submit'' when referring to the sentence, ''I also certify that I am authorized to submit this information by this facility on its behalf.'' The commenter acknowledged that anyone who contributes to the IRF–PAI is, in effect, involved in the submitting of data to us. However, in common parlance, ''submit'' often refers to the actual act of electronically submitting the final product to us.

Response: We plan to provide more specific instructions for completing the signature page in the IRF–PAI training manual that will accompany the revised IRF–PAI form. We understand the commenter's concerns regarding the attestation statement on the signature page, and we are deleting the statement, ''I also certify that I am authorized to submit this information by this facility on its behalf.'' Removal of this statement from the attestation should clarify what providers are attesting to, and alleviate any concerns.

Comment: Several commenters expressed concern that the proposed addition of the signature page is burdensome and unnecessary because staff entries in the electronic health record are already stamped with date and time, in addition to the name and credentials of the person entering the information. These commenters stated that it would be burdensome to track down individuals to sign an additional sheet of paper.

Response: When the coverage requirements became effective January 1, 2010, providers requested a place on the IRF–PAI where they could sign, date, and record the time in order to comply with the hospital conditions of participation (CoPs). We are taking this opportunity to acknowledge those requests made by the industry. Additionally, the signature item clarifies for the provider and CMS that the requirement has been met.

Comment: One commenter requested that we provide a definition for the new discharge status code 64—Medicaid Nursing Facility.

Response: Medicaid coverage of nursing facility services is available only for services provided in a nursing home licensed and certified by the state survey agency as a Medicaid Nursing Facility (NF). Medicaid nursing facility services are available only when other payment options are unavailable and the individual is eligible for the Medicaid program. For more information please reference the link provided: *http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Delivery-Systems/Institutional-Care/Nursing-Facilities-NF.html.*

Comment: One commenter recommended that the IRF–PAI changes be delayed one year to coincide with the implementation of ICD–10, so that providers can incorporate all of the changes at one time. This commenter suggested that a delayed effective date for the IRF–PAI changes would decrease burden by only having to make updates to information systems once.

Response: We proposed an effective date of October 1, 2014, for all of the finalized IRF–PAI changes. In concert with stakeholder recommendations, we are finalizing this proposal which will help alleviate burden on providers. We believe that the October 1, 2014 effective date will provide IRF's with an adequate amount of time to make necessary changes to information systems as well as provide extensive education for clinicians.

Final Decision: Based on careful consideration of the comments that we received on the proposed non-quality related updates to the IRF–PAI for FY 2014, we are finalizing the following items:

- The status code options for Items 15A: Admit From, 16A: Pre-hospital Living Situation and 44D: Patient's Discharge Destination/Living Setting will be 01—Home (private home/apt., board/care, assisted living, group home, transitional living); 02—Short-term General Hospital; 03—Skilled Nursing Facility (SNF); 04—Intermediate Care; 06—Home under care of organized home health service organization; 50—Hospice (Home); 51—Hospice (Institutional Facility); 61—Within institution to swing bed; 62—Another Inpatient Rehabilitation Facility; 63—Long-Term Care Hospital (LTCH); 64—Medicaid Nursing Facility; 65—Inpatient Psychiatric Facility; 66—Critical Access Hospital; 99—Not Listed
- The status code options for Items 20A: Primary Source and 20B: Secondary Source will be 02—Medicare-Fee for Service; 51—Medicare-Medicare Advantage; 99—Not Listed
- The additions will include Item 24: Comorbid Conditions (15 additional spaces); item 25A: Height; item 26A: Weight; Signature of Persons Completing the IRF–PAI (with the addition of a ''time'' prompt); 44C: Was the patient discharged alive?
- The deletions will include items 18: Pre-Hospital Vocational Category; 19: Pre-Hospital Vocational Effort; 25: Is the patient comatose at admission; 26: Is the patient delirious at admission; 28: Clinical signs of dehydration; 44E: Was patient discharged with Home Health Services
- Using the language ICD code(s) on the IRF–PAI
- The technical corrections at items 44D: Patient's discharge destination/living setting and 45: Discharge to Living With
- The revised IRF–PAI will become effective for IRF discharges occurring on or after October 1, 2014. All final changes to the IRF–PAI will be represented when it is posted with the final rule.

X. Technical Corrections to the Regulations at § 412.130

In the FY 2012 IRF PPS final rule (76 FR 47869 through 47873), we revised the regulations for inpatient rehabilitation facilities at § 412.23(b), § 412.25(b), § 412.29, and § 412.30 to update and simplify the policies, to eliminate unnecessary repetition and confusion, and to enhance consistency with the IRF coverage requirements. Among other revisions, we removed the regulations that were formerly in § 412.30, and revised and consolidated the requirements regarding ''new'' IRFs and ''new'' IRF beds that previously existed in § 412.30 into the revised regulations at § 412.29(c). However, we have recently discovered that § 412.130, which outlines the policies regarding retroactive adjustments for incorrectly excluded hospitals and units, was not updated to reflect the changes to § 412.30 and § 412.29. Specifically, § 412.130 still references regulations in § 412.30 that were revised and consolidated into § 412.29(c). Further, it still references regulations that were formerly in § 412.23(b)(2), but were moved into § 412.29(b) in the FY 2012 IRF PPS final rule (76 FR 47869 through 47873).

We proposed to make the following technical corrections to the regulations in § 412.130 to conform with the revisions to the regulations in § 412.23(b), § 412.29, and § 412.30 that were implemented in the FY 2012 IRF PPS final rule (76 FR 47869 through 47873):

- Replace the current reference to ''§ 412.23(b)(8)'' in § 412.130(a)(1) with the new reference to § 412.29(c),
- Replace all of the current references to ''§ 412.23(b)(2)'' in § 412.130(a)(1), (2), and (3) with the new reference to § 412.29(b),
- Replace the current reference to ''§ 412.30(a)'' in § 412.130(a)(2) with the new reference to § 412.29(c), and
- Replace the current reference to ''§ 412.30(c)'' in § 412.130(a)(3) with the new reference to § 412.29(c).

We did not receive any comments on the proposed technical corrections to the regulations at § 412.130. Thus, we are finalizing the technical corrections as proposed, effective for IRF discharges occurring on or after October 1, 2013.

XI. Revisions to the Conditions of Payment for IRF Units Under the IRF PPS

The regulations at § 412.25 specify the requirements for an IRF unit to be excluded from the inpatient prospective

payment system (IPPS) specified in § 412.1(a)(1) and to instead be paid under the IRF PPS specified in § 412.1(a)(3). The requirements at § 412.25 are unique to IRF units of hospitals, whereas the requirements at § 412.29 apply to both freestanding IRF hospitals and IRF units of hospitals. Among the requirements at § 412.25 is the requirement (at § 412.25(a)(1)(iii)) that the institution of which the IRF unit is a part must have ''enough beds that are not excluded from the prospective payment systems to permit the provision of adequate cost information, as required by § 413.24(c) of this chapter.'' We have not previously specified how many such beds the hospital, of which the IRF unit is a part, must have to meet this requirement. However, we have recently received questions from providers about whether one or two hospital beds that are certified for payment under the IPPS, in some cases beds that are rarely used for patient care, would meet the requirement at § 412.25(a)(1)(iii). We believe this does not meet the requirement at § 412.25(a)(1)(iii), which provides for the hospital of which the IRF unit is a part to be an IPPS hospital, which we believe is not demonstrated by the presence of just one or two hospital beds.

In addition, from a fairness and quality of care perspective, we are particularly concerned about the application of the regulations in § 412.29(g), which require freestanding IRF hospitals to have a full-time director of rehabilitation, but only require IRF units of acute care hospitals (and CAHs) to have a director of rehabilitation for 20 hours per week. We believe that it is unfair to other freestanding IRF hospitals and potentially problematic from a quality of care standpoint for an IRF that is effectively operating as a freestanding IRF hospital, even though it is technically classified as an IRF unit, to be allowed to have a director of rehabilitation only 20 hours per week.

Further, we are unclear how the IRF unit that is part of a hospital with only one or two beds would be able to meet another requirement, at § 412.25(a)(7), that specifies that an IRF unit must have beds that are ''physically separate from (that is, not commingled with) the hospital's other beds.'' The requirement at § 412.25(a)(7) means that there is some sort of physical separation that distinguishes the IRF unit from the rest of the hospital beds. We believe that it is unlikely that this requirement would be met in the situation in which the hospital of which the IRF unit is a part only has one or two beds, in some cases beds that are rarely used for patient care.

Thus, we proposed to specify at § 412.25(a)(1)(iii) a minimum number of hospital beds that the IPPS hospital must have to meet the requirements at § 412.25(a)(1)(iii) for having an IRF unit. We note that, though§ 412.25(a)(1)(iii) also applies to inpatient psychiatric facilities (IPFs), these facilities have their own requirements at § 412.27 for payment under the IPF PPS that we are not changing in this proposed rule. IPFs should continue following the regulations at § 412.27.

We proposed to specify in § 412.25(a)(1)(iii) that the institution of which the IRF unit is a part must have at least 10 staffed and maintained hospital beds that are not excluded from the IPPS, or at least 1 staffed and maintained hospital bed for every 10 certified IRF beds, whichever number is greater. If the institution is not able to meet this requirement, then the IRF unit should instead be classified as an IRF hospital. We also proposed to exclude CAHs that have IRF units from these requirements, as CAHs already have very specific bed size restrictions.

We received 3 comments on the proposed revisions to the conditions of payment for IRF units under the IRF PPS, which are summarized below.

Comment: Several commenters noted that the conversion from an IRF unit to a freestanding IRF hospital to meet the new proposed requirements could pose problems for a facility in meeting certain state licensing and/or state certificate of need requirements. These commenters suggested that these state-level requirements could be ''burdensome, difficult and expensive'' for the IRF.

Response: Although the conversion from an IRF unit to a freestanding IRF hospital is a simple administrative task within Medicare, which does not necessitate any new surveys, any changes to the IRF's Medicare provider agreement, or any changes to the IRF's payment status under Medicare, we recognize that the conversion may take longer to complete under state laws. Thus, we are implementing this change on a one-year delay, so that it will be effective for IRF discharges occurring on or after October 1, 2014, to give IRFs who are affected by this change ample time to conform to state certificate of need or other state licensure laws.

Final Decision: After considering the comments that we received on the proposed revision to the conditions of payment for IRF units under the IRF PPS, we are finalizing the change to § 412.25(a)(1)(iii) to specify that the institution of which the IRF unit is a part must have at least 10 staffed and maintained hospital beds that are not excluded from the IPPS, or at least 1 staffed and maintained hospital bed for every 10 certified IRF beds, whichever number is greater. We exclude CAHs that have IRF units from these requirements, as CAHs already have very specific bed size restrictions. We are implementing this change effective for IRF discharges occurring on or after October 1, 2014 (a one-year delay in the effective date) to give IRFs affected by this change adequate time to comply with state certificate of need or other state licensure laws.

XII. Clarification of the Regulations at § 412.630

In the original rule establishing a prospective payment system for Medicare payment of inpatient hospital services provided by a rehabilitation hospital or by a rehabilitation unit of a hospital, we stated that that there would be no administrative or judicial review, under sections 1869 and 1878 of the Act or otherwise, of the establishment of case-mix groups, the methodology for the classification of patients within these groups, the weighting factors, the prospective payment rates, outlier and special payments and area wage adjustments. See FY 2002 IRF PPS final rule (66 FR 41316, 41319). Our intent was to honor the full breadth of the preclusion of administrative or judicial review provided by section 1886(j)(8) of the Act. However, the regulatory text reflecting the preclusion of review has been at times improperly interpreted to allow review of adjustments authorized under section 1886(j)(3)(v) of the Act. Because we interpret the preclusion of review at § 1886(j)(8) of the Act to apply to all payments authorized under section 1886(j)(3) of the Act, we do not believe that there should be administrative or judicial review of any part of the prospective rate. Accordingly, we are clarifying our regulation at § 412.630 by deleting the word ''unadjusted'' so that the regulation will clearly preclude review of ''the Federal per discharge payment rates.'' This clarification will provide for better conformity between the regulation and the statutory language.

As such, in accordance with sections 1886(j)(7)(A), (B), and (C) of the Act, we are revising the regulations at § 412.630 to clarify that administrative or judicial review under sections 1869 or 1878 of the Act, or otherwise, is prohibited with regard to the establishment of the methodology to classify a patient into the case-mix groups and the associated weighting factors, the federal per discharge payment rates, additional

payments for outliers and special payments, and the area wage index.

We received 2 comments on the proposed clarification of the regulations at § 412.630, which are summarized below.

Comment: The commenters expressed concerns with our proposal to revise the regulations at 42 CFR 412.630 to clarify that the Medicare statute precludes administrative and judicial review of the Federal per discharge payment rates, including the LIP adjustment. One commenter stated that the proposal is not a ''clarification'' that can be applied to pending cases, is inconsistent with the statute, runs afoul of the presumption of judicial review, fails to give proper notice of the regulatory change, and is unconstitutional.

Response: We disagree with the commenter's statements. Our proposed change serves to clarify the regulation so that it clearly reflects the preclusion of review found in the statute. It also removes any doubt as to the conformity of the regulation to the preclusion of review found in the statute, which by its own terms is applicable to all pending cases regardless of whether it is reflected in regulations or not.

We also strongly disagree with the commenter's reading of the statute. Section 1886(j)(8) of the statute broadly precludes review of ''the prospective payment rates under paragraph (3),'' that is, section 1886(j)(3). Within this section, subsection 1886(j)(3)(A) authorizes certain adjustments to the IRF payment rates and, within that, subsection 1886(j)(3)(A)(v) authorizes adjustments to the rates by such other factors as the Secretary determines are necessary to properly reflect variations in necessary costs of treatment among rehabilitation facilities.'' The LIP adjustment is made under authority of section 1886(j)(3)(A)(v). As that provision is contained within section 1886(j)(3), and the IRF payment rates under section 1886(j)(3) are precluded from review by section 1886(j)(8), the LIP adjustment falls squarely within the statutory preclusion of review. Such preclusion overcomes any presumption of reviewability that might generally apply, and it is not unconstitutional for Congress (which has the power to define the jurisdiction of the federal courts) to preclude review of certain issues as it has done here. Several virtually identical preclusions of review in other sections of the Medicare statute have been repeatedly upheld and applied by federal courts. Finally, as to notice, the proposed rule itself served as notice of our intention to revise the regulation. In addition, as discussed below, the longstanding language of the statute itself provides sufficient notice to apply the preclusion.

Comment: One commenter stated that our proposal cannot be a clarification because we have allowed review of matters concerning the LIP adjustment for many years. This commenter further stated that any preclusion of review should apply only to the ''formulas'' used in the IRF payment rates, and that to preclude review would prevent providers from correcting errors in their payments and would result in two separate methods being used to pay IRFs and hospitals paid under the inpatient prospective payment system (IPPS).

Response: We disagree with these comments. The preclusion of review has been effective since its enactment as part of the IRF prospective payment system in 2002. No regulation or revision of any regulation was necessary for the statutory preclusion to become effective, regardless of whether we or our contractors may have participated in review of IRF LIP matters in the past without making a jurisdictional objection. To the extent that such erroneous participation may have occurred, it does not override the mandate of the statute or prevent us from immediately applying the statutory preclusion of review.

In addition, the preclusion applies to all aspects of the IRF PPS payment rates, not just the formulas. Courts have applied nearly identical preclusion provisions in other parts of the Medicare statute to prevent review of all subsidiary aspects of the matter or determination protected from review. Finally, while precluding review of the IRF LIP adjustment may prevent correction of certain errors, we can only conclude that Congress has made the judgment that such a result is an appropriate trade-off for the gains in efficiency and finality that are achieved by precluding review. Similarly, although applying the preclusion here may result in certain questions being reviewable for an IPPS hospital but not an IRF, this is a judgment that Congress has made. We note that there is a preclusion of review provision in the IPPS statute also, at section 1886(d)(7). The precise contours of these preclusive provisions were for Congress to draw.

Final Decision: After careful review of the comments we received on the clarification of the regulations at § 412.630, we are adopting our proposal to revise the regulations at 42 CFR 412.630 to clarify that the Medicare statute precludes administrative and judicial review of the Federal per discharge payment rates under section 1886(j)(3), including the LIP adjustment. This revision to the regulation is effective October 1, 2013.

XIII. Revision to the Regulations at § 412.29

According to the regulations at § 412.29(d), to be excluded from the inpatient prospective payment system (IPPS) and instead be paid under the IRF PPS, a facility must ''have in effect a preadmission screening procedure under which each prospective patient's condition and medical history are reviewed to determine whether the patient is likely to benefit significantly from an intensive inpatient hospital program. This procedure must ensure that the preadmission screening is reviewed and approved by a rehabilitation physician prior to the patient's admission to the IRF.'' The latter sentence of this regulation is based on the preadmission screening requirement for Medicare coverage of IRF services in § 412.622(a)(4)(i)(D). The requirement was repeated in both places for consistency.

However, in § 412.622(a)(4)(i)(D), we specify that this requirement applies to patients ''for whom the IRF seeks payment'' from Medicare. We believe that the analogous requirement in § 412.29(d) should also clearly state that it applies only to patients for whom the IRF is seeking payment directly from Medicare. Other payer sources, such as private insurance, have their own IRF admission requirements, and we do not believe that it would be appropriate to interfere with or duplicate the requirements that other payer sources may already have in place. Thus, we proposed to amend § 412.29(d) to clarify that the IRF's preadmission screening procedure must ensure that the preadmission screening for a Medicare Part A Fee-for-Service patient is reviewed and approved by a rehabilitation physician prior to the patient's admission to the IRF. We continue to believe that the basic preadmission screening procedure itself is an important element of providing quality IRF care to all patients and, thus, we will require that the basic preadmission screening procedure requirement remain in place for all patients regardless.

We received 5 comments on the revision to the regulations at § 412.29(d), which are summarized below.

Comment: Several commenters expressed support for the proposed revisions to the regulations at § 412.29, which clarify that we require rehabilitation physician review and concurrence of a patient's preadmission screening prior to the IRF admission

only for Medicare Fee-for-Service beneficiaries. The commenters indicated that this proposed regulation change would greatly relieve the burden on IRFs that treat a large proportion of non-Medicare patients, for whom other admission requirements typically apply. These commenters also requested that we amend the Rehabilitation Unit and Rehabilitation Hospital Criteria Worksheets and the Attestation Statement (State Operations Manual Exhibit 127, Attestation Statement) to appropriately reflect this change to the regulations.

Response: We appreciate the stakeholder community bringing this issue to our attention, thereby giving us the opportunity to alleviate unintended provider burden. We encourage stakeholders to bring these types of issues to our attention, as we are always willing to consider suggestions that can improve the Medicare program while at the same time reducing the regulatory burden on providers. We will ensure that the appropriate adjustments are made to the Worksheets and the Attestation Statement in accordance with the change to the regulations.

Comment: One commenter recommended that we further clarify the distinction between Medicare Conditions of Payment and the IRF coverage requirements. The commenter suggested that a table distinguishing the two requirements would be useful to providers.

Response: We thank the commenter for the suggestion, and will take this into consideration for future stakeholder outreach in this area.

Final Decision: Based on consideration of the comments received on the proposed change to § 412.29(d), we are finalizing this change, effective for IRF discharges occurring on or after October 1, 2013.

XIV. Revisions and Updates to the Quality Reporting Program for IRFs

A. Background and Statutory Authority

Section 3004(b) of the Affordable Care Act added section 1886(j)(7) to the Act, which requires the Secretary to implement a quality reporting program (QRP) for IRFs. This program applies to freestanding IRF hospitals as well as IRF units that are affiliated with acute care facilities, which includes critical access hospitals (CAHs).

Beginning in FY 2014, section 1886(j)(7)(A)(i) of the Act requires the reduction of the applicable IRF PPS annual increase factor, as previously modified under section 1886(j)(3)(D) of the Act, by 2 percentage points for any IRFs that fail to submit data to the Secretary in accordance with requirements established by the Secretary for that fiscal year. Section 1886(j)(7)(A)(ii) of the Act notes that this reduction may result in the increase factor being less than 0.0 for a fiscal year, and in payment rates under this subsection for a fiscal year being less than the payment rates for the preceding fiscal year. Any reduction based on failure to comply with the reporting requirements is, in accordance with section 1886(j)(7)(B) of the Act, limited to the particular fiscal year involved. The reductions are not to be cumulative and will not be taken into account in computing the payment amount under section (j) for a subsequent fiscal year.

Section 1886(j)(7)(C) of the Act requires that each IRF submit data to the Secretary on quality measures specified by the Secretary. The required quality measure data must be submitted to the Secretary in a form, manner and time, specified by the Secretary.

The Secretary is generally required to specify measures that have been endorsed by the entity with a contract under section 1890(a) of the Act. This contract is currently held by the National Quality Forum (NQF), which is a voluntary consensus standard-setting organization. The NQF was established to standardize health care quality measurement and reporting through its consensus development process.

We have generally adopted NQF-endorsed measures in our reporting programs. However, section 1886(j)(7)(D)(ii) of the Act provides that ''in the case of a specified area or medical topic determined appropriate by the Secretary for which a feasible and practical measure has not been endorsed by the entity with a contract under section 1890(a) of the Act, the Secretary may specify a measure that is not so endorsed, so long as due consideration is given to measures that have been endorsed or adopted by a consensus-based organization identified by the Secretary.'' Under section 1886(j)(7)(D)(iii) of the Act, the Secretary was required to publish the selected measures that will be applicable to the FY 2014 IRF PPS no later than October 1, 2012.

Section 1886(j)(7)(E) of the Act requires the Secretary to establish procedures for making data submitted under the IRF QRP available to the public. The Secretary must ensure that each IRF is given the opportunity to review the data that is to be made public prior to the publication or posting of this data.

We seek to promote higher quality and more efficient health care for all patients who receive care in acute and post-acute care settings. Our efforts are, in part, effectuated by quality reporting programs coupled with the public reporting of data collected under those programs. The initial framework of the IRF QRP was established in the FY 2012 IRF PPS final rule (76 FR 47873).

B. Quality Measures Previously Finalized for and Currently Used in the IRF Quality Reporting Program

1. Measures Finalized in the FY 2012 IRF PPS Final Rule

In the FY 2012 IRF PPS final rule (76 FR 47874 through 47878), we adopted applications of 2 quality measures for use in the first data reporting cycle of the IRF QRP: (1) An application of ''Catheter-Associated Urinary Tract Infection [CAUTI] for Intensive Care Unit Patients'' [1] (NQF#0138); and (2) an application of ''Percent of Residents with Pressure Ulcers that Are New or Worsened (short-stay)'' (NQF #0678). We adopted applications of these 2 measures because neither of them, at the time, was endorsed by the NQF for the IRF setting. We also discussed our plans to propose a 30-Day All Cause Risk Standardized Post IRF Discharge Hospital Readmission Measure at a later date.

2. Measures Finalized in the CY 2013 OPPS/ASC Final Rule

In the CY 2013 OPPS/ASC final rule (77 FR 68500 through 68507), we adopted:

- Updates to the CAUTI measure to reflect the NQF's expansion of this measure to the IRF setting, replacing our previous adoption of an application of the measure for the IRF QRP;
- A policy that would allow any measure adopted for use in the IRF QRP to remain in effect until the measure was actively removed, suspended, or replaced (and specifically applied this policy to the CAUTI and pressure ulcer measures that had already been adopted for use in the IRF QRP); and
- A sub-regulatory process to incorporate NQF updates to IRF quality

[1] The version of the CAUTI measure that was adopted in the FY 2012 IRF PPS final rule (76 FR 47874 through 47876) was titled ''Catheter-Associated Urinary Tract Infection [CAUTI] Rate Per 1,000 Urinary Catheter Days for ICU patients. However, shortly after the FY 2012 IRF PPS final rule was published, this measure was submitted by the CDC (measure steward) to the NQF for a measure maintenance review, The CDC asked for changes to the measure, including expansion of the scope of the measure to non-ICU patient care locations and additional healthcare facility settings, including IRFs. The name of the measure was changed to reflect the character of the revised CAUTI measure. This measure is now titled ''National Health Safety Network (NHSN) Catheter Associated Urinary Tract Infection (CAUTI) Outcome Measure.''

measure specifications that do not substantively change the nature of the measure.

At the time of the CY 2013 OPPS/ASC final rule, the NQF had endorsed the pressure ulcer measure for the IRF setting, and re-titled it to cover both residents and patients within LTCH and IRF settings, in addition to the Nursing Home/Skilled Nursing Facility setting. Although the measure had been expanded to the IRF setting, we concluded that it was not possible to adopt the NQF endorsed measure ''Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (short-stay)'' (NQF #0678) because it is a risk-adjusted measure. Public comments revealed that the ''Quality Indicator'' section of the IRF–PAI did not contain the data elements that would be needed to calculate a risk-adjusted measure. As a result, we decided to: (1) adopt an application of the NQF #0678 pressure ulcer measure that was a non-risk-adjusted pressure ulcer measure (numerator and denominator data only); (2) collect the data required for the numerator and the denominator using the current version of the IRF–PAI; (3) delay public reporting of pressure ulcer measure results until we could amend the IRF–PAI to add the data elements necessary for risk-adjusting NQF #0678, and then (4) adopt the NQF-endorsed version of the measure covering the IRF setting through rulemaking (77 FR 68507).

a. National Healthcare Safety Network (NHSN) Catheter Associated Urinary Tract Infection (CAUTI) Outcome Measure (NQF #0138)

In the CY 2013 OPPS/ASC final rule we adopted the current version of NQF #0138 NHSN Catheter Associated Urinary Tract Infection (CAUTI) Outcome Measure (replacing an application of this measure which we initially adopted in the FY 2012 IRF PPS (76 FR 47874 through 47886). The NQF endorsed measure applies to the FY 2015 IRF PPS annual increase factor and all subsequent annual increase factors (77 FR 68504 through 68505).

Since the publication of the CY 2013 OPPS/ASC final rule, the NHSN CAUTI measure has not changed. Furthermore, we have not removed, suspended, or replaced this measure and it remains an active part of the IRF QRP. Additional information about this measure can be found at *http://www.qualityforum.org/QPS/0138.* Our procedures for data submission for this measure have also remained the same. IRFs should continue to submit their CAUTI measure data to the Centers for Disease Control and Prevention (CDC) NHSN. Details regarding submission of IRF CAUTI data to NHSN can be found at the NHSN Web site at *http://www.cdc.gov/nhsn/inpatient-rehab/index.html.*

We received several comments related to this previously finalized measure, NQF #0138, and some other previously finalized measures, raising some questions about our current policies. While we greatly appreciate the commenters' views on such previously finalized measures and policies, we did not make any proposals relating to them in the FY 2014 IRF PPS proposed rule (78 FR 26880). As such, we will not, in general, be addressing them here. However, we will consider all of these views for future rulemaking and program development. We have responded, however, to a few comments in which commenters asked only for a clarification related to an existing policy and/or measure.

Comment: Several commenters, including MedPAC, expressed that CMS should focus on measures that reflect the success of rehabilitation care, mentioning specifically functional improvement and/or discharge to community. One commenter suggested these measures be used instead of the ''process of care measures related to urinary tract infections and pressure ulcers''.

Response: We appreciate the commenter's suggestion. We would like to thank MedPAC and the other commenters for their comments. We also agree that a discharge to community measure would likely be very important to beneficiaries and serve as a useful corollary to the 30-day readmissions measure we proposed in the FY 2014 IRF PPS proposed rule, because it reflects whether a patient returns home, rather than returning directly to the acute hospital or another inpatient facility. We have developed a strategic plan related to the types of quality measures that we will propose over the next several rulemaking cycles. Patient experience of care and care coordination measures, such as a discharge to community measure, are included in this plan. We have previously discussed a measure of discharge to community in one of the IRF–QRP Technical Expert Panels. We also agree with MedPAC's suggestion that adding quality measures that assess functional improvement should be a priority for the IRFQRP. At this time, our quality measure development contractor is completing the development of quality measures that specifically focus on outcomes related to improvement of a patient's functional status, and these measures have been presented to the Measures Application Partnership (MAP) to determine whether the MAP at least supports the direction of the concept behind these measures (since the measures are not yet complete). The MAP) and its functions are described in detail at *http://www.qualityforum.org/map/.* The development of these measures has necessitated several years of work, involving testing, revisions, and expert review. However, we are now close to being in our final stages of the development of these measures, and will present them to the MAP this year. Before proposing to adopt these measures, we want to take all steps necessary to ensure that the introduction of functional measurement into the IRF–QRP is comprehensive in design so as to be meaningful to our beneficiaries, Medicare and our stakeholders.

Comment: One commenter expressed concern about changes made by the CDC to the CAUTI infection definitions in 2013, and the pending review with further changes to the definition likely in early 2014. This commenter believed that instability of data between baseline years and into CY 2014 can be expected due to the changes in the CAUTI definitions. One commenter expressed support for the continued use of the CAUTI measure, but suggested that training could help to support a smooth transition when the new reporting definitions are introduced. The commenter further encouraged CMS to provide any training necessary that will support a smooth transition when new reporting definitions are introduced.

Response: According to the measure steward, Centers for Disease Control and Prevention (CDC), NHSN's definition of CAUTI did not change in 2013, and the revised criteria in 2013 for what constitutes an healthcare-associated infection (HAI) amounts to providing operational guidance—already widely in use before the guidance was published—that makes identifying HAIs more consistent across reporting healthcare facilities. There was no change in the NQF measure specification; the CAUTI measure remains the same. As a result, CAUTI data reported for infections occurring in 2013 can be compared to the CAUTI baseline established using CAUTI date reported for infections occurring in 2009. In short, there was no significant change in the measure and the changes in HAI criteria have no bearing on reporting obligations. We will continue to work with the NHSN to provide provider training on any changes affecting the IRF QRP.

Comment: One commenter expressed concern about the adequacy of the risk adjustment of the CAUTI measure, especially with regard to its impact on IRFs caring for patients with a spinal cord injury.

Response: With regard to risk adjustment, the CAUTI measure relies on robust statistical analysis to inform its risk adjustment methodologies to ensure that the measure is accurately reported. We will work with the CDC to continue to collect data and to explore the possibility of refining the CAUTI measure through NQF measure maintenance and future rulemaking, if the change is substantive, as more data is collected.

b. Application of Percent of Residents or Patients With Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678)

In the CY 2103 OPPS/ASC final rule (77 FR 68500 through 68507) we finalized adoption of a non-risk-adjusted application of this measure using the current version of the IRF–PAI. To adopt the NQF-endorsed version of this measure, we must update the existing IRF–PAI to include the additional data elements necessary to risk adjust this measure. We also delayed public reporting of pressure ulcer measure results until we amend the IRF–PAI to add the data elements necessary for risk adjusting NQF #0678 (77 FR 68507). We are not making any changes to the application of measure #0678 finalized in the CY 2013 OPPS/ASC final rule for the FY 2015 and FY 2016 IRF PPS annual increase factors. Furthermore, we have not removed, suspended, or replaced this measure for those specific annual increase factors and the application of NQF #0678 remains an active part of the IRF QRP for that purpose. Additional information about this measure can be found at *http://www.qualityforum.org/QPS/0678.* Our procedures for data submission for this measure also have remained the same. IRFs should continue to collect and submit pressure ulcer measure data during CY 2013 using the IRF–PAI released on October 1, 2012 for the FY 2015 IRF PPS annual increase factor. Further, IRFs should continue to collect and submit pressure ulcer measure data during the first three quarters of CY 2014 using the IRF–PAI released on October 1, 2012 for the FY 2016 IRF PPS annual increase factor.

In the May 8, 2013 proposed rule (78 FR 26909 through 26924), we did propose to adopt a revised version of the IRF–PAI starting October 1, 2014 for the FY 2017 PPS annual increase factor and subsequent fiscal years annual increase factors. We noted that the proposed revisions to the IRF–PAI would allow collection of data elements necessary for risk adjustment of NQF #0678, which is required by the NQF endorsed version of the measure. We also proposed to replace the current application of NQF #0678 and adopt instead the NQF endorsed version of this measure. We have discussed these proposed changes in more detail in section C. below.

TABLE 10—QUALITY MEASURES FINALIZED IN THE CY 2013 OPPS/ASC FINAL RULE AFFECTING THE FY 2015 IRF ANNUAL INCREASE FACTOR AND SUBSEQUENT YEAR INCREASE FACTORS

NQF measure ID	Measure title
NQF #0138	National Health Safety Network (NHSN) Catheter-associated Urinary Tract Infection (CAUTI) Outcome Measure.+
Application of NQF #0678	Percent of Residents or Patients with Pressure Ulcers That are New or Worsened (Short-Stay).*

+ Using CDC/NHSN.
* Using October 1, 2012 release of IRF–PAI.

C. New IRF QRP Quality Measures Affecting the FY 2016 and FY 2017 IRF PPS Annual Increase Factor, and Subsequent Year Increase Factors

1. General Considerations Used for Selection of Quality Measures for the IRF QRP

In the May 8, 2013 proposed rule (78 FR 26909 through 26924), we noted that the successful development of an IRF quality reporting program that promotes the delivery of high-quality healthcare services in IRFs is our paramount concern. We discussed many of the factors we had taken into account in selecting measures to propose in the May 8, 2013 proposed rule (78 FR 26909 through 26924), and we refer readers there for details about our selection process. We do wish to note here that, in our measure selection activities for the IRF QRP, we must take into consideration input we receive from a multi-stakeholder group, the Measure Applications Partnership (MAP), which is convened by the NQF as part of a pre-rulemaking process that we have established and are required to follow under section 1890A of the Act. The MAP is a public-private partnership comprised of multi-stakeholder groups convened by the NQF for the primary purpose of providing input to CMS on the selection of certain categories of quality and efficiency measures, as required by section 1890A(a)(3) of the Act. By February 1st of each year, the NQF must provide MAP input to CMS. We have taken the MAP's input into consideration in selecting measures for this rule. Input from the MAP is located at *http://www.qualityforum.org/Setting_Priorities/Partnership/Measure_Applications_Partnership.aspx.* We also take into account national priorities, such as those established by the National Priorities Partnership (NPP) at *http://www.qualityforum.org/Setting_Priorities/NPP/National_Priorities_Partnership.aspx,* the HHS Strategic Plan at *http://www.hhs.gov/secretary/about/priorities/priorities.html,* and the National Strategy for Quality Improvement in Healthcare at *http://www.ahrq.gov/workingforquality/nqs/nqs2012annlrpt.pdf.* To the extent practicable, we have sought to adopt measures that have been endorsed by a national consensus organization, recommended by multi-stakeholder organizations, and developed with the input of providers, purchasers/payers, and other stakeholders.

2. New Measures for the FY 2016 and FY 2017 Annual Increase Factors

For the FY 2016 IRF PPS annual increase factor, in addition to retaining the previously discussed CAUTI and Pressure Ulcer measures, we proposed in the May 8, 2013 proposed rule (78 FR 26909 through 26924), to adopt one new measure: Influenza Vaccination Coverage among Healthcare Personnel Measure (NQF #0431). In addition, for the FY 2017 IRF PPS annual increase factor, we proposed to adopt three quality measures: (1) All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from Inpatient Rehabilitation Facilities, (2) Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay) (NQF #0680), and (3) the NQF endorsed version of Percent of Residents or Patients with Pressure Ulcers that are New or Worsened (Short-Stay) (NQF

#0678). We discuss these measures in more detail below in this final rule.

2. New Quality Measures for Quality Data Reporting Affecting the FY 2016 IRF PPS Annual Increase Factor

a. IRF QRP Measure #1: Influenza Vaccination Coverage Among Healthcare Personnel (NQF #0431)

In the FY 2014 IRF PPS proposed rule (78 FR 26880), we proposed to adopt the CDC developed Influenza Vaccination Coverage among Healthcare Personnel (NQF #0431) measure that is currently collected by the CDC via the NHSN. This measure reports on the percentage of IRF health care personnel (HCP) who receive the influenza vaccination. We noted that this measure was included on the CMS' List of Measures under Consideration for December 1, 2012 and that this measure was reviewed by the MAP and was included in the MAP input that was transmitted to CMS on February 1, 2013, as required by section 1890A(a)(3) of the Act. The MAP fully supported the use of this measure in the IRF setting, indicating it promotes alignment across quality reporting programs (for example, with Long-Term Care Hospital Quality Reporting Program (LTCHQR Program) and Hospital Inpatient Quality Reporting Program (Hospital IQR)) and addresses a core measure concept.

Health care personnel are at risk for both acquiring influenza from patients and transmitting it to patients, and health care personnel often come to work when ill.[2] One early report of health care personnel influenza infections during the 2009 H1N1 influenza pandemic estimated 50 percent of infected health care personnel had contracted the influenza virus from patients or coworkers in the healthcare setting.[3]

The CDC Advisory Committee on Immunization Practices (ACIP) guidelines recommends that all health care personnel get an influenza vaccination every year to protect themselves and patients.[4] Even though levels of influenza vaccination among health care personnel have slowly increased over the past 10 years, less than 50 percent of health care personnel each year received the influenza vaccination until the 2009 and 2010 season, when an estimated 62 percent of health care personnel got a seasonal influenza vaccination. In the 2010 and 2011 season, 63.5 percent of health care personnel reported an influenza vaccination. Increased influenza vaccination coverage among health care personnel is expected to result in reduced morbidity and mortality related to influenza virus infection among patients, aligning with the NQS's aims of better care and healthy people/communities. This measure has been finalized for reporting in the Hospital IQR Program, LTCHQR Program, and the Ambulatory Surgical Center Quality Reporting Program (ASCQR Program).

We refer readers to the NHSN Manual, Healthcare Personnel Safety Component Protocol Module, Influenza Vaccination and Exposure Management Modules, which is available at the CDC Web site at *http://www.cdc.gov/nhsn/inpatient-rehab/hcp-vacc/index.html* for measure specifications and additional details.

In the FY 2014 IRF PPS proposed rule (78 FR 26909 through 26924), we proposed that the Influenza Vaccination Coverage Among Healthcare Personnel measure (NQF #0431) have its own reporting period to align with the influenza vaccination season, which is defined by the CDC as October 1st (or when the vaccine becomes available) through March 31st. We further proposed that IRFs will submit their data for this measure to the NHSN (*http://www.cdc.gov/nhsn/*). The National Healthcare Safety Network (NHSN) is a secure Internet-based healthcare-associated infection tracking system maintained by the CDC and can be utilized by all types of health care facilities in the United States, including IRFs. NHSN collects data via a web-based tool hosted by the CDC. Information on the NHSN system, including protocols, report forms, and guidance documents can be found at the provided web link: *http://www.cdc.gov/nhsn/.* NHSN will submit data to CMS on behalf of the facility. We also proposed that for the FY 2016 IRF PPS annual increase factor data collection will cover the period from October 1, 2014 (or when the vaccine becomes available) through March 31, 2015 (78 FR 26909 through 26924).

Details related to the use of NHSN for data submission and information on definitions, numerator data, denominator data, data analyses, and measure specifications for the Influenza Vaccination Coverage among Healthcare Personnel (NQF #0431) measure can be found at *http://www.cdc.gov/nhsn/inpatient-rehab/hcp-vacc/index.html.* Because IRFs are already using the NHSN for the submission of CAUTI data, the administrative burden related to data collection and submission for this measure under the IRF QRP should be minimal.

While IRFs can enter information in NHSN at any point during the influenza season for the healthcare personnel (HCP) influenza vaccination measure NQF #0431, data submission is only required once per influenza season, unlike the other measure finalized for the IRF QRP that utilizes NHSN (CAUTI measure NQF #0138). For example, IRFs can choose to submit HCP influenza vaccination data on a monthly basis. However, each time an IRF submits these data, it will be asked to provide a cumulative total of vaccinations for the ''current'' influenza season. Thus, entering this information at the end of the influenza season would yield the same total number of vaccinations. The NHSN system will not track the individual number of vaccinations on a monthly basis, but, rather, will track the cumulative total of vaccinations for the ''current'' influenza season. We proposed that the final deadline associated with this measure should align with the other CMS deadline for IRF HAI (CAUTI) reporting into NHSN, which is May 15th. IRF QRP data collection timelines and submission deadlines are discussed below.

Also, as noted in the proposed rule, data collection for this measure is not 12 months, as with other measures, but is approximately 6 months (that is, October 1st (or when the vaccine becomes available) through March 31st of the following year). This data collection period is applicable only to NQF #0431 Influenza Vaccination Coverage Among Healthcare Personnel, and not applicable to any other IRF QRP measures, proposed or adopted, unless explicitly stated. The measure specifications for this measure can be found at *http://www.cdc.gov/nhsn/inpatient-rehab/hcp-vacc/index.html* and at *http://www.qualityforum.org/QPS/0431*.

We sought public comments on the Influenza Vaccination Coverage among Healthcare Personnel (NQF #0431) measure for the FY 2016 IRF PPS annual increase factor and subsequent years. The responses to public comments on our adopting NQF #0431 are discussed below in this section of the final rule.

Comment: Several commenters expressed unconditional agreement with our proposal to adopt the Influenza Vaccination Coverage among Healthcare Personnel measure in the IRF QRP. However, a majority of commenters

[2] Wilde JA, McMillan JA, Serwint J, *et al.* Effectiveness of influenza vaccine in healthcare professionals: A randomized trial. JAMA. 1999; 281:908–913.

[3] Harriman K, Rosenberg J, Robinson S, *et al.* Novel influenza A (H1N1) virus infections among health-care personnel—United States, April–May 2009. MMWR Morb Mortal Wkly Rep. 2009; 58(23): 641–645.

[4] Fiore AE, Uyeki TM, Broder K, *et al.* Prevention and control of influenza with vaccines: Recommendations of the Advisory Committee on Immunization Practices (ACIP), 2010. MMWR Recomm Rep. 2010. 59(08): 1–62.

expressed a conditional support for this measure in which they support the use of the measure by IRFs that are freestanding hospitals, but do not support the use of this measure by IRF units that are affiliated with an acute care facility. These commenters believe that IRF units should be excluded from this measure because most IPPS hospitals include IRF unit employees in reporting health care personnel influenza vaccination rates to NHSN under the IPPS Quality Reporting program.

Response: The intent of NQF measure #0431 is to incentivize full influenza vaccination coverage of all healthcare workers (HCWs) within a specific kind of facility and to measure the extent to which that goal is accomplished within that facility. We regard an IRF unit that is affiliated with an acute care facility to be its own separate type of facility, with its own responsibility for HCW vaccination and data submission. The submission of data by an IRF unit that is affiliated with an acute care facility will constitute location-specific reporting to NHSN for the HCWs who have worked within that specific unit. These IRF units will need to account for any staff that work within the unit for one day or more between Oct 1st and March 31st of a flu season and fall within the 3 required categories of staff as defined by the NHSN protocol, including payroll employees, licensed independent practitioners, and students/trainees/volunteers. The acute care facility will have the same requirements for submission of data, but will need to cover all of its inpatient care units, which will include any existing IRF units that are affiliated with an acute care facility, and will essentially be reporting facility-wide counts. The data submitted for these two separate requirements will never be summed together.

Comment: Many of the commenters requested that CMS clarify that the data collection period for the influenza vaccine begins on October 1st and not at an earlier date, should the influenza vaccination become available at any time before October 1st.

Response: NHSN specifies the reporting period for influenza vaccine coverage in its protocol. Vaccine coverage reporting, that is, measure numerator data, is required based on data collected from Oct 1 or whenever the vaccine becomes available. This statement ensures that if the vaccine is available early, any vaccines given before Oct 1 can be credited toward vaccination coverage, and if the vaccine is late, then the vaccination counts are to begin as soon as possible after Oct 1.

For the denominator count, IRFs will need to account for any staff that work within the unit for 1 day or more between Oct 1st and March 31st of a flu season and fall within the 3 required categories of staff as defined by the NHSN protocol, including payroll employees, licensed independent practitioners, and students/trainees/volunteers.

Final Decision: Having carefully considered the comments we received on the Influenza Vaccination Coverage among Healthcare Personnel (NQF #0431), we are finalizing the adoption of this measure for use in the IRF QRP.

TABLE 11—SUMMARY OF QUALITY MEASURES AFFECTING THE FY 2016 IRF PPS ANNUAL INCREASE FACTOR

Continued Measure Affecting the FY 2015 Annual Increase Factor and Subsequent Year Annual Increase Factors:
• NQF #0138: National Health Safety Network (NHSN) Catheter-associated Urinary Tract Infection (CAUTI) Outcome Measure. +
Continued Measure Affecting the FY 2015 and FY 2016 Annual Increase Factors:
• Application of NQF #0678: Percent of Residents with Pressure Ulcers That are New or Worsened (Short-Stay). *
New IRF QRP Measure Affecting the FY 2016 IRF PPS Annual Increase Factor and Subsequent Year Increase Factors:
• NQF #0431: Influenza Vaccination Coverage among Healthcare Personnel. +

+ Using CDC NHSN.
* Using October 1, 2012 release of IRF–PAI.

3. Quality Measures for Quality Data Reporting Affecting the FY 2017 IRF PPS Annual Increase Factor and Subsequent Years

In the FY 2014 IRF PPS proposed rule (78 FR 26909 through 26924), we proposed to adopt 2 additional quality measures and replace an existing quality measure for the IRF QRP for the FY 2017 annual increase factor and subsequent year increase factors. The new measures we proposed are: (1) All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from Inpatient Rehabilitation Facilities, and (2) Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay) (NQF #0680). In addition, we proposed to replace the non-risk adjusted application of Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (short-stay) (NQF #0678) with adoption of the NQF-endorsed version of this measure. A summary of the public comments received and our responses to comments are discussed below.

a. IRF QRP Measure #1: All-Cause Unplanned Readmission Measure for 30 Days Post Discharge From Inpatient Rehabilitation Facilities

In the May 8, 2013 proposed rule (78 FR 26909 through 26924), we proposed to adopt an All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from Inpatient Rehabilitation Facilities. This measure estimates the risk-standardized rate of unplanned, all-cause hospital readmissions for cases discharged from an IRF who were readmitted to a short-stay acute care hospital or LTCH, within 30 days of an IRF discharge. We noted that this is a claims-based measure which will not require reporting of new data by IRFs, and hence, will not be used to determine IRF reporting compliance for the IRF QRP.

Addressing unplanned hospital readmissions is a high priority for HHS and CMS as our focus continues on promoting patient safety, eliminating healthcare associated infections, improving care transitions, and reducing the cost of healthcare. Readmissions are costly to the Medicare program and have been cited as sensitive to improvements in coordination of care and discharge planning for patients.[5] Although the literature on readmissions is mainly concerned with discharges from short-term acute hospitals, the same issues of discharge planning, communications and coordination arise at discharge from other inpatient facilities.

IRFs provide intensive rehabilitation services to patients after an injury, illness, or surgery. According to MedPAC, the average length of stay for most patients in an IRF is 13.1 days.[6] In 2010, almost 360,000 Medicare Fee-for-Service (FFS) beneficiaries received care

[5] **Federal Register**/Vol. 76, No. 160/Thursday, August 18, 2011/Rules and Regulations, C1a.

[6] MedPAC, Report to Congress, Medicare Payment Policy, March, 2012. *http://www.medpac.gov/chapters/Mar12_Ch09.pdf.*

in IRFs and cost the Medicare FFS program over $6 billion dollars. The unadjusted readmission rate to an IPPS hospital in the 30 days following an IRF discharge was about 15 percent.[7] With such a large proportion of patients being readmitted to a hospital level of care, we proposed a risk-adjusted measure of readmission rate, the All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from Inpatient Rehabilitation Facilities. An IRF's readmission rate is affected by complex and critical aspects of care, such as communication between providers or between providers and patients; prevention of, and response to, complications; patient safety; and coordinated transitions to the community or a less intense level of care. While disease-specific measures of readmission are useful in identifying deficiencies in care for specific groups of patients, they account for only a small minority of total readmissions. By contrast, a facility-wide, all-cause readmission reflects a broader assessment of the quality of care in IRFs, and may consequently better promote quality improvement and inform consumers about quality.

While some readmissions are unavoidable, such as those resulting from the inevitable progression of disease or worsening of chronic conditions, readmissions may also result from poor quality of care or inadequate transitions between care settings. Randomized controlled trials in short-stay acute care hospitals have shown that improvement in the following areas can directly reduce hospital readmission rates: Quality of care during the initial admission; improvement in communication with patients, their caregivers and their clinicians; patient education; pre-discharge assessment; and coordination of care after discharge. Successful randomized trials have reduced 30-day readmission rates by 20 to 40 percent.[8] [9] [10] [11] [12] [13] [14] and a 2011 meta-analysis of randomized clinical trials found evidence that interventions associated with discharge planning helped to reduce readmission rates,[15] illustrating how hospitals may influence readmission rates through best practices.

Because many studies have shown readmissions to be related to quality of care, and that interventions have been able to reduce 30-day readmission rates, we believe it is appropriate to include an all-condition readmission rate as a quality measure in the IRF QRP. Promoting quality improvements leading to successful transitions of care for patients moving from the IRF setting to the community or another post-acute care setting, and reducing preventable facility-wide readmission rates, is consistent with the National Quality Strategy priorities of safer, better coordinated care and lower costs.

Our approach to developing this measure is not the same as, but is in many ways very similar to NQF-endorsed Hospital-Wide (HWR) Risk-Adjusted All-Cause Unplanned Readmission Measure (NQF #1789) (*http://www.qualityforum.org/Publications/2012/07/Patient_Outcomes_All-Cause_Readmissions_Expedited_Review_2011.aspx*) finalized for the Hospital IQR Program in the FY 2013 IPPS/LTCH PPS Final Rule (FR 77 53521 through 53528). To the extent appropriate, we have harmonized the IRF measure with the HWR measure and other measures of readmission rates developed for post-acute care (PAC) settings, including LTCHs. We have provided more details about these measures and our attempts to harmonize with them below.

The All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from Inpatient Rehabilitation Facilities measure assesses returns to short-stay acute care hospitals or LTCHs within 30 days of discharge from an IRF to the community or another care setting of lesser intensity. Patient readmissions are tracked using Medicare claims data for 30 days after discharge, to the date of patient death, if the patient dies within 30 days of discharge. Because patients differ in complexity and morbidity, the measure is risk-adjusted for patient case-mix. The measure also excludes planned readmissions, because these are not considered to be indicative of poor quality of care on the part of the IRF.

A model developed by a CMS measure development contractor predicts admission rates while accounting for patient demographics, primary condition in the prior short stay, comorbidities, and a few other patient factors. While estimating the predictive power of patient characteristics, the model also estimates a facility specific effect common to patients treated at that facility. Similar to the Hospital IQR Program hospital-wide readmission measure, the IRF QRP measure is the ratio of the number of risk-adjusted predicted unplanned readmissions for each individual IRF, including the estimated facility effect, to the average number of risk-adjusted predicted unplanned readmissions for the same patients treated at the average IRF. A ratio above one indicates a higher than expected readmission rate, or lower level of quality, while a ratio below one indicates a lower than expected readmission rate, or higher level of quality. (The methodology report detailing the development of the IPPS hospital-wide measure and the NQF report may be downloaded from: *http://www.qualityforum.org/Publications/2012/07/Patient_Outcomes_AllCause_Readmissions_Expedited_Review_2011.aspx.*)

The patient population includes IRF patients who:

- Were discharged alive from the IRF.
- Had 12 months of Medicare Part A, Fee-for-Service coverage prior to the IRF stay.
- Had 30 days of Medicare Part A, Fee-for-Service coverage post discharge.
- Had an acute care facility (IPPS, CAH or psychiatric hospital) stay within the 30 days prior to the IRF stay.
- Were aged 18 years or above when admitted to the IRF.

[7] Bernard SL, Dalton K, Lenfestey N F, Jarrett NM, Nguyen KH, Sorensen AV, Thaker S, West ND. Study to support a CMS Report to Congress: Assess feasibility of extending the hospital-acquired conditions—present on admission IPPS payment policy to non-IPPS payment environments. Prepared for the Centers for Medicare & Medicaid Services (CMS Contract No. HHSM–500–T00007). 2011.

[8] Jack BW, Chetty VK, Anthony D, Greenwald JL, Sanchez GM, Johnson AE, et al. A reengineered hospital discharge program to decrease rehospitalization: a randomized trial. Ann Intern Med 2009;150(3):178–87.

[9] Coleman EA, Smith JD, Frank JC, Min SJ, Parry C, Kramer AM. Preparing patients and caregivers to participate in care delivered across settings: the Care Transitions Intervention. J Am Geriatr Soc 2004;52(11):1817–25.

[10] Courtney M, Edwards H, Chang A, Parker A, Finlayson K, Hamilton K. Fewer emergency readmissions and better quality of life for older adults at risk of hospital readmission: a randomized controlled trial to determine the effectiveness of a 24-week exercise and telephone follow-up program. J Am Geriatr Soc 2009;57(3):395–402.

[11] Garasen H, Windspoll R, Johnsen R. Intermediate care at a community hospital as an alternative to prolonged general hospital care for elderly patients: a randomized controlled trial. BMC Public Health 2007;7:68.

[12] Koehler BE, Richter KM, Youngblood L, Cohen BA, Prengler ID, Cheng D, et al. Reduction of 30-day post discharge hospital readmission or emergency department (ED) visit rates in high-risk elderly medical patients through delivery of a targeted care bundle. J Hosp Med 2009;4(4):211–218.

[13] Naylor M, Brooten D, Jones R, Lavizzo-Mourey R, Mezey M, Pauly M. Comprehensive discharge planning for the hospitalized elderly. A randomized clinical trial. Ann Intern Med 1994;120(12):999–1006.

[14] Naylor MD, Brooten D, Campbell R, Jacobsen BS, Mezey MD, Pauly MV, et al. Comprehensive discharge planning and home follow-up of hospitalized elders: a randomized clinical trial. JAMA 1999;281(7):613–20.

[15] Naylor MD, Aiken LH, Kurtzman ET, Olds DM, Hirschman KB.The Importance of Transitional Care in Achieving Health Reform. Health Affairs 2011; 30(4):746–754.

As with the Hospital IQR Program hospital-wide readmission measure, patients with medical treatment for cancer are excluded. Studies of this population that were reviewed for the Hospital IQR Program readmission measure showed them to have a different trajectory of illness and mortality than other patient populations.[16] The measure also excludes patients who died during the IRF stay, IRF patients under the age of 18, or IRF patients discharged against medical advice (AMA).

Readmissions that are not included in the measure are:

- Transfers from an IRF to another IRF or acute care facility.
- Readmissions within the 30-day window that are usually considered planned due to the nature of the procedures and principal diagnoses of the readmission.
- IRF stays with data that are problematic. (The Medicare data files occasionally have anomalous records that indicate a person is in two facilities or stays that overlap in dates, or are otherwise potentially erroneous or contradictory.)

The planned readmission list includes the planned procedures specified in the Hospital-Wide All-Cause Unplanned Readmission (HWR) Measure (NQF #1789) used in the Hospital IQR Program, plus other procedures that we determined in consultation with technical expert panels. In addition to the list of planned procedures is a list of diagnoses (provided at the link below in the planned readmission criteria), which, if found as the principal diagnosis on the readmission claim, would indicate that the procedure occurred during an unplanned readmission. The planned readmissions criteria may be found at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/Downloads/DRAFT-Specifications-for-the-Proposed-All-Cause-Unplanned-30-day-Post-IRF-Discharge-Readmission-Measure.pdf* with a link to the latest planned readmissions criteria used in the HWR at the end of Table 1.

A discharged patient is tracked until one of the following occurs: (1) The 30-day period ends; (2) the patient dies; or (3) the patient is readmitted to an acute level of care (short or long term). If multiple readmissions occur, only the first is considered for this measure. If the readmission is unplanned, it is counted as a readmission in the measure rate. If the readmission is planned, the readmission is not counted in the measure rate. The occurrence of a planned readmission ends further tracking for readmissions in the 30-day window following discharge from the IRF.

Readmission rates are risk-adjusted for patient case-mix characteristics, independent of quality. The risk adjustment modeling estimates the effects of patient characteristics on the probability of readmission so they can be adjusted out when reporting the readmission rates. The risk-adjustment model for IRFs accounts for demographic characteristics, principal diagnosis, comorbidities, case-mix group in the IRF, length of stay in the prior acute care facility, critical care days in the prior acute care facility, number of acute care facility stays in the prior year, and the occurrence of various surgery types in the prior acute care facility stay. In modeling IRF readmissions, all patients are included in a single model. We did not divide patients into groups clinically, modeling separate patient types separately as was done in the IPPS HWR measure. In the HWR there are five patient cohorts, each modeled separately, and a combined score for the facility. All IRF patients are modeled as one group, both because IRFs have a substantially smaller patient population, restricting the ability to create reasonably large subgroups, and the technical expert panel did not recommend any such stratification.

While the HWR measure used 1 year of data, the smaller IRF patient population led us to merge 2 years of data for the IRF QRP. This approach is similar to that used by the Hospital IQR Program condition-specific readmission measures, such as that for heart attack and heart failure patients, which use 3 years of claims data. Increasing sample size by merging multiple years produces more precise estimates of the effects of all the risk adjusters and increases the sample size associated with each facility. Larger patient samples are generally better for meaningfully distinguishing facility performance. We proposed this measure under the exception authority in section 1886(m)(5)(D)(ii) of the Act for the IRF QRP. This section provides that in the case of a specified area or medical topic determined appropriate by the Secretary for which a feasible and practical measure has not been endorsed by the entity with a contract under section 1890(a) of the Act, the Secretary may specify a measure that is not so endorsed as long as due consideration is given to measures that have been endorsed or adopted by a consensus organization identified by the Secretary.

We noted in the proposed rule we had not been able to identify an NQF-endorsed readmission measure that was appropriate for the IRF setting. In 2012, NQF endorsed hospital-wide readmission measures, the National Committee for Quality Assurance (NCQA) measure intended for health plans, Plan All-Cause Readmissions (NQF #1768), and CMS' Hospital-Wide All-Cause Unplanned Readmission Measure (HWR) (NQF #1789), of which the latter is the model for the All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from Inpatient Rehabilitation Facilities measure, proposed in the FY 2014 IRF PPS proposed rule. This measure was present on CMS's List of Measures Under Consideration, and the most recent MAP Pre-Rulemaking Report noted that ''readmission measures are also examples of measures that MAP recommends be standardized across settings, yet customized to address the unique needs of the heterogeneous PAC/LTC population'' (*http://www.qualityforum.org/Publications/2013/02/MAP_Pre-Rulemaking_Report__-_February_2013.aspx* (*pp. 177–180*)). Although the MAP supported the direction of this measure, they cautioned that the readmission measure required further development. The MAP has also continually noted the need for ''care transition measures in PAC/LTC performance measurement programs'' and stated that ''setting-specific admission and readmission measures under consideration would address this need.'' [17]

In the May 8, 2013 proposed rule, we stated our intention to seek NQF endorsement of the All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from Inpatient Rehabilitation Facilities measure. We noted that because this is a claims-based measure not requiring reporting of new data by IRFs, this measure will not be used to determine IRF reporting compliance for the IRF QRP. We also stated that we expected to begin reporting feedback to IRFs on performance of this measure in CY 2016 and that initial provider feedback will be based on CY 2013 and CY 2014 Medicare FFS claims data related to IRF readmissions and that the readmission measure will be part of the IRF public reporting program once public reporting

[16] National Quality Forum. ''Patient Outcomes: All-Cause Readmissions Expedited Review 2011''. July 2012. pp12.

[17] National Quality Forum. *Measure Applications Partnership Pre-Rulemaking Report: 2013 Recommendations of Measures Under Consideration by HHS: February 2013.* Available at *http://www.qualityforum.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=72738.*

is implemented. We noted that details pertaining to this measure can be found on the IRF Quality Reporting Program Web site at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/index.html*. We invited stakeholders to submit public comments in response to our proposal to adopt the All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from Inpatient Rehabilitation Facilities. A summary of the public comments received and our responses to comments are discussed below.

Comment: Many commenters have expressed concern that CMS has not yet sought and obtained NQF endorsement for the IRF readmission measure.

Response: We are aware this measure is not yet NQF-endorsed for the IRF setting and are working to submit the measure for NQF review and endorsement. Currently, we are working with contractors to submit the measure for NQF endorsement in October 2013. For the time being, we have chosen to adopt this measure by exercising our authority to finalize a non-NQF endorsed measure when NQF endorsed measures are not available or appropriate for a setting and the Secretary has given due consideration to measures that have been endorsed or adopted by a consensus organization identified by the Secretary. We were not able to find a measure that was appropriate for the IRF setting.

Comment: Several commenters requested that additional risk adjustors be added to the risk adjustment model for the IRF readmission measure, including patient data such as function and social support, on the IRF–PAI.

Response: The proposed readmission measure is a risk-standardized readmission measure that adjusts for case-mix differences based on the clinical status of the patient at the time of admission to the IRF. That is, the measure is risk-adjusted for certain key variables that are clinically relevant or have been found to have strong relationships with the outcome, including age group, sex, comorbid diseases, history of repeat admissions. We also include as adjusters the IRF case-mix groups (CMGs). The 92 CMGs are patient classes based on information on the IRF–PAI and are reported on claims. The CMG assigned to a patient contain information on the reason for IRF treatment (impairment group), functional status, and sometimes cognitive status and age group. These data elements from claims further enhance risk adjustment which, along with information from the IRF–PAI, are sufficient without requiring linking the IRF–PAI assessments themselves. We will investigate in the future if including data elements, such as function and social support, directly from the IRF–PAI would produce substantive improvement of the model.

Comment: Several commenters suggested that socioeconomic status and social factors be added to the risk adjustment model for the IRF readmission measure.

Response: The inclusion of factors related to socioeconomic status (SES) has been raised in the context of the IPPS Hospital IQR measures and our policy in that program omits them as explicit risk adjusters. Medicaid dual eligibility, which is related to income, is a socioeconomic factor, and is also not accounted for explicitly in IQR measures. The IRF measure harmonizes with the other readmission measures in that respect (the IQR and the final long-term care hospital readmission measure). The effect of SES is similar in the case of IRFs to the effects in the IPPS setting and the reasoning for not explicitly accounting for SES is similar. The effect of levels of SES is captured to a great extent by other variables included in the model. The readmission measure is a risk-standardized readmission measure that adjusts for case-mix differences based on the clinical status of the patient at the time of admission to the hospital. That is, they are risk-adjusted for certain key variables (for example, age, sex, comorbid diseases, and a history of repeat admissions) that are clinically relevant and/or have been found to have strong relationships with the outcome. To the extent that race or SES results in certain patient groups having a worse medical condition profile, those factors are accounted for in the measure.

These measures are not otherwise adjusted for other factors such as race or English language proficiency. We believe such additional adjustments are not appropriate because the association between such patient factors and health outcomes can be due, in part, to differences in the quality of health care received by groups of patients with varying race/language/SES. Differences in the quality of health care received by certain racial and ethnic groups may be obscured if the measures risk-adjust for race and ethnicity. In addition, risk-adjusting for patient race, for instance, may suggest that hospitals with a high proportion of minority patients are held to different standards of quality than hospitals treating fewer minority patients. We appreciate the concerns of hospitals that care for disproportionately large numbers of disadvantaged populations. Our analysis indicates that better quality of care is achievable regardless of the demographics of the hospital's patients.

Comment: Many commenters, including MedPAC, suggested the IRF readmission measure should focus on avoidable or related hospitalizations.

Response: The issue of all-cause readmissions as opposed to a more focused set of readmission types has been raised in other contexts such as the HWR IQR measure. Discussions with technical experts have led us to prefer using an all-cause measure rather than a condition-specific readmissions measure. A measure of avoidable or related readmissions is possible when the population being measured is narrowly defined and certain complications are being targeted. For broader measures, a narrow set of readmission types is not practical. In addition, readmissions may be clinically related even if they are not diagnostically related. A patient may have comorbid conditions that are unrelated to the reason for rehabilitation. If not properly dealt with in discharge planning a readmission for such a condition may become more likely. One of the primary purposes of a readmission measure is to encourage improved transitions at discharge, a choice among discharge destinations and care coordination. A readmission can occur that is less related to the primary condition being treated in the IRF than to the coordination of care post-discharge. That said, we have chosen to reduce the all-cause readmission set by excluding readmissions that are normally for planned or expected diagnosis and procedures. We augmented the research for the Hospital IQR set of planned readmissions for the IRF setting with recommendations and input from a TEP in the field of post-acute care (including IRFs). Nearly 9 percent of readmissions are considered planned. In the case where the readmission is due to a random event, such as a car accident, we expect these events to be randomly distributed across hospitals.

Comment: Several commenters indicated that the readmission measure may have the unintended consequence of reducing access to IRF care.

Response: We recognize that in some cases, hospital readmission will occur. Hospital readmission is not considered as a ''never event'' that hospitals are expected to reduce to zero. The measure of hospital readmission is risk-adjusted to account for the factors that increase this readmission risk, so that hospitals with a disproportionately larger share of patients who are at high risk for readmission do not perform worse on

the quality measure due to factors out of their control. We appreciate the commenters' concerns but the risk adjustment is intended to adjust for more complex patients so that access to care will not be reduced. Nonetheless, as with all quality measures that we have implemented, we will examine IRF data to monitor for potential unintended consequences.

Comment: Some commenters suggested that more than 2 years of data be included in the readmissions measure to increase sample size.

Response: The 2 years of data for each reporting period is a compromise between sample size and timeliness. In this case the total number of IRF stays in 1 year of national data is much smaller than the number of IPPS stays. However, 2 years of data generally yield good sample sizes at the facility level. Ninety-five percent of facilities have more than 100 patients averaged in their measure. We do not think that 3 years of data is needed at this time. However, we will continue to monitor this data over time and if there is a significant change in number of IRF discharges in total or in individual facilities we will reconsider the data requirement.

Final Decision: Having carefully considered the comments we received on the All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from Inpatient Rehabilitation Facilities, we are finalizing the adoption of this measure for use in the IRF QRP. We will also continue to seek NQF endorsement of the All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from Inpatient Rehabilitation Facilities measure.

b. IRF QRP Quality Measure #2: Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay) (NQF #0680)

In the May 8, 2013 proposed rule (78 FR 26909 through 26924), we proposed to add the NQF #0680 Percent of Residents or Patients who were assessed and Appropriately Given the Seasonal Influenza Vaccination (Short-Stay) measure to the IRF QRP, and we proposed to collect the data for this measure through the addition of data items to the Quality Indicator section of the IRF–PAI. We noted that this measure was on CMS's list of measures under consideration that were reviewed by the MAP and was included in the MAP input that was transmitted to CMS, as required by the pre-rulemaking process in section 1890A(a)(3) of the Act. The MAP panel supported the use of this measure in the IRF setting, noting that it promotes alignment across settings and addresses a core measure concept.

Although influenza is prevalent among all population groups, the rates of death and serious complications related to influenza are highest among those ages 65 and older and those with medical complications that put them at higher risk. The CDC reports that an average of 36,000 Americans die annually from influenza and its complications, and most of these deaths are among people 65 years of age and over.[18] In 2004, approximately 70,000 deaths were caused by influenza and pneumonia, and more than 85 percent of these deaths were among the elderly.[19] Given that many individuals receiving health care services in IRFs are elderly and/or have several medical conditions, many IRF patients are within the target population for influenza immunization.[20] [21]

We have also proposed to add the data elements needed for this measure, as an influenza data item set, to the Quality Indicator section of the IRF–PAI and that data for this measure will be collected using a revised version of the IRF–PAI. Our proposed revision of the IRF–PAI includes a new data item set designed to assess patients' influenza vaccination status. The revised IRF–PAI would become effective on October 1, 2014. We noted that these proposed data set items are harmonized with data elements (O0250: Influenza Vaccination Status) from the Minimum Data Set (MDS) 3.0 and LTCH CARE Data Set item sets [22] [23] and that the specifications and data elements for this proposed measure are available in the MDS 3.0 QM User's Manual available on our Web site at *https://www.cms.gov/NursingHomeQualityInits/Downloads/MDS30QM-Manual.pdf.*

For purposes of this measure, the influenza vaccination season consists of October 1st (or when the vaccine becomes available) through March 31st each year. We proposed that while an IRF's compliance with reporting quality data for this measure will be based on the calendar year, the measure calculation and public reporting of this measure (once public reporting is implemented) will be based on the influenza vaccination season starting on October 1 (or when vaccine becomes available) and ending on March 31 of the subsequent year.

The IRF–PAI Training Manual will indicate how providers should complete these items during the time period outside of the vaccination season (that is, prior to October 1st or when vaccine becomes available and after March 31 of the following year). The measure specifications for this measure, Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay) (NQF #0680), can be found on the CMS Web site: *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/NursingHomeQualityInits/NHQIQualityMeasures.html.* Measure specifications are located in the download titled: MDS 3.0 QM User's Manual V6.0. Additional information on this measure can also be found at *http://www.qualityforum.org/QPS/0680.*

In the May 8, 2013 proposed rule, we invited public comment on our proposal to use the Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay) (NQF #0680) measure for the FY 2017 IRF PPS annual increase factor and subsequent years. A summary of the public comments received and our responses to comments are discussed below.

Comment: Several commenters indicated that they did not support the patient immunization measure because it is not a core focus of care in IRFs.

Response: While we appreciate the commenters' point of view, influenza is a serious illness, especially for patients who are elderly, immuno-compromised, or who have recently undergone surgery—characteristics that describe

[18] Centers for Medicare & Medicaid Services (2011, May). Adult Immunization: Overview. Retrieved from *https://www.cms.gov/Immunizations/.*

[19] Gorina Y, Kelly T, Lubitz J, *et al.* (2008, February). Trends in influenza and pneumonia among older persons in the United States. Aging Trends no. 8. Retrieved from *http://www.cdc.gov/nchs/data/ahcd/agingtrends/08influenza.pdf.*

[20] Centers for Disease Control and Prevention. (2008, September). Influenza e-brief: 2008–2009 flu facts for policymakers. Retrieved from *http://www.cdc.gov/washington/pdf/flu_newsletter.pdf.*

[21] Zorowitz, RD. Stroke Rehabilitation Quality Indicators: Raising the Bar in the Inpatient Rehabilitation Facility. Topics in Stroke Rehabilitation 2010; 17 (4):294–304.

[22] Centers for Medicare & Medicaid Services. MDS 3.0 Item Subsets V1.10.4 for the April 1, 2012 Release. Retrieved from *https://www.cms.gov/NursingHomeQualityInits/30_NHQIMDS30TechnicalInformation.asp.*

[23] The LTCH CARE Data Set Version 2.00, the data collection instrument for the submission of the Percent of Residents or Patients with Pressure Ulcers That are New or Worsened (Short-Stay) measure and the Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay) measure, is currently under review by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act (PRA) *http://www.gpo.gov/fdsys/pkg/FR-2013-02-01/pdf/2013-02155.pdf.* The LTCH CARE Data Set Version 1.01 was approved on April 24, 2012 by OMB in accordance with the PRA. The OMB Control Number is 0938–1163. Expiration Date April 30, 2013.

many of the patients in IRFs. CDC reports that pneumonia and influenza were the 5th leading cause of death amongst individuals 65 and older and that between 1997 and 2007, deaths among people aged 65 and older accounted for 87.9 percent of deaths related to pneumonia and influenza. Providing appropriate influenza vaccination is an important preventative measure that is the responsibility of healthcare providers in all settings. Although many patients may have already been offered and/or received the influenza vaccine in the acute care setting, the ultimate goal is that 100 percent of patients are assessed for appropriate receipt of the influenza vaccine, and achieving this goal requires the participation of all healthcare providers.

Comment: Several commenters expressed concern that the NQF #0680 Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine is redundant because patients are offered many opportunities to receive the influenza vaccination prior to admission into the IRF and are highly likely to have already received the influenza vaccine in the acute care hospital. Several commenters also noted that the patient influenza measure may lead to over-vaccination of patients.

Response: We appreciate the comments and acknowledge the commenters' concern for redundancy and over-vaccination. The specifications for the Percent of Patients or Residents Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (short stay) measure are written so that clinicians can document if patients have already received the influenza vaccine for the current influenza season. The numerator statement of the measure includes patients who received the influenza vaccine, either inside or outside the IRF, for the current influenza season. An IRF can report that a patient received the vaccine prior to admission to the IRF and that it should not re-vaccinate the patient for purposes of being able to report the patient receiving a vaccination in the IRF. We acknowledge that facilities will need to adhere to the principles of proper care coordination and documentation to avoid over-immunization and under-immunization. However, the specifications for the measure are designed to encourage facilities to only vaccinate when the patient has not already received the vaccination.

Comment: Several commenters requested guidance on how to track down the influenza vaccination history of patients.

Response: We refer commenters to the measure description and specifications of the NQF-endorsed measure at the NQF Web site *http://www.qualityforum.org/QPS/0680.* Further, to the extent that the commenters are asking us to issue guidance on proper vaccine documentation for purposes of ensuring that the receiving facility has an accurate immunization history, we agree that care coordination is essential to avoid over- as well as under-immunization. The influenza vaccination measure, however, was not designed to offer guidance to providers on how to vaccinate. The measure is specified to assess if the patient was vaccinated, where the patient was vaccinated (if they were vaccinated), or why the vaccination was not given (if the patient was not vaccinated). Patients who were not vaccinated due to a contraindication and patients who refused the vaccination are both counted in the numerator and accounted separately in the numerator of the measure. In a situation where vaccination status is unknown, we would expect that the IRF provider would make a clinical judgment on whether or not to vaccinate a patient, taking into account the patient's medical history and current health status, as well as the existing policy of their IRF on vaccination. The IRF must only report the decision it made; that is, whether the vaccination was or was not given. The measure does not require an IRF to provide a vaccination that was not appropriate due to a contraindication or a patient refusal, or to provide a vaccination to a patient who was already given a vaccination outside of the IRF. We encourage all IRFs to vaccinate according to their facilities' policies and the best clinical judgment of the medical providers treating each individual patient and to document the reason for the vaccination decision in the patient's medical record.

Comment: Many commenters requested clarification about the data collection period for the patient influenza vaccine.

Response: Starting with 2014–2015 Influenza season data collection will be required for all patients in the IRF for 1 or more days between October 1 and March 31. Clinicians can report that the reason a given patient did not receive the vaccine was that the patient was not in the facility during the current influenza vaccination season. Consistent with NQF #0431, the vaccination measure for healthcare personnel, it is the vaccinations received for patients in the IRF during the influenza season (October 1st to March 31st) that will be included in measure calculations and for the purpose of public reporting.

Final Decision: After careful consideration of the public comments received, we are finalizing our proposal to adopt the Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay) (NQF #0680) measure for the FY 2017 IRF PPS annual increase factor and subsequent years. We are additionally clarifying that data collection will begin starting with the 2014–2015 Influenza season. Data collection for this and all subsequent influenza seasons will be from October 1 through March 31 of the following year. All data collection and submission guidelines will be addressed in the IRF Quality Reporting Manual.

c. IRF QRP Quality Measure #3: Percent of Residents or Patients With Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678)—Adoption of the NQF-Endorsed Version of This Measure

In the May 8, 2013 proposed rule (78 FR 26909 through 26924), we have proposed to adopt the NQF-endorsed version of the NQF #0678 pressure ulcer measure, with data collection beginning October 1, 2014 using the revised version of IRF–PAI, for quality reporting affecting the FY 2017 and subsequent years IRF PPS annual increase factors. We also proposed to remove the current non-risk adjusted application of this measure when the revised IRF–PAI is implemented on October 1, 2014. We noted in the proposed rule that, until September 30, 2014, IRFs should continue to submit pressure ulcer data using the IRF–PAI released on October 1, 2012 for the purposes of data submission requirements for the FY 2015 and FY 2016 IRF PPS increase factors. Details about our proposed changes to the IRF–PAI and additional information regarding data submission are discussed in the proposed rule (78 FR 26909 through 26924).

We invited public comment in response to our proposed removal of the currently adopted non-risk adjusted application of the Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (short-stay) (NQF #0678) and the adoption of the NQF-endorsed version of the Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (NQF #0678). A summary of the public comments received and our responses to comments are discussed below in this final rule.

Comment: Several commenters expressed support for our proposal to remove the currently adopted non-risk

adjusted application of the Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (short-stay) (NQF #0678) and adopt the NQF endorsed version of the Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short Stay) (NQF #0678) for the FY 2017 annual increase factor. These commenters also expressed general support for the addition of the risk adjustment factors associated with this measure to the IRF–PAI.

Response: We appreciate the commenters for their supportive comments and their feedback for the measure to the IRF–PAI.

Final Decision: After careful consideration of the comments received, we are finalizing our proposal to adopt the NQF-endorsed version of the Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (short-stay) (NQF #0678) measure beginning on October 1, 2014, using the revised version of the IRF–PAI. We are also finalizing our proposal to remove the existing non-risk adjusted application of NQF #0678 from the IRF QRP effective October 1, 2014.

TABLE 12—SUMMARY OF MEASURES AFFECTING THE FY 2017 IRF PPS ANNUAL INCREASE FACTOR AND SUBSEQUENT YEAR INCREASE FACTORS

Continued Measure Affecting the FY 2015 Annual Increase Factor:
- NQF #0138: National Health Safety Network (NHSN) Catheter-associated Urinary Tract Infection (CAUTI) Outcome Measure.+

New IRF QRP Measure Affecting the FY 2016 IRF PPS Annual Increase Factor:
- NQF #0431: Influenza Vaccination Coverage among Healthcare Personnel.+

New IRF QRP Measures Affecting the FY 2017 IRF PPS Annual Increase Factor:
- All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from Inpatient Rehabilitation Facilities^
- NQF #0680: Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay).*
- NQF #0678: Percent of Residents or Patients with Pressure Ulcers That are New or Worsened (Short-Stay).*

+ Using CDC/NHSN.
* Using the IRF–PAI released October 1, 2014.
^ Medicare Fee-For-Service claims data.

D. Changes to the IRF–PAI That Are Related to the IRF Quality Reporting Program

1. General Background

A version of the IRF–PAI has been in use in the IRF setting since January 1, 2002, when IRFs first began receiving payment under the IRF PPS. IRFs must submit a completed IRF–PAI for each Medicare Part A, B, and C patient that is admitted and discharged from the IRF.

The IRF PPS utilizes information from the IRF–PAI to classify patients into distinct groups based on clinical characteristics and expected resource needs. Separate payments are calculated for each group, including the application of case and facility level adjustments available at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/index.html.*

In the FY 2014 proposed rule, we proposed to release an updated version of the IRF–PAI on October 1, 2014 (78 FR 26909–26924) . Proposed revisions included data elements that will (1) allow for risk adjustment of the NQF #0678 Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay), (2) allow for voluntary submission of more detailed data collection related to NQF #0678 Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay), and (3) allow for data collection for NQF #0680 Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay). We also proposed to adopt a new numbering schema for the IRF–PAI.

What we have proposed includes both mandatory and voluntary additions to the IRF–PAI. Collection of voluntary data elements by IRFs will have no impact on measure calculations or on our determination of whether the IRF has met the reporting requirements under the IRF QRP. In contrast, failure to complete mandatory data elements may result in non-compliance with the IRF QRP requirements and subject the facility to a 2 percentage point reduction in its annual increase factor. We have provided more details about these items below at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/Spotlights-Announcements.html* under ''CMS–10036''.

The October 1, 2014 release of the IRF–PAI that we proposed, inclusive of all the changes that we intend to finalize here, and information about the IRF–PAI submission process can be found at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Downloads/508c-IRF-PAI-2014.pdf.* A PRA package for the revised IRF–PAI discussed here has been submitted for the Office of Management and Budget's (OMB) review and approval. The PRA package documents are available for viewing on the CMS PRA Listings Web page at: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing-Items/CMS1216518.html?DLPage=1&DLFilter=IRF-PAI&DLSort=1&DLSortDir=descending.* The PRA package form number is cms-10036, and the OMB control number for this PRA package is 0938–0842.

a. Background Related to Collection of Pressure Ulcer Data Elements Using the IRF–PAI

In the FY 2012 IRF PPS final rule, we finalized a proposal to adopt an application of the NQF #0678 ''Percent of Residents with Pressure Ulcers That Are New or Worsened (Short-Stay)'' measure for use in the IRF QRP, beginning with the IRF PPS annual increase factor for FY 2014. We also finalized our proposal to collect the data for this pressure ulcer measure using the IRF–PAI. In order to comply with section 3004 of the Affordable Care Act requirements, we deleted the set of outdated pressure ulcer assessment items that were voluntary quality questions and had been located in the ''Quality Indicator'' section of the IRF–PAI and replaced them with a new set of pressure ulcer quality measure data items that were designed to capture the data necessary for the finalized application of NQF #0687. These items were modeled after the MDS 3.0 items, numbered 48A to 50D, and changed the status of the pressure ulcer data items from ''voluntary'' to ''mandatory.'' These revisions to the IRF–PAI went into effect on October 1, 2012.

Since the publication of the FY 2012 final rule (76 FR 47836) we have received numerous comments about the current version of the IRF–PAI from IRF providers, provider organizations, and

advocacy groups. In the CY 2013 OPPS/ASC final rule, we discussed a number of specific public comments related to pressure ulcer data that we received in response to the CY 2013 OPPS/ASC IRF proposed rule (77 FR 68506). In that CY 2013 proposed rule, we proposed to update the application of NQF #0678 that we had previously incorporated into the IRF QRP by instead incorporating the actual NQF-endorsed version of this measure (77 FR 45196). NQF #0678 is a risk adjusted measure. Commenters expressed specific concerns regarding the ability of the data elements in the IRF–PAI to sufficiently risk-adjust the measure. We agreed that there were limitations related to the risk adjustment data items that are on the IRF–PAI that went into effect on October 1, 2012, impacting the ability to calculate the measure using all of the risk adjustment related covariates. As a result, the CY 2013 OPPS/ASC final rule adopted an application of #0680 without risk-adjustment for FY 2015 and subsequent years (77 FR 68507).

In the proposed rule, we noted that in response to the comments and feedback received in previous rules discussed above, we intended to propose modifications to the data items in both the admission and discharge IRF–PAI assessments as discussed below.

2. Revisions to the IRF–PAI To Add Mandatory Risk Adjustment Data Items for NQF #0678 Percent of Residents or Patients With Pressure Ulcers That Are New or Worsened (Short-Stay)

In the FY 2014 IRF PPS proposed rule (78 FR 26909–26924), we proposed to update the current IRF–PAI to include data elements that are necessary to risk adjust the Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay) (NQF #0678). These updates to the IRF–PAI include the addition of the following indicator boxes to the IRF–PAI admission assessment: (1) Peripheral Vascular Disease, (2) Peripheral Arterial Disease, and (3) Diabetes. The additions would be placed in the Quality Indicators section of the revised IRF–PAI.

We further determined that risk adjustment factors related to height and weight had inadvertently been left off of the revised version of the IRF–PAI that became effective on October 1, 2012. We proposed to add height and weight to the IRF–PAI to correct this oversight into the ''Medical Information'' section of the IRF–PAI. As a general rule, we would place all data items related to quality reporting and quality measures within the Quality Indicator section of the IRF–PAI. However, the height and weight items have a dual purpose because they can be used for the calculation of Body Mass Index (BMI), which is used as one part of the analysis for compliance with the 60 percent rule. Even though the height and weight items are placed in the ''Medical Information'' section of the IRF–PAI, they are also being added to the IRF–PAI for calculating risk adjustment for the pressure ulcer measure. Failure to provide height and weight information could result in a finding of non-compliance with the reporting requirements.

We invited public comment on our proposal to include data elements required for risk-adjustment of NQF #0678 Percent of Patients with Pressure Ulcers That Are New or Worsened measure as mandatory data collection elements in the revised IRF–PAI. Below is a summary of public comments received for the additional elements required for risk-adjustment of the pressure ulcer measure, and our responses to these comments.

Comment: One commenter questioned the use of peripheral artery disease (PAD), peripheral vascular disease (PVD), and diabetes mellitus (DM) as risk adjusters for the pressure ulcer quality measure.

Response: Peripheral Arterial Disease, Peripheral Vascular Disease, and Diabetes are all conditions affecting perfusion and oxygenation, which are considered to impact risk of pressure ulcer development. Conditions causing issues of sensory perception (for example, peripheral neuropathy) or an alteration to intact skin (dry skin, erythema and other skin alterations) also are considered to impact risk of pressure ulcer development (Pressure Ulcer Prevention Clinical Practice Guideline, NPUAP). Additionally, statistical analyses showed that these factors were found to be significantly associated with the development of pressure ulcers when risk adjustment models were tested in a large sample of IRF patients.

Comment: Several commenters requested that CMS consider adding impairment group as a risk adjuster for the pressure ulcer measure.

Response: When developing the pressure ulcer quality measure, we reviewed the literature and obtained input from clinicians on which factors should be tested as potential risk adjustors. Various measurements of functional status/functional impairment were tested on a large sample of IRF patients, and were not found to be statistically significant in the population as a whole. We will continue to analyze this measure as more data is collected and will consider testing additional risk adjustors for future iterations of the measure.

Comment: A commenter expressed concern that the adoption of the NQF-endorsed version of the pressure ulcer measure ''may be too premature.'' This commenter noted that CMS recently held a technical expert panel to discuss the potential development of a standardized set of pressure ulcer measurement items to be used across multiple healthcare settings (referred to as ''cross-setting''), and therefore, this commenter suggested that CMS delay implementing the revised pressure ulcer items.

Response: It was necessary for us to finalize development of the proposed updates to the pressure ulcer data items for the October 1, 2014 IRF–PAI release prior to work on the cross-setting pressure ulcer measures because of the significant amount of time required to implement such a data item set. However, we will continue to work on improving the data collection efforts to ensure that the most relevant patient information is obtained.

Final Decision: After careful consideration of the public comments we received, we are finalizing our proposal to include the additional risk adjustment elements discussed above to the IRF–PAI for the purpose of risk-adjustment for NQF #0678 Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay).

3. Revisions to the IRF–PAI To Add Voluntary Data Items Related to NQF #0678 Percent of Residents or Patients With Pressure Ulcers That Are New or Worsened (Short-Stay)

The pressure ulcer measure numerator for the NQF #0678 endorsed version of the ''Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay)'' measure looks at the number of patients with a target assessment during the selected time window who have one or more Stage 2 through 4 pressure ulcer(s) that are new or that have worsened compared with the previous assessment. According to the NQF Web site, in its description of NQF #0678, ''Stage 1 pressure ulcers are excluded from this measure because recent studies have identified difficulties in objectively measuring them across different populations.'' The measure numerator also does not include what is referred to as ''unstageable'' pressure ulcers, which we describe below. The data that that has been mandatory for IRFs to report under the IRF QRP are those that met

the requirements of the application of NQF #0678 that we finalized in the CY 2013 OPPS/ASC final rule (as incorporated into the 2012 version of the IRF PAI), which reflected the same staging for pressure ulcers as the NQF-endorsed version of the measure. We have proposed to include in the 2014 version of the IRF–PAI additional mandatory data items to accommodate the risk adjustment requirements of the NQF-endorsed version of this measure.

We have received feedback from providers through a variety of sources (including a May 2, 2012 in-person training and special open door forums that occurred on November 29, 2011; April 19, 2012; July 26, 2012; August 16, 2012; September 20, 2012; and October 18, 2012) in regard to the pressure ulcer items on the IRF–PAI. Additionally, we have received feedback in the form of questions from IRF providers submitted to the IRF Quality Reporting Program Helpdesk.

We learned from provider feedback that a majority of IRF providers want the ability and flexibility to document information about all stages of pressure ulcers (numerical stages 1 through 4 and pressure ulcers that are not numerically stageable due to suspected deep tissue injury, slough and/or eschar, or non-removable devices, known as unstageable pressure ulcers), in addition to data on the stages of pressure ulcers required for the quality measure, and that they felt this extended documentation would allow them to track the evolution of pressure ulcers. We further learned that many providers felt that it is important to have a way to document information about healed pressure ulcers because they wanted us to know about these positive outcomes.

In response to the feedback we received from providers, we proposed to add voluntary data items to the IRF–PAI Quality Indicators section, designed to address providers' concerns about the adequacy of current pressure ulcer data items. As modified, our proposed admission assessment consists of 2 main topics: (1) Unhealed Pressure Ulcers; and (2) Pressure Ulcer Risk Conditions. Also, the discharge assessment consists of 2 main topics: (1) Unhealed Pressure Ulcers; and (2) Healed Pressure Ulcers. Within each main topic there are sub-topics that contain a set of questions. The provider is asked to document how many pressure ulcers, if any, the patient has at each stage upon admission. We have added new questions that extend beyond stages 2 through 4 pressure ulcers, covering the presence of stage 1 pressure ulcers, as well as unstageable pressure ulcers that are due to a non-removable device or dressing, to slough or eschar, or deep tissue injury. We note that the discharge assessment differs somewhat from the admission assessment with regard to the pressure ulcer questions. A copy of the 2014 IRF–PAI can be found at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/IRFPAI.html*.

We have added this greater specificity to the pressure ulcer items to allow providers to document pressure ulcers in more detail. In describing the inadequacy they perceived in the present pressure ulcer items, providers described such situations as those in which a patient is admitted into an IRF with an unstageable pressure ulcer that is a suspected deep tissue injury (DTI). During the course of the IRF stay the DTI evolves into a stage 3 and, after several days, worsens to a stage 4. On the current version of the IRF–PAI, providers have no ability to document the presence of an unstageable pressure ulcer that existed when the patient was admitted. Whether or not the IRF believes there is an unstageable pressure ulcer, the IRF must document that the patient had no pressure ulcers on the admission assessment. However later, after the DTI worsens to a stage 3, if the IRF judges from the nature of the pressure ulcer that it was extremely likely to have been present at admission, the IRF would have to go back and change their documentation on the admission assessment to reflect that the patient actually had a stage 3 pressure ulcer upon admission. Upon discharge, the IRF would document that the patient has a stage 4 pressure ulcer. With the new pressure ulcer data items for 2014, the IRF will be able to document the presence of the unstageable pressure ulcer or suspected DTI on the admission assessment. The revisions to the IRF–PAI for 2014 will allow the IRF to give a more complete and accurate picture of the progression of this pressure ulcer when the patient is discharged.

While Stage 1 and unstageable pressure ulcers are not part of the NQF #0678 endorsed version of the ''Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay),'' and are not mandatory, we nonetheless believe that it is appropriate and important for us to collect this information. As the measure steward for this measure, CMS would like to gather and analyze data regarding Stage 1 and unstageable pressure ulcers to help determine if any modification to the existing measure should be made. This data could also help us determine if any additional pressure ulcer measures should be developed. For example, collecting data about Stage 1 pressure ulcers could provide us with information that would allow us to assess whether these pressure ulcers can now be objectively measured across different populations.

Additionally, as we have noted above, some pressure ulcers that are present on admission can become stageable and then worsen to a higher stage during the IRF stay. Access to data on these kinds of situations would assist us in determining whether including unstageable and Stage 1 measures in the measure results may be appropriate in the future. We might accomplish this by expanding the current measure or developing an entirely new pressure ulcer measure.

We invited public comment on our proposed revisions to the IRF–PAI of voluntary items related to the staging of pressure ulcers. We received the following public comments in response to our proposals for the addition of these voluntary pressure ulcer items to the IRF–PAI.

Comment: Several commenters suggested that stage 1 pressure ulcers should not be collected on the IRF–PAI.

Response: We obtained feedback from providers on the pressure ulcer items on the IRF–PAI released in October 2012 during Provider Trainings, Open Door Forums, and via the Quality Reporting Program Helpdesk. Based on the feedback we received, we learned that many IRF providers want the ability to document as much information as possible about all types of pressure ulcers and feel that this will help them to better track the evolution of pressure ulcers. Because it would be useful to us, as well as providers, to obtain complete, accurate information about the quality of care being provided in IRFs, we included fields for the documentation of all stages of pressure ulcers, including Stage 1 and Unstageable pressure ulcers. However, NQF #0678 covers only Stages 2–4 pressure ulcers. Stage 1 pressure ulcers are not included in the quality measure. If a facility does not wish to report data on these pressure ulcers, they are under no obligation to do so.

Comment: Several commenters requested that each IRF–PAI quality indicator pressure ulcer item be labeled as to whether it is mandatory or voluntary. Another commenter recommended that the voluntary IRF–PAI quality indicator pressure ulcer items be segregated from the mandatory items, or that CMS in some way on the IRF–PAI indicate which of the items are voluntary.

Response: We have posted on our Web site a detailed matrix that identifies which data elements will be required,

and which will be voluntary (available at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/Spotlights-Announcements.html*) and this matrix will also be incorporated into the final IRF PAI Training Manual which will be posted on CMS IRF PPS Web site. We do not directly indicate on the IRF–PAI which items are mandatory versus which items are voluntary. These designations are subject to change, and although we can address such changes in rulemaking, the IRF–PAI is only released biannually. Thus, our ability to change these designations on the IRF–PAI itself is limited and could lead to provider confusion should these designations not align with current policy because they have changed during the interim year when we do not have a new release of the IRF–PAI.

Comment: One commenter suggested that if a pressure ulcer is discovered after the removal of a ''non-removable device or other dressing'' during the IRF stay, and there was no documentation of this wound from the discharging hospital, this should not be counted on the IRF–PAI due to issues of attribution.

Response: Assessment items collecting data on unstageable pressure ulcers are voluntary. However, if a numerically staged pressure ulcer is observed when a non-removable device/dressing is removed, and the pressure ulcer is still present at the time of discharge, that pressure ulcer will be reported on the IRF–PAI at discharge. If there were documentation that the pressure ulcer was present at admission at the same stage, and it did not worsen to a higher stage during the stay, then the pressure ulcer would not be considered new or worsened. The item in the proposed October 1, 2014 IRF–PAI ''Unstageable due to Non-Removable Device or Dressing'' should be used on admission when there is documentation of a known pressure ulcer that cannot be fully visualized and staged due to a non-removable device.

Comment: Several commenters indicated that the IRF–PAI is now too long and causes undue burden.

Response: We obtained feedback from providers in October of 2012 on the IRF PAI during Provider Trainings, Open Door Forums, and via the Quality Reporting Program Helpdesk. Based on the feedback we received, providers wanted the ability to provide as much information as possible to truly track the evolution of pressure ulcers, so in order to accommodate these providers, we are adding voluntary items. However, only those pressure ulcer items required to calculate the quality measure NQF #0678, Percent of Patients or Residents with Pressure Ulcers That Are New or Worsened (Short Stay), are required in order for providers to avoid a 2 percentage point reduction of the applicable IRF PPS annual increase factor. Therefore, if a facility finds completing the additional data items burdensome, it is under no obligation to do so. Please refer to the 2014 IRF–PAI training manual for the voluntary/mandatory status of each item.

Comment: One commenter requested that CMS consider capturing the degree to which a pressure ulcer has healed by discharge.

Response: Pressure ulcer healing and treatment is a complex clinical issue that is difficult to capture in standardized assessment items. The IRF–PAI does not record incremental improvement, but instead captures only condition on admission and discharge, based on staging pressure ulcers, to avoid undue burden of data collection on facilities. Possible indicators of healing are numerous and not always accurate. These include surface area reduction, a common indicator for tracking the healing of pressure ulcers; however, we do not believe it is an appropriate data element to include in the IRF–PAI because it is not the sole determinant of healing. Development of granulation tissue, decrease in erythema, decrease in exudate, re-epithelialization, etc., are also other ways to document pressure ulcer healing. We cannot add data elements for all possible indicators. Also, many IRF stays are short, averaging 13 days, and we have no expectation that severe pressure ulcers will heal completely during this timeframe. If the patient is admitted with a full thickness pressure ulcer which will likely not be healed in approximately 13 days, it would simply be noted in the patient's record as full thickness on discharge. The IRF would not experience any negative impact from a quality reporting standpoint in a situation such as this, because this information is not required for purposes of NQF #0678. Also, from a more general perspective, quality measures are not designed to track a full set of details about the progress of any individual patient, but rather to include just enough information to register a patient's decline or improvement while in the care of a facility. This kind of assessment can assist us in monitoring the overall quality of facilities to ensure patients are receiving high-quality care and to identify facilities whose practices can be improved.

Final Decision: After giving careful consideration to the public comments received in response to our proposal to add new voluntary pressure ulcer items to the IRF–PAI, we are finalizing the proposal to add the new pressure ulcer items that were posted on the IRF PPS Web page and as part of the IRF–PAI PRA package.

4. Revisions to the IRF–PAI To Add Mandatory Data Items Related to NQF #0680 Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay)

We have proposed to make changes to the IRF–PAI discharge assessment to include the addition of elements necessary to report data for the proposed measure, Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay) (NQF #0680). These items will be based on the items from the MDS 3.0 and LTCH CARE Data Set items.[24] [25] There are 3 data elements that will be collected in relation to this measure: Two are used to calculate the measure, and a third is used to ensure internal consistency and data accuracy. The items are as follows:

- Did the patient receive the influenza vaccine in this facility for this year's influenza vaccination season?
- Date influenza vaccine was received, and
- If influenza vaccine not received, state reason.

These items and questions allow the IRF to report if and when an influenza vaccine was given at the facility. They also allow the IRF to indicate why a vaccine was not given if that is the case. Further details on the specifications and data elements for this measure are available in the MDS 3.0 QM User's Manual available on our Web site at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/NursingHomeQualityInits/NHQIQualityMeasures.html*. Measure specifications are located in the download titled: MDS 3.0 QM User's Manual V6.0. Measure information is

[24] Centers for Medicare & Medicaid Services. MDS 3.0 Item Subsets V1.10.4 for the April 1, 2012 Release. Retrieved from *https://www.cms.gov/NursingHomeQualityInits/30_NHQIMDS30TechnicalInformation.asp*.

[25] The LTCH CARE Data Set Version 2.00, the data collection instrument for the submission of the Percent of Residents or Patients with Pressure Ulcers That are New or Worsened (Short-Stay) measure and the Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay) measure, is currently under review by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act (PRA) *http://www.gpo.gov/fdsys/pkg/FR-2013-02-01/pdf/2013-02155.pdf*. The LTCH CARE Data Set Version 1.01 was approved on April 24, 2012 by OMB in accordance with the PRA. The OMB Control Number is 0938–1163. Expiration Date April 30, 2013.

also available at *http://www.qualityforum.org/QPS/0680*.

In the proposed rule, we invited public comment on our proposed revisions to the IRF–PAI related to NQF #0680 Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay). The comments we received were related to our proposal to adopt the measure itself, and not on how we were proposing to modify the IRF–PAI. For a summary of comments and responses on this issue, please see section XIV.3.b. of this final rule.

Final Decision: After careful consideration of the public comments we received, we are finalizing our proposal to modify the IRF–PAI discharge item set to add the 3 data elements for collecting data for NQF #0680.

5. Revisions to the IRF–PAI Related to Numbering of Quality Indicator Items

In the revised IRF–PAI, we include changes in the numbering scheme used in the Quality Indicator section of the IRF–PAI from a ''consecutive numbering scheme'' for numbering assessment items to a numbering scheme that allows greater flexibility for item removal and insertion. Problems arise with a consecutive numbering scheme when items are removed or new ones are inserted because this changes the numbers of some or all of the items around them. Other CMS post-acute care data collection vehicles, such as the MDS 3.0 and the LTCH CARE Data Set, have adopted a more flexible numbering schema that allows insertion or removal of items without requiring renumbering of the remaining items. We proposed to adopt a similar numbering schema in the revised IRF–PAI. A less flexible numbering system that necessitates renumbering items on the IRF–PAI in the event of such changes will result in a given item number having very different meanings on different versions of the IRF–PAI item set.

For more details about our plans for changes to the IRF–PAI, see *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/IRFPAI.html*.

In the May 8, 2013 proposed rule, we invited public comments about our proposal to change the numbering scheme used in the quality indicator section of the IRF–PAI. A summary of the public comments received and our responses to comments are discussed below.

Comment: We did not receive any comments in response to our proposal to change the type of numbering used on the quality indicator section of the IRF–PAI from a consecutive scheme to a numbering scheme similar to that used in the MDS 3.0. We did, however, receive comments requesting that page numbers be added to the IRF–PAI. The commenters suggested that because this document was being increased from 3 to 9 pages in length as a result of the proposed changes to the Quality Indicator section of the IRF–PAI then the page numbering should be added. Another commenter requested that page numbers be added to the IRF–PAI because ''numbering the IRF–PAI pages will help keep it in correct order, since it is filed in the medical record.''

Response: We agree with the commenters that adding page numbering to the IRF–PAI can assist IRFs in keeping the document in correct order. We also acknowledge that the proposed changes to the Quality Indicator section of the IRF–PAI will significantly increase the length of this document.

Final Decision: After careful consideration of the public comments we received, we are finalizing our proposal to adopt a flexible numbering scheme (similar to that used in MDS 3.0) into the Quality Indicator section of the IRF–PAI. In addition, we will add general page numbering to the IRF–PAI document.

E. Change in Data Collection and Submission Periods for Future Program Years

The FY 2012 final rule (76 FR 47836) included an initial framework for the IRF QRP. In that rule we also finalized the initial quality measures to be used in the IRF QRP, stated how data for these measures would to be collected, and selected the time periods for the data collection and reporting of the quality data.

The FY 2012 final rule (76 FR 47836) also finalized the initial IRF QRP data reporting cycle, affecting the FY 2014 annual increase factor, as beginning on October 1, 2012 and ending on December 31, 2012. Beginning in 2013 for the FY 2015 annual increase factor, and for subsequent year annual increase factors, we finalized that quality reporting cycles would be based on a full calendar year (CY) cycle (76 FR 47879).

When there are new measures added to the quality reporting program that will be collected on the IRF–PAI, that data collection instrument must be updated accordingly. The next update to the IRF- PAI will take place on October 1, 2014. Under current policy, the IRF QRP data collection cycle for the FY 2016 annual increase factor will not begin until January 1, 2014.

In the FY 2014 proposed rule, we proposed to change the IRF–PAI data collection periods for the FY 2016 and FY 2017 annual increase factors in order to align with the release of the new version of the IRF–PAI on October 1, 2014. We have also proposed to shorten the data collection period impacting the FY 2016 IRF PPS annual increase factor to 9 months, so that the FY 2017 reporting periods can begin on October 1, 2014 using the new version of the IRF–PAI. Under this proposal, the next data collection period would run from January 1, 2014 to September 30, 2014 and affect the IRF PPS annual increase factor for FY 2016.

We further proposed to start fiscal year data collection periods beginning on October 1, 2014, and data collected for discharges during October 1, 2014 to September 30, 2015 will affect the FY 2017 IRF PPS annual increase factor. In addition, we proposed that data collection will continue on FY cycles unless there is an event that requires that this cycle be amended. We noted that, in the event the established cycles must be changed, we will make this apparent to the public and follow all necessary processes to make the change. Finalizing these proposals will result in having 2 separate data collection and submission schedules for IRF–PAI and NHSN based measures. We provide more details on this distinction below.

We invited public comment on our proposal to alter the IRF–PAI data collection periods impacting the FY 2016 and FY 2017 increase factors in a way that aligns with the release of the next version of the IRF–PAI instrument. A summary of the public comments received and our responses to comments are discussed below.

Comment: Several commenters expressed support for this proposal. We did not receive any comments that included objections to our proposal to change the data collection and submission timeframe for data collected using the IRF–PAI from a calendar year basis to a fiscal year basis, beginning on October 1, 2014. Likewise, no commenters objected to our continuing collection of NHSN data on a calendar year basis.

Response: We thank those commenters for their support of the proposed changes to the data collection and submission cycle for data collected using the IRF–PAI from a calendar to a fiscal year basis.

Comment: Several commenters expressed their support for our proposal to continue data collection and submission of NHSN measures data on a calendar year basis beginning on October 1, 2014 with the exception of

the Influenza Vaccination Among Healthcare Personnel Measure (NQF #0431). These commenters expressed an opinion that IRF units within acute care hospitals should be permitted to attest that their health care personnel flu vaccination measure data is reported through the acute care hospital's reporting, thereby automatically receiving credit for reporting in the IRF QRP.

Response: We thank those commenters for their support of our proposal to continue to report data to NHSN on a calendar year. We do not agree, however, that IRF units located within IPPS hospitals should be permitted to attest to the submission of (NQF #0431) Influenza Vaccination among Healthcare Personnel measure data as part of the IPPS data. We will require all IRFs to report data for this measure. For a full discussion of this specific issue, as well as details about this measure, see section XIV.3.C.2 above *''IRF QRP Measure #1: Influenza Vaccination Coverage among Healthcare Personnel (NQF #0431)''.*

Final Decision: After careful consideration of the public comments received, we are finalizing our proposal to change the data collection timeframe for data submitted via the IRF–PAI to a fiscal year basis beginning on October 1, 2014, and to continue data collection of data that is reported via NHSN on a calendar year basis.

1. Implementation of Data Submission Deadlines for the IRF QRP

In the FY 2012 IRF PPS final rule we stated that details regarding data submission and reporting requirements would be posted on the CMS Web site at *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/index.html* no later than January 31, 2012 (76 FR 47879). Further data submission details for the IRF QRP were posted on the CMS IRF QRP Web site on January 31, 2012, as promised. In addition, data submission details were disseminated to IRFs at various times from January 31, 2012 to December 31, 2012, through an in-person training held on May 2, 2012, Open Door Forums, list-serve announcements, IRF QRP Web page postings and responses to IRF QRP Helpdesk inquiries. In these communications, we announced that the final data submission deadline for the IRF QRP would be May 15th for all measures finalized for the FY 2014 annual increase factor and each subsequent years annual increase factor.

We realize the value in providing clear submission deadlines for the IRF QRP and we believe that we should provide deadlines that clearly distinguish between data submitted using the NHSN and data submitted using the IRF–PAI. Further, it is important to have distinct deadlines at which point data submitted afterward, including data modifications and corrections, could not be used for reporting or IRF PPS annual increase factor determinations. For purposes of the FY 2016 and subsequent year IRF PPS annual increase factors, and for the purposes of applying quarterly deadlines for public reporting purposes, we proposed the inclusion of quarterly data submission deadlines in addition to the previously finalized deadlines. We believe that clear submission deadlines this will ensure timely submission of data.

2. Quarterly Timelines for Submitting Data Using the IRF–PAI

For the purposes of submitting quality data using the IRF–PAI for the IRF QRP, we have proposed new quarterly timeframes described below that we believe will provide sufficient time for IRFs to meet quality reporting requirements and allow us to harmonize IRF QRP data submission deadlines with the LTCHQR Program and Hospital IQR. Beginning with data collection and reporting impacting the FY 2016 annual increase factor, we proposed that IRFs follow the deadlines presented in the tables below to complete submission of data for each quarter. For each quarter outlined in the tables below during which IRFs are required to collect data, we proposed a final deadline occurring approximately 135 days (or approximately 4 and ½ months) after the end of each quarter by which all data collected during that quarter must be submitted. We believe that this is a reasonable amount of time to allow IRFs to submit data and make any necessary corrections. We have summarized these deadlines in the tables below.

TABLE 13—TIMELINES FOR SUBMISSION OF IRF QRP PROGRAM QUALITY DATA USING IRF–PAI * FOR FY 2016 IRF PPS ANNUAL INCREASE FACTOR +: APPLICATION OF NQF #0678 PERCENT OF RESIDENTS OR PATIENTS WITH PRESSURE ULCERS THAT ARE NEW OR WORSENED (SHORT-STAY)

Quarter	IRF–PAI Data collection period	IRF–PAI Data submission deadline for corrections of the IRF QRP
FY 2016 Annual Increase Factor		
Quarter 1	January 1, 2014–March 31, 2014	August 15, 2014.
Quarter 2	April 1, 2014–June 30, 2014	November 15, 2014.
Quarter 3	July 1, 2014–September 30, 2014	February 15, 2015.

* Using October 1, 2012 release of IRF–PAI.
+ FY 2016 APU determination is based on 3 quarters of data submission for the pressure ulcer measure.

TABLE 14—TIMELINES FOR SUBMISSION OF IRF QRP PROGRAM QUALITY DATA USING IRF–PAI * FOR FY 2017 IRF PPS ANNUAL INCREASE FACTOR: NQF #0678 PERCENT OF RESIDENTS OR PATIENTS WITH PRESSURE ULCERS THAT ARE NEW OR WORSENED (SHORT-STAY), AND NQF #0680 PERCENT OF RESIDENTS OR PATIENTS WHO WERE ASSESSED AND APPROPRIATELY GIVEN THE SEASONAL INFLUENZA VACCINE (SHORT-STAY)

Quarter	IRF–PAI Data collection period	IRF–PAI Data submission deadline for corrections of the IRF QRP
FY 2017 Annual Increase Factor		
Quarter 1	October 1, 2014–December 31, 2014	May 15, 2015.

TABLE 14—TIMELINES FOR SUBMISSION OF IRF QRP PROGRAM QUALITY DATA USING IRF–PAI * FOR FY 2017 IRF PPS ANNUAL INCREASE FACTOR: NQF #0678 PERCENT OF RESIDENTS OR PATIENTS WITH PRESSURE ULCERS THAT ARE NEW OR WORSENED (SHORT-STAY), AND NQF #0680 PERCENT OF RESIDENTS OR PATIENTS WHO WERE ASSESSED AND APPROPRIATELY GIVEN THE SEASONAL INFLUENZA VACCINE (SHORT-STAY)—Continued

Quarter	IRF–PAI Data collection period	IRF–PAI Data submission deadline for corrections of the IRF QRP
Quarter 2	January 1, 2015–March 31, 2015	August 15, 2015.
Quarter 3	April 1, 2015–June 30, 2015	November 15, 2015.
Quarter 4	July 1, 2015–September 30, 2015	February 15, 2016.

* Using October 1, 2014 release of IRF–PAI.

3. Quarterly Submission Timelines of Data Reported Using NHSN

In the FY 2014 proposed rule (78 FR 26909 through 26924), we proposed that the IRF QRP align its deadlines for submitting of quality data via the NHSN with the established deadlines set forth in the Hospital IQR and LTCHQR Programs. We noted that the CDC recommends that a facility report Healthcare Acquired Infection (HAI) events such as CAUTI as close to the time of the event as possible, and certainly within 30 days after the event. We agree with the CDC's recommendations and therefore are requiring that IRFs report CAUTI events, even null events (months without CAUTIs) within 30 days (on a monthly level) after each event using the NHSN.

We are finalizing our proposal to continue the calendar year basis of reporting CAUTI, using quarterly deadlines as established by the Hospital IQR program for all events that occur during each quarter. Final submission deadlines for data collected through the NHSN are shown in the tables below.

TABLE 15—TIMELINES FOR SUBMISSION OF IRF QRP PROGRAM QUALITY DATA USING CDC/NSHN FOR FY 2016 AND FY 2017 IRF PPS ANNUAL INCREASE FACTOR: NATIONAL HEALTH SAFETY NETWORK (NHSN) CATHETER-ASSOCIATED URINARY TRACT INFECTION (CAUTI) OUTCOME MEASURE

Quarter	CDC/NHSN Data collection period	CDC/NHSN Data submission deadline
FY 2016 Annual Increase Factor		
Quarter 1	January 1, 2014–March 31, 2014	August 15, 2014.
Quarter 2	April 1, 2014–June 30, 2014	November 15, 2014.
Quarter 3	July 1, 2014–September 30, 2014	February 15, 2015.
Quarter 4	October 1, 2014–December 31, 2014	May 15, 2015.
FY 2017 Annual Increase Factor		
Quarter 1	January 1, 2015–March 31, 2015	August 15, 2015.
Quarter 2	April 1, 2015–June 30, 2015	November 15, 2015.
Quarter 3	July 1, 2015–September 30, 2015	February 15, 2016.
Quarter 4	October 1, 2015–December 31, 2015	May 15, 2016.

Further, we proposed to apply to IRF QRP the same deadlines established for the reporting of the Influenza Vaccination Coverage Among Health Personnel (NQF #0431) measure in the Hospital IQR Program and proposed in the LTCH QRP.

TABLE 16—TIMELINES FOR SUBMISSION OF IRF QRP PROGRAM QUALITY DATA USING CDC/NSHN FOR FY 2016 AND FY 2017 IRF PPS ANNUAL INCREASE FACTOR: NQF #0431 INFLUENZA VACCINATION COVERAGE AMONG HEALTHCARE PERSONNEL

Data collection timeframe	CDC/NHSN Data submission deadline
FY 2016 Annual Increase Factor	
October 1, 2014 (or when the influenza vaccine becomes available)–March 31, 2015	May 15, 2015.
FY 2017 Annual Increase Factor	
October 1, 2015 (or when the influenza vaccine becomes available)–March 31, 2016	May 15, 2016.

We invited public comment on the proposals made in the proposed rule regarding data submission quarterly and final deadlines for the purposes of reporting data using the IRF–PAI and for the purposes of reporting data using the NHSN. The following are comments received in response to these proposals and our response to these comments.

Comment: A few comments expressed support for our proposal to apply quarterly reporting deadlines to both the measures reported using the IRF–PAI on a fiscal year basis and to the measures reported to the CDC via NHSN on a calendar year basis.

Response: We thank the commenters for their supportive comments on the IRF–PAI measure on a fiscal year basis.

Final Decision: After careful consideration of the public comments we received, we are finalizing our proposal to apply quarterly deadlines to both the measures reported using the IRF–PAI on a fiscal year basis and to the measures reported to the CDC via NHSN on a calendar year basis.

F. Reconsideration and Appeals Process

In the proposed rule (78 FR 26909 through 26921) we provided details pertaining to a reconsideration process, and the mechanisms related to provider requests for reconsideration of their annual increase factor, such as filing requests, required content, supporting documentation, and mechanisms of notification and final determinations on the IRF QRP Web site this spring at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/index.html.* We also invited public comment on the proposed procedures for reconsideration and appeals. We received the following public comments related to our discussion of the reconsideration process in the proposed rule:

Comment: Many commenters expressed support of CMS' proposed IRF QRP reconsideration and appeals process. Further, one commenter encouraged CMS to mirror the processes used in the Hospital IQR Program and the Hospital Outpatient Quality Reporting (OQR) Program when developing reconsideration and appeals and for the IRF QRP.

Response: We thank the commenters for their support for the inclusion of reconsideration and appeals processes in the IRF QRP. It is our goal to align our reconsideration and appeals process and policies with those of existing quality reporting programs, such as Hospital IQR Program and the Hospital Outpatient Quality Reporting Program, to the extent appropriate for the IRF QRP. We greatly appreciate the commenters' views on the reconsideration process, and will consider all of these comments for future rulemaking and program development.

Comment: One commenter expressed concern that CMS did not provide procedural details of the reconsideration process through rulemaking and encouraged CMS to ensure that sufficient outreach and education is conducted in a timely manner regarding these processes.

Response: We thank the commenter for the comments. We established a Web site that provides procedural details for the FY 2014 IRF QRP reconsideration process. This information is available at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/Reconsideration-and-Disaster-Waiver-Requests.html.* We noted in the FY 2014 proposed rule (78 FR 26909 through 26921) that we developed this Web site as a resource to inform providers on how to seek reconsideration of any decision of non-compliance for the FY 2014 annual increase factor, and the necessary steps to do so. We provided a process for reconsideration should IRFs choose to avail themselves of it. In the FY 2014 proposed rule (78 FR 26909 through 26921), we stated that IRFs must first apply for reconsideration through CMS prior to appealing our initial finding of non-compliance to the PRRB. In light of a commenter's concern that CMS did not provide procedural details of the reconsideration process through rulemaking and concern that CMS ensure that sufficient outreach and education are available, we have decided to continue with an IRF QRP reconsideration process that is voluntary for the time being in order to fully address these concerns. We are therefore only recommending that IRFs use the reconsideration process prior to appealing to the PRRB. We note that the agency has had good success under the Hospital IQR program with a process that is very similar to the one we proposed for the IRF QR. From the provider perspective, it allows for the opportunity to resolve issues early in the process when we have dedicated resources to considering all reconsideration requests before payment changes are applied to an IRF's annual payment update. From CMS' perspective, it decreases the number of appeals presented to the PRRB, which reviews cases for all quality reporting programs, allowing for more efficient operations at the appeals level.

Because we have been aware that providers should be able to request a reconsideration of their annual increase factor if their circumstances warrant it as soon as possible, we provided details pertaining to the voluntary reconsideration process, and the mechanisms related to provider requests for reconsiderations of their annual increase factor, such as filing requests, required content, supporting documentation, and mechanisms of notification and final determinations on the IRF QRP Web site in spring 2013 prior to any IRF's need for information on the CMS reconsideration process for the FY 2014 annual increase factor and subsequent years annual increase factors at: *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting.* CMS' subregulatory approach to the FY 2014 reconsideration process was necessary, as any other form of the reconsideration process that we might propose and finalize in this rule would not be final and in effect until October 1, 2013. This would have the effect of proposing and finalizing a FY 2014 process for reconsiderations that should already be completed. We note that we are finalizing the policy that this subregulatory approach to the reconsideration process will remain in effect until we can propose and finalize a regulatory version of the reconsideration process in future rulemaking.

As part of the voluntary process, IRFs that are non-compliant with the reporting requirements during a given reporting cycle will be notified of that finding. The purpose of this notification is to put the IRF on notice of the following: (1) That the IRF has been identified as being non-compliant with the IRF QRP's reporting requirements for the reporting cycle in question; (2) that the IRF will be scheduled to receive a reduction in the amount of two percentage points to the annual payment update for the upcoming fiscal year; (3) that the IRF may file a request for reconsideration if they believe that the finding of non-compliance is erroneous, or that if they were non-compliant, they have a valid and justifiable excuse for this non-compliance; and (4) that the IRF must follow a defined process on how to file a request for reconsideration, which will be described in the notification.

Upon the conclusion of our review of each request for reconsideration, we will render a decision. We may reverse our initial finding of noncompliance if: (1) The IRF provides proof of full compliance with all requirements during the reporting period; or (2) the IRF provides adequate proof of a valid or justifiable excuse for non-compliance if the IRF was not able to comply with requirements during the reporting period. We will uphold our initial finding of noncompliance if the IRF cannot show any justification for noncompliance.

G. Policy for Granting a Waiver of the IRF QRP Data Submission Requirements in Case of Disaster or Extraordinary Circumstances

Our experience with other quality reporting programs has shown that there are times when providers are unable to submit quality data due to the occurrence of extraordinary circumstances beyond their control (for example, natural or man-made disasters). We define a ''disaster'' as any natural or man-made catastrophe which causes damages of sufficient severity and magnitude to partially or completely destroy or delay access to medical records and associated documentation. Natural disasters could include events such as hurricanes, tornadoes, earthquakes, volcanic eruptions, fires, mudslides, snowstorms, and tsunamis. Man-made disasters could include such events as terrorist attacks, bombings, floods caused by man-made actions, civil disorders, and explosions. A disaster may be widespread or impact multiple structures or be isolated and impact a single site only.

In certain instances of either natural or man-made disasters, an IRF may have the ability to conduct a full patient assessment, and record and save the associated data either during or before the occurrence of an extraordinary event. In this case, the extraordinary event has not caused the facility's data files to be destroyed, but it could hinder the IRF's ability to meet the quality reporting program's data submission deadlines. In this scenario, the IRF would potentially have the ability to report the data at a later date, after the emergency circumstances have subsided. In such cases, a temporary waiver of the IRF duty to report quality measure data may be appropriate.

In other circumstances of natural or man-made disaster, an IRF may not have had the ability to conduct a full patient assessment, and record and save the associated data before the occurrence of an extraordinary event. In such a scenario, the facility does not have data to submit to CMS as a result of the extraordinary event. We believe that it is appropriate, in these situations, to grant a full waiver of the reporting requirements.

It is our goal not to penalize IRF providers in these circumstances or to unduly increase their burden during these times. Therefore, we proposed a process, for payment year 2015 and subsequent years, for IRF providers to request and for us to grant waivers with respect to the reporting of quality data when there are extraordinary circumstances beyond the control of the provider. When a waiver is granted, an IRF will not incur payment reduction penalties for failure to comply with the requirements of the IRF QRP.

In the FY 2014 proposed rule (78 FR 26909 through 26921), we proposed to establish a disaster waiver process, in which IRFs that have experienced a disaster can request a waiver of their quality reporting responsibilities for purposes of payment year 2015 and subsequent payment years. We proposed that the IRF may request a waiver for one or more quarters by submitting a written request to CMS. We also proposed that should IRFs compose a letter to CMS that documents the waiver request, with the information described below, and submit the letter to CMS via email to the IRF Help Desk at *IRFQRPReconsiderations@cms.hhs.gov.* IRFs that have filed a request for an IRF QRP disaster waiver with an IRF–PAI waiver request using the procedure that is described under our regulations at 42 CFR § 412.614 can indicate this in their letter to CMS for their request for a waiver for quality reporting purposes.[26]

Note that the subject of the email must read ''Disaster Waiver Request'' and the letter must contain the following information:

- IRF CCN;
- IRF name;
- CEO or CEO-designated personnel contact information including name, telephone number, email address, and mailing address (the address must be a physical address, not a post office box);
- IRF's reason for requesting a waiver;
- Evidence of the impact of extraordinary circumstances, including but not limited to photographs, newspaper and other media articles; and
- A date when the IRF believes that it will again be able to submit IRF QRP data and a justification for the proposed date.

We proposed that the letter documenting the disaster waiver request be signed by the IRF's CEO, and must be submitted within 30 days of the date that the extraordinary circumstances occurred. Following receipt of the letter, we would: (1) Provide a written acknowledgement, using the contact information provided in the letter, to the CEO or designated contact person, notifying them that the request has been received, and (2) after CMS has made a decision as to whether to grant the waiver request, provide a formal response to the CEO, or designated contact person notifying them of our decision.

This policy does not preclude us from granting waivers to IRFs that have not requested them when we determine that an extraordinary circumstance, such as an act of nature, affects an entire region or locale. If we make the determination to grant a waiver to IRFs in a region or locale, we propose to communicate this decision through routine communication channels to IRFs and vendors, including but not limited to issuing memos, emails, and notices on *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/index.html.*

In the proposed rule, we invited public comment on our proposed disaster waiver process. A summary of the public comments received and our responses to comments are discussed below.

Comment: Several commenters stated that they support the IRF QRP disaster waiver policy and ''applaud the agency for recognizing the impact of natural disasters and other extenuating circumstances on the ability of IRFs to collect and report quality data.''

Response: We appreciate the commenters' support and recognition of our efforts to plan for various types of emergency situations that can impact an IRF's ability to report quality data.

Final Decision: After careful consideration of the public comments received, we are finalizing the IRF QRP disaster/extraordinary circumstances waiver and appeals processes as proposed.

H. Public Display of Data Quality Measures for the IRF QRP Program

Under section 1886(j)(7)(E) of the Act, the Secretary is required to establish procedures for making data submitted under the IRF QRP available to the public. Section 1886(j)(7)(E) of the Act also requires procedures to ensure that each IRF provider has the opportunity to review the data that is to be made public with respect to its facility, prior to such data being made public. Section 1886(j)(7)(E) of the Act requires CMS to report quality measures that relate to services furnished in IRFs on CMS' Web site.

Currently, the Agency is developing plans regarding the implementation of these provisions. We appreciate the need for transparency in the processes and procedures that will be implemented to allow for the public reporting of the IRF QRP data and to afford providers the opportunity to preview that data before it is made public. At this time, we have not

[26] *http://www.gpo.gov/fdsys/pkg/CFR-2011-title42-vol2/pdf/CFR-2011-title42-vol2-sec412-614.pdf.*

established procedures or timelines for public reporting of data, but we intend to include related proposals in future rule making.

Comment: Several commenters urged CMS to convene stakeholders to inform this process prior to rulemaking. One commenter strongly encouraged CMS to display the most current performance data for public reporting of IRF QRP data.

Response: We appreciate the commenters for their feedback. We appreciate the need to ensure that the data made publicly available is easily understood by all stakeholders, including providers and consumers. At this time, we are working to establish procedures for public reporting, including procedures that provide the opportunity for IRFs to review their data before it is made public, and will propose such procedures through future rulemaking after allowing stakeholders the opportunity to submit input.

We thank the commenters for the input and suggestions, and we will consider them as we develop proposals for public reporting of quality measures in future rulemaking.

I. Method for Applying the Reduction to the FY 2014 IRF Increase Factor for IRFs That Fail To Meet the Quality Reporting Requirements

As previously noted, section 1886(j)(7)(A)(i) of the Act requires application of a 2 percentage point reduction of the applicable market basket increase factor for IRFs that fail to comply with the quality data submission requirements. FY 2014 is to be the first year that the mandated reduction will be applied for IRFs that failed to comply with the data submission requirements during the data collection period October 1, 2012 through December 31, 2012. Thus, in compliance with 1886(j)(7)(A)(i) of the Act, we will apply a 2 percentage point reduction to the applicable FY 2014 market basket increase factor (1.8 percent) in calculating an adjusted FY 2014 standard payment conversion factor to apply to payments for only those IRFs that failed to comply with the data submission requirements. As noted previously, application of the 2 percentage point reduction may result in an update that is less than 0.0 for a fiscal year and in payment rates for a fiscal year being less than such payment rates for the preceding fiscal year. Also, reporting-based reductions to the market basket increase factor will not be cumulative; they will only apply for the FY involved. Table 17 shows the calculation of the adjusted FY 2014 standard payment conversion factor that will be used to compute IRF PPS payment rates for any IRF that failed to meet the quality reporting requirements for the period from October 1, 2012 through December 31, 2012.

TABLE 17—CALCULATIONS TO DETERMINE THE ADJUSTED FY 2014 STANDARD PAYMENT CONVERSION FACTOR FOR IRFS THAT FAILED TO MEET THE QUALITY REPORTING REQUIREMENT

Explanation for Adjustment		Calculations
Standard Payment Conversion Factor for FY 2013		$14,343
Adjusted Market Basket Increase Factor for FY 2014 (2.6 percent), reduced by 0.3 percentage point in accordance with sections 1886(j)(3)(C) and (D) of the Act and a 0.5 percentage point reduction for the productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act, further reduced by 2 percentage points for IRFs that failed to meet the quality reporting requirement	×	0.99800
Budget Neutrality Factor for the Wage Index and Labor-Related Share	×	1.0010
Budget Neutrality Factor for the Revisions to the CMG Relative Weights	×	1.0000
Budget Neutrality Factor for the Update to the Rural Adjustment Factor	×	1.0025
Budget Neutrality Factor for the Update to the LIP Adjustment Factor	×	1.0171
Budget Neutrality Factor for the Update to the Teaching Status Adjustment Factor	×	0.9962
Adjusted FY 2014 Standard Payment Conversion Factor	=	$14,555

XV. Miscellaneous Comments

Comment: Several commenters requested that CMS use the most recent three years of data and the first year of data collected under ICD–10 to review and update the list of comorbidities used to determine the tier payments to ensure that the tier list reflects all conditions that contribute significantly to IRF costs of care. One commenter also suggested that CMS re-examine the omission from this list of certain comorbidities that are considered preventable and might lead to perverse incentives for the IRF to undertreat these conditions.

Response: We appreciate the commenters' suggestions, and will consider these suggestions for future analyses.

Comment: One commenter suggested that CMS revise the IRF coverage requirements that are described in chapter 1, section 110 of the Medicare Benefit Policy Manual (Pub. L. 100–02) to allow recreational therapy services to count, on a limited basis, towards the intensive rehabilitation therapy requirement in IRFs when the medical necessity is well-documented by the rehabilitation physician in the medical record and is ordered by the rehabilitation physician as part of the overall plan of care for the patient.

Response: As we did not propose any changes to the IRF coverage requirements in § 412.622(a)(3), (4), and (5) that would affect any of the requirements described in chapter 1, section 110 of the Medicare Benefit Policy Manual (Pub. L. 100–02), this comment is outside the scope of the proposed rule. However, as we have indicated previously in the FY 2012 IRF PPS final rule (76 FR 47836 at 47883), we do not believe that recreational therapy services should replace the provision of the 4 core skilled therapy services (physical therapy, occupational therapy, speech-language therapy, and prosthetics/orthotics). Thus, we believe it should be left to each individual IRF to determine whether offering recreational therapy is the best way to achieve the desired patient care outcomes. As we have stated previously, recreational therapy is a covered service in IRFs when the medical necessity is well-documented by the rehabilitation physician in the medical record and is ordered by the rehabilitation physician as part of the overall plan of care for the patient. Recreational therapy may be offered as an additional service above and beyond the core skilled therapy services used to demonstrate the provision of an intensive rehabilitation therapy program, but may not replace one of these therapies.

Comment: One commenter requested that we consider a new model of payment for post-acute care services, such as the Continuing Care Hospital (CCH) model, that would pay based on the needs of the patient rather than the setting in which the care is provided.

This commenter urged us to pilot test the CCH idea.

Response: As we did not propose any new payment models for post-acute care services in the FY 2014 IRF PPS proposed rule (78 FR 26880), this comment is outside the scope of this rule. However, we appreciate the commenter's suggestions, and we note that on May 15, 2013, CMS announced a second round of Health Care Innovation Awards. Under this announcement, we will spend up to $1 billion for awards and evaluation of projects from across the country that test new payment and service delivery models that will deliver better care and lower costs for Medicare, Medicaid, and Children's Health Insurance Program (CHIP) enrollees. In addition, we commenced the Bundled Payments for Care Improvement Initiative, whereby organizations will enter into payment arrangements that include financial and performance accountability for episodes of care. These models may lead to higher quality, more coordinated care at a lower cost to Medicare. In one of the model designs being tested (referred to as ''Model 3'' at *http://innovation.cms.gov/initiatives/BPCI-Model-3*), the episode of care will be triggered by an acute care hospital stay and will begin at initiation of post-acute care services with a participating skilled nursing facility, inpatient rehabilitation facility, long-term care hospital or home health agency.

Comment: Several commenters requested that we use the electronic signature guidelines provided in the Medicare Program Integrity Manual to allow the use of electronic signatures for all required documentation, including for the rehabilitation physician's review and concurrence with the preadmission screening requirements under the IRF coverage requirements in 412.622(a)(3)(i).

Response: As we did not propose any changes to the regulations in § 412.622(a)(3)(i) in the May 8, 2013 proposed rule (78 FR 26880), this comment in outside the scope of this final rule. However, we have provided specific guidance on the use of electronic signatures for documentation of the rehabilitation physician's review and concurrence with the IRF preadmission screening requirements, which can be downloaded from the IRF PPS Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Downloads/ElecSysClar.pdf.*

XVI. Provisions of the Final Regulations

In this final rule, we are adopting the provisions set forth in the FY 2014 IRF PPS proposed rule (78 FR 26880), except as noted elsewhere in the preamble. Specifically:

A. Payment Provision Changes

- We will update the FY 2014 IRF PPS relative weights and average length of stay values using the most current and complete Medicare claims and cost report data in a budget-neutral manner, as discussed in section IV of this final rule.
- We will update the FY 2014 IRF PPS facility-level adjustment factors, using the most current and complete Medicare claims and cost report data with an enhanced estimation methodology, in a budget-neutral manner, as discussed in section V of this final rule.
- We will update the FY 2014 IRF PPS payment rates by the market basket increase factor, based upon the most current data available, with a 0.3 percentage point reduction as required by sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(iii) of the Act and a productivity adjustment required by section 1886(j)(3)(C)(ii)(I) of the Act, as described in section VI of this final rule.
- We will indicate the Secretary's Final Recommendation for updating IRF PPS payments for FY 2014, in accordance with the statutory requirements, as described in section VI of this final rule.
- We will update the FY 2014 IRF PPS payment rates by the FY 2014 wage index and the labor-related share in a budget-neutral manner, as discussed in section VI of this final rule.
- We will calculate the final IRF Standard Payment Conversion Factor for FY 2014, as discussed in section VI of this final rule.
- We will update the outlier threshold amount for FY 2014, as discussed in section VII of this final rule.
- We will update the cost-to-charge ratio (CCR) ceiling and urban/rural average CCRs for FY 2014, as discussed in section VII of this final rule.
- We will adopt revisions to the list of eligible ICD–9–CM diagnosis codes that meet the presumptive compliance criteria, with a one-year delayed implementation date, as discussed in section VIII of this final rule.
- We will adopt non-quality-related revisions to IRF–PAI sections effective October 1, 2014, as discussed in section IX of this final rule.
- We will adopt revisions and updates to quality measures and reporting requirements under the quality reporting program for IRFs in accordance with section 1886(j)(7) of the Act, effective October 1, 2014, as discussed in section XIV of this final rule.

B. Revisions to Existing Regulation Text

In this final rule, we will make the following revisions to the existing regulations:

- We will revise § 412.25(a)(1)(iii) to specify a minimum required number of beds that are not excluded from the inpatient prospective payment system (IPPS) for a hospital that has an IRF unit, with a one-year delayed implementation date to give providers an opportunity to comply with the requirements, as described in section XI of this final rule.
- We will make technical corrections to § 412.130, to reflect prior changes to the regulations at § 412.29 and § 412.30 that we made in the FY 2012 IRF PPS final rule (76 FR 47836), as described in section X of this final rule.
- We will make clarifications to § 412.630, to reflect the scope of section 1886(j)(8) of the Act, as described in section XII of this final rule.
- We will revise § 412.29(d), to clarify that Medicare requires the rehabilitation physician's review and concurrence on the preadmission screening for Medicare Part A Fee-for-Service patients only, as described in section XIII of this final rule.

XVII. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 30-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 Paperwork Reduction Act of 1995 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.

This final rule does not impose any new information collection requirements as outlined in the regulation text. However, this final rule does make reference to associated information collections that are not discussed in the regulation text contained in this document. The

following is a discussion of these information collections, some of which have already received OMB approval.

A. ICRs Regarding IRF QRP

As stated in section XIV. of this final rule, we are adopting one new measure for use in the IRF QRP which will affect the increase factor for FY 2016. This quality measure is: Influenza Vaccination Coverage among Healthcare Personnel (NQF #0431). We are also adopting 2 new measures that will affect the increase factor for FY 2017. The first is an All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from Inpatient Rehabilitation Facilities. This measure is a claims-based measure that does not require submission of data by IRF providers. In addition, we are adopting the Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay) (NQF #0680) measure. Finally, we are replacing a non-risk adjusted application of an NQF-endorsed pressure ulcer measure, in which only numerator and denominator data is collected, to use the NQF-endorsed version of this measure ''Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay)'' (NQF #0678), which is a risk-adjusted measure. Each of these measures will be collected in the manner described below:

1. Influenza Vaccination Coverage Among Healthcare Personnel (NQF #0431)

In section XIV. of this final rule, we are adopting the new measure, Influenza Vaccination Coverage among Healthcare Personnel (NQF #0431) to the IRF QRP. IRFs will be required to collect data related to the number of healthcare personnel working at a facility who have been vaccinated against the influenza virus during a given influenza vaccination season. The CDC has determined that the influenza vaccination season begins on October 1st (or when the vaccine becomes available) and ends on the following March 31st each year. This measure requires that the provider submit only one report to NHSN by the data submission deadline of May 15 following the close of the data collection period each year.

It has become a common practice for healthcare facilities, including IRFs, to promote vaccination of employees for the influenza virus and to keep records of which of their staff members received this vaccination each year. Therefore, we do not believe that IRFs will incur any additional burden related to the collection of the data for this measure.

We anticipate that it will take approximately 15 minutes to prepare and transmit the required data for this measure to the CDC each year. The reporting of the data for this measure can be done while the provider is logged onto NHSN for the purpose of entering their CAUTI measure data. We believe that this task can be completed by an administrative person such as a Medical Secretary/Medical Data Entry Clerk. The average hourly wage for Medical Records or Health Information Technicians is $15.55.[27] We estimate that the annual cost to each IRF for the reporting of the staff influenza measure will be $3.89.[28] The annual cost across the 1161 IRFs in the U.S. that are reporting data to CMS is estimated to be $4,516.[29]

2. All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from Inpatient Rehabilitation Facilities

As stated in section XIV. of this final rule, data for this measure will be collected from Medicare claims and therefore will not add any additional reporting burden for IRFs.

3. Percent of Residents or Patients with Pressure Ulcers that are New or Have Worsened (Short-Stay) (NQF #0678)

In section XIV of this final rule, we are adopting the NQF-endorsed version of the measure titled ''Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay)'' (NQF #0678), affecting the FY 2017 annual increase factor. To support the standardized collection and calculation of this quality measure, we are modifying the current Inpatient Rehabilitation Facility-Patient Assessment Instrument (IRF–PAI) by replacing the current pressure ulcer items with data elements similar or identical to those collected through the Minimum Data Set 3.0 (MDS 3.0) used in nursing homes. By building upon preexisting resources, we intend to reduce administrative burden related to data collection and submission. We anticipate that the initial setup and acclimation to pressure ulcer data collection will have already occurred with the adoption of the pressure ulcer measure for the IRF QRP for the FY 2014 annual increase factor. Therefore, we believe the transition to reporting similar as well as additional data elements for this measure will be less burdensome.

We expect that the admission and discharge pressure ulcer data will be collected by a clinician such as an RN because the assessment and staging of pressure ulcers requires a high degree of clinical judgment and experience. We estimate that it will take approximately 10 minutes of time by the RN to perform the admission pressure ulcer assessment. We further estimate that it will take an additional 15 minutes of time to complete the discharge pressure ulcer assessment. We expect that during these time periods, the RN would be engaged in the collection of data for the purpose of the IRF QRP and would not be engaged in the performance of routine patient care.

We estimate that there are 359,000 IRF–PAI submissions per year[30] and that there are 1161 IRFs in the U.S. reporting quality data to CMS. Based on these figures, we estimate that each IRF will submit approximately 309 IRF–PAIs per year or 26 IRF–PAIs per month.[31] Assuming that each IRF–PAI submission requires 25 minutes of time by an RN at an average hourly wage of $33.23,[32] the yearly cost to each IRF would be $4,278.36[33] and the annualized cost across all IRFs would be $4,967,176.[34]

We also expect that most IRFs will use administrative personnel, such as a medical secretary or medical data entry clerk, to perform the task of entering the IRF–PAI pressure ulcer assessment data into their electronic health record (EHR) system and/or the CMS JIRVEN program. We estimate that this data entry task will take no more than 3 minutes for each IRF–PAI record or 15.45 hours for each IRF annually or

[27] According to the U.S. Bureau of Labor Statistics, the mean hourly wage for a Medical Records & Health Information Technician is $15.55. See: *http://www.bls.gov/ooh/healthcare/medical-records-and-health-information-technicians.htm.*

[28] 15 minutes Administrative staff time to collect and report staff influenza measure @ $15.55 per hour = $3.9889 per IRF per year.

[29] At the time of the writing of this rule, there were 1161 IRFs reporting quality data to CMS. ($3.9889 per IRF per year × 1161 IRFs in U.S. = $4,621516).

[30] MedPAC, A Data Book: Health Care Spending and the Medicare Program (June 2012), *http://www.medpac.gov/chapters/Jun12DataBookSec8.pdf.*

[31] 359,000 IRF–PAIs per all IRFs per year/1161 IRFs in U.S. = 309 IRF–PAIs per each IRF per year.

309 IRF–PAI reports per IRF per year/12 months per year = 26 IRF–PAI reports per each IRF per year.

[32] According to the U.S. Bureau of Labor Statistics, the mean hourly wage for a Registered Nurse is $33.23. (See *http://www.bls.gov/oes/2011/may/oes291111.htm*).

[33] 25 minutes × 309 IRF–PAI assessments per each IRF per year = 7,725 minutes per each IRF per year.

7,725 minutes per each IRF per year/60 minutes per hour = 128.75 hours per each IRF per year.

128.75 hours per year × $33.23 per hour = $4,278.36 nursing wages per each IRF per year.

[34] $4,278.36 × 1161 IRF providers = $4,967,176 per all IRFs per year.

17,937 hours across all IRFs. As noted above, the average hourly wage for a Medical Records & Health Information Technician is $15.55. As we noted above, there are approximately 359,000 IRF–PAI submissions per year and 1161 IRFs reporting quality data to CMS. Given this wage information, the estimated total annual cost across all reporting IRFs for the time required for entry of pressure ulcer data into the IRF–PAI record is $278,930. We further estimate the average yearly cost to each individual IRF to be $240.25.

We estimate that the combined annualized time burden related to the pressure ulcer data item set for work performed, by the both clinical and administrative staff will be 144.20 hours for each individual IRF and 167,416 hours across all IRFs. The total estimated annualized cost for collection and submission of pressure ulcer data is $4,518.61 for each IRF and $5,246,106 across all IRFs. We estimate the cost for each pressure ulcer submission to be $14.61.

4. Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay) (NQF #0680)

In section XIV. of this final rule, we are adding the measure, Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay) (NQF #0680) to the IRF QRP. We further are adding a new set of standardized data elements now used in the MDS 3.0 to the IRF–PAI to collect the data required for this measure.

IRFs are already required to complete and transmit certain IRF–PAI data on all Medicare Part A Fee-for-Service and Medicare Part C (Medicare Advantage) patients to receive payment from Medicare. By building upon preexisting resources, we intend to reduce administrative burden related to data collection and submission. We anticipate that the initial setup and acclimation to data collection through the IRF–PAI for purposes of reporting IRF quality measure data will have already occurred with the adoption of the Pressure Ulcer measure for the IRF QRP for the FY 2014 increase factor. Therefore, we believe the transition to reporting an additional measure via the IRF–PAI may be less burdensome.

We estimate that completion of the patient influenza measure item set will take approximately 5 minutes to complete. The patient influenza item set consists of three items (questions). Each item is straightforward and does not require physical assessment for completion. We estimate that it will take approximately 0.7 minutes to complete each item, or 2.1 minutes to complete the entire item set. However, in some cases, the person completing this item set may need to consult the patient's medical record to obtain data about the patient's influenza vaccination. Therefore, we have allotted 1.6 minutes per item or a total of 5 minutes to complete the item set.

The IRF staff will be required to perform a full influenza assessment only during the influenza vaccination season. The CDC defines that influenza vaccination season as the time period from October 1st (or when the vaccine becomes available) through March 31 each year. From April 1st through September 30th, IRFs are not required to perform full influenza screening and may skip to the next item set after checking the selection which indicates that the patient's IRF stay occurred outside of the influenza vaccination season. Our time estimate reflects the averaged amount of time necessary to complete the influenza item set both during and outside the influenza vaccination season.

We anticipate that the patient influenza item set will be completed by a clinician such an RN, while completing the Quality Indicator section of the IRF–PAI. It is most appropriate for an RN to complete the influenza item set because it involves performing a skilled assessment to determine, from a patient's records, whether the patient has received a vaccination and, if not, to discuss with the patient any medications or other related topics such as medication allergies, other vaccinations that the patient may have had, and any contraindications that might exist for receiving the influenza vaccination. The nurse has knowledge and experience to determine the relevance of this information to the patient influenza items and also to determine if the patient should be given the influenza vaccination.

As noted above, we estimate that it will take approximately 5 minutes to complete the patient influenza measure item set. We have also noted above that there are approximately 359,000 IRF–PAIs completed annually across all 1161 IRFs that report IRF quality data to CMS. This breaks down to approximately 309 IRF–PAIs completed by each IRF yearly.[35] We estimate that the annual time burden for reporting the patient influenza vaccination measure data is 29,896 hours across all IRFs in the U.S. and 26 hours for each individual IRF. According to the U.S. Bureau of Labor, the hourly wage for a Registered Nurse is $33.23. Taking all of the above information into consideration, we estimate the annual cost across all IRFs for the submission of the patient influenza measure data to be $993,433. We further estimate the cost for each individual IRF to be $855.67. A summary of the public comments received on our burden estimate for this measure and our responses to those comments are discussed below.

Comment: The additional burden of data collection (that is, seeking information directly from the patient or by searching through the paper medical record) must not take away from limited resources in these facilities which are needed to provide direct care.

Response: We agree that there will be some additional burden added because IRFs will be required to check to see if the patient received the influenza vaccination prior to admission to the IRF. However, we believe that the burden will be minimal.

Most patients are transferred to IRFs from an acute care facility. If the patient received the influenza vaccination while in the acute care facility, there should be several places where the information about the administration of this vaccination can be quickly and easily located. The influenza vaccination is a medication, so the Medication Administration Record would be one place that this information could be located. Also, if this vaccination was ordered by a physician or the acute care facility had standing orders for the administration of the vaccination, then the Physicians Order section of the chart is another place that is likely to contain the influenza vaccination information.

Comment: One commenter suggested that CMS' estimates on the burden caused by the implementation of the two vaccination measures (Influenza Vaccination Coverage among Healthcare Personnel (NQF #0431) and Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay) (NQF#0680) are inaccurate because they do not encompass changes that must be made to its billing software, electronic medical records, or administrative processes.

Response: When making a burden estimate, we estimate only those activities and costs that are common to a majority of providers and which can be fairly and accurately estimated across all IRFs. Unfortunately, costs related to changes to billing and electronic medical record software, or

[35] 359,000 IRF–PAI reports per all IRFs per year/ 1161 IRFs in U.S. = 309 IRF–PAI reports per each IRF per year.

administrative processes are costs that are so variable among different IRFs we are not able to make an accurate estimate of these costs that can be applied across all providers.

Costs for updates to electronic medical records are extremely variable and will depend on many factors such as the manufacturer of the electronic medical records software; whether there is a warranty that covers updates; whether the IRF has a service contract which covers updates; who the IRF hires to perform upgrades to its system; where the IRF is geographically located; or whether the cost is incurred by a large corporation that owns many IRFs or the IRF is a solely owned and operated facility. In regard to costs for changes to administrative processes, these costs are also difficult to define or quantify as they are equally variable, if not more so than costs related to changes to electronic record systems.

Even though it was not reflected in the burden estimate, CMS does recognize that many IRFs will incur costs for changes that will be required to billing software, electronic medical records, or administrative processes. Some of these changes are required as a result of the IRF QRP proposals that we are finalizing in this final rule. However, we believe that some of these costs are also attributable to non-quality related proposals that are being finalized in this rule.

B. ICRs Regarding Non-Quality Related Changes to the IRF–PAI

We will revise several items on the IRF–PAI to provide greater clarity for providers. The changes include updating several items regarding the response options available to providers. Additionally, we are removing several items that we believe are unnecessary for providers to continue documenting on the IRF–PAI since those items are already being documented in the patients' medical record. We are also adding several items, such as a signature page, to fulfill providers' request to have an organized way to document who has assessed the patient and when that assessment took place. We do not estimate any additional burden for IRFs to complete the IRF–PAI as a result of these changes. We estimate the time that will be needed to complete the new non-quality related proposed items, equals the time that was needed to complete the previous non-quality related items. When the original burden estimates were completed for the IRF–PAI, we estimated that the proposed deletion of the non-quality related items would take approximately 3 minutes to complete. Thus, removing these items the IRF–PAI would decrease the total estimated burden of completing the non-quality related portions of the IRF–PAI by 3 minutes. However, we estimate that it will take about 3 minutes to complete the new non-quality related items that we are proposing to add. Therefore, we estimate no net change in the amount of time associated with completing the non-quality related portions of the IRF–PAI and that the burden for completing these portions of the IRF–PAI will not change.

We did not receive any comments specifically on the information collection requirements regarding the non-quality related changes to the IRF–PAI.

We will be submitting a revision to the current IRF–PAI collection of information approval under (OMB control number 0938–0842) for OMB review and approval.

If you comment on these information collection and recordkeeping requirements, please do either of the following:

1. Submit your comments electronically as specified in the **ADDRESSES** section of the proposed rule; or

2. Submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, *Attention:* CMS Desk Officer, CMS–1448–P, *Fax:* (202) 395–6974; or, *Email: OIRA_submission@omb.eop.gov.*

XVIII. Regulatory Impact Analysis

A. Statement of Need

This final rule updates the IRF prospective payment rates for FY 2014 as required under section 1886(j)(3)(C) of the Act. It responds to section 1886(j)(5) of the Act, which requires the Secretary to publish in the **Federal Register** on or before the August 1 that precedes the start of each fiscal year, the classification and weighting factors for the IRF PPS's case-mix groups and a description of the methodology and data used in computing the prospective payment rates for that fiscal year.

This rule implements sections 1886(j)(3)(C) and (D) of the Act. Section 1886(j)(3)(C)(ii)(I) of the Act requires the Secretary to apply a multi-factor productivity adjustment to the market basket increase factor, and to apply other adjustments as defined by the Act. The productivity adjustment applies to FYs from 2012 forward. The other adjustments apply to FYs 2010 through 2019.

This rule also adopts some policy changes within the statutory discretion afforded to the Secretary under section 1886(j) of the Act. We will revise the list of diagnosis codes that are eligible under the presumptive compliance method of calculating an IRF's compliance percentage under the ''60 percent rule'' effective for compliance review periods beginning on or after October 1, 2014 (a one-year delay), update the IRF facility-level adjustment factors, revise sections of the Inpatient Rehabilitation Facility-Patient Assessment Instrument, revise requirements for acute care hospitals that have IRF units beginning on or after October 1, 2014 (a one-year delay), clarify the IRF regulation text regarding limitation of review, and revise and update quality measures under the IRF quality reporting program. We believe that the policy changes will enhance the clarity, accuracy, and fairness of the IRF PPS.

B. Overall Impacts

We have examined the impacts of this final rule as required by Executive Order 12866 (September 30, 1993, Regulatory Planning and Review), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (September 19, 1980, Pub. L. 96–354) (RFA), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 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). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. A regulatory impact analysis (RIA) must be prepared for a major final rule with economically significant effects ($100 million or more in any one year). We estimate the total impact of the policy updates described in this final rule by comparing the estimated payments in FY 2014 with those in FY 2013. This analysis results in an estimated $170 million increase for FY 2014 IRF PPS payments. As a result, this final rule is designated as economically ''significant'' under section 3(f)(1) of Executive Order 12866, and hence a major rule under the Congressional Review Act. Also, the rule has been reviewed by OMB.

The Regulatory Flexibility Act (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, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most IRFs and most other providers and suppliers are small entities, either by having revenues of $7 million to $34.5 million or less in any 1 year depending on industry classification, or by being nonprofit organizations that are not dominant in their markets. (For details, see the Small Business Administration's final rule that set forth size standards for health care industries, at 65 FR 69432 at *http://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf,* effective March 26, 2012.) Because we lack data on individual hospital receipts, we cannot determine the number of small proprietary IRFs or the proportion of IRFs' revenue that is derived from Medicare payments. Therefore, we assume that all IRFs (an approximate total of 1,100 IRFs, of which approximately 60 percent are nonprofit facilities) are considered small entities and that Medicare payment constitutes the majority of their revenues. The Department of Health and Human Services generally uses a revenue impact of 3 to 5 percent as a significance threshold under the RFA. As shown in Table 18, we estimate that the net revenue impact of this final rule on all IRFs is to increase estimated payments by approximately 2.3 percent. However, we find that certain categories of IRF providers would be expected to experience revenue impacts in the 3 to 5 percent range. We estimate a 5.0 percent overall impact for teaching IRFs with resident to average daily census ratios of 10 to 19 percent, a 10.1 percent overall impact for teaching IRFs with a resident to average daily census ratio greater than 19 percent, and a 4.1 percent overall impact for IRFs with a DSH patient percentage of 0 percent. As a result, we anticipate this final rule adoptes a net positive impact on a substantial number of small entities. Medicare fiscal intermediaries, Medicare Administrative Contractors, and carriers are not considered to be small entities. Individuals and States are not included in the definition of a small entity.

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 603 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. As discussed in detail below, the rates and policies set forth in this final rule will not have a significant impact (not greater than 3 percent) on rural hospitals based on the data of the 167 rural units and 18 rural hospitals in our database of 1,134 IRFs for which data were available.

Section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–04, enacted on March 22, 1995) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any one year of $100 million in 1995 dollars, updated annually for inflation. In 2013, that threshold level is approximately $141 million. This final rule will not impose spending costs on State, local, or tribal governments, in the aggregate, or by the private sector, of greater than $141 million.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a final rule that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has federalism implications. As stated above, this final rule will not have a substantial effect on State and local governments, preempt state law, or otherwise have a federalism implication.

C. Detailed Economic Analysis

1. Basis and Methodology of Estimates

This final rule sets forth policy changes and updates to the IRF PPS rates contained in the FY 2013 notice (77 FR 44618). Specifically, this final rule updates the CMG relative weights and average length of stay values, the facility-level adjustment factors, the wage index, and the outlier threshold for high-cost cases. This final rule also applies a MFP adjustment to the FY 2014 RPL market basket increase factor in accordance with section 1886(j)(3)(C)(ii)(I) of the Act, and a 0.3 percentage point reduction to the FY 2014 RPL market basket increase factor in accordance with sections 1886(j)(3)(C)(ii)(II) and (D)(iii) of the Act. Further, this final rule contains changes to the list of ICD–9–CM codes that are used in the 60 percent rule presumptive methodology. Since these changes are being made with a one-year delayed implementation date, for compliance review periods beginning on or after October 1, 2014, no financial impacts will accrue until FY 2015 from these changes. In addition, section XIV of this rule discusses the first implementation (in FY 2014) of the required 2 percentage point reduction of the market basket increase factor for any IRF that fails to meet the IRF quality reporting requirements, in accordance with section 1886(j)(7) of the Act.

We estimate that the impact of the changes and updates described in this final rule will be a net estimated increase of $170 million in payments to IRF providers. This estimate does not include the estimated impacts of the changes to the list of ICD–9–CM codes that are used in the 60 percent rule presumptive compliance (as discussed below), which are effective for compliance review periods on or after October 1, 2014, or the estimated impacts of the implementation (in FY 2014) of the required 2 percentage point reduction of the market basket increase factor for any IRF that fails to meet the IRF quality reporting requirements (as discussed below). The impact analysis in Table 18 of this final rule represents the projected effects of the updates to IRF PPS payments for FY 2014 compared with the estimated IRF PPS payments in FY 2013. We determine the effects by estimating payments while holding all other payment variables constant. We use the best data available, but we do not attempt to predict behavioral responses to these changes, and we do not make adjustments for future changes in such variables as number of discharges or case-mix.

We note that certain events may combine to limit the scope or accuracy of our impact analysis, because such an analysis is future-oriented and, thus, susceptible to forecasting errors because of other changes in the forecasted impact time period. Some examples could be legislative changes made by the Congress to the Medicare program that would impact program funding, or changes specifically related to IRFs. Although some of these changes may not necessarily be specific to the IRF PPS, the nature of the Medicare program is such that the changes may interact, and the complexity of the interaction of these changes could make it difficult to predict accurately the full scope of the impact upon IRFs.

In updating the rates for FY 2014, we are adopting standard annual revisions described in this final rule (for example, the update to the wage and market basket indexes used to adjust the Federal rates). We are also implementing a productivity adjustment to the FY 2014 RPL market basket increase factor in accordance with section 1886(j)(3)(C)(ii)(I) of the Act, and

a 0.3 percentage point reduction to the FY 2014 RPL market basket increase factor in accordance with sections 1886(j)(3)(C)(ii)(II) and (D)(iii) of the Act. We estimate the total increase in payments to IRFs in FY 2014, relative to FY 2013, will be approximately $170 million.

This estimate is derived from the application of the FY 2014 RPL market basket increase factor, as reduced by a productivity adjustment in accordance with section 1886(j)(3)(C)(ii)(I) of the Act, and a 0.3 percentage point reduction in accordance with sections 1886(j)(3)(C)(ii)(II) and (D)(iii) of the Act, which yields an estimated increase in aggregate payments to IRFs of $135 million. Furthermore, there is an additional estimated $35 million increase in aggregate payments to IRFs due to the update to the outlier threshold amount. Outlier payments are estimated to increase from approximately 2.5 percent in FY 2013 to 3.0 percent in FY 2014. Therefore, summed together, we estimate that these updates will result in a net increase in estimated payments of $170 million from FY 2013 to FY 2014.

The effects of the updates that impact IRF PPS payment rates are shown in Table 18. The following updates that affect the IRF PPS payment rates are discussed separately below:

- The effects of the update to the outlier threshold amount, from approximately 2.5 percent to 3.0 percent of total estimated payments for FY 2014, consistent with section 1886(j)(4) of the Act.
- The effects of the annual market basket update (using the RPL market basket) to IRF PPS payment rates, as required by section 1886(j)(3)(A)(i) and sections 1886(j)(3)(C) and (D) of the Act, including a productivity adjustment in accordance with section 1886(j)(3)(C)(i)(I) of the Act, and a 0.3 percentage point reduction in accordance with sections 1886(j)(3)(C) and (D) of the Act.
- The effects of applying the budget-neutral labor-related share and wage index adjustment, as required under section 1886(j)(6) of the Act.
- The effects of the budget-neutral changes to the CMG relative weights and average length of stay values, under the authority of section 1886(j)(2)(C)(i) of the Act.
- The effects of the updates to the Rural, LIP, and Teaching Status adjustment factors, using an updated methodology.
- The total change in estimated payments based on the FY 2014 payment changes relative to the estimated FY 2013 payments.

2. Description of Table 18

Table 18 categorizes IRFs by geographic location, including urban or rural location, and location with respect to CMS's 9 census divisions (as defined on the cost report) of the country. In addition, the table divides IRFs into those that are separate rehabilitation hospitals (otherwise called freestanding hospitals in this section), those that are rehabilitation units of a hospital (otherwise called hospital units in this section), rural or urban facilities, ownership (otherwise called for-profit, non-profit, and government), by teaching status, and by disproportionate share patient percentage (DSH PP). The top row of Table 18 shows the overall impact on the 1,134 IRFs included in the analysis.

The next 12 rows of Table 18 contain IRFs categorized according to their geographic location, designation as either a freestanding hospital or a unit of a hospital, and by type of ownership; all urban, which is further divided into urban units of a hospital, urban freestanding hospitals, and by type of ownership; and all rural, which is further divided into rural units of a hospital, rural freestanding hospitals, and by type of ownership. There are 949 IRFs located in urban areas included in our analysis. Among these, there are 733 IRF units of hospitals located in urban areas and 216 freestanding IRF hospitals located in urban areas. There are 185 IRFs located in rural areas included in our analysis. Among these, there are 167 IRF units of hospitals located in rural areas and 18 freestanding IRF hospitals located in rural areas. There are 302 for-profit IRFs. Among these, there are 263 IRFs in urban areas and 39 IRFs in rural areas. There are 688 non-profit IRFs. Among these, there are 571 urban IRFs and 117 rural IRFs. There are 144 government-owned IRFs. Among these, there are 115 urban IRFs and 29 rural IRFs.

The remaining four parts of Table 18 show IRFs grouped by their geographic location within a region, by teaching status, and by DSH PP. First, IRFs located in urban areas are categorized with respect to their location within a particular one of the nine Census geographic regions. Second, IRFs located in rural areas are categorized with respect to their location within a particular one of the nine Census geographic regions. In some cases, especially for rural IRFs located in the New England, Mountain, and Pacific regions, the number of IRFs represented is small. IRFs are then grouped by teaching status, including non-teaching IRFs, IRFs with an intern and resident to average daily census (ADC) ratio less than 10 percent, IRFs with an intern and resident to ADC ratio greater than or equal to 10 percent and less than or equal to 19 percent, and IRFs with an intern and resident to ADC ratio greater than 19 percent. Finally, IRFs are grouped by DSH PP, including IRFs with zero DSH PP, IRFs with a DSH PP less than 5 percent, IRFs with a DSH PP between 5 and less than 10 percent, IRFs with a DSH PP between 10 and 20 percent, and IRFs with a DSH PP greater than 20 percent.

The estimated impacts of each policy described in this final rule to the facility categories listed above are shown in the columns of Table 18. The description of each column is as follows:

- Column (1) shows the facility classification categories described above.
- Column (2) shows the number of IRFs in each category in our FY 2012 analysis file.
- Column (3) shows the number of cases in each category in our FY 2012 analysis file.
- Column (4) shows the estimated effect of the adjustment to the outlier threshold amount.
- Column (5) shows the estimated effect of the update to the IRF PPS payment rates, which includes a productivity adjustment in accordance with section 1886(j)(3)(C)(ii)(I) of the Act, and a 0.3 percentage point reduction in accordance with sections 1886(j)(3)(C)(ii)(II) and (D)(iii) of the Act.
- Column (6) shows the estimated effect of the update to the IRF labor-related share and wage index, in a budget-neutral manner.
- Column (7) shows the estimated effect of the update to the CMG relative weights and average length of stay values, in a budget-neutral manner.
- Column (8) shows the estimated effect of the update to the facility adjustment factors using an updated methodology, in a budget-neutral manner.
- Column (9) compares our estimates of the payments per discharge, incorporating all of the proposed policies reflected in this final rule for FY 2014 to our estimates of payments per discharge in FY 2013.

The average estimated increase for all IRFs is approximately 2.3 percent. This estimated net increase includes the effects of the RPL market basket increase factor for FY 2014 of 2.6 percent, reduced by a productivity adjustment of 0.5 percentage point in accordance with section 1886(j)(3)(C)(ii)(I) of the Act, and further reduced by 0.3 percentage point in accordance with sections

1886(j)(3)(C)(ii)(II) and (D)(iii) of the Act. It also includes the approximate 0.5 percent overall estimated increase in estimated IRF outlier payments from the update to the outlier threshold amount. Since we are making the updates to the IRF wage index, the facility-level adjustments, and the CMG relative weights in a budget-neutral manner, they will not be expected to affect total estimated IRF payments in the aggregate. However, as described in more detail in each section, they will be expected to affect the estimated distribution of payments among providers.

TABLE 18—IRF IMPACT TABLE FOR FY 2014

[Columns 4–9 in %]

Facility classification	Number of IRFs	Number of cases	Outlier	Adjusted market basket increase factor for FY 2014 [1]	FY 2014 CBSA wage index and labor-share	CMG	Facility adjust.	Total percent change
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Total	1,134	382,756	0.5	1.8	0.0	0.0	0.0	2.3
Urban unit	733	181,133	0.7	1.8	0.0	0.0	0.2	2.8
Rural unit	167	27,098	0.6	1.8	0.1	0.0	−2.4	0.0
Urban hospital	216	168,609	0.2	1.8	−0.1	0.0	0.3	2.1
Rural hospital	18	5,916	0.1	1.8	−0.1	−0.1	−3.0	−1.3
Urban For-Profit	263	143,162	0.2	1.8	−0.2	0.0	0.2	2.0
Rural For-Profit	39	7,728	0.3	1.8	0.1	0.0	−2.9	−0.7
Urban Non-Profit	571	178,424	0.6	1.8	0.2	0.0	0.2	2.8
Rural Non-Profit	117	20,578	0.5	1.8	0.0	0.0	−2.4	−0.1
Urban Government	115	28,156	0.7	1.8	−0.2	0.0	0.3	2.7
Rural Government	29	4,708	0.7	1.8	0.2	0.0	−2.6	0.1
Urban	949	349,742	0.5	1.8	0.0	0.0	0.2	2.5
Rural	185	33,014	0.5	1.8	0.0	0.0	−2.5	−0.2
Urban by Region								
Urban New England	32	16,779	0.3	1.8	0.7	0.0	0.0	2.8
Urban Middle Atlantic	140	59,466	0.4	1.8	0.0	0.0	0.7	2.9
Urban South Atlantic	130	62,557	0.3	1.8	−0.3	0.0	0.0	1.9
Urban East North Central	182	52,632	0.6	1.8	0.2	0.0	0.6	3.2
Urban East South Central	49	24,489	0.2	1.8	−0.8	0.0	0.4	1.7
Urban West North Central	73	18,097	0.6	1.8	0.5	0.0	−0.1	2.8
Urban West South Central	171	67,575	0.4	1.8	−0.1	0.0	0.3	2.4
Urban Mountain	73	23,459	0.6	1.8	−0.5	0.0	0.1	2.0
Urban Pacific	99	24,688	0.9	1.8	0.7	0.0	−0.9	2.5
Rural by Region								
Rural New England	6	1,400	0.8	1.8	−0.5	−0.1	−1.8	0.1
Rural Middle Atlantic	15	2,711	0.3	1.8	−0.2	0.0	−2.2	−0.3
Rural South Atlantic	24	5,624	0.3	1.8	0.1	0.0	−2.5	−0.3
Rural East North Central	32	5,595	0.5	1.8	0.3	0.0	−2.4	0.1
Rural East South Central	22	3,852	0.4	1.8	0.0	0.1	−2.7	−0.4
Rural West North Central	27	3,660	0.7	1.8	−0.7	0.0	−2.2	−0.4
Rural West South Central	48	9,130	0.4	1.8	0.4	0.0	−3.1	−0.6
Rural Mountain	7	664	1.2	1.8	0.2	0.1	−1.5	1.9
Rural Pacific	4	378	1.9	1.8	0.1	−0.1	−1.1	2.6
Teaching Status								
Non-teaching	1,018	334,415	0.4	1.8	0.0	0.0	−0.2	2.0
Resident to ADC less than 10%	65	32,238	0.5	1.8	0.1	0.0	0.6	3.0
Resident to ADC 10%–19%	39	14,504	0.8	1.8	0.1	0.0	2.3	5.0
Resident to ADC greater than 19%	12	1,599	0.6	1.8	0.3	0.0	7.1	10.1
Disproportionate Share Patient Percentage (DSH PP)								
DSH PP = 0%	38	7,859	1.1	1.8	0.2	0.0	1.0	4.1
DSH PP less than 5%	195	64,484	0.4	1.8	−0.1	0.0	0.8	2.9
DSH PP 5%–10%	323	123,384	0.3	1.8	−0.1	0.0	0.3	2.4
DSH PP 10%–20%	347	124,564	0.4	1.8	0.1	0.0	−0.1	2.2
DSH PP greater than 20%	231	62,465	0.7	1.8	0.0	0.0	−1.1	1.3

[1] This column reflects the impact of the RPL market basket increase factor for FY 2014 of 1.8 percent, which includes a market basket update of 2.6 percent, a 0.3 percentage point reduction in accordance with sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(iii) of the Act and a 0.5 percentage point reduction for the productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act.

3. Impact of the Update to the Outlier Threshold Amount

The estimated effects of the update to the outlier threshold adjustment are presented in column 4 of Table 18. In the July 30, 2012 FY 2013 IRF PPS notice (77 FR 44618), we used FY 2011 IRF claims data (the best, most complete data available at that time) to set the outlier threshold amount for FY 2013 so that estimated outlier payments would equal 3 percent of total estimated payments for FY 2013.

For this final rule, we are updating our analysis using FY 2012 IRF claims data and, based on this updated analysis, we estimate that IRF outlier payments as a percentage of total estimated IRF payments are 2.5 percent in FY 2013. We attribute this underpayment in IRF outliers for FY 2013 to the effects of the recently-implemented IRF outlier reconciliation policy (as outlined in Chapter 3, Section 140.2.8 of the Medicare Claims Processing Manual (Pub. 100–04) that we believe is causing a downward trend in IRF cost-to-charge ratios (CCR). We are seeing this downward trend in CCRs in all of the settings for which we implemented the outlier reconciliation policy. Thus, we are adjusting the outlier threshold amount in this final rule to set total estimated outlier payments equal to 3 percent of total estimated payments in FY 2014. The estimated change in total IRF payments for FY 2014, therefore, includes an approximate 0.5 percent increase in payments because the estimated outlier portion of total payments is estimated to increase from approximately 2.5 percent to 3 percent.

The impact of this outlier adjustment update (as shown in column 4 of Table 18) is to increase estimated overall payments to IRFs by about 0.5 percent. We estimate the largest increase in payments from the update to the outlier threshold amount to be 1.9 percent for rural IRFs in the Pacific region. We do not estimate that any group of IRFs will experience a decrease in payments from this update.

4. Impact of the Market Basket Update to the IRF PPS Payment Rates

The estimated effects of the market basket update to the IRF PPS payment rates are presented in column 5 of Table 18. In the aggregate the update will result in a net 1.8 percent increase in overall estimated payments to IRFs. This net increase reflects the estimated RPL market basket increase factor for FY 2014 of 2.6 percent, reduced by the 0.3 percentage point in accordance with sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(iii) of the Act, and further reduced by a 0.5 percentage point productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act.

5. Impact of the CBSA Wage Index and Labor-Related Share

In column 6 of Table 18, we present the effects of the budget-neutral update of the wage index and labor-related share. The proposed changes to the wage index and the labor-related share are discussed together because the wage index is applied to the labor-related share portion of payments, so the changes in the two have a combined effect on payments to providers. As discussed in section VI (C) of this final rule, we will decrease the labor-related share from 69.981 percent in FY 2013 to 69.494 percent in FY 2014.

In the aggregate, since these updates to the wage index and the labor-related share are applied in a budget-neutral manner as required under section 1886(j)(6) of the Act, we do not estimate that these proposed updates will affect overall estimated payments to IRFs. However, we estimate that these updates will have small distributional effects. For example, we estimate the largest increase in payments from the update to the CBSA wage index and labor-related share of 0.7 percent for urban IRFs in the New England and Pacific regions. We estimate the largest decrease in payments from the update to the CBSA wage index and labor-related share to be a 0.8 percent decrease for urban IRFs in the East South Central region.

6. Impact of the Update to the CMG Relative Weights and Average Length of Stay Values

In column 7 of Table 18, we present the effects of the budget-neutral update of the CMG relative weights and average length of stay values. In the aggregate, we do not estimate that these updates will affect overall estimated payments to IRFs. However, we do expect these updates to have small distributional effects. Freestanding rural hospitals will see a 0.1 decrease in payments as a result of these updates. The rural areas affected are New England and Pacific. The largest estimated increase in payments as a result of these updates is a 0.1 increase in the rural Mountain and East South Central regions.

7. Impact of the Updates to the Facility-Level Adjustments

In column 8 of Table 18, we present the effects of the budget-neutral updates to the IRF facility-level adjustment factors (the rural, LIP, and teaching status adjustment factors) for FY 2014. In the aggregate, we do not estimate that these updates will affect overall estimated payments to IRFs. However, we estimate that these updates will have distributional effects, as shown in Table 18. The largest estimated decrease in payments as a result of these updates is a 3.1 percent decrease to rural IRFs in the West South Central region. The largest estimated increase in payments as a result of these updates is a 10.1 percent increase for teaching IRFs with a resident to average daily census ratio greater than 19 percent.

8. Impact of the Refinements to the Presumptive Compliance Criteria Methodology

As discussed in section VIII of this final rule, we are changing the list of ICD–9–CM codes available to meet the presumptive compliance criteria. We believe that these changes will improve the accuracy and integrity of the IRF PPS by ensuring that the cases that qualify as meeting the 60 percent rule truly meet the requirements in 42 CFR 412.29(b). These changes will affect all 1,134 IRFs, as these facilities will need to change their coding practices to continue to meet the 60 percent compliance percentage using the presumptive methodology. However, we are implementing these changes with a one-year delayed effective date, so that these changes will be effective for compliance review periods beginning on or after October 1, 2014. Thus, any potential financial impacts of these policy changes will not accrue until FY 2015.

We estimate that the financial impact, in the absence of any behavioral responses to these changes on the part of providers, would be a decrease of 6.9 percent (or $520 million) in overall estimated payments to IRFs for FY 2015. We note that these estimates are unchanged from the ones we had noted in the proposed rule, even though we have decided to add some ICD–9–CM codes that we had proposed for deletion back onto the list of ICD–9–CM codes that would qualify a patient as meeting the 60 percent rule criteria. This is because we inadvertently used the wrong list of ICD–9–CM codes in our analysis for the proposed rule. Had we used the correct list of ICD–9–CM codes for the proposed rule analysis, our estimates of the financial impact of the proposals would have been $20 million (or 0.2%) higher than those presented in the proposed rule, and our estimates would therefore have reduced to $520 million (6.9 percent) for this final rule.

However, as we noted in the proposed rule, we believe that IRFs will be able to improve the specificity of their

coding practices, alter their admitting practices, meet the 60 percent compliance threshold under medical review, and make other modifications to their operations to continue to meet the 60 percent compliance threshold.

For example, we estimate that about 90 percent of the IRF cases that will potentially be affected by the final revisions to the presumptive methodology codes are affected by the removal of the non-specific codes. However, we have been careful to remove only those non-specific codes for which more specific codes for the same conditions will remain on the list of codes that meet the presumptive methodology. Thus, in all of these cases, we believe that the IRF will be able to switch to a more specific code for the same condition, leaving the IRF's admission practices and classification status unaffected.

About 1 percent of the cases that we estimate would be affected by the final revisions are affected by the Unilateral Upper Extremity Amputation codes, the Congenital Anomaly codes, and the Miscellaneous codes combined. Thus, we do not estimate that the removal of these code groups will have a significant effect on IRF admission or coding practices, or classification status.

Finally, approximately 9 percent of the cases that we estimate will be affected by the final revisions involve arthritis diagnoses. We estimate that the revisions in this category will have the largest potential effects on providers because, by the very nature of these revisions, IRFs would not have another arthritis code on the list to code instead. We estimate that about 14 percent of all IRF cases are coded with the arthritis codes that we are removing from the list, and in 11 percent of these cases, the arthritis code is the only code that would qualify the patient as meeting the 60 percent rule requirements. However, for the arthritis category of codes, we estimate that most of these cases will still be found to meet the 60 percent rule requirements under medical review, so we estimate that these revisions will lead to few if any IRF declassifications.

Historically, we have seen that IRFs adapt quickly to changes in the 60 percent rule, as evidenced by the rapid response to changes over time in the compliance threshold. Thus, we have every reason to believe that they will adapt quickly to the changes to the presumptive methodology list. In addition, the changes will not affect how many patients would ultimately be shown to meet the 60 percent rule criteria on medical review. For these reasons, we believe that our best estimate of the impact on IRFs of these changes is no net change in Medicare reimbursement payments. Instead, IRFs will quickly change their coding practices, admission practices, meet the 60 percent compliance threshold under medical review, and make other changes to their business practice to ensure that they continue to meet the 60 percent rule requirements; although we lack data to more precisely characterize the rule-induced costs, benefits and transfers that would be experienced by IRFs, their patients and other relevant entities, we note that the $520 million estimate appearing earlier in this section represents an upper bound (probably an extreme upper bound) on the costs that would be borne by IRFs.

We intend to closely monitor provider coding practices to these changes to the 60 percent rule in order to identify whether those patients that we envisioned would be served under the IRF PPS are counting toward the presumptive compliance percentage. We will also monitor whether these changes are having any unintended consequences in terms of limiting access to care.

Comment: One commenter requested that CMS make its impact analysis of the changes to the presumptive methodology public.

Response: We used the same methodology in the FY 2014 proposed and final rules to estimate the impacts of changes to the ICD–9–CM codes used in the presumptive methodology that we used in the May 7, 2004 to estimate the impacts of the modifications to the 60 percent rule, with one exception. A description of that methodology is included in the May 7, 2004 final rule (69 FR 25752 at 25770 through 25774). We deviated from this methodology in one respect. In this final rule, we report the estimated financial impact on IRF providers of the changes to the presumptive compliance method. In the May 7, 2004 final rule, however, we reported the estimated financial impact on Medicare's baseline (that is, the amount of savings that would be projected to accrue to the Medicare program from the policies that were finalized in the May 7, 2004 final rule). Thus, in the May 7, 2004 final rule, we estimated a net decrease in IRF admission, and then estimated that patients that were no longer treated in IRFs would be treated instead in another Medicare setting (such as a skilled nursing facility or home health care setting). We estimated the decrease in Medicare payments to IRFs, but added to that estimate the total estimated Medicare payments to the alternative Medicare settings in which the patients would have received care. Those estimates, therefore, represent the net savings to the Medicare program. In this final rule, we are only estimating the financial impacts on IRFs, so we do not add back in the payments for the patients treated in alternative settings.

9. Effects of Updates to the IRF QRP

This final rule sets forth a number of updates and several policy changes to the IRF Quality Reporting Program. Specifically, we are taking the following actions: (A) finalizing the use of the following measures for the IRF QRP: (1) Percent of Patients/Residents with Pressure Ulcers that are New or Worsened (NQF #0678); (2) Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay) (NQF #0680); (3) Influenza Vaccination Coverage among Healthcare Personnel (NQF #0431); (4) All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from Inpatient Rehabilitation Facilities Measure; (B) Adding new data items to the IRF–PAI to collect data for the patient influenza vaccination and pressure ulcer measures; (C) Re-numbering of Quality Indicator section of the IRF–PAI items, using a flexible numbering system; (D) finalizing our proposal to change data collection for all IRF–PAI based measures to a fiscal year basis; (E) Finalizing our proposal to impose quarterly data submission deadlines for all but one measure; (F) providing a discussion of the voluntary reconsideration process for IRFs that CMS finds to be out of compliance with the reporting requirements; (G) and a disaster waiver process.

We have based our assessment of the effects of this final rule on all of the actions described in the previous paragraph. One of the changes we have finalized is the adoption of a new pressure ulcer measure. Currently, the IRF QRP contains a pressure ulcer measure that is an application of an NQF-endorsed measure (Percent of Residents or Patients with Pressure Ulcers That Are New or Worsened (Short-Stay)'' (NQF #0678)) that we adopted in the FY 2012 IRF PPS final rule (76 FR 47836). That measure affects an IRF's annual increase factors up through the FY 2016 annual increase factor. We have now adopted the actual NQF-endorsed version of this measure, which will affect the IRF PPS increase factor for FY 2017 and subsequent years increase factors. We also made revisions to the pressure ulcer items on the IRF–PAI that providers will use to collect data for this measure.

IRFs will incur some financial impact from the use of the pressure ulcer

measure item set that will be incorporated into the IRF–PAI. We expect that the admission and discharge pressure ulcer data will be collected by a clinician such as a RN because the assessment and staging of pressure ulcers requires a high degree of clinical judgment and experience. We estimate that it will take approximately 10 minutes of time by the RN to perform the admission pressure ulcer assessment. We further estimate that it will take 15 minutes of time to complete the discharge pressure ulcer assessment. During these time periods, the RN would be engaged in the collection of data for the purpose of the IRF QRP and would not be performing patient care. An RN or clinician with a similar level of training and expertise should perform the pressure ulcer assessment and record this data on the IRF–PAI.

We believe use of the NQF-endorsed pressure ulcer measure will cause IRFs to incur additional annual financial burden in the amount of $4,518.61 and across all IRFs, $5,246,106. This burden is comprised of the clinical and administrative wages. The clinical wages are based on an average hourly wage rate of $33.23 for a RN.[36] We estimate that there are 359,000 IRF–PAI submissions per year[37] and that there are 1161 IRFs in the U.S. that will report quality data to CMS. Based on these figures, we estimate that each IRF will submit approximately 309 IRF–PAIs per year or 25.75 IRF–PAIs per month.[38] Assuming that each IRF–PAI submission requires 25 minutes of time by an RN at an average hourly wage of $33.23, the yearly cost to each IRF would be $4,278.36[39] and the annualized cost across all IRFs would be $4,967,176.[40] To calculate the total amount of administrative staff wages incurred, we estimate that this data entry task will take no more than 3 minutes per each IRF–PAI record or 15.45 hours per each IRF annually or 17,937 hours across all IRFs. According to the U.S. Bureau of Labor, the average hourly wage for Administrative Assistants is $15.55. We have estimated that there are approximately 359,000 IRF–PAI submissions per year and 1161 IRFs in the U.S. that are reporting quality data to CMS. Given this wage information, the estimated total annual cost across all IRFs for the time required for entry of pressure ulcer data into the IRF–PAI record is $278,930. We further estimate the average yearly cost to each IRF to be $240.25.

In addition to updating the pressure ulcer measure, we have added 3 new quality measures to the IRF QRP. These measures include: (1) Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short-Stay) (NQF #0680), which will affect the FY 2017 increase factor and subsequent years increase factors; (2) Influenza Vaccination Coverage among Healthcare Personnel (NQF #0431), which will affect the FY 2016 increase factor and subsequent years increase factors; and (3) an All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from Inpatient Rehabilitation Facilities, which will affect the FY 2017 increase factor and subsequent years increase factors. We discuss the impact of each measure upon IRFs below.

IRFs will now submit their data for the patient influenza measure (NQF #0680) on the IRF–PAI. We have added a new data item set consisting of 3 items to the IRF–PAI to collect the data for this measure. IRF staff will be required to perform a full influenza assessment only during the influenza vaccination season, which has been defined by the CDC as the time period from October 1st (or when the vaccine becomes available) through March 31 each year. From April 1st through September 30th, IRFs are not required to perform a full influenza screening. Our time estimate reflects the averaged amount of time necessary to complete the influenza item set both during and outside the influenza vaccination season.

We believe that it will be most appropriate for a clinician, such as an RN, to complete the influenza items because this assessment requires clinical judgment and knowledge of vaccinations. An administrative employee, such as a medical data entry clerk or administrative assistant would not have this level of knowledge. We do not believe that IRFs will require additional time by administrative staff to encode and transmit this data to CMS, because submission of an IRF–PAI for each patient is already required as a condition for payment.

As noted above, we estimate that it will take approximately 5 minutes to complete the patient influenza measure item set. We have also noted above that there are approximately 359,000 IRF–PAIs completed annually across all 1161 IRFs that report IRF quality data to CMS. This breaks down to approximately 309 IRF–PAIs completed by each IRF yearly. We estimate that the annual time burden for reporting the patient influenza vaccination measure data is 29,896 hours across all IRFs in the U.S. and 25.75 hours for each individual IRF. According to the U.S. Bureau of Labor, the hourly wage for a Registered Nurse is $33.23. The estimated annual cost across all IRFs in the U.S. for the submission of the patient influenza measure data is $993,433 and $855.67 for each individual IRF.

IRFs will submit their data for the staff immunization measure (NQF #0431) to the CDC's healthcare acquired (HAI) surveillance Web site known as NHSN. Data collection for this measure is only required from October 1st (or when the vaccine becomes available) through March 31st each year, during which time IRFs will be required to keep records of which staff members receive the influenza vaccination. IRFs are only required to make one report to NHSN after the close of the reporting period on March 31st. All data must be submitted by May 15th of each year. We do not believe that IRFs will incur any new burden associated with the collection of data during the influenza vaccination season. We believe that most IRFs already keep records related to the influenza vaccination of their staff because this impacts many aspects of their business, including but not limited to, staff absences and transmission of illness to other staff and patients.

We estimate that it will take each IRF approximately 15 minutes of time once per year to gather the data that was collected during the influenza vaccinations season, and prepare to make their report to NHSN. We do not estimate that it will take IRFs additional time to input their data into NHSN, once they have logged onto the system for the purpose of submitting their monthly CAUTI report. We believe that this task can be completed by an administrative person such as a Medical Secretary Medical Data Entry Clerk. As noted above, the average hourly wage for Medical Records or Health Information Technicians is $15.55.[41] We

[36] According to the U.S. Bureau of Labor Statistics, the mean hourly wage for a Registered Nurse is $33.23. (See *http://www.bls.gov/oes/2011/may/oes291111.htm*).

[37] MedPAC, A Data Book: Health Care Spending and the Medicare Program (June 2012), *http://www.medpac.gov/chapters/Jun12DataBookSec8.pdf.*

[38] 359,000 IRF–PAI reports per all IRFs per year/1161 IRFs in U.S. = 309 IRF–PAI reports per each IRF per year 309 IRF–PAI reports per IRF per year/12 months per year = 26 IRF–PAI reports per each IRF per year.

[39] 25 minutes × 309 IRF–PAI assessments per each IRF per year = 7,725 minutes per each IRF per year 7,725 minutes per each IRF per year/60 minutes per hour = 128.75 hours per each IRF per year 128.75 hours per year × $33.23 per hour = $4,278.36 nursing wages per each IRF per year.

[40] $4,278.36 × 1161 IRF providers = $4,967,176 per all IRFs per year.

[41] According to the U.S. Bureau of Labor Statistics, the mean hourly wage for a Medical Records & Health Information Technician is $15.55.

Continued

estimate that the average yearly cost to each IRF for the reporting of this measure will be $3.89 [42] and the cost across all IRFs will be $4,516.[43]

The readmission measure (All-Cause Unplanned Readmission Measure for 30 Days Post Discharge from Inpatient Rehabilitation Facilities) is a claims-based measure and, therefore, IRFs are not required to submit any data for this measure. We do not anticipate that IRFs will be impacted by any financial or time burdens as a result of the use of this measure for the IRF QRP.

Taking all of the above-stated information into consideration, we estimate that the total cost to IRFs in FY 2015, including staff wages and 48 percent for fringe benefits and overhead, is $9.2 million as related to (1) Influenza Vaccination Coverage among Healthcare Personnel (NQF #0431); (2) Percent of Patients with Pressure Ulcers That Are New or Worsened (NQF #0678); and (3) Percent of Patients that Were Appropriately Assessed and Given the Influenza Vaccination (NQF #0680).

Over the past 18 months, we have received a great deal of positive feedback from IRFs about the IRF QRP, and overall, IRFs have been very receptive to the introduction of the IRF QRP into the IRF setting. The IRF provider community has shared many suggestions and ideas related to the IRF QRP. Outreach activities, such as a one-day in-person training, and 6 open door forums were well attended. Given the amount of positive feedback and willingness to participate in the IRF QRP that has been demonstrated by IRFs, we anticipate that there will be a relatively small number of IRFs that fail to report the type and amount of quality data that IRFs are required to collect and submit. Our proposed reconsideration process allows IRFs that receive an initial finding of non-compliance an opportunity to file a request for reconsideration of this finding. Access to this process may have the effect of lowering even further the number of IRFs who have not ultimately succeeded in meeting the IRF QRP reporting requirements.

10. Impact of the Implementation of the 2 Percentage Point Reduction in the Increase Factor for Failure To Meet the IRF Quality Reporting Requirements

As discussed in section XIV. of this final rule and in accordance with section 1886(j)(7) of the Act, we will implement a 2 percentage point reduction in the FY 2014 increase factor for IRFs that have failed to report the required quality reporting data to us during the first IRF quality reporting period (from October 1, 2012 through December 31, 2012). In section XIV of this final rule, we discuss how the 2 percentage point reduction will be applied. Currently, we cannot estimate the overall financial impacts of the application of this reduction on aggregate IRF PPS payments or on the distribution of IRF PPS payments among providers because we cannot predict the number of or types of IRFs that will fail to report the required quality reporting data. IRFs are currently required to complete the non-quality portions of the IRF–PAI to receive payment for all Medicare fee-for-service admissions. Therefore, we estimate that the number of IRFs that would fail to submit the additional quality reporting data on the IRF–PAI form is very low.

The official reporting period end date for the first IRF quality reporting period was May 15, 2013. While we made a preliminary determination of compliance related to IRFs in June 2013, we feel that it would not be prudent to release those numbers at this time. We believe that these numbers could change substantially during the reconsideration process (described in section XIII. of the May 8, 2013 (78 FR 26880) proposed rule that will occur between July and September 2013, and that we will not have a true picture of IRF performance until after this final rule is displayed. We intend to closely monitor the effects of this new quality reporting program on IRF providers as we cannot predict the number of, or types of IRFs that would fail to report the required quality reporting data for the first quality reporting period.

D. Alternatives Considered

As stated in section XVIII (B) of this final rule, we estimate that the changes discussed in the rule would result in a significant economic impact on IRFs. The overall impact on all IRFs is an estimated increase in FY 2014 payments of $170 million (2.3 percent), relative to FY 2013. The following is a discussion of the alternatives considered for the IRF PPS updates contained in this final rule.

Section 1886(j)(3)(C) of the Act requires the Secretary to update the IRF PPS payment rates by an increase factor that reflects changes over time in the prices of an appropriate mix of goods and services included in the covered IRF services. Thus, we did not consider alternatives to updating payments using the estimated RPL market basket increase factor for FY 2014. However, as noted previously in this final rule, section 1886(j)(3)(C)(ii)(I) of the Act requires the Secretary to apply a productivity adjustment to the market basket increase factor for FY 2014 and sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(iii) of the Act require the Secretary to apply a 0.3 percentage point reduction to the market basket increase factor for FY 2014. Thus, in accordance with section 1886(j)(3)(C) of the Act, we are updating IRF federal prospective payments in this final rule by 1.8 percent (which equals the 2.6 percent estimated RPL market basket increase factor for FY 2014 reduced by 0.3 percentage points, and further reduced by a 0.5 percentage point productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act).

We considered maintaining the existing CMG relative weights and average length of stay values for FY 2014. However, in light of recently available data and our desire to ensure that the CMG relative weights and average length of stay values are as reflective as possible of recent changes in IRF utilization and case mix, we believe that it is appropriate to update the CMG relative weights and average length of stay values at this time to ensure that IRF PPS payments continue to reflect as accurately as possible the current costs of care in IRFs.

We considered maintaining the current facility-level adjustment factors (that is, the rural factor at 18.4 percent, the LIP factor at 0.4613, and teaching status adjustment factor at 0.6876). However, as discussed in more detail in section V (B) of this final rule, our recent research efforts have shown significant differences in cost structures between freestanding IRFs and IRF units of acute care hospitals (and CAHs). We have found that these cost structure differences substantially influence the estimates of the adjustment factors. For this reason, our regression analysis found that the proposed inclusion of the control variable for a facility's status as either a freestanding IRF hospital or an IRF unit of an acute care hospital (or a CAH) would greatly enhance the accuracy of the adjustment factors for FY 2014, as we incorporate updated data. Further, as noted previously, we received comments on the FY 2012 IRF PPS proposed rule suggesting this enhancement to the methodology. Thus, we believe that the best approach at this time is to update the facility-level adjustment factors for FY 2014 using this enhancement to the methodology.

We considered maintaining the existing outlier threshold amount for FY

See: *http://www.bls.gov/ooh/healthcare/medical-records-and-health-information-technicians.htm.*

[42] 15 minutes Administrative staff time to collect and report staff influenza measure @ $15.55 per hour = $3.9889 per IRF per year.

[43] $3.89 per IRF per year × 1161 IRFs in U.S. = $4,621,516.

2014. However, analysis of updated FY 2012 data indicates that estimated outlier payments would be lower than 3 percent of total estimated payments for FY 2013, by approximately 0.5 percent, unless we updated the outlier threshold amount. Consequently, we are adjusting the outlier threshold amount in this final rule to reflect a 0.5 percent increase thereby setting the total outlier payments equal to 3 percent, instead of 2.5 percent, of aggregate estimated payments in FY 2014.

Finally, we considered maintaining the current list of ICD–9–CM codes used to determine an IRF's compliance with the 60 percent rule under the presumptive methodology, or maintaining some of the categories of codes that we proposed removing from the list in the proposed rule. However, we believe that the specific ICD–9–CM codes removed in section VIII of this final rule results in a list that better reflects the 60 percent rule regulations. For example, the removal of the non-specific diagnosis codes (as discussed in section VIII of this final rule) is in accordance with the trend toward requiring more specific coding in other Medicare payment settings, such as the IPPS. We believe that the incentives to use more specific codes, whenever possible, will also lead to improvements in the quality of care for patients by providing more detailed information that medical personnel can use to enhance the specificity of patients' care plans. In addition, the removal of the arthritis diagnosis codes (as discussed in section VIII of this final rule) will enable CMS to ensure that we only count patients as meeting the 60 percent rule requirements if they have met the necessary severity and prior treatment requirements, information which is not discernible from the ICD–9–CM codes themselves. With respect to the other code categories that we are removing from the presumptive methodology list, we do not believe that patients who are coded with these codes would typically require treatment in an IRF, as described in more detail in section VIII of this final rule. However, to give providers more time to adjust to the changes, we are delaying the effective date of these changes by one year, so that the changes will be effective for compliance review periods beginning on or after October 1, 2014.

E. Accounting Statement

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf*), in Table 19, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of this final rule. Table 19 provides our best estimate of the increase in Medicare payments under the IRF PPS as a result of the updates presented in this final rule based on the data for 1,134 IRFs in our database. In addition, the table below presents the costs associated with the new IRF quality reporting program requirements for FY 2015.

TABLE 19—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES

Category	Transfers
Change in Estimated Transfers from FY 2013 IRF PPS to FY 2014 IRF PPS:	
Annualized Monetized Transfers	$170 million.
From Whom to Whom?	Federal Government to IRF Medicare Providers.
Estimated Impacts in FY 2015	
Refinements to the presumptive compliance criteria methodology under the '60 percent rule':	
Annualized Monetized Transfers	The estimated FY 2015 impact of the refinements to the presumptive compliance criteria methodology reflects a decrease of payments between $0 to $520 million, depending on the IRFs behavioral responses to the changes, with $520 million representing the upper bound.
From Whom to Whom?	Federal Government to IRF Medicare Providers.
Cost to updating the Quality Reporting Program for IRFs:	
Annualized Monetized Costs for IRFs to Submit Data (Quality Reporting Program).	$9.2 million.

F. Conclusion

Overall, the estimated payments per discharge for IRFs in FY 2014 are projected to increase by 2.3 percent, compared with the estimated payments in FY 2013, as reflected in column 9 of Table 18. IRF payments per discharge are estimated to increase 2.5 percent in urban areas and decrease 0.2 percent in rural areas, compared with estimated FY 2013 payments. Payments per discharge to rehabilitation units are estimated to increase 2.8 percent in urban areas, whereas we estimate no change in payments per discharge to rehabilitation units in rural areas. Payments per discharge to freestanding rehabilitation hospitals are estimated to increase 2.1 percent in urban areas and decrease 1.3 percent in rural areas.

Overall, IRFs are estimated to experience a net increase in payments as a result of the policies in this final rule. The largest payment increase is estimated to be a 3.2 percent increase for urban IRFs located in the East North Central region. This is due to the large positive effect of the facility adjustment updates for urban IRFs in this region. Finally, the total cost to IRFs in FY 2015 is $9.2 million as related to (1) Influenza Vaccination Coverage among Healthcare Personnel (NQF #0431); (2) Percent of Patients with Pressure Ulcers That Are New or Worsened (NQF #0678); and (3) Percent of Patients that Were Appropriately Assessed and Given the Influenza Vaccination (NQF #0680).

List of Subjects in 42 CFR Part 412

Administrative practice and procedure, Health facilities, Medicare, Puerto Rico, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as follows:

PART 412—PROSPECTIVE PAYMENT SYSTEMS FOR INPATIENT HOSPITAL SERVICES

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

Authority: Sections 1102, 1862, and 1871 of the Social Security Act (42 U.S.C. 1302, 1395y, and 1395hh).

■ 2. Section 412.25 is amended by revising paragraph (a)(1)(iii) to read as follows:

§ 412.25 Excluded hospital units: Common requirements.

(a) * * *

(1) * * *

(iii) Unless it is a unit in a critical access hospital, the hospital of which an IRF is a unit must have at least 10 staffed and maintained hospital beds that are not excluded from the inpatient prospective payment system, or at least 1 staffed and maintained hospital bed for every 10 certified inpatient rehabilitation facility beds, whichever number is greater. Otherwise, the IRF will be classified as an IRF hospital, rather than an IRF unit. In the case of an inpatient psychiatric facility unit, the hospital must have enough beds that are not excluded from the inpatient prospective payment system to permit the provision of adequate cost information, as required by § 413.24(c) of this chapter.

* * * * *

■ 3. Section 412.29 is amended by revising paragraph (d) to read as follows:

§ 412.29 Classification criteria for payment under the inpatient rehabilitation facility prospective payment system.

* * * * *

(d) Have in effect a preadmission screening procedure under which each prospective patient's condition and medical history are reviewed to determine whether the patient is likely to benefit significantly from an intensive inpatient hospital program. This procedure must ensure that the preadmission screening for each Medicare Part A Fee-for-Service patient is reviewed and approved by a rehabilitation physician prior to the patient's admission to the IRF.

* * * * *

■ 4. Section 412.130 is amended by revising paragraphs (a)(1), (a)(2) and (a)(3) to read as follows:

§ 412.130 Retroactive adjustments for incorrectly excluded hospitals and units.

(a) * * *

(1) A hospital that was excluded from the prospective payment systems specified in § 412.1(a)(1) or paid under the prospective payment system specified in § 412.1(a)(3), as a new rehabilitation hospital for a cost reporting period beginning on or after October 1, 1991 based on a certification under § 412.29(c) regarding the inpatient population the hospital planned to treat during that cost reporting period, if the inpatient population actually treated in the hospital during that cost reporting period did not meet the requirements of § 412.29(b).

(2) A hospital that has a unit excluded from the prospective payment systems specified in § 412.1(a)(1) or paid under the prospective payment system specified in § 412.1(a)(3), as a new rehabilitation unit for a cost reporting period beginning on or after October 1, 1991, based on a certification under § 412.29(c) regarding the inpatient population the hospital planned to treat in that unit during the period, if the inpatient population actually treated in the unit during that cost reporting period did not meet the requirements of § 412.29(b).

(3) A hospital that added new beds to its existing rehabilitation unit for a cost reporting period beginning on or after October 1, 1991 based on a certification under § 412.29(c) regarding the inpatient population the hospital planned to treat in these new beds during that cost reporting period, if the inpatient population actually treated in the new beds during that cost reporting period did not meet the requirements of § 412.29(b).

* * * * *

■ 5. Section 412.630 is revised to read as follows:

§ 412.630 Limitation on review.

Administrative or judicial review under sections 1869 or 1878 of the Act, or otherwise, is prohibited with regard to the establishment of the methodology to classify a patient into the case-mix groups and the associated weighting factors, the Federal per discharge payment rates, additional payments for outliers and special payments, and the area wage index.

Authority: (Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program).

Dated: July 23, 2013.

Marilyn Tavenner,

Administrator, Centers for Medicare & Medicaid Services.

Approved: July 29, 2013.

Kathleen Sebelius,

Secretary.

[FR Doc. 2013–18770 Filed 7–31–13; 4:15 pm]

BILLING CODE 4120–01–P



FEDERAL REGISTER

Vol. 78 Tuesday,
No. 151 August 6, 2013

Part IV

Department of Health and Human Services

Centers for Medicare and Medicaid Services

42 CFR Parts 413 and 424
Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities for FY 2014; Rules

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 413 and 424

[CMS–1446–F]

RIN 0938–AR65

Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities for FY 2014

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: This final rule updates the payment rates used under the prospective payment system for skilled nursing facilities (SNFs) for fiscal year (FY) 2014. In addition, it revises and rebases the SNF market basket, revises and updates the labor related share, and makes certain technical and conforming revisions in the regulations text. This final rule also includes a policy for reporting the SNF market basket forecast error in certain limited circumstances and adds a new item to the Minimum Data Set (MDS), Version 3.0 for reporting the number of distinct therapy days. Finally, this final rule adopts a change to the diagnosis code used to determine which residents will receive the AIDS add-on payment, effective for services provided on or after the October 1, 2014 implementation date for conversion to ICD–10–CM.

DATES: *Effective Date:* This final rule is effective on October 1, 2013.

FOR FURTHER INFORMATION CONTACT:

Penny Gershman, (410) 786–6643, for information related to clinical issues.

John Kane, (410) 786–0557, for information related to the development of the payment rates and case-mix indexes.

Kia Sidbury, (410) 786–7816, for information related to the wage index.

Bill Ullman, (410) 786–5667, for information related to level of care determinations, consolidated billing, and general information.

SUPPLEMENTARY INFORMATION:

Availability of Certain Information Exclusively Through the Internet on the CMS Web site

The Wage Index for Urban Areas Based on CBSA Labor Market Areas (Table A) and the Wage Index Based on CBSA Labor Market Areas for Rural Areas (Table B) are published in the **Federal Register** as an Addendum to the annual SNF PPS rulemaking (that is, the SNF PPS proposed and final rules or, when applicable, the current update notice). However, as of FY 2012, a number of other Medicare payment systems adopted an approach in which such tables are no longer published in the **Federal Register** in this manner, and instead are made available exclusively through the Internet; see, for example, the FY 2012 Hospital Inpatient PPS (IPPS) final rule (76 FR 51476). To be consistent with these other Medicare payment systems and streamline the published content to focus on policy discussion, we proposed to use a similar approach for the SNF PPS as well. We also proposed to revise the applicable regulations text at § 413.345 to accommodate this approach, consistent with the wording of the corresponding statutory authority at section 1888(e)(4)(H)(iii) of the Social Security Act (the Act). We did not receive any comments on this proposal. Therefore, as discussed in greater detail in section V. of this final rule, we are finalizing this proposal and revising the applicable regulations text at § 413.345 to accommodate this approach. Under this approach, effective October 1, 2013, the individual wage index values displayed in Tables A and B of this rule will no longer be published in the **Federal Register** as part of the annual SNF PPS rulemaking, and instead will be made available exclusively through the Internet on CMS's SNF PPS Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/SNFPPS/WageIndex.html.* Consistent with the provisions of section 1888(e)(4)(H)(iii) of the Act, we will continue to publish in the **Federal Register** the specific ''factors to be applied in making the area wage adjustment'' (for example, the SNF prospective payment system's use of the hospital wage index exclusive of its occupational mix adjustment) as part of our annual SNF PPS rulemaking process, but that document will no longer include a listing of the individual wage index values themselves, which will instead be made available exclusively through the Internet on the CMS Web site.

In addition, we note that in previous years, each rule or update notice issued under the annual SNF PPS rulemaking cycle has included a detailed reiteration of the various individual legislative provisions that have affected the SNF PPS over the years, a number of which represented temporary measures that have long since expired. That discussion, along with detailed background information on various other aspects of the SNF PPS, will henceforth be made available exclusively on the CMS Web site as well, at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/SNFPPS/index.html.*

To assist readers in referencing sections contained in this document, we are providing the following Table of Contents.

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Regulations Text

Acronyms

In addition, because of the many terms to which we refer by acronym in this final rule, we are listing these abbreviations and their corresponding terms in alphabetical order below:

AIDS Acquired Immune Deficiency Syndrome
ARD Assessment reference date
BBA Balanced Budget Act of 1997, Pub. L. 105–33
BBRA Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act of 1999, Pub. L. 106–113
BIPA Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000, Pub. L. 106–554
CAH Critical access hospital
CBSA Core-based statistical area
CFR Code of Federal Regulations
CMI Case-mix index
CMS Centers for Medicare & Medicaid Services
COT Change of therapy
ECI Employment Cost Index
EOT End of therapy
EOT–R End of therapy–resumption
FQHC Federally qualified health center
FR Federal Register
FY Fiscal year
GAO Government Accountability Office
HCPCS Healthcare Common Procedure Coding System
HOMER Home office Medicare records
IGI IHS (Information Handling Services) Global Insight, Inc.
MDS Minimum data set
MFP Multifactor productivity
MMA Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. 108–173
MSA Metropolitan statistical area
NAICS North American Industrial Classification System
NTA Non-Therapy Ancillary
OMB Office of Management and Budget
OMRA Other Medicare Required Assessment
PPS Prospective Payment System
RAI Resident assessment instrument
RAVEN Resident assessment validation entry
RFA Regulatory Flexibility Act, Pub. L. 96–354
RHC Rural health clinic
RIA Regulatory impact analysis
RUG–III Resource Utilization Groups, Version 3
RUG–IV Resource Utilization Groups, Version 4
RUG–53 Refined 53-Group RUG–III Case-Mix Classification System
SCHIP State Children's Health Insurance Program
SNF Skilled nursing facility
STM Staff time measurement
STRIVE Staff time and resource intensity verification
UMRA Unfunded Mandates Reform Act, Pub. L. 104–4

I. Executive Summary

A. Purpose

This final rule updates the SNF prospective payment rates for FY 2014 as required under section 1888(e)(4)(E) of the Act. It also responds to section 1888(e)(4)(H) of the Act, which requires the Secretary to ''provide for publication in the **Federal Register**'' before the August 1 that precedes the start of each fiscal year, the unadjusted federal per diem rates, the case-mix classification system, and the factors to be applied in making the area wage adjustment used in computing the prospective payment rates for that fiscal year.

B. Summary of Major Provisions

In accordance with sections 1888(e)(4)(E)(ii)(IV) and 1888(e)(5) of the Act, the federal rates in this final rule reflect an update to the rates that we published in the SNF PPS update notice for FY 2013 (77 FR 46214) which reflects the SNF market basket index, adjusted by the forecast error correction, if applicable, and the multifactor productivity adjustment for FY 2014.

C. Summary of Cost, Transfers, and Benefits

Provision description	Total transfers
FY 2014 SNF PPS payment rate update	The economic impact of this final rule is an estimated increase of $470 million in aggregate payments to SNFs during FY 2014.

II. Background

A. Statutory Basis and Scope

As amended by section 4432 of the Balanced Budget Act of 1997 (BBA, Pub. L. 105–33, enacted on August 5, 1997), section 1888(e) of the Act provides for the implementation of a PPS for Medicare payment for covered SNF services. This methodology uses prospective, case-mix adjusted per diem payment rates applicable to all covered SNF services defined in section 1888(e)(2)(A) of the Act. The SNF PPS is effective for cost reporting periods beginning on or after July 1, 1998, and covers all costs of furnishing covered SNF services (routine, ancillary, and capital-related costs) other than costs associated with approved educational activities and bad debts. Under section 1888(e)(2)(A)(i) of the Act, covered SNF services include post-hospital extended care services for which benefits are provided under Part A, as well as those items and services (other than a certain limited number of excluded services described in clauses (ii), (iii), and (iv) of section 1888(e)(2)(A), such as physician services) for which payment may otherwise be made under Part B and which are furnished to Medicare beneficiaries who are residents in a SNF during a covered Part A stay. A comprehensive discussion of these provisions appears in the May 12, 1998 interim final rule (63 FR 26252).

B. Initial Transition

Under sections 1888(e)(1)(A) and 1888(e)(11) of the Act, the SNF PPS included an initial, three-phase transition that blended a facility-specific rate (reflecting the individual facility's historical cost experience) with the federal case-mix adjusted rate. The transition extended through the facility's first three cost reporting periods under the PPS, up to and including the one that began in FY 2001. Thus, the SNF PPS is no longer operating under the transition, as all facilities have been paid at the full federal rate effective with cost reporting periods beginning in FY 2002. Currently, we base payments for SNFs entirely on the adjusted federal per diem rates, and we no longer include adjustment factors under the transition related to facility-specific rates for the upcoming FY.

C. Required Annual Rate Updates

Section 1888(e)(4)(E) of the Act requires the SNF PPS payment rates to be updated annually. The most recent annual update occurred in an update notice that set forth updates to the SNF PPS payment rates for FY 2013 (77 FR 46214).

Under this requirement, section 1888(e)(4)(H) of the Act specifies that we provide for publication annually in the **Federal Register** of the following:

- The unadjusted federal per diem rates to be applied to days of covered SNF services furnished during the upcoming FY.
- The case-mix classification system to be applied with respect to these services during the upcoming FY.
- The factors to be applied in making the area wage adjustment with respect to these services.

Along with other revisions discussed later in this preamble, this final rule also provides the required annual

updates to the per diem payment rates for SNFs for FY 2014.

III. Summary of the Provisions of the FY 2014 SNF PPS Proposed Rule

In the FY 2014 SNF PPS proposed rule (78 FR 26438), we proposed an update to the payment rates used under the PPS for SNFs for FY 2014. Additionally, we proposed to revise and rebase the SNF market basket, to use this revised and rebased SNF market basket to determine the SNF PPS update for FY 2014; to update and revise the labor related share; and to make certain technical and conforming revisions in the regulations text. The proposed rule also included a proposed policy for revising how we report the SNF market basket forecast error in certain limited circumstances. In addition, we proposed a new item to be included on the Minimum Data Set (MDS), Version 3.0. Finally, we proposed to transition to the ICD–10–CM diagnosis code B20 in order to identify those residents for whom it is appropriate to apply the AIDS add-on payment under section 511 of the MMA, effective upon the October 1, 2014 implementation date for conversion to ICD–10–CM.

IV. Analysis of and Responses to Public Comments on the FY 2014 SNF PPS Proposed Rule

In response to the publication of the FY 2014 SNF PPS proposed rule, we received 20 timely public comments from individual providers, corporations, government agencies, private citizens, trade associations, and major organizations. The following are brief summaries of each proposed provision, a summary of the public comments that we received related to that proposal, and our responses to the comments.

A. General Comments on the FY 2014 SNF PPS Proposed Rule

In addition to the comments we received on the proposed rule's discussion of specific aspects of the SNF PPS (which we address later in this final rule), commenters also submitted the following, more general observations on the payment system. A discussion of these comments, along with our responses, appears below.

Comment: We received a number of comments about the MDS. Commenters noted the complexity of the MDS 3.0, particularly with regard to several of the newer assessment types, the need to clarify the Resident Assessment Instrument (RAI) Manual, the manual update process, and the time required to become trained on the new MDS 3.0 requirements.

Response: We appreciate these concerns and we recognize that the MDS 3.0 is a complex assessment tool. We provided extensive training and opportunities to assist with questions about the MDS 3.0 both prior to and after its October 1, 2010 implementation on audio conferences, at national training conferences, in the form of the RAI Manual and subsequent clarification updates, and postings to the MDS 3.0 and SNF PPS Web sites.

We have also provided support in response to oral and written inquiries, and issued clarification during Open Door Forums, RAI Manual updates, and through online and telephone technical assistance. We are committed to continuing training on both the MDS 3.0 and RUG–IV systems. Additionally, as we receive provider input through these efforts, we will continue to update and clarify the RAI Manual to ensure that it continues to provide accurate information and guidance on CMS policies in a timely fashion.

Comment: A few commenters raised the issue of Non-Therapy Ancillaries (NTAs). All of the comments we received on this issue supported CMS's broad objective to develop a new method for paying for NTAs received in the SNF. These commenters urged CMS to expedite the research necessary to develop a new model for NTA payment and to implement such a model shortly thereafter.

Response: We appreciate all of the comments on this topic and the broad support for our objective to address this issue. Furthermore, the comments we received provided a number of interesting and creative ideas for consideration during the research process. We look forward to working with providers and stakeholders in the future as we continue to research this possible refinement to the SNF PPS.

B. SNF PPS Rate Setting Methodology and FY 2014 Update

In the FY 2014 SNF PPS proposed rule (78 FR 26441 through 26463), we outlined the basic methodology used to set the rates for the SNF PPS. We also discussed several proposals associated with our rate setting methodology, including proposals associated with revising and rebasing the SNF market basket for FY 2014, using the revised and rebased SNF market basket to update the SNF payment rates, and updating and revising the labor-related share, as well as a proposal associated with how CMS reports the SNF forecast error correction for a given year. Our discussion of the rate setting methodology, our proposed changes associated with this methodology, and the comments, along with our responses, on these proposals appear below.

1. Federal Base Rates

Under section 1888(e)(4) of the Act, the SNF PPS uses per diem federal payment rates based on mean SNF costs in a base year (FY 1995) updated for inflation to the first effective period of the PPS. We developed the federal payment rates using allowable costs from hospital-based and freestanding SNF cost reports for reporting periods beginning in FY 1995. The data used in developing the federal rates also incorporated a ''Part B add-on,'' which is an estimate of the amounts that, prior to the SNF PPS, would have been payable under Part B for covered SNF services furnished to individuals during the course of a covered Part A stay in a SNF.

In developing the rates for the initial period, we updated costs from FY 1995 to the first effective year of the PPS (which was the 15-month period beginning July 1, 1998) using a SNF market basket index, and then standardized for geographic variations in wages and for the costs of facility differences in case mix. In compiling the database used to compute the federal payment rates, we excluded those providers that received new provider exemptions from the routine cost limits, as well as costs related to payments for exceptions to the routine cost limits. Using the formula that the BBA prescribed, we set the federal rates at a level equal to the weighted mean of freestanding costs plus 50 percent of the difference between the freestanding mean and weighted mean of all SNF costs (hospital-based and freestanding) combined. We computed and applied separately the payment rates for facilities located in urban and rural areas, and adjusted the portion of the federal rate attributable to wage-related costs by a wage index to reflect geographic variations in wages.

2. SNF Market Basket Update

Section 1888(e)(5)(A) of the Act requires us to establish a SNF market basket index that reflects changes over time in the prices of an appropriate mix of goods and services included in covered SNF services. Accordingly, we have developed a SNF market basket index that encompasses the most commonly used cost categories for SNF routine services, ancillary services, and capital-related expenses. Section 1888(e)(5)(B) of the Act defines the SNF market basket percentage as the percentage change in the SNF market basket index from the midpoint of the

previous FY to the midpoint of the current FY. For the federal rates set forth in this final rule, we use the percentage change in the SNF market basket index to compute the update factor for FY 2014, based on the IGI second quarter 2013 forecast (with historical data through first quarter of 2013) of the FY 2014 percentage increase in the FY 2010-based SNF market basket for routine, ancillary, and capital related expenses. In the FY 2014 SNF PPS proposed rule, the FY 2014 SNF market basket percentage was based on the IGI first quarter 2013 forecast (with historical data through the fourth quarter 2012) of the FY 2014 percentage increase in the FY 2010-based SNF market basket index for routine, ancillary, and capital-related expenses. The final SNF market basket update is discussed in section IV.B.5 of this final rule. As discussed in sections IV.B of this final rule, this market basket percentage change is reduced by the forecast error correction (§ 413.337(d)(2)), and by the MFP adjustment as required by section 1888(e)(5)(B)(ii) of the Act.

a. Revising and Rebasing the SNF Market Basket Index

In the FY 2008 SNF PPS final rule (72 FR 43425 through 43430), we revised and rebased the SNF market basket, which included updating the base year from FY 1997 to FY 2004. For FY 2014, we proposed to rebase the market basket to reflect FY 2010 Medicare allowable total cost data (routine, ancillary, and capital-related) and to revise the cost categories, cost weights, and price proxies used to determine the market basket (78 FR 26451 through 26461).

Specifically, we proposed to develop cost category weights for the FY 2010-based SNF market basket in two stages. First, we proposed to derive base weights for seven major categories (wages and salaries, employee benefits, contract labor, pharmaceuticals, professional liability insurance, capital-related, and a residual ''all other'') from the FY 2010 Medicare cost report (MCR) data for freestanding SNFs. Second, we proposed to divide the residual ''all other'' cost category into subcategories, using U.S. Department of Commerce Bureau of Economic Analysis' (BEA) 2002 Benchmark Input-Output (I–O) tables for the nursing home industry aged forward using price changes. Furthermore, we proposed to continue to use the same overall methodology as was used for the FY 2004-based SNF market basket to develop the capital related cost weights of the FY 2010-based SNF market basket.

We proposed to include five new cost categories in the FY 2010-based SNF market basket: (1) Medical Instruments and Supplies; (2) Apparel; (3) Machinery and Equipment; (4) Administrative and Facilities Support Services; and (5) Financial Services. We also proposed to divide the Nonmedical Professional Fees cost category into Nonmedical Professional Fees: Labor-Related and Nonmedical Professional Fees: Nonlabor-Related; and to revise our labels for the Labor-Intensive Services and Nonlabor-Intensive Services cost categories to All Other: Labor-Related Services and All Other: Nonlabor-Related Services, respectively.

In addition, we proposed to revise several price proxies, including using the ECI for Wages and Salaries for Nursing Care Facilities (NAICS 6231) to measure price growth of the Wages and Salaries cost category, and using the ECI for Benefits for Nursing Care Facilities (NAICS 6231) to measure price growth of the Benefits cost category.

We refer readers to the FY 2014 SNF PPS proposed rule (78 FR 26450–26461) for a complete discussion of our proposals and associated rationale related to revising and rebasing the SNF market basket. We received a number of public comments on the proposed revising and rebasing of the SNF market basket. A discussion of these comments, with our responses, appears below.

Comment: Several commenters were in agreement with our efforts to revise and rebase the SNF Market Basket. One commenter recommended that we forgo rebasing the SNF market basket index until cost data that adequately reflects recent and upcoming changes to the SNF cost structure are available. Furthermore, the commenter stated that the expenses reflected in the proposed FY 2010 base year do not account for system-wide and industry-wide changes that have occurred since FY 2010, which impose additional costs on SNFs. Specifically, they stated the following changes have occurred since 2010 or are about to occur: (1) Effective beginning FY 2011, CMS implemented changes to the reporting of therapy minutes on the MDS; (2) effective beginning FY 2012, CMS implemented a new therapy-related assessment and reporting changes; and (3) significant new requirements and costs on SNFs as employers due to the implementation of the Affordable Care Act.

Response: We last rebased and revised the SNF market basket in the FY 2008 SNF PPS final rule (72 FR 43412, 43425–29), reflecting a FY 2004 base year. In the FY 2014 SNF PPS proposed rule, we proposed to rebase and revise the SNF market basket to reflect FY 2010 data as these were the most recent Medicare cost report data available; a decision that was supported by numerous commenters. We do not agree with the commenter's suggestion to postpone the rebasing of the SNF market basket and continue to use a FY 2004-based SNF market basket, which is less relevant with regard to the costs faced by SNFs and, thus, is not as technically appropriate as the FY 2010-based index. We will actively monitor the MCR data to determine if the cost structure changes in a meaningful way as future years of data become available and will propose any appropriate revisions or rebasing of the SNF market basket in future rulemaking.

Comment: One commenter supported our efforts to improve payment accuracy by rebasing and revising the market basket. However, they expressed concern about the accuracy of the Medicare SNF cost reports on which we rely. They stated that since payments are now based on the SNF PPS, and have for an increasing time been divorced from an individual facility's costs, less attention has been given to assuring their accuracy.

The commenter also expressed concern that there has not been a recent federal study on the accuracy of the SNF Medicare Cost Reports. They recommended that we commission a study of the accuracy of SNF Medicare cost reports and commit to revising applicable parts of the new market basket index, if the study shows that such changes are warranted.

The commenter also stated that there may be accuracy issues with the SNF cost reports, as evidenced by MedPAC's use of unpublished screens to select SNF cost reports for its analyses. Therefore, they recommended that we explain what, if any, screens, exclusions, or other mechanisms were used in the selection of the FY 2010 SNF cost reports on which the new market basket weights are computed.

Response: We appreciate the commenter's concern over the accuracy of the Medicare cost report data. Similar to MedPAC, we do apply edits to the MCR data to remove reporting errors and outliers. Specifically, MCR data are excluded if total facility costs, total operating costs, Medicare general inpatient routine service costs, and Medicare payments are less than or equal to zero. Additionally, for each of the major cost weights (wages and salaries, employee benefits, contract labor, pharmaceuticals, professional liability insurance, capital-related expenses) the data are trimmed by: (1) Requiring that major expenses (such as salary costs) and total Medicare

allowable costs are greater than zero; and (2) excluding the top and bottom 5 percent of the major cost weight (for example, salary costs as a percent of total Medicare allowable costs). These are the same types of edits utilized for the FY 2004-based SNF market basket, as well as other PPS market baskets (including but not limited to IPPS and HHA). We believe this trimming process considerably improves the accuracy of the data used to compute the major cost weights.

In response to the commenters' recommendation that we commission a study of the accuracy of Medicare SNF cost reports, we note that implementing such a recommendation would require significant resources and approval through OMB's standard survey and auditing process (see ''Standards and Guidelines for Statistical Surveys'' *http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/statpolicy/standards_stat_surveys.pdf* and ''Guidance on Agency Survey and Statistical Information Collections'' *http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/pmc_survey_guidance_2006.pdf*). In the past, cost report audits have been conducted but were limited to specific fields and a small sample of providers. At this time, we believe this approach is the most efficient and appropriate way to identify and address cost report errors and to improve the accuracy of the MCR data used to develop the SNF market basket cost weights. We would appreciate industry representatives communicating to their members the importance of completing the cost reports as accurately as possible, the implications of misreported data, and the possible impacts on their future payments.

Comment: One commenter was supportive of periodic rebasing and revisions to the SNF market basket, but recommended that we hold off on updating the weights and price proxies this year pending refinements to the underlying Medicare cost reports to correct data issues that they believe may bias the major cost categories weights. Their concerns included:

(1) The effect of excluding cost reports where the Medicare General Inpatient Routine. Service Costs are less than or equal to zero. They expressed concern about the effect of the exclusion of providers whose Medicare general inpatient routine service costs (as reported on Worksheet D1 of the SNF MCR) are less than or equal to zero, noting that this edit alone is responsible for excluding over 4,000 Medicare cost reports (approximately 30 percent of all SNFs filing a Medicare cost report) from the analytic database and the subsequent weight calculations. They acknowledged that the exclusion makes sense on its face and that clearly facilities with zero or negative inpatient routine service costs should be excluded. Upon reviewing the cost reports, however, they asserted that the issue is not that inpatient routine service costs are zero or negative, but rather that the Worksheet D1 is an optional worksheet. They also encouraged CMS to examine, develop, and evaluate other exclusion criteria that target the same issue that CMS seeks to address with the Medicare inpatient routine services cost exclusion.

(2) Some of the cost category methodology descriptions in the proposed rule were unclear and requested that CMS in both this year's final rule and future proposed rules provide more specificity in the precise methodology for estimating the market basket cost weights using the Medicare cost reports. The commenter requested that CMS make available a detailed item-by-item description of the formulas used in the calculation of the major cost category weights in the final rule and that CMS provide the analytic databases used to support the major cost category weight calculations on the CMS Web site.

(3) The commenter claims that the CMS methodology for wages and salaries (specifically the numerator for wages and salaries), benefits, contract labor, and pharmaceuticals is inaccurate. The commenter based this conclusion on their own estimates, which were an attempt to re-create the CMS methodology and were provided in their comments. Additionally, the commenter requested more information be provided in the final rule to ensure that the results and analysis are valid and accurate.

Response: We disagree with the commenter's recommendation to hold off on updating the weights and price proxies this year. We believe our methodology is technically sound and does not have any of the data issues that the commenter suggests may bias the major cost category weights. We are using the same general methodology used to develop the FY 2004-based SNF market basket, as finalized in the FY 2008 SNF PPS final rule (72 FR 43412, 43425–43429) . In our response below, we address the three main concerns identified by the commenter.

The commenter suggested that we explore alternative edits and examine, develop, and evaluate other exclusion criteria that target the same issue that we seek to address with the Medicare inpatient services routine cost exclusion. However, we continue to believe that this edit (exclusion of providers whose Medicare general inpatient routine service costs are less than or equal to zero) is appropriate as our goal is to create a market basket that is representative of freestanding SNF providers serving Medicare patients.

Worksheet D1 is ''optional'' to those provider's filing a low Medicare utilization cost report (See Provider Reimbursement Manual, part II, Section 110 *http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021935.html*). The cost structure of these providers would reflect the expenses required to serve predominately non-Medicare patients. Therefore, we believe excluding these providers is appropriate.

Our market basket sample, which included approximately 10,000 providers, represents 70 percent of all freestanding SNF providers that submitted a Medicare cost report for FY 2010. In addition, we note that a sensitivity analysis that removed the Medicare general inpatient routine service cost edit had a minor impact on the salary cost weight of −0.2 percentage point. Therefore, we believe the resulting cost weights are representative of the average across all SNFs serving Medicare patients, even though we exclude some reports. The final sample of SNF Medicare Cost Reports used to calculate the market basket cost weights excluded any providers that reported costs less than or equal to zero for the following categories: total facility costs, total operating costs, Medicare general inpatient routine service costs, and Medicare payments. Therefore, the final sample used included roughly 10,000 of the 14,000 providers that submitted a Medicare cost report for FY 2010.

After we apply these edits, we calculate the cost weights as specified in the FY 2014 SNF PPS proposed rule (78 FR 26451 through 26461); this method is further clarified below. For each of the major cost weights (wages and salaries, employee benefits, contract labor, pharmaceuticals, professional liability insurance, and capital-related expenses), the data are trimmed by: (1) Requiring that major expenses (such as wages and salary costs) and total Medicare allowable costs are greater than zero; and (2) excluding the top and bottom 5 percent of the major cost weight (for example, salary costs as a percent of total Medicare allowable costs). We would note that this trimming process is done for each cost weight individually. For example,

providers excluded from the drug cost weight calculation are not automatically excluded from the other cost weight calculations and trimming process. These are the same types of edits utilized for the FY 2004-based SNF market basket as well as other PPS market baskets (including but not limited to IPPS and HHA). We believe this trimming process considerably improves the accuracy of the data used to compute the major cost weights.

For all of the cost weights, Medicare allowable total costs were equal to total expenses from Worksheet B, lines 16, 21 through 30, 32, 33, and 48 plus Medicaid drug costs as defined below.

We included estimated Medicaid drug costs in the pharmacy cost weight as well as the denominator for total Medicare allowable costs. This is the same methodology used for the FY 2004-based SNF market basket revision and rebasing. During that revision and rebasing, commenters expressed concern over the exclusion of these Medicaid drug expenses. In response, we revised the market basket drug cost weight methodology to include these costs in the Medicare allowable methodology. We finalized this methodology in the FY 2008 SNF PPS final rule (72 FR 43425 through 43430), and for the same reasons set forth in that final rule, we believe it is appropriate to continue to use this methodology in the proposed FY 2010-based SNF market basket. The methodology used in the FY 2010-based SNF market basket includes Medicaid drug costs in the Medicare allowable MCR total costs (as calculated using Worksheet B, lines 16, 21 through 30, 32, 33, 48) for each of the cost weights prior to trimming them as specified above. An alternative methodology would be to calculate and trim the nondrug cost weights using only Medicare allowable total costs from Worksheet B and then adjust the resulting cost weights for the inclusion of Medicaid drug costs. We believe our approach is technically appropriate as it allows for this adjustment to be applied at the individual (that is, provider) level, which is preferable.

Finally, we would clarify that the final weights of the proposed FY 2010-based SNF market basket are based on weighted means. For example, the final salary cost weight after trimming is equal to the sum of total Medicare allowable wages and salaries divided by the sum of total Medicare allowable costs (including Medicaid drug costs) where providers with larger wages and salary costs have a larger weight in the final wages and salaries cost weight. This methodology is consistent with the methodology used to calculate the FY 2004-based SNF market basket cost weights and other PPS market basket cost weights.

We believe the proposed rule included sufficient information regarding CMS's methodology and the underlying data used for revising and rebasing the SNF market basket. As stated in the FY 2014 SNF PPS proposed rule, the cost category weights for the proposed rebased and revised market basket were derived using freestanding Skilled Nursing Facility Medicare Cost Reports and Bureau of Economic Analysis 2002 Input-Output data. Both databases are publicly available on the CMS and BEA Web sites, respectively. We would note that the databases used for the other market basket rebasings (such as, the hospital Medicare cost report data for the IPPS market basket) are also publicly available on the CMS and BEA Web sites, as well.

However, in order to respond to the commenter's suggestion for more information on the detailed methodology for calculating the proposed FY 2010-based SNF market basket major cost weights, we have provided a detailed discussion of the methodology, as requested. These clarifications should allow the commenter to adequately re-create the market basket weights so that discrepancies between their results and the proposed FY 2010-based SNF market basket cost weights (that they believed produced inaccurate results) can be reconciled. We believe that the commenter's estimates and conclusions were based on a misunderstanding of the formulas used to calculate the major cost weights for the FY 2010-based SNF market basket, and thus we believe the additional clarification provided below should address commenter's concerns.

Specifically, we provide additional clarification on the specific Medicare cost report fields used to calculate the major cost weights: (1) The wages and salaries; (2) employee benefits; (3) contract labor; (4) pharmaceutical; (5) professional liability insurance; (6) capital; and (7) All Other ''residual'':

(1) Wages and Salaries (before the allocation of contract labor): We derived the wages and salaries cost category using the FY 2010 SNF MCRs. We determined Medicare allowable wages and salaries mostly from Worksheet S–3, part II data. Medicare allowable wages and salaries are equal to total wages and salaries (Worksheet S3, part II, line 1, column 3) minus: (1) Excluded salaries from Worksheet S–3, part II; and (2) nursing facility and non-reimbursable salaries from Worksheet A, lines 18, 34 through 36. Specifically, we determined excluded salaries in three steps: (1) Sum of data from Worksheet S3, part II, lines 3–5, and 8–14; Worksheet A, lines 18, 31, 34–36, 51, and 56; (2) estimated overhead salaries attributable to the non-Medicare allowable cost centers defined as (total overhead salaries (Worksheet S3, Part III, line 14) as a percent of total salaries Worksheet S3, Part II, line 1, column 3) * excluded salaries as defined in step (1); (3) total excluded salaries is equal to the sum of (1) and (2).

(2) Employee Benefits (before the allocation of contract labor): We determined the weight for employee benefits using FY 2010 SNF MCR data. We derived Medicare allowable benefit costs from Worksheet S–3, part II. Medicare allowable benefits are equal to total benefits from Worksheet S–3, part II, (lines 19–21) minus excluded (non-Medicare allowable) benefits. Non-Medicare allowable benefits are derived by multiplying non-Medicare allowable salaries (otherwise referred to as excluded salaries above) times the ratio of total benefit costs for the SNF to the total wage costs for the SNF.

(3) Contract Labor: We determined the weight for contract labor using 2010 SNF MCR data. We derived Medicare allowable contract labor costs from Worksheet S–3, part II line 17 minus Nursing Facility (NF) contract labor costs, and Medicare allowable total costs from Worksheet B. (Worksheet S–3, part II line 17 includes only those costs attributable to services rendered in the SNF and/or NF for contracted direct patient care services, that is, nursing, therapeutic, rehabilitative, or diagnostic services furnished under contract rather than by employees, and management contract services costs, defined as those individuals who are working at the facility in the capacity of chief executive, chief operating officer, chief financial officer, or nursing administrator.) NF contract labor costs, which are not reimbursable under Medicare, are derived by multiplying total contract labor costs by the ratio of NF wages and salaries (Worksheet A, column 1, line 18), to the sum of NF and SNF wages and salaries (Worksheet A, column 1, line 16).

(4) Pharmaceuticals: First, we calculated pharmaceutical costs using the non-salary costs from the Pharmacy cost center (Worksheet B, column 0, line 11 less Worksheet A, column 1, line 11) and the Drugs Charged to Patients' cost center (Worksheet B, column 0, line 30 less Worksheet A, column 1, line 30), both found on Worksheet B of the SNF MCRs. Since these drug costs were attributable to the entire SNF and not limited to Medicare allowable services,

we adjusted the drug costs by the ratio of Medicare allowable pharmacy total costs to total pharmacy costs from Worksheet B, part I, column 11. Worksheet B, part I allocates the general service cost centers, which are often referred to as ''overhead costs'' (in which pharmacy costs are included) to the Medicare allowable and non-Medicare allowable cost centers.

Second, for the FY 2010-based SNF market basket, we proposed to continue to adjust the drug expenses reported on the MCR to include an estimate of total Medicaid drug costs, which are not represented in the Medicare-allowable drug cost weight. Similar to the last rebasing, we are estimating Medicaid drug costs based on data representing dual-eligible Medicaid beneficiaries. Medicaid drug costs are estimated by multiplying Medicaid dual-eligible drug costs per day times the number of Medicaid days as reported in the Medicare allowable skilled nursing cost center in the SNF MCR. Medicaid dual-eligible drug costs per day (where the day represents an unduplicated drug supply day) were estimated using a sample of 2010 Part D claims for those dual-eligible beneficiaries who had a Medicare SNF stay during the year. Medicaid dual-eligible beneficiaries would receive their drugs through the Medicare Part D benefit, which would work directly with the pharmacy, and therefore, these costs would not be represented in the Medicare SNF MCRs. A random 20 percent sample of Medicare Part D claims data yielded a Medicaid drug cost per day of $17.39. We note that the FY 2004-based SNF market basket relied on data from the Medicaid Statistical Information System, which yielded a dual-eligible Medicaid drug cost per day of $13.65 for 2004. For the revised and rebased FY 2010-based SNF market basket, we used Part D claims to estimate total Medicaid drug costs as this provides drug expenditure data for dual-eligible beneficiaries for 2010. The Medicaid Statistical Information system is no longer a comprehensive database for dual-eligible beneficiaries' drug costs.

(5) Professional Liability Insurance: We calculated the professional liability insurance costs from Worksheet S–2 of the MCRs as the sum of premiums, paid losses, and self-insurance (Worksheet S–2, column 1, line 45 plus Worksheet S–2, column 2, line 45 plus Worksheet S–2, column 3, line 45).

(6) Capital-Related: We derived the capital-related costs using the FY 2010 SNF MCRs. We calculated the Medicare allowable capital-related cost weight from Worksheet B, part II (Worksheet B, part II, column 18, line 16 plus Worksheet B, part II, column 18, lines 21 to 30 plus Worksheet B, part II, column 18, line 32 plus Worksheet B, part II, column 18, line 33 plus Worksheet B, part II, column 18, line 48 plus Worksheet B, part II, column 18, lines 52 to 54).

(7) All Other Expenses: The ''all other'' cost weight is a residual, calculated by subtracting the major cost weights (wages and salaries, employee benefits, contract labor, pharmaceuticals, professional liability insurance, and capital-related expenses) from 100. As stated in the FY 2014 SNF proposed rule (78 FR 26451), we then proposed to divide the residual ''all other'' cost category (21.534 percent) into subcategories, using U.S. Department of Commerce Bureau of Economic Analysis' (BEA) 2002 Benchmark Input–Output (I–O) tables for the nursing home industry aged forward to FY 2014 using price changes. We also proposed that if more recent BEA Benchmark I–O data for 2007 were released between the proposed and final rule with sufficient time to incorporate such data into the final rule that we would incorporate these data, as appropriate, into the FY 2010-based SNF PPS market basket for the final rule, so that the SNF market basket reflects the most recent BEA data available.

Comment: One commenter had questions on our methodology for the proposed FY 2010-based SNF market basket contract labor cost weight. They stated that the contract labor in a nursing facility is primarily comprised of agency nursing (commonly called nursing pool) and contracted therapy. They further stated that we calculate Allowable Contract Labor by multiplying total contract labor cost by the ratio of SNF salaries and wages to SNF and NF salaries and wages, which they indicated is reasonable to assume because agency nursing would provide services to patients in skilled units and in NF units. However, they asserted that while this allocation approach is reasonable for agency nursing, it is not appropriate for contracted therapy. They further stated that contract therapy costs relate almost exclusively to skilled patients and are reported as ancillary costs (Worksheet B Part I, lines 25–27), which are Medicare allowable expenses. They indicated that allocating these costs on the ratio of SNF and NF salaries results in a percentage of these costs being considered as non-allowable, which is inaccurate. Therefore, they proposed that prior to determining the Allowable Contract Labor using the ratio methodology described above, that contract therapy costs (which they calculate as Worksheet A, lines 25–27, column 2) be removed. Total Medicare allowable contract labor would be equal to the Allowable Contract Labor plus the contract therapy costs.

Response: We appreciate the commenter bringing to our attention a potential issue with contracted therapy costs weight methodology. While the commenter has raised an issue that would require further analysis, our preliminary analysis indicates that the impact to the cost weight for a change like this would be negligible (0.001 percentage points to the cost weight). Therefore, we will continue to use our current methodology but will conduct further analysis and communicate any findings in future rulemaking.

Comment: One commenter suggested that we should provide the public with a meaningful opportunity to comment on the incorporation of more recent BEA Benchmark Input–Output (I–O) data into the FY 2014 market basket update before using this data as proposed.

Response: The 2007 Benchmark I–O data has not been published by the BEA and, therefore, we will not be incorporating this data into the FY 2010-based SNF market basket. The 2007 Benchmark I–O data is expected to be published in December 2013. Any future use of this 2007 data in the SNF market basket will be proposed in rulemaking, which will provide the public with a meaningful opportunity to comment.

Comment: Several commenters disagreed with our proposal in the FY 2014 SNF PPS proposed rule (78 FR 26458) to use the ECI for Nursing Care Facilities (Private Industry) (NAICS 6231; BLS series code CIU2026231000000I) to measure price growth of the wages and salaries and employee benefit cost category. They stated that the proposed wages and salaries price proxy index may be too heavily weighted with a lower-skilled labor mix to be adequately representative of the mix of labor skills necessary to deliver care to Medicare SNF patients. In addition, they stated that according to the Census Bureau, there were 16,320 establishments classified in NAICS 6231 in 2007. For that year, 13,841 SNFs submitted cost reports, suggesting that approximately 15 percent of establishments in this industry classification are facilities providing care to residents who are less complex and resource-intensive than SNF residents, especially SNF post-acute care patients. These commenters stated that if these facilities have a less-skilled workforce whose wages and salaries increase at a slower rate than higher-skilled occupations, using the

ECI for NAICS 6231 as the price proxy for wages and salaries in the SNF market basket index could bias the SNF market basket update downward. Furthermore, one commenter proposed that we use a blended price proxy based on 25 percent of the ECI for wages and salaries for nursing and residential care facilities (NAICS 623) and 75 percent of the ECI for wages and salaries for hospital workers (NAICS 622). The commenter suggested that we collect data for a sample of Medicare SNFs to determine the appropriate weighting.

Response: We do not agree with the commenter's suggestion to continue to use a blended price proxy similar to that used for the FY 2004-based SNF market basket to measure the price growth of wages and salaries and employee benefit cost category. The FY 2004-based SNF market basket used a blended index of a more general nursing home ECI for Nursing and Residential Facilities (NAICS 623, representing facilities that provide a mix of health and social services) and the ECI for wages and salaries of hospital workers (NAICS 622) as a result of the discontinuation of an ECI for Nursing and Personal Care Facilities based on the Standard Industrial Classification (SIC) 805. The blended index was proposed and finalized in the FY 2008 SNF PPS rulemaking (72 FR 25550–51 and 72 FR 43425–29, respectively) to address the industry's and CMS's concern about the lack of an ECI that best represented Medicare-certified SNFs. After requests from CMS and the SNF industry, BLS began publishing the ECI for Nursing Care Facilities (6231) in 2006. Because BLS had just begun publishing ECI data for Nursing Care Facilities (NAICS 6231) at the time of the last SNF market revision and rebasing, IGI, the economic forecasting firm, was unable to forecast this price proxy at that time.

As stated by the commenter, according to the 2007 Economic Census there were 16,320 establishments classified in NAICS 6231 in 2007; however, 15,335 establishments operated for the entire year (as also reported in the 2007 Economic Census). Of the 13,841 SNF providers submitting a Medicare cost report, 13,830 were open for an entire year. Therefore, 85–90 percent of the 2007 NAICS 6231 establishments are likely Medicare-certified SNFs. The commenter proposes that we continue to use NAICS 623 (Nursing and Residential Facilities), which is less representative of Medicare-certified SNFs since it also includes other types of facilities such as Residential care facilities, in the blended price proxy.

Because we believe the ECI for Nursing Care Facilities (NAICS 6231) is representative of the SNF industry as discussed above, we continue to believe it is the most technically appropriate proxy for the compensation price inflation faced by Medicare-certified SNFs. As such, we believe that a blended price proxy is no longer necessary.

After considering the comments we received, for the reasons discussed above and in the FY 2014 SNF PPS proposed rule, we are finalizing without modification our proposals as presented in the FY 2014 SNF PPS proposed rule (78 FR 26451 through 26461) to revise the FY 2004-based SNF market basket and to rebase it to reflect a base year of FY 2010, effective October 1, 2013. Table 1 presents the final revised and rebased FY 2010-based SNF market basket index.

TABLE 1—FY 2010-BASED SNF MARKET BASKET

Cost category	Weight	Proposed price proxy
Compensation	62.093	
Wages and Salaries	50.573	ECI for Wages and Salaries for Nursing Care Facilities.
Employee Benefits	11.520	ECI for Benefits for Nursing Care Facilities.
Utilities	2.223	
Electricity	1.411	PPI for Commercial Electric Power.
Fuels, Nonhighway	0.667	PPI for Commercial Natural Gas.
Water and Sewerage	0.145	CPI–U for Water and Sewerage Maintenance.
Professional Liability Insurance	1.141	CMS Hospital Professional Liability Insurance Index.
All Other	27.183	
Other Products	16.148	
Pharmaceuticals	7.872	PPI for Pharmaceuticals for Human Use, Prescription.
Food, Wholesale Purchase	3.661	PPI for Processed Foods and Feeds.
Food, Retail Purchases	1.190	CPI–U for Food Away From Home.
Chemicals	0.166	Blend of Chemical PPIs.
Medical Instruments and Supplies	0.764	PPI for Medical, Surgical, and Personal Aid Devices.
Rubber and Plastics	0.981	PPI for Rubber and Plastic Products.
Paper and Printing Products	0.838	PPI for Converted Paper and Paperboard Products.
Apparel	0.195	PPI for Apparel.
Machinery and Equipment	0.190	PPI for Machinery and Equipment.
Miscellaneous Products	0.291	PPI for Finished Goods Less Food and Energy.
All Other Services	11.035	
Labor-Related Services	6.227	
Nonmedical Professional Fees: Labor-related	3.427	ECI for Total Compensation for Professional and Related Occupations.
Administrative and Facilities Support	0.497	ECI for Total Compensation for Office and Administrative Support.
All Other: Labor-Related Services	2.303	ECI for Total Compensation for Service Occupations.
Non Labor-Related Services	4.808	
Nonmedical Professional Fees: Non Labor-Related.	2.042	ECI for Total Compensation for Professional and Related Occupations.
Financial Services	0.899	ECI for Total Compensation for Financial Activities.
Telephone Services	0.572	CPI–U for Telephone Services.
Postage	0.240	CPI–U for Postage and Delivery Services.
All Other: Nonlabor-Related Services	1.055	CPI–U for All Items Less Food and Energy.
Capital-Related Expenses	7.360	
Total Depreciation	3.180	

TABLE 1—FY 2010-BASED SNF MARKET BASKET—Continued

Cost category	Weight	Proposed price proxy
Building and Fixed Equipment	2.701	BEA chained price index for nonresidential construction for hospitals and special care facilities—vintage weighted (25 years).
Movable Equipment	0.479	PPI for Machinery and Equipment—vintage weighted (6 years).
Total Interest	2.096	
For-Profit SNFs	0.869	Average yield on municipal bonds (Bond Buyer Index 20 bonds)—vintage weighted (22 years).
Government and Nonprofit SNFs	1.227	Average yield on Moody's AAA corporate bonds—vintage weighted (22 years).
Other Capital-Related Expenses	2.084	CPI–U for Rent of Primary Residence.
Total	100.000	

i. Effect of Revising and Rebasing the SNF Market Basket Index on the Labor-Related Share

We define the labor-related share (LRS) as those expenses that are labor-intensive and vary with, or are influenced by, the local labor market. Each year, we calculate a revised labor-related share based on the relative importance of labor-related cost categories in the input price index. In the FY 2014 SNF PPS proposed rule (78 FR 26462–63), we proposed to revise and update the labor-related share to reflect the relative importance of the following FY 2010-based SNF market basket cost weights that we believe are labor-intensive and vary with, or are influenced by, the local labor market: (1) Wages and salaries; (2) employee benefits; (3) contract labor; (4) the labor-related portion of nonmedical professional fees; (5) administrative and facilities support services; (6) all other: Labor-related services (previously referred to in the FY 2004-based SNF market basket as labor-intensive); and (7) a proportion of capital-related expenses. We proposed to continue to include a proportion of capital-related expenses because a portion of these expenses are deemed to be labor-intensive and vary with, or are influenced by, the local labor market. For example, a proportion of construction costs for a medical building would be attributable to local construction workers' compensation expenses.

Consistent with previous SNF market basket revisions and rebasings, the ''all other: labor-related services'' cost category is mostly comprised of building maintenance and security services (including, but not limited to, commercial and industrial machinery and equipment repair, nonresidential maintenance and repair, and investigation and security services). Because these services tend to be labor-intensive and are mostly performed at the SNF facility (and therefore, unlikely to be purchased in the national market), we believe that they meet our definition of labor-related services.

The inclusion of the administrative and facilities support services cost category into the labor-related share remains consistent with the current labor-related share, since this cost category was previously included in the FY 2004-based SNF market basket labor-intensive cost category. As stated in the FY 2014 SNF PPS proposed rule (78 FR 26462), we proposed to establish a separate administrative and facilities support services cost category so that we can use the ECI for Total Compensation for Office and Administrative Support Services to reflect the specific price changes associated with these services.

For the FY 2004-based SNF market basket, we assumed that all nonmedical professional services (including accounting and auditing services, engineering services, legal services, and management and consulting services) were purchased in the local labor market and, thus, all of their associated fees varied with the local labor market. As a result, we previously included 100 percent of these costs in the labor-related share. As we discussed in the FY 2014 SNF PPS proposed rule (78 FR 26462), in an effort to determine more accurately the share of nonmedical professional fees that should be included in the labor-related share, we surveyed SNFs regarding the proportion of those fees that are attributable to local firms and the proportion that are purchased from national firms. Based on these weighted results, we determined that SNFs purchase, on average, the following portions of contracted professional services inside their local labor market:

- 86 percent of accounting and auditing services.
- 89 percent of architectural, engineering services.
- 78 percent of legal services.
- 87 percent of management consulting services.

Together, these four categories represent 2.672 percentage points of the total costs for the proposed FY 2010-based SNF market basket. We applied the percentages from this special survey to their respective SNF market basket weights to separate them into labor-related and nonlabor-related costs. As a result, we are designating 2.285 of the 2.672 total to the labor-related share, with the remaining 0.387 categorized as nonlabor-related.

In addition to the professional services listed above, we also classified expenses under NAICS 55, Management of Companies and Enterprises, into the nonmedical professional fees cost category. The NAICS 55 data are mostly comprised of corporate, subsidiary, and regional managing offices, or otherwise referred to as home offices. Formerly, all of the expenses within this category were considered to vary with, or be influenced by, the local labor market, and thus, were included in the labor-related share. Because many SNFs are not located in the same geographic area as their home office, we analyzed data from a variety of sources to determine what proportion of these costs should be appropriately included in the labor-related share. As discussed in the FY 2014 SNF PPS proposed rule (78 FR 26462), we proposed a methodology to determine the proportion of NAICS 55 costs that should be allocated to the labor-related share based on the percent of SNF home office compensation attributable to those SNFs that had home offices located in their respective labor markets. Our proposed methodology was based on data from MCRs, as well as a CMS database of Home Office Medicare Records (HOMER). Using this proposed methodology, we determined that 32 percent of SNF home office compensation costs were for SNFs that

had home offices located in their respective local labor markets; therefore, we proposed to allocate 32 percent of NAICS 55 expenses to the labor-related share. We believe that this methodology provides a reasonable estimate of the NAICS 55 expenses that are appropriately allocated to the labor-related share, because we primarily rely on data on home office compensation costs as provided by SNFs on Medicare cost reports. By combining these data with the specific MSAs for the SNF and their associated home office, we believe we have a reasonable estimate of the proportion of SNF's home office costs that would be incurred in the local labor market.

In the proposed FY 2010-based SNF market basket, NAICS 55 expenses that were subject to allocation based on the home office allocation methodology represent 1.833 percent of the total costs. Based on the home office results, we are apportioning 0.587 percentage point of the 1.833 percentage points figure into the labor-related share and designating the remaining 1.247 percentage points as nonlabor-related.

The Benchmark I–O data contains other smaller cost categories that we allocate fully to either nonmedical professional fees: labor-related or nonmedical professional fees: nonlabor-related. Together, the sum of these smaller cost categories, the four nonmedical professional fees cost categories where survey results were available, and the NAICS 55 expenses represent all nonmedical professional fees, or 5.469 percent of total costs in the SNF market basket. Of the 5.469 percentage points, 3.427 percentage points represent professional fees: labor-related while 2.042 percentage points represent nonmedical professional fees: nonlabor-related.

For a complete discussion of our proposals related to the labor-related share and associated rationale, we refer readers to the FY 2014 SNF PPS proposed rule (78 FR 26462–63). A discussion of the comments we received related to these proposals, with our responses, appears below.

Comment: One commenter disagreed with our use of the professional fees survey to determine the labor-related portion of Nonmedical Professional Fees costs associated with accounting and auditing services; architectural, engineering services; legal services; and management and consulting services. They stated that the survey of 141 providers only represents 0.94 percent of the approximately 15,000 SNFs nationwide. Furthermore, they contended that even when the services are purchased from ''national firms,'' those services are priced by national firms according to local market costs.

Response: We believe a method that distributes these professional fees based on empirical research and data, and not on assumption, represents a technical improvement to the construction of the market basket and the estimate of the labor-related share. In an effort to draw a nationally representative sample of skilled nursing facilities, we used data on full-time equivalents (FTE's) to represent the sizes of each SNF and then selected institutions for participation in the survey, across various strata (to be representative across Census Region and Urban/Rural status), based on their relative FTE size. That is, the greater the number of one's FTEs, the greater the chance of being selected to participate in the sample from one's specific stratum.

The survey itself prompted sample institutions to select from multiple choice answers the proportions of their professional fees that are purchased from firms located outside of their respective local labor market. The multiple choice answers for each type of professional service included the following options: 0 percent of fees; 1–20 percent of fees; 21–40 percent of fees; 41–60 percent of fees; 61–80 percent of fees; 81–99 percent of fees; and 100 percent of fees. We chose this type of approach, as opposed to asking firms for more detailed approximations of their spending, in an attempt to reduce variability within the data.

Responses were gathered with each participating institution being assigned a sample weight equal to the inverse of their selection probability (with adjustments for non-response bias to ensure the representativeness of the data). This type of application represents a very common survey approach and is based on valid and widely-accepted statistical techniques. We believe that this methodology of weighting responses allows for an adequate sample size to draw inferences for this purpose.

We noted generally that, depending on the exact professional service, between 25 percent and 50 percent of the institutions indicated that they purchased at least some percentage of those services from firms beyond their local labor market. Given these findings, we developed a weighted average of the results to determine the final proportion to be excluded from the labor-related share for each of the four types of professional services surveyed.

The following represents a description of the steps we used in developing the weighted averages to designate these fees as labor-related or nonlabor-related:

First, for those institutions that spent between 1 percent and 20 percent of the professional services fees on firms located beyond their local labor markets, we multiplied their weighted count by the mid-point of that range (or 10 percent) as those estimates tended to have very low variability around their respective point estimates. As an example, for Accounting and Auditing services, if a weighted count of 500 SNFs responded that they paid ''1 to 20 percent'' of their professional fees for these services to firms located outside of their local labor market, we would multiply 500 times 10 percent. This would represent our first subtotal.

Second, for those firms that spent more than 20 percent of their fees on firms located outside of their local labor markets, the variance around the point estimates tended to be higher. As a result we multiplied the weighted number of firms by the low point within each multiple choice answer's range in order to develop our overall weighted estimates. Using a similar example as above, if a weighted count of 300 SNFs responded that they paid ''21 to 40 percent'' of their professional fees to firms located outside of their local labor market, we would multiply 300 times 21 percent. This would be repeated for the other categories, as well and represent our next set of subtotals.

For the last step in the calculations, we added the subtotals together and then divided by the total number of weighted SNFs in order to determine what proportion of their professional fees went to firms inside and outside of their local labor markets.

Additionally, we disagree with the commenter that services purchased from national firms are always priced at local labor market cost rates. We believe, for example, that an accounting firm that employs accountants located at their headquarters would have a standard pricing structure that is developed to ensure that their costs of operation are covered, regardless of the location of their clients. Finally, in the absence of a creditable data source from the commenter, we do not believe it would be appropriate to include costs associated with professional services purchased from nationally based firms located beyond the SNF's local labor market in the labor-related share.

After considering the comments we received, for the reasons discussed above and in the FY 2014 SNF PPS proposed rule, we are finalizing our proposal, as presented in the FY 2014 SNF PPS proposed rule (78 FR 26462 through 26463), to update and revise the

labor-related share effective October 1, 2013, to reflect the relative importance of the following FY 2010-based SNF market basket cost weights that we believe are labor-intensive and vary with, or are influenced by, the local labor market: (1) Wages and salaries; (2) employee benefits; (3) contract labor; (4) the labor-related portion of nonmedical professional fees; (5) administrative and facilities support services; (6) all other: labor-related services (previously referred to in the FY 2004-based SNF market basket as labor-intensive); and (7) a proportion of capital-related expenses. Furthermore, in the FY 2014 SNF PPS proposed rule (78 FR 26443), we also proposed if more recent data became available (for example, a more recent estimate of the FY 2010-based SNF market basket, MFP adjustment, and/or FY 2004-based SNF market basket used for the forecast error calculation), we would use such data, if appropriate, to determine the FY 2014 SNF market basket update, FY 2014 labor-related share relative importance, and MFP adjustment in the FY 2014 SNF PPS final rule. Accordingly, Table 2 below summarizes the revised and updated labor-related share for FY 2014, which is based on IGI's most recent forecast (second quarter 2013 forecast with historical data through first quarter 2013) of the rebased and revised FY 2010-based SNF market basket, compared to the labor-related share that was used for the FY 2013 SNF PPS update.

TABLE 2—FY 2013 AND FY 2014 SNF LABOR-RELATED SHARE

	Relative importance, labor-related, FY 2013 (FY 2004-based index) 12:2 forecast	Relative importance, labor-related, FY 2014 (FY 2010-based index) 13:2 forecast
Wages and salaries [1]	49.847	49.118
Employee benefits	11.532	11.423
Nonmedical Professional fees: labor-related	1.307	3.446
Administrative and facilities support services	N/A	0.499
All Other: Labor-related services [2]	3.364	2.287
Capital-related (.391)	2.333	2.772
Total	68.383	69.545

[1] The wages and salaries and employee benefits cost weight reflect contract labor costs.
[2] Previously referred to as labor-intensive services cost category in the FY 2004-based SNF market basket.

2. Market Basket Estimate for the FY 2014 SNF PPS Update

We also proposed to determine the FY 2014 SNF market basket percentage under section 1888(e)(5)(B)(i) of the Act based on the percentage increase in the revised and rebased FY 2010-based SNF market basket (78 FR 26441). As discussed above, we are finalizing our proposal to revise and rebase the SNF market basket to reflect a base year of FY 2010. Thus, we are finalizing our proposal to use the FY 2010-based SNF market basket to determine the SNF market basket percentage increase for FY 2014. Section IV.B.5 of this final rule includes further discussion of the SNF market basket percentage increase for FY 2014.

3. Forecast Error Adjustment

As discussed in the June 10, 2003 supplemental proposed rule (68 FR 34768) and finalized in the August 4, 2003, final rule (68 FR 46057 through 46059), the regulations at § 413.337(d)(2) provide for an adjustment to account for market basket forecast error. The initial adjustment for market basket forecast error applied to the update of the FY 2003 rate for FY 2004, and took into account the cumulative forecast error for the period from FY 2000 through FY 2002, resulting in an increase of 3.26 percent to the FY 2004 update. Subsequent adjustments in succeeding FYs take into account the forecast error from the most recently available FY for which there is final data, and apply the difference between the forecasted and actual change in the market basket when the difference exceeds a specified threshold. We originally used a 0.25 percentage point threshold for this purpose; however, for the reasons specified in the FY 2008 SNF PPS final rule (72 FR 43425, August 3, 2007), we adopted a 0.5 percentage point threshold effective for FY 2008 and subsequent fiscal years. As we stated in the FY 2004 SNF PPS final rule that first issued the market basket forecast error adjustment (68 FR 46058, August 4, 2003), the adjustment will ''. . . reflect both upward and downward adjustments, as appropriate.''

In the FY 2014 SNF PPS proposed rule (78 FR 26441 through 26442), we discussed the forecast error for FY 2012 (the most recently available FY for which there is final data), and proposed a new method for reporting the forecast error in situations where the forecast error calculation is equal to 0.5 percentage point when rounded to one significant digit (otherwise referred to as a tenth of a percentage point). For FY 2012, the estimated increase in the market basket index was 2.7 percentage points, while the actual increase was 2.2 percentage points, resulting in the actual increase being 0.5 percentage point lower than the estimated increase. As the forecast error calculation in this instance does not permit one to determine definitively if the forecast error adjustment threshold has been exceeded, we proposed to report the forecast error to two significant digits so that we may determine whether the forecast error correction threshold has been exceeded and whether the forecast error adjustment should be applied under § 413.337(d)(2). This policy would apply only in those instances where the forecast error, when rounded to one significant digit, is 0.5 percentage point. Furthermore, we stated that we would apply the proposed policy where the difference between the actual and projected market basket is either positive or negative 0.5 percentage point. We believe this approach is necessary and appropriate to ensure that the necessity for a forecast error adjustment is accurately determined in accordance with § 413.337(d)(2). Therefore, we proposed that, following the policy outlined above, we would determine the forecast error for FY 2012 to the second significant digit, or the hundredth of a percentage point. The forecasted FY 2012 SNF market basket

percentage change was 2.7 percent. When rounded to the second significant digit, it was 2.69 percent. This would be subtracted from the actual FY 2012 SNF market basket percentage change, rounded to the second significant digit, of 2.18 percent to yield a negative forecast error correction of 0.51 percentage point. As the forecast error correction, when rounded to two significant digits, exceeds 0.5 percentage point, a forecast error adjustment would be warranted under the policy outlined in the FY 2008 SNF PPS final rule (72 FR 43425) (see § 413.337(d)(2)).

We stated in the proposed rule that, consistent with prior applications of the forecast error adjustment since establishing the 0.5 percentage point threshold, and consistent with our applications of both the market basket adjustment and productivity adjustment described below, once we have determined that a forecast error adjustment is warranted, we will continue to apply the adjustment itself at one significant digit (otherwise referred to as a tenth of a percentage point). Therefore, the FY 2014 SNF market basket percentage change of 2.3 percent would be adjusted downward by the forecast error correction of 0.5 percentage point, resulting in a net SNF market basket increase factor of 1.8 percent.

We received a number of comments on the proposed change to how the forecast error is reported in these limited circumstances, as well as more general comments on the SNF forecast error adjustment. A discussion of these comments, with our responses, appears below.

Comment: The comments received on this topic supported the approach proposed in the FY 2014 SNF PPS proposed rule for reporting the forecast error in situations where the forecast error calculation is equal to 0.5 percentage point when rounded to one significant digit. Some commenters did, however, state that we should consider using a 0.45 percentage point threshold instead of the 0.5 percentage point threshold, where we would apply a forecast error adjustment when the forecast error exceeded 0.45 percentage point. According to the commenters, this would permit us to continue applying an adjustment at the one significant digit level without requiring different methods for reporting the forecast error in a given year. Finally, it was requested that we confirm that in cases where the threshold rounds to 0.50 percentage point, at the two significant digit level, that a forecast error adjustment would not be applied.

Response: We appreciate the support for our proposal from commenters. With respect to the commenters' suggestion that we adopt a 0.45 percentage point threshold rather than the current 0.5 percentage point threshold, we note that we did not propose to change the forecast error threshold in the FY 2014 SNF PPS proposed rule, and thus we are not adopting such a change at this time. We proposed only to change how the forecast error is *reported* to create greater transparency, in those limited cases where the forecast error rounds to 0.5 percentage point at the one significant digit level, as to whether and why the forecast error adjustment is or is not being applied in a given year. We continue to believe that a 0.5 percentage point threshold is appropriate and enables us to identify those instances where the difference between the actual and projected market basket becomes sufficiently significant to indicate that the historical price changes are not being adequately reflected.

In response to the comment concerning whether, under our proposed policy, the forecast error adjustment would be applied in cases where the forecast error rounds to 0.50 percentage point at the two significant digit level, we would not apply the forecast error adjustment in such a case as the forecast error would not exceed the 0.5 percentage point threshold.

Comment: Several commenters suggested that we apply a cumulative forecast error adjustment to account for all of the variations in the market basket forecasts since FY 2003. These commenters stated that while the industry has tolerated the adjustment process, the lack of any cumulative adjustment in recent years violates the precedent set by CMS in 2003 when the last cumulative adjustment was made and that the cumulative adjustment in 2003 demonstrated recognition by us of the cumulatively erosive effect of multi-year forecasting errors. The commenters recommended that we adopt a policy which recognizes the cumulative effect of multi-year market basket forecast errors and that an adjustment be made to account for the cumulative errors since FY 2003.

Response: In the FY 2004 SNF PPS final rule, we applied a one-time, cumulative forecast error adjustment resulting in an increase of 3.26 percent (68 FR 46036, 46058). Since that time, the forecast errors have been relatively small and clustered near zero. As stated in prior rulemaking on the SNF PPS—including, most recently, the FY 2012 SNF PPS final rule (76 FR 48527, August 8, 2011)—we believe the forecast error correction should be applied only when the degree of forecast error in any given year is such that the SNF base payment rate does not adequately reflect the historical price changes faced by SNFs. Accordingly, we continue to believe that the forecast error adjustment mechanism should appropriately be reserved for the type of major, unexpected change that initially gave rise to this policy, rather than the minor year-to-year variances that are a routine and inherent aspect of this type of statistical measurement.

Accordingly, for the reasons discussed in this final rule and in the FY 2014 SNF PPS proposed rule (78 FR 26441 through 26442), we are finalizing our proposal to report the forecast error to the second significant digit in only those instances where the forecast error rounds to 0.5 percentage point at one significant digit. Effective October 1, 2013, we will report the forecast error to the second significant digit in those instances where the forecast error rounds to 0.5 percentage point at one significant digit, so that we may determine whether the forecast error adjustment threshold has been exceeded. As discussed above, once we have determined that a forecast error adjustment is warranted, we will continue to apply the adjustment itself at one significant digit (otherwise referred to as a tenth of a percentage point).

4. Multifactor Productivity Adjustment

Section 3401(b) of the Affordable Care Act (consisting of the Patient Protection and Affordable Care Act, Pub. L. 111–148, enacted on March 23, 2010, and the Health Care and Education Reconciliation Act of 2010, Pub. L. 111–152, enacted on March 30, 2010) requires that, in FY 2012 (and in subsequent FYs), the market basket percentage under the SNF payment system as described in section 1888(e)(5)(B)(i) of the Act is to be reduced annually by the productivity adjustment described in section 1886(b)(3)(B)(xi)(II) of the Act. Section 1886(b)(3)(B)(xi)(II) of the Act, added by section 3401(a) of the Affordable Care Act, sets forth the definition of this productivity adjustment. The statute defines the productivity adjustment to be equal to ''the 10-year moving average of changes in annual economy-wide private nonfarm business multi-factor productivity (as projected by the Secretary for the 10-year period ending with the applicable fiscal year, year, cost-reporting period, or other annual period)'' (the MFP adjustment). The Bureau of Labor Statistics (BLS) is the agency that publishes the official measure of private nonfarm business

multifactor productivity (MFP). Please see *http://www.bls.gov/mfp* to obtain the BLS historical published MFP data.

The projection of MFP is currently produced by IGI, an economic forecasting firm. To generate a forecast of MFP, IGI replicated the MFP measure calculated by the BLS, using a series of proxy variables derived from IGI's U.S. macroeconomic models. This process is described in greater detail in section III.F.3 of the FY 2012 SNF PPS final rule (76 FR 48527 through 48529).

a. Incorporating the Multifactor Productivity Adjustment Into the Market Basket Update

Section 1888(e)(5)(A) of the Act requires the Secretary to ''establish a skilled nursing facility market basket index that reflects changes over time in the prices of an appropriate mix of goods and services included in covered skilled nursing facility services.'' Section 1888(e)(5)(B)(ii) of the Act, added by section 3401(b) of the Affordable Care Act, requires that for FY 2012 and each subsequent FY, after determining the market basket percentage described in section 1888(e)(5)(B)(i) of the Act, ''the Secretary shall reduce such percentage by the productivity adjustment described in section 1886(b)(3)(B)(xi)(II)'' (which we refer to as the multifactor productivity (MFP) adjustment). Section 1888(e)(5)(B)(ii) of the Act further states that the reduction of the market basket percentage by the MFP adjustment may result in the market basket percentage being less than zero for a FY, and may result in payment rates under section 1888(e) of the Act for a FY being less than such payment rates for the preceding FY. Thus, if the application of the MFP adjustment to the market basket percentage calculated under section 1888(e)(5)(B)(i) of the Act results in an MFP-adjusted market basket percentage that is less than zero, then the annual update to the unadjusted federal per diem rates under section 1888(e)(4)(E)(ii) of the Act would be negative, and such rates would decrease relative to the prior FY.

For the FY 2014 SNF PPS update, the MFP adjustment is calculated as the 10-year moving average of changes in MFP for the period ending September 30, 2014. In accordance with section 1888(e)(5)(B)(i) of the Act and § 413.337(d)(2) of the regulations, the SNF PPS market basket percentage for FY 2014 is based on IGI's second quarter 2013 forecast of the FY 2010-based SNF market basket update (which is 2.3 percent), as adjusted by the forecast error adjustment (which is 0.5 percent), and is estimated to be 1.8 percent. In accordance with section 1888(e)(5)(B)(ii) of the Act (as added by section 3401(b) of the Affordable Care Act) and § 413.337(d)(3), this market basket percentage is then reduced by the MFP adjustment (which is the 10-year moving average of changes in MFP for the period ending September 30, 2014) of 0.5 percent. In the FY 2014 SNF PPS proposed rule (78 FR 26443), we proposed that if more recent data became available, we would use that data, if appropriate, to determine the FY 2014 MFP adjustment. The MFP adjustment of 0.4 percent set forth in the proposed rule was based on IGI's first quarter 2013 forecast. The 0.5 percent MFP adjustment set forth in this final rule is based on updated IGI data (that is, IGI second quarter 2013 forecast). The resulting MFP-adjusted SNF market basket update is equal to 1.3 percent, or 1.8 percent less the 0.5 percentage point MFP adjustment.

5. Market Basket Update Factor for FY 2014

Sections 1888(e)(4)(E)(ii)(IV) and 1888(e)(5)(i) of the Act require that SNF PPS unadjusted federal per diem rates for the previous fiscal year be adjusted by the market basket index percentage change for the fiscal year involved, in order to compute the unadjusted federal per diem rates for the current year. Accordingly, we determined the total growth from the average market basket index for the period of October 1, 2012 through September 30, 2013 to the average market basket index for the period of October 1, 2013 through September 30, 2014. This process yields a market basket update factor of 2.3 percent. As further explained in section IV.B.3 of this final rule, as applicable, we adjust the market basket update factor to reflect the forecast error from the most recently available FY for which there is final data and apply this adjustment whenever the difference between the forecasted and actual percentage change in the market basket exceeds a 0.5 percentage point threshold. Since the forecasted FY 2012 SNF market basket percentage change exceeded the actual FY 2012 SNF market basket percentage change (FY 2012 is the most recently available FY for which there is final data) by more than 0.5 percentage point, the FY 2014 market basket update factor of 2.3 percent would be adjusted downward by the applicable difference, in this case 0.5 percentage points, which reduces the FY 2014 market basket update factor to 1.8 percent. In addition, for FY 2014, section 1888(e)(5)(B) of the Act requires us to reduce the market basket percentage by the MFP adjustment (the 10-year moving average of changes in MFP for the period ending September 30, 2014) of 0.5 percent, as described in section IV.B.4. of this final rule. The resulting MFP-adjusted SNF market basket update would be equal to 1.3 percent, or 1.8 percent less 0.5 percentage point. We used the FY 2010-based SNF market basket percentage, adjusted as described above, to adjust each per diem component of the federal rates forward to reflect the change in the average prices for FY 2014 from average prices for FY 2013. We further adjust the rates by a wage index budget neutrality factor, described later in this section. Tables 3 and 4 reflect the updated components of the unadjusted federal rates for FY 2014, prior to adjustment for case-mix.

TABLE 3—FY 2014 UNADJUSTED FEDERAL RATE PER DIEM—URBAN

Rate component	Nursing—case-mix	Therapy—case-mix	Therapy—non-case-mix	Non-case-mix
Per Diem Amount	$165.81	$124.90	$16.45	$84.62

TABLE 4—FY 2014 UNADJUSTED FEDERAL RATE PER DIEM—RURAL

Rate component	Nursing—case-mix	Therapy—case-mix	Therapy—non-case-mix	Non-case-mix
Per Diem Amount	$158.41	$144.01	$17.57	$86.19

6. Case-Mix Adjustment

Under section 1888(e)(4)(G)(i) of the Act, the federal rate also incorporates an adjustment to account for case-mix, using a classification system that accounts for the relative resource utilization of different patient types. The statute specifies that the adjustment is to reflect both a resident classification system established by the Secretary to account for the relative resource use of different patient types, as well as resident assessment data and other data that the Secretary considers appropriate. In the May 12, 1998 interim final rule with comment period that initially implemented the SNF PPS (63 FR 26252), we developed the RUG–III case-mix classification system, which tied the amount of payment to resident resource use in combination with resident characteristic information. Staff time measurement (STM) studies conducted in 1990, 1995, and 1997 provided information on resource use (time spent by staff members on residents) and resident characteristics that enabled us not only to establish RUG–III, but also to create case-mix indexes (CMIs). The original RUG–III grouper logic was based on clinical data collected in 1990, 1995, and 1997. As discussed in the FY 2010 SNF PPS proposed rule (74 FR 22208), we subsequently conducted a multi-year data collection and analysis under the Staff Time and Resource Intensity Verification (STRIVE) project to update the case-mix classification system for FY 2011. The resulting Resource Utilization Groups, Version 4 (RUG–IV) case-mix classification system reflected the data collected in 2006 through 2007 during the STRIVE project, and the RUG–IV model was finalized in the FY 2010 SNF PPS final rule (74 FR 40288) to take effect in FY 2011 concurrently with an updated new resident assessment instrument, version 3.0 of the Minimum Data Set (MDS 3.0), which collects the clinical data used for case-mix classification under RUG–IV.

We note that case-mix classification is based, in part, on the beneficiary's need for skilled nursing care and therapy services. The case-mix classification system uses clinical data from the MDS to assign a case-mix group to each patient that is then used to calculate a per diem payment under the SNF PPS. Further, because the MDS is used as a basis for payment as well as a clinical assessment, we have provided extensive training on proper coding and the time frames for MDS completion in the RAI Manual. For an MDS to be considered valid for use in determining payment, the MDS assessment must be completed in compliance with the instructions in the RAI Manual in effect at the time the assessment is completed. For payment and quality monitoring purposes, the RAI Manual consists of both the Manual instructions and the interpretive guidance and policy clarifications posted on the appropriate MDS Web site at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/NursingHomeQualityInits/MDS30RAIManual.html*.

Under section 1888(e)(4)(H), each update of the payment rates must include the case-mix classification methodology applicable for the upcoming FY. The payment rates set forth in this final rule reflect the use of the RUG–IV case-mix classification system from October 1, 2013, through September 30, 2014. We list the case-mix adjusted RUG–IV payment rates, provided separately for urban and rural SNFs, in Tables 5 and 6 with corresponding case-mix values. These tables do not reflect the add-on for SNF residents with AIDS enacted by section 511 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA, Pub. L. 108–173) discussed below, which we apply only after making all other adjustments (including the wage index and case-mix adjustments).

TABLE 5—RUG–IV CASE-MIX ADJUSTED FEDERAL RATES AND ASSOCIATED INDEXES—URBAN

RUG–IV Category	Nursing index	Therapy index	Nursing component	Therapy component	Non-case mix therapy comp	Non-case mix component	Total rate
RUX	2.67	1.87	$442.71	$233.56	.....	$84.62	$760.89
RUL	2.57	1.87	426.13	233.56	.....	84.62	744.31
RVX	2.61	1.28	432.76	159.87	.....	84.62	677.25
RVL	2.19	1.28	363.12	159.87	.....	84.62	607.61
RHX	2.55	0.85	422.82	106.17	.....	84.62	613.61
RHL	2.15	0.85	356.49	106.17	.....	84.62	547.28
RMX	2.47	0.55	409.55	68.70	.....	84.62	562.87
RML	2.19	0.55	363.12	68.70	.....	84.62	516.44
RLX	2.26	0.28	374.73	34.97	.....	84.62	494.32
RUC	1.56	1.87	258.66	233.56	.....	84.62	576.84
RUB	1.56	1.87	258.66	233.56	.....	84.62	576.84
RUA	0.99	1.87	164.15	233.56	.....	84.62	482.33
RVC	1.51	1.28	250.37	159.87	.....	84.62	494.86
RVB	1.11	1.28	184.05	159.87	.....	84.62	428.54
RVA	1.10	1.28	182.39	159.87	.....	84.62	426.88
RHC	1.45	0.85	240.42	106.17	.....	84.62	431.21
RHB	1.19	0.85	197.31	106.17	.....	84.62	388.10
RHA	0.91	0.85	150.89	106.17	.....	84.62	341.68
RMC	1.36	0.55	225.50	68.70	.....	84.62	378.82
RMB	1.22	0.55	202.29	68.70	.....	84.62	355.61
RMA	0.84	0.55	139.28	68.70	.....	84.62	292.60
RLB	1.50	0.28	248.72	34.97	.....	84.62	368.31
RLA	0.71	0.28	117.73	34.97	.....	84.62	237.32
ES3	3.58	.....	593.60	.....	16.45	84.62	694.67
ES2	2.67	.....	442.71	.....	16.45	84.62	543.78
ES1	2.32	.....	384.68	.....	16.45	84.62	485.75
HE2	2.22	.....	368.10	.....	16.45	84.62	469.17
HE1	1.74	.....	288.51	.....	16.45	84.62	389.58
HD2	2.04	.....	338.25	.....	16.45	84.62	439.32
HD1	1.60	.....	265.30	.....	16.45	84.62	366.37
HC2	1.89	.....	313.38	.....	16.45	84.62	414.45
HC1	1.48	.....	245.40	.....	16.45	84.62	346.47

TABLE 5—RUG–IV CASE-MIX ADJUSTED FEDERAL RATES AND ASSOCIATED INDEXES—URBAN—Continued

RUG–IV Category	Nursing index	Therapy index	Nursing component	Therapy component	Non-case mix therapy comp	Non-case mix component	Total rate
HB2	1.86		308.41		16.45	84.62	409.48
HB1	1.46		242.08		16.45	84.62	343.15
LE2	1.96		324.99		16.45	84.62	426.06
LE1	1.54		255.35		16.45	84.62	356.42
LD2	1.86		308.41		16.45	84.62	409.48
LD1	1.46		242.08		16.45	84.62	343.15
LC2	1.56		258.66		16.45	84.62	359.73
LC1	1.22		202.29		16.45	84.62	303.36
LB2	1.45		240.42		16.45	84.62	341.49
LB1	1.14		189.02		16.45	84.62	290.09
CE2	1.68		278.56		16.45	84.62	379.63
CE1	1.50		248.72		16.45	84.62	349.79
CD2	1.56		258.66		16.45	84.62	359.73
CD1	1.38		228.82		16.45	84.62	329.89
CC2	1.29		213.89		16.45	84.62	314.96
CC1	1.15		190.68		16.45	84.62	291.75
CB2	1.15		190.68		16.45	84.62	291.75
CB1	1.02		169.13		16.45	84.62	270.20
CA2	0.88		145.91		16.45	84.62	246.98
CA1	0.78		129.33		16.45	84.62	230.40
BB2	0.97		160.84		16.45	84.62	261.91
BB1	0.90		149.23		16.45	84.62	250.30
BA2	0.70		116.07		16.45	84.62	217.14
BA1	0.64		106.12		16.45	84.62	207.19
PE2	1.50		248.72		16.45	84.62	349.79
PE1	1.40		232.13		16.45	84.62	333.20
PD2	1.38		228.82		16.45	84.62	329.89
PD1	1.28		212.24		16.45	84.62	313.31
PC2	1.10		182.39		16.45	84.62	283.46
PC1	1.02		169.13		16.45	84.62	270.20
PB2	0.84		139.28		16.45	84.62	240.35
PB1	0.78		129.33		16.45	84.62	230.40
PA2	0.59		97.83		16.45	84.62	198.90
PA1	0.54		89.54		16.45	84.62	190.61

TABLE 6—RUG–IV CASE-MIX ADJUSTED FEDERAL RATES AND ASSOCIATED INDEXES—RURAL

RUG–IV Category	Nursing index	Therapy index	Nursing component	Therapy component	Non-case mix therapy comp	Non-case mix component	Total rate
RUX	2.67	1.87	$422.95	$269.30		$86.19	$778.44
RUL	2.57	1.87	407.11	269.30		86.19	762.60
RVX	2.61	1.28	413.45	184.33		86.19	683.97
RVL	2.19	1.28	346.92	184.33		86.19	617.44
RHX	2.55	0.85	403.95	122.41		86.19	612.55
RHL	2.15	0.85	340.58	122.41		86.19	549.18
RMX	2.47	0.55	391.27	79.21		86.19	556.67
RML	2.19	0.55	346.92	79.21		86.19	512.32
RLX	2.26	0.28	358.01	40.32		86.19	484.52
RUC	1.56	1.87	247.12	269.30		86.19	602.61
RUB	1.56	1.87	247.12	269.30		86.19	602.61
RUA	0.99	1.87	156.83	269.30		86.19	512.32
RVC	1.51	1.28	239.20	184.33		86.19	509.72
RVB	1.11	1.28	175.84	184.33		86.19	446.36
RVA	1.10	1.28	174.25	184.33		86.19	444.77
RHC	1.45	0.85	229.69	122.41		86.19	438.29
RHB	1.19	0.85	188.51	122.41		86.19	397.11
RHA	0.91	0.85	144.15	122.41		86.19	352.75
RMC	1.36	0.55	215.44	79.21		86.19	380.84
RMB	1.22	0.55	193.26	79.21		86.19	358.66
RMA	0.84	0.55	133.06	79.21		86.19	298.46
RLB	1.50	0.28	237.62	40.32		86.19	364.13
RLA	0.71	0.28	112.47	40.32		86.19	238.98
ES3	3.58		567.11		17.57	86.19	670.87
ES2	2.67		422.95		17.57	86.19	526.71
ES1	2.32		367.51		17.57	86.19	471.27
HE2	2.22		351.67		17.57	86.19	455.43
HE1	1.74		275.63		17.57	86.19	379.39
HD2	2.04		323.16		17.57	86.19	426.92
HD1	1.60		253.46		17.57	86.19	357.22

TABLE 6—RUG–IV CASE-MIX ADJUSTED FEDERAL RATES AND ASSOCIATED INDEXES—RURAL—Continued

RUG–IV Category	Nursing index	Therapy index	Nursing component	Therapy component	Non-case mix therapy comp	Non-case mix component	Total rate
HC2	1.89		299.39		17.57	86.19	403.15
HC1	1.48		234.45		17.57	86.19	338.21
HB2	1.86		294.64		17.57	86.19	398.40
HB1	1.46		231.28		17.57	86.19	335.04
LE2	1.96		310.48		17.57	86.19	414.24
LE1	1.54		243.95		17.57	86.19	347.71
LD2	1.86		294.64		17.57	86.19	398.40
LD1	1.46		231.28		17.57	86.19	335.04
LC2	1.56		247.12		17.57	86.19	350.88
LC1	1.22		193.26		17.57	86.19	297.02
LB2	1.45		229.69		17.57	86.19	333.45
LB1	1.14		180.59		17.57	86.19	284.35
CE2	1.68		266.13		17.57	86.19	369.89
CE1	1.50		237.62		17.57	86.19	341.38
CD2	1.56		247.12		17.57	86.19	350.88
CD1	1.38		218.61		17.57	86.19	322.37
CC2	1.29		204.35		17.57	86.19	308.11
CC1	1.15		182.17		17.57	86.19	285.93
CB2	1.15		182.17		17.57	86.19	285.93
CB1	1.02		161.58		17.57	86.19	265.34
CA2	0.88		139.40		17.57	86.19	243.16
CA1	0.78		123.56		17.57	86.19	227.32
BB2	0.97		153.66		17.57	86.19	257.42
BB1	0.90		142.57		17.57	86.19	246.33
BA2	0.70		110.89		17.57	86.19	214.65
BA1	0.64		101.38		17.57	86.19	205.14
PE2	1.50		237.62		17.57	86.19	341.38
PE1	1.40		221.77		17.57	86.19	325.53
PD2	1.38		218.61		17.57	86.19	322.37
PD1	1.28		202.76		17.57	86.19	306.52
PC2	1.10		174.25		17.57	86.19	278.01
PC1	1.02		161.58		17.57	86.19	265.34
PB2	0.84		133.06		17.57	86.19	236.82
PB1	0.78		123.56		17.57	86.19	227.32
PA2	0.59		93.46		17.57	86.19	197.22
PA1	0.54		85.54		17.57	86.19	189.30

Section 511 of the MMA amended section 1888(e)(12) of the Act to provide for a temporary increase of 128 percent in the PPS per diem payment for SNF residents with Acquired Immune Deficiency Syndrome (AIDS) to reflect increased costs associated with these residents, effective for services furnished on or after October 1, 2004. This special add-on for SNF residents with AIDS is required to remain in effect until ''. . . the Secretary certifies that there is an appropriate adjustment in the case mix . . . to compensate for the increased costs associated with [such] residents . . . .'' The add-on for SNF residents with AIDS is also discussed in Program Transmittal #160 (Change Request #3291), issued on April 30, 2004, which is available online at *www.cms.gov/transmittals/downloads/r160cp.pdf*. In the FY 2010 SNF PPS final rule (74 FR 40288) (in which we finalized the RUG–IV case-mix classification system), we did not address the certification of a case mix adjustment alternative to the add-on for SNF residents with AIDS, thus allowing the add-on payment required by section 511 of the MMA to remain in effect. For the limited number of SNF residents that qualify for this add-on, there is a significant increase in payments. Using FY 2011 data, we identified fewer than 4,100 SNF residents with a diagnosis code of 042 (Human Immunodeficiency Virus (HIV) Infection) who qualify for this add-on. For FY 2014, an urban facility with a resident with AIDS in RUG–IV group ''HC2'' would have a case-mix adjusted payment of $414.45 (see Table 4) before the application of the add-on required by the MMA. After application of the add-on, an increase of 128 percent, this urban facility would receive a case-mix adjusted payment of approximately $944.95 for this resident.

Currently, we use the International Classification of Diseases, 9th revision, Clinical Modification (ICD–9–CM) code 042 to identify those residents for whom it is appropriate to apply the AIDS add-on established by section 511 of the MMA. In this context, we note that, in accordance with the requirements of the final rule published in the **Federal Register** on September 5, 2012 (77 FR 54664), we will be discontinuing our current use of the ICD–9–CM, effective with the compliance date for using the International Classification of Diseases, 10th revision, Clinical Modification (ICD–10–CM) of October 1, 2014. In the FY 2014 SNF PPS proposed rule (78 FR 26444), with regard to the above-referenced ICD–9–CM diagnosis code of 042, we proposed to transition to the equivalent ICD–10–CM diagnosis code of B20 upon the October 1, 2014 implementation date for conversion to ICD–10–CM in order to identify those residents for whom it is appropriate to apply the AIDS add-on. We invited public comment on this proposal. We received only one comment that included a reference to this proposal, and this comment simply acknowledged the proposal without offering any specific observations about it. Accordingly, in this final rule, we are finalizing this proposal without any modification. Therefore, effective with services furnished on or after October 1, 2014, for the reasons set forth above and in the FY 2014 SNF PPS proposed rule (78 FR 26444), the AIDS add-on established by section 511 of the MMA

will apply to beneficiaries with an ICD–10–CM diagnosis code of B20.

7. Wage Index Adjustment

Section 1888(e)(4)(G)(ii) of the Act requires that we adjust the portion of the federal rates attributable to wages and wage-related costs for the area in which the facility is located compared to the national average of such costs using a wage index that we find appropriate. Since the implementation of the SNF PPS, we have used hospital wage data in developing a wage index to be applied to SNFs. In the FY 2014 SNF PPS proposed rule (78 FR 26446 through 26447), we proposed to continue that practice, as we continue to believe that in the absence of SNF-specific wage data, using the hospital inpatient wage index is appropriate and reasonable for the SNF PPS. As explained in the update notice for FY 2005 (69 FR 45786, July 30, 2004), the SNF PPS does not use the hospital area wage index's occupational mix adjustment, as this adjustment serves specifically to define the occupational categories more clearly in a hospital setting; moreover, the collection of the occupational wage data also excludes any wage data related to SNFs. Therefore, we believe that using the updated wage data exclusive of the occupational mix adjustment continues to be appropriate for the SNF PPS.

In the FY 2014 SNF PPS proposed rule (78 FR 26447), we also proposed to continue using the same methodology discussed in the FY 2008 SNF PPS final rule (72 FR 43423) to address those geographic areas in which there are no hospitals and, thus, no hospital wage index data on which to base the calculation of the FY 2014 SNF PPS wage index. For rural geographic areas that do not have hospitals and, therefore, lack hospital wage data on which to base an area wage adjustment, we proposed to use the average wage index from all contiguous CBSAs as a reasonable proxy. For FY 2014, there are no rural geographic areas that do not have hospitals, and thus this methodology will not be applied. Furthermore, we indicated that we would not apply this methodology to rural Puerto Rico, but instead would continue using the most recent wage index previously available for that area due to the distinct economic circumstances that exist there (for example, due to the close proximity to one another of almost all of Puerto Rico's various urban and non-urban areas, using the methodology discussed in the FY 2008 final rule would produce a wage index for rural Puerto Rico that is inappropriately higher than that in half of its urban areas). For urban areas without specific hospital wage index data, we proposed to use the average wage indexes of all of the urban areas within the state to serve as a reasonable proxy for the wage index of that urban CBSA. For FY 2014, the only urban area without wage index data available is CBSA 25980, Hinesville-Fort Stewart, GA.

In the SNF PPS final rule for FY 2006 (70 FR 45026, August 4, 2005), we adopted the changes discussed in the OMB Bulletin No. 03–04 (June 6, 2003), available online at *http://www.whitehouse.gov/omb/bulletins/b03-04.html,* which announced revised definitions for metropolitan statistical areas (MSAs), and the creation of micropolitan statistical areas and combined statistical areas. In addition, OMB published subsequent bulletins regarding CBSA changes, including changes in CBSA numbers and titles. We indicated in the FY 2008 SNF PPS final rule (72 FR 43423), that all subsequent SNF PPS rules and notices are considered to incorporate the CBSA changes published in the most recent OMB bulletin that applies to the hospital wage data used to determine the current SNF PPS wage index. The OMB bulletins are available online at *http://www.whitehouse.gov/omb/bulletins/index.html.*

On February 28, 2013, OMB issued OMB Bulletin No. 13–01, announcing revisions to the delineation of Metropolitan Statistical Areas, Micropolitian Statistical Areas, and Combined Statistical Areas, and guidance on uses of the delineation of these areas. A copy of this bulletin may be obtained at *http://www.whitehouse.gov/sites/default/files/omb/bulletins/2013/b-13-01.pdf.* This bulletin states that it provides the delineations of all Metropolitan Statistical Areas, Metropolitan Divisions, Micropolitan Statistical Areas, Combined Statistical Areas, and New England City and Town Areas in the United States and Puerto Rico based on the standards published in the June 28, 2010 **Federal Register** (75 FR 37246–37252) and Census Bureau data.

While the revisions OMB published on February 28, 2013 are not as sweeping as the changes made when we adopted the CBSA geographic designations for FY 2006, the February 28, 2013 bulletin does contain a number of significant changes. For example, there are new CBSAs, urban counties that become rural, rural counties that become urban, and existing CBSAs that are being split apart.

The changes made by the bulletin and their ramifications must be extensively reviewed and assessed by CMS before using them for the SNF PPS wage index. Because the bulletin was not issued until February 28, 2013, we were unable to undertake such a lengthy process before publication of the FY 2014 proposed rule. By the time the bulletin was issued, the FY 2014 SNF PPS proposed rule was in the advanced stages of development. We had already developed the FY 2014 proposed wage index based on the previous OMB definitions. As we stated in the FY 2014 SNF PPS proposed rule (78 FR 26448), to allow for sufficient time to assess the new changes and their ramifications, we intend to propose changes to the wage index based on the newest CBSA changes in the FY 2015 SNF PPS proposed rule, and thus we would continue to use the previous OMB definitions (that is, those used for the FY 2013 SNF PPS update notice) for the FY 2014 SNF PPS wage index.

A discussion of the comments that we received on the wage index adjustment to the federal rates, and our responses to those comments, appears below.

Comment: Commenters recommend that we reconsider developing a SNF-specific wage index suggesting that ''hospital cost data may not be the most reliable resource when determining geographical differences in salary structure for skilled nursing facilities.'' Additionally, one commenter recommends that this rule reflect any changes needed to ensure that adjustments more accurately reflect salary experiences of facilities. Commenters request that we provide an update in the final rule on its efforts and plans for wage index reform for the SNF PPS that aims to minimize fluctuations, match the costs of labor in the market, and provides for a single wage index policy.

Response: Tables A and B in the Addendum of this final rule reflect updated hospital wage data used to develop the SNF PPS wage index published in the FY 2014 SNF PPS proposed rule (78 FR 26471 through 26480). Consistent with our previous responses to these recurring comments (most recently published in the FY 2010 SNF PPS final rule (74 FR 40301)), developing a wage index that utilizes data specific to SNFs would require us to engage in a resource-intensive audit process. Also, we note that section 315 of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA) (Pub. L. 106–554, enacted on December 21, 2000) authorized us to establish a geographic reclassification procedure that is specific to SNFs, but only after collecting the data necessary to establish

a SNF wage index that is based on wage data from nursing homes. However, to date, this has proven to be unfeasible due to the volatility of existing SNF wage data and the significant amount of resources that would be required to improve the quality of that data. As discussed above, we continue to believe that in the absence of SNF-specific wage data, using the hospital inpatient wage index (without the occupational mix adjustment) is appropriate and reasonable for the SNF PPS.

In addition, we note that we have engaged in research efforts relating to the development of an alternative hospital wage index for the IPPS, which examined the issues the commenters mentioned about ensuring that the wage index minimizes fluctuations, matches the costs of labor in the market, and provides for a single wage index policy. Section 3137(b) of the Affordable Care Act required the Secretary of Health and Human Services to submit to Congress a report that includes a plan to reform the hospital wage index under section 1886 of the Act. In developing the plan, the Secretary was directed to take into account the goals for reforming such system set forth in the June 2007 MedPAC report entitled ''Report to Congress: Promoting Greater Efficiency in Medicare'' (available at *http://www.medpac.gov/documents/jun07_entirereport.pdf.*), including establishing a new hospital compensation index system that:

- Uses Bureau of Labor Statistics data, or other data or methodologies, to calculate relative wages for each geographic area involved;
- Minimizes wage index adjustments between and within MSAs and Statewide rural areas;
- Includes methods to minimize the volatility of wage index adjustments that result from implementation of policy, while maintaining budget neutrality in applying such adjustments;
- Takes into account the effect that implementation of the system would have on health care providers and on each region of the country.
- Addresses issues related to occupational mix, such as staffing practices and ratios, and any evidence on the effect on quality of care or patient safety as a result of the implementation of the system; and
- Provides for a transition.

As delegated by the Secretary, CMS contracted with Acumen, L.L.C. (Acumen) to review the June 2007 MedPAC report and recommend a methodology for an improved Medicare wage index system. After consultation with relevant parties during the development of the plan, the Secretary submitted the report to Congress, which is available via the Internet at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/Wage-Index-Reform.html.* We will continue to monitor closely research efforts surrounding the development of an alternative hospital wage index for the IPPS and the potential impact or influence of that research on the SNF PPS.

Once calculated, we apply the wage index adjustment to the labor-related portion of the federal rate, which is 69.545 percent of the total rate. This percentage reflects the labor-related relative importance for FY 2014, using the FY 2010-based SNF market basket. Each year, we calculate a revised labor-related share, based on the relative importance of labor-related cost categories (that is, those cost categories that are sensitive to local area wage costs) in the input price index. As discussed in section IV.B.2 of this final rule, for the FY 2014 SNF PPS update, we revised the labor-related share to reflect the relative importance of the revised FY 2010-based SNF market basket cost weights for the following cost categories: wages and salaries; employee benefits; contract labor; the labor-related portion of nonmedical professional fees; administrative and facilities support services; all other: labor-related services (previously referred to in the FY 2004-based SNF market basket as labor-intensive); and a proportion of capital-related expenses.

We calculate the labor-related relative importance from the SNF market basket, and it approximates the labor-related portion of the total costs after taking into account historical and projected price changes between the base year, FY 2010, and FY 2014. The price proxies that move the different cost categories in the market basket do not necessarily change at the same rate, and the relative importance captures these changes. Accordingly, the relative importance figure more closely reflects the cost-share weights for FY 2014 than the base-year weights from the SNF market basket.

We calculate the labor-related relative importance for FY 2014 in four steps. First, we compute the FY 2014 price index level for the total market basket and each cost category of the market basket. Second, we calculate a ratio for each cost category by dividing the FY 2014 price index level for that cost category by the total market basket price index level. Third, we determine the FY 2014 relative importance for each cost category by multiplying this ratio by the base year (FY 2010) weight. Finally, we add the FY 2014 relative importance for each of the labor-related cost categories to produce the FY 2014 labor-related relative importance. Tables 7 and 8 show the case-mix adjusted RUG–IV federal rates by labor-related and non-labor-related components. Table 2 in section IV.B.4 provides the FY 2014 labor-related share components based on the revised and rebased FY 2010-based SNF market basket.

TABLE 7—RUG–IV CASE-MIX ADJUSTED FEDERAL RATES FOR URBAN SNFS BY LABOR AND NON-LABOR COMPONENT

RUG–IV category	Total rate	Labor portion	Non-labor portion
RUX	$760.89	$529.16	$231.73
RUL	744.31	517.63	226.68
RVX	677.25	470.99	206.26
RVL	607.61	422.56	185.05
RHX	613.61	426.74	186.87
RHL	547.28	380.61	166.67
RMX	562.87	391.45	171.42
RML	516.44	359.16	157.28
RLX	494.32	343.77	150.55
RUC	576.84	401.16	175.68
RUB	576.84	401.16	175.68
RUA	482.33	335.44	146.89
RVC	494.86	344.15	150.71
RVB	428.54	298.03	130.51
RVA	426.88	296.87	130.01

TABLE 7—RUG–IV CASE-MIX ADJUSTED FEDERAL RATES FOR URBAN SNFS BY LABOR AND NON-LABOR COMPONENT—Continued

RUG–IV category	Total rate	Labor portion	Non-labor portion
RHC	431.21	299.88	131.33
RHB	388.10	269.90	118.20
RHA	341.68	237.62	104.06
RMC	378.82	263.45	115.37
RMB	355.61	247.31	108.30
RMA	292.60	203.49	89.11
RLB	368.31	256.14	112.17
RLA	237.32	165.04	72.28
ES3	694.67	483.11	211.56
ES2	543.78	378.17	165.61
ES1	485.75	337.81	147.94
HE2	469.17	326.28	142.89
HE1	389.58	270.93	118.65
HD2	439.32	305.53	133.79
HD1	366.37	254.79	111.58
HC2	414.45	288.23	126.22
HC1	346.47	240.95	105.52
HB2	409.48	284.77	124.71
HB1	343.15	238.64	104.51
LE2	426.06	296.30	129.76
LE1	356.42	247.87	108.55
LD2	409.48	284.77	124.71
LD1	343.15	238.64	104.51
LC2	359.73	250.17	109.56
LC1	303.36	210.97	92.39
LB2	341.49	237.49	104.00
LB1	290.09	201.74	88.35
CE2	379.63	264.01	115.62
CE1	349.79	243.26	106.53
CD2	359.73	250.17	109.56
CD1	329.89	229.42	100.47
CC2	314.96	219.04	95.92
CC1	291.75	202.90	88.85
CB2	291.75	202.90	88.85
CB1	270.20	187.91	82.29
CA2	246.98	171.76	75.22
CA1	230.40	160.23	70.17
BB2	261.91	182.15	79.76
BB1	250.30	174.07	76.23
BA2	217.14	151.01	66.13
BA1	207.19	144.09	63.10
PE2	349.79	243.26	106.53
PE1	333.20	231.72	101.48
PD2	329.89	229.42	100.47
PD1	313.31	217.89	95.42
PC2	283.46	197.13	86.33
PC1	270.20	187.91	82.29
PB2	240.35	167.15	73.20
PB1	230.40	160.23	70.17
PA2	198.90	138.33	60.57
PA1	190.61	132.56	58.05

TABLE 8—RUG–IV CASE-MIX ADJUSTED FEDERAL RATES FOR RURAL SNFS BY LABOR AND NON-LABOR COMPONENT

RUG–IV category	Total rate	Labor portion	Non-labor portion
RUX	$778.44	$541.37	$237.07
RUL	762.60	530.35	232.25
RVX	683.97	475.67	208.30
RVL	617.44	429.40	188.04
RHX	612.55	426.00	186.55
RHL	549.18	381.93	167.25
RMX	556.67	387.14	169.53
RML	512.32	356.29	156.03
RLX	484.52	336.96	147.56
RUC	602.61	419.09	183.52
RUB	602.61	419.09	183.52
RUA	512.32	356.29	156.03

TABLE 8—RUG–IV CASE-MIX ADJUSTED FEDERAL RATES FOR RURAL SNFS BY LABOR AND NON-LABOR COMPONENT—Continued

RUG–IV category	Total rate	Labor portion	Non-labor portion
RVC	509.72	354.48	155.24
RVB	446.36	310.42	135.94
RVA	444.77	309.32	135.45
RHC	438.29	304.81	133.48
RHB	397.11	276.17	120.94
RHA	352.75	245.32	107.43
RMC	380.84	264.86	115.98
RMB	358.66	249.43	109.23
RMA	298.46	207.56	90.90
RLB	364.13	253.23	110.90
RLA	238.98	166.20	72.78
ES3	670.87	466.56	204.31
ES2	526.71	366.30	160.41
ES1	471.27	327.74	143.53
HE2	455.43	316.73	138.70
HE1	379.39	263.85	115.54
HD2	426.92	296.90	130.02
HD1	357.22	248.43	108.79
HC2	403.15	280.37	122.78
HC1	338.21	235.21	103.00
HB2	398.40	277.07	121.33
HB1	335.04	233.00	102.04
LE2	414.24	288.08	126.16
LE1	347.71	241.81	105.90
LD2	398.40	277.07	121.33
LD1	335.04	233.00	102.04
LC2	350.88	244.02	106.86
LC1	297.02	206.56	90.46
LB2	333.45	231.90	101.55
LB1	284.35	197.75	86.60
CE2	369.89	257.24	112.65
CE1	341.38	237.41	103.97
CD2	350.88	244.02	106.86
CD1	322.37	224.19	98.18
CC2	308.11	214.28	93.83
CC1	285.93	198.85	87.08
CB2	285.93	198.85	87.08
CB1	265.34	184.53	80.81
CA2	243.16	169.11	74.05
CA1	227.32	158.09	69.23
BB2	257.42	179.02	78.40
BB1	246.33	171.31	75.02
BA2	214.65	149.28	65.37
BA1	205.14	142.66	62.48
PE2	341.38	237.41	103.97
PE1	325.53	226.39	99.14
PD2	322.37	224.19	98.18
PD1	306.52	213.17	93.35
PC2	278.01	193.34	84.67
PC1	265.34	184.53	80.81
PB2	236.82	164.70	72.12
PB1	227.32	158.09	69.23
PA2	197.22	137.16	60.06
PA1	189.30	131.65	57.65

Section 1888(e)(4)(G)(ii) of the Act also requires that we apply this wage index adjustment in a manner that does not result in aggregate payments under the SNF PPS that are greater or less than would otherwise be made in the absence of the wage adjustment. For FY 2014 (federal rates effective October 1, 2013), we apply an adjustment to fulfill the budget neutrality requirement. We meet this requirement by multiplying each of the components of the unadjusted federal rates by a budget neutrality factor equal to the ratio of the weighted average wage adjustment factor for FY 2013 to the weighted average wage adjustment factor for FY 2014. For this calculation, we use the same 2012 claims utilization data for both the numerator and denominator of this ratio. We define the wage adjustment factor used in this calculation as the labor share of the rate component multiplied by the wage index plus the non-labor share of the rate component. The budget neutrality factor for FY 2014 is 1.0006. The wage index applicable to FY 2014 is set forth in Tables A and B, which appear in the Addendum of this final rule, and is also available on the CMS Web site at *http://cms.gov/Medicare/Medicare-Fee-for-Service-Payment/SNFPPS/WageIndex.html.*

After consideration of the comments we received, for the reasons discussed in this final rule and in the FY 2014 SNF PPS proposed rule, we are finalizing the wage index adjustment and related policies as proposed in the FY 2014 SNF PPS proposed rule (78 FR 24446 through 26449) without modification.

8. Adjusted Rate Computation Example

Using the hypothetical SNF XYZ described below, Table 9 shows the adjustments made to the federal per diem rates to compute the provider's actual per diem PPS payment under the described scenario. We derive the Labor and Non-labor columns from Table 7. As illustrated in Table 9, SNF XYZ's total PPS payment would equal $41,718.20.

TABLE 9—ADJUSTED RATE COMPUTATION EXAMPLE SNF XYZ: LOCATED IN CEDAR RAPIDS, IA (URBAN CBSA 16300), WAGE INDEX: 0.8964

RUG–IV group	Labor	Wage index	Adjusted labor	Non-labor	Adjusted rate	Percent adjustment	Medicare days	Payment
RVX	$470.99	0.8964	$422.20	$206.26	$628.46	$628.46	14	$8,798.44
ES2	378.17	0.8964	338.99	165.61	504.60	504.60	30	15,138.00
RHA	237.62	0.8964	213.00	104.06	317.06	317.06	16	5,072.96
CC2*	219.04	0.8964	196.35	95.92	292.27	666.38	10	6,663.80
BA2	151.01	0.8964	135.37	66.13	201.50	201.50	30	6,045.00
							100	41,718.20

*Reflects a 128 percent adjustment from section 511 of the MMA.

C. Additional Aspects of the SNF PPS

1. SNF Level of Care—Administrative Presumption

The establishment of the SNF PPS did not change the fundamental requirements for SNF coverage under Medicare. However, because the case-mix classification reflects the beneficiary's need for skilled nursing care and therapy, we have attempted, where possible, to coordinate claims review procedures with the existing resident assessment process and case-mix classification system discussed in section IV.B of this final rule. This approach includes an administrative presumption that utilizes a beneficiary's initial classification in one of the upper 52 RUGs of the 66-group RUG–IV case-mix classification system to assist in making certain SNF level of care determinations.

In accordance with section 1888(e)(4)(H)(ii) of the Act and the regulations at § 413.345, we include in each update of the federal payment rates in the **Federal Register** the designation of those specific RUGs under the classification system that represent the required SNF level of care for Medicare coverage, as provided in § 409.30. As set forth in the FY 2011 SNF PPS update notice (75 FR 42910), this designation reflects an administrative presumption under the 66-group RUG–IV system that beneficiaries who are correctly assigned to one of the upper 52 RUG–IV groups on the initial 5-day, Medicare-required assessment are automatically classified as meeting the SNF level of care definition up to and including the assessment reference date on the 5-day Medicare-required assessment.

A beneficiary assigned to any of the lower 14 RUG–IV groups is not automatically classified as either meeting or not meeting the SNF level of care definition, but instead receives an individual level of care determination using the existing administrative criteria. This presumption recognizes the strong likelihood that beneficiaries assigned to one of the upper 52 RUG–IV groups during the immediate post-hospital period require a covered level of care, which would be less likely for those beneficiaries assigned to one of the lower 14 RUG–IV groups.

In the July 30, 1999 final rule (64 FR 41670), we indicated that we would announce any changes to the guidelines for Medicare level of care determinations related to modifications in the case-mix classification structure. In this final rule, we continue to designate the upper 52 RUG–IV groups for purposes of this administrative presumption, consisting of all groups encompassed by the following RUG–IV categories:

- Rehabilitation plus Extensive Services;
- Ultra High Rehabilitation;
- Very High Rehabilitation;
- High Rehabilitation;
- Medium Rehabilitation;
- Low Rehabilitation;
- Extensive Services;
- Special Care High;
- Special Care Low; and,
- Clinically Complex.

However, we note that this administrative presumption policy does not supersede the SNF's responsibility to ensure that its decisions relating to level of care are appropriate and timely, including a review to confirm that the services prompting the beneficiary's assignment to one of the upper 52 RUG–IV groups (which, in turn, serves to trigger the administrative presumption) are themselves medically necessary. As we explained in the FY 2000 SNF PPS final rule (64 FR 41667), the administrative presumption:

> . . . is itself rebuttable in those individual cases in which the services actually received by the resident do not meet the basic statutory criterion of being reasonable and necessary to diagnose or treat a beneficiary's condition (according to section 1862(a)(1) of the Act). Accordingly, the presumption would not apply, for example, in those situations in which a resident's assignment to one of the upper . . . groups is itself based on the receipt of services that are subsequently determined to be not reasonable and necessary.

Moreover, we want to stress the importance of careful monitoring for changes in each patient's condition to determine the continuing need for Part A SNF benefits after the assessment reference date of the 5-day assessment.

2. Consolidated Billing

Sections 1842(b)(6)(E) and 1862(a)(18) of the Act (as added by section 4432(b) of the BBA) require a SNF to submit consolidated Medicare bills to its fiscal intermediary or Medicare Administrative Contractor for almost all of the services that its residents receive during the course of a covered Part A stay. In addition, section 1862(a)(18) places the responsibility with the SNF for billing Medicare for physical therapy, occupational therapy, and speech-language pathology services that the resident receives during a noncovered stay. Section 1888(e)(2)(A) of the Act excludes a certain limited number of services from the consolidated billing provision (primarily those services furnished by physicians and certain other types of practitioners), which remain separately

billable under Part B when furnished to a SNF's Part A resident. These excluded service categories are discussed in greater detail in section V.B.2 of the May 12, 1998 interim final rule (63 FR 26295 through 26297).

We note that section 103 of the Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act of 1999 (BBRA, Pub. L. 106–113, enacted on November 29, 1999) amended section 1888(e)(2)(A) of the Act by further excluding a number of individual ''high-cost, low probability'' services, identified by Healthcare Common Procedure Coding System (HCPCS) codes, within several broader categories (chemotherapy items, chemotherapy administration services, radioisotope services, and customized prosthetic devices) that otherwise remained subject to this provision. We discuss this BBRA amendment in greater detail in the FY 2001 SNF PPS proposed and final rules (65 FR 19231 through 19232, April 10, 2000, and 65 FR 46790 through 46795, July 31, 2000), as well as in Program Memorandum AB–00–18 (Change Request #1070), issued March 2000, which is available online at *www.cms.gov/transmittals/downloads/ab001860.pdf*.

As explained in the FY 2001 SNF PPS proposed rule (65 FR 19232), the amendments enacted in section 103 of the BBRA not only identified for exclusion from this provision a number of particular service codes within four specified categories (that is, chemotherapy items, chemotherapy administration services, radioisotope services, and customized prosthetic devices), but also gave the Secretary ''. . . the authority to designate additional, individual services for exclusion within each of the specified service categories.'' In the FY 2001 SNF PPS proposed rule, we also noted that the BBRA Conference report (H.R. Rep. No. 106–479 at 854 (1999) (Conf. Rep.)) characterizes the individual services that this legislation targets for exclusion as ''. . . high-cost, low probability events that could have devastating financial impacts because their costs far exceed the payment [SNFs] receive under the prospective payment system . . . .'' According to the conferees, section 103(a) of the BBRA ''is an attempt to exclude from the PPS certain services and costly items that are provided infrequently in SNFs . . . .'' By contrast, we noted that the Congress declined to designate for exclusion any of the remaining services within those four categories (thus, leaving all of those services subject to SNF consolidated billing), because they are relatively inexpensive and are furnished routinely in SNFs.

As we further explained in the FY 2001 SNF PPS final rule (65 FR 46790), and as our longstanding policy, any additional service codes that we might designate for exclusion under our discretionary authority must meet the same statutory criteria used in identifying the original codes excluded from consolidated billing under section 103(a) of the BBRA: The code must fall within one of the four service categories specified in the BBRA, and the code also must meet the same standards of high cost and low probability in the SNF setting, as discussed in the BBRA Conference report. Accordingly, we characterized this statutory authority to identify additional service codes for exclusion ''. . . as essentially affording the flexibility to revise the list of excluded codes in response to changes of major significance that may occur over time (for example, the development of new medical technologies or other advances in the state of medical practice)'' (65 FR 46791). In the FY 2014 SNF PPS proposed rule (78 FR 26449–26450), we specifically invited public comments identifying HCPCS codes in any of these four service categories (chemotherapy items, chemotherapy administration services, radioisotope services, and customized prosthetic devices) representing recent medical advances that might meet our criteria for exclusion from SNF consolidated billing. A discussion of the public comments received on this topic, along with our responses, appears below.

Comment: One commenter suggested that we should categorically exclude all chemotherapy and radiation therapy services from consolidated billing. Another commenter reiterated a recommendation that commenters had repeatedly urged us to adopt in previous years, to expand the existing exclusion for certain high-intensity outpatient hospital services (such as radiation therapy) to encompass services furnished in other, nonhospital settings.

Response: With respect to chemotherapy services, we have noted repeatedly in prior rulemaking on the SNF PPS—including, most recently, the FY 2012 SNF PPS final rule (76 FR 48532 through 48533, August 8, 2011)—that in creating a statutory carve-out for chemotherapy and certain other designated types of services, the BBRA

> . . . did not categorically exclude all such services from SNF consolidated billing. Instead, the legislation specifically identified individual excluded services within designated categories, by Healthcare Common Procedure Coding System (HCPCS) code. The BBRA's Conference Report explained that this legislation specifically targeted those 'high-cost, low probability' items and services that '. . . are not typically administered in a SNF, or are exceptionally expensive, or are given as infusions, thus requiring special staff expertise to administer' (H.R. Conf. Rep. No. 106–479 at 854). By contrast, other types of services within those categories that '. . . are relatively inexpensive and are administered routinely in SNFs' remain subject to SNF consolidated billing under this legislation.

Radiation therapy, by contrast, is not one of the service categories designated for exclusion under the BBRA legislation, but instead is encompassed within the administrative exclusion for certain types of exceptionally intensive outpatient services under the regulations at § 411.15(p)(3)(iii). As such, *all* types of radiation therapy services are, in fact, already excluded from consolidated billing, but *only* when furnished in the hospital or CAH setting. In response to the recurring calls for expanding this exclusion to encompass services furnished in freestanding (nonhospital/CAH) settings, we have repeatedly noted—most recently, in the FY 2012 SNF PPS final rule (76 FR 48532, August 8, 2011)—that the existing law does not provide us with the authority to ''. . . establish a categorical exclusion for these services that would apply irrespective of the setting in which they are furnished.'' In addition, as we initially noted in the FY 2009 SNF PPS final rule (73 FR 46436, August 8, 2008) and then reiterated in a number of subsequent final rules, the repeated calls to expand the administrative exclusion for high-intensity outpatient services in this manner would appear to reflect

> . . . a continued misunderstanding of the underlying purpose of this provision. As we have consistently noted in response to comments on this issue in previous years . . . and as also explained in Medicare Learning Network (MLN) Matters article SE0432 . . . the rationale for establishing this exclusion was to address those types of services that are so far beyond the normal scope of SNF care that they *require the intensity of the hospital setting* in order to be furnished safely and effectively.

Moreover, we note that when the Congress enacted the consolidated billing exclusion for certain RHC and FQHC services in section 410 of the MMA, the accompanying legislative history's description of present law acknowledged that the existing exclusions for exceptionally intensive outpatient services are specifically limited to '. . . certain outpatient services *from a Medicare-participating hospital or critical access hospital* . . .' (emphasis added). (See the House Ways

and Means Committee Report (H. Rep. No. 108–178, Part 2 at 209), and the Conference Report (H. Conf. Rep. No. 108–391 at 641)). Therefore, these services are excluded from SNF consolidated billing *only* when furnished in the outpatient hospital or CAH setting, and not when furnished in other, freestanding (non-hospital or non-CAH) settings.

Comment: One commenter cited the longstanding chemotherapy exclusion for Rituximab (Rituxan, HCPCS code J9310), which it characterized as a ''*non-cancer* chemotherapy . . . drug used to treat rheumatoid arthritis'' (emphasis added), and presented this as a precedent for expanding this exclusion to encompass a number of other drugs that are not used in the treatment of cancer. The commenter asserted that in the absence of such an exclusion, suppliers of these drugs who do not have ''an executed contract in place with the SNF prior to administration'' would be ''forced to absorb the significant cost of the drug or biologic.''

Response: We note that the description of Rituximab as a ''non-cancer'' chemotherapy drug is not entirely accurate, and requires a more detailed discussion. As explained on MedlinePlus, the Web site of the National Institutes of Health's U.S. National Library of Medicine (*http://www.nlm.nih.gov/medlineplus/druginfo/meds/a607038.html*),

> Rituximab is used alone or with other medications to treat certain types of non-Hodgkin's lymphoma (NHL; a type of cancer that begins in a type of white blood cells that normally fights infection). Rituximab is also used with another medication to treat the symptoms of rheumatoid arthritis (RA; a condition in which the body attacks its own joints, causing pain, swelling, and loss of function) in people who have already been treated with a certain type of medication called a tumor necrosis factor (TNF) inhibitor.

Thus, while it is true that this drug is approved for use in treating certain non-cancer conditions such as rheumatoid arthritis, it is actually approved for use in treating cancer as well, and it is this latter application that represents the basis for its exclusion from consolidated billing as a chemotherapy drug. In this context, we note that when an otherwise excluded chemotherapy drug is prescribed for a use that does not involve treating cancer, the drug would not qualify as an excluded ''chemotherapy'' drug in that instance. This is consistent with the discussion of the chemotherapy exclusion in the FY 2010 SNF PPS final rule (74 FR 40354), which notes that this exclusion does not encompass drugs that ''are not anti-cancer drugs,'' as well as in the FY 2012 SNF PPS final rule (76 FR 48531), which similarly notes that this exclusion does not extend to drugs that ''are actually used to treat diseases *other than* cancer'' (emphasis added). Moreover, the commenter appears to be concerned that the absence of an executed contract would serve to absolve the SNF of its liability to pay the supplier for a bundled service. We note that this is not the case. In MLN Matters article #MM3592 (available online at *http://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/downloads/MM3592.pdf*), while emphasizing the importance of written agreements between SNFs and their suppliers, we clearly specify that an arrangement between a SNF and its supplier ''is validated not by the presence of specific supporting written documentation but rather by their actual compliance with the requirements governing such 'arrangements','' and that ''the absence of an agreement with its supplier (written or not) does not relieve the SNF of its responsibility to pay suppliers for services 'bundled' in the SNF PPS payment from Medicare.''

Comment: Some commenters advocated the exclusion of other types of services that do not fall within the categories identified in the BBRA. We received a comment requesting that DIFICID® (fidaxomicin) be excluded from consolidated billing. DIFICID® is an orally administered tablet that is used specifically for treating severe cases of diarrhea associated with certain potentially life-threatening infections of the gastrointestinal tract. The commenter noted this drug's potential to reduce the recurrence of such infections (along with associated hospitalizations and physician office visits), and to improve patient quality of life. The commenter cited as precedents the existing authority for excluding certain ''high-cost, low probability'' services under the BBRA, as well as the separate payment made for certain drugs under the heading of screening and preventive services, as discussed in MLN Matters Special Edition article #SE0436 (available online at *http://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/downloads/SE0436.pdf*). The commenter then urged the creation of a similar exclusion for DIFICID® on public policy grounds, expressing concern that the continued inclusion of DIFICID® within the SNF PPS bundle might prompt SNFs to opt for alternate treatments that are less expensive, but also less efficacious.

Response: As we have consistently stated (most recently, in the FY 2012 SNF PPS final rule (76 FR 48530, August 8, 2011)), the BBRA authorizes us to identify additional services for exclusion *only within* those particular service categories—chemotherapy items; chemotherapy administration services; radioisotope services; and, customized prosthetic devices—that it has designated for this purpose, and does not give us the authority simply to carve out additional categories of services beyond those specified in the law on ''public policy grounds.'' Accordingly, as DIFICID® does not fall within one of the specific service categories designated for this purpose in the statute itself, we are unable to exclude it from consolidated billing under this authority. Further, we note that while the cited MLN Matters article does indeed discuss certain drugs that are separately covered under Medicare Part B or Part D when furnished to Part A SNF residents, those particular drugs are vaccines that are *preventive* rather than therapeutic in nature and, as such, are by definition outside the scope of the Part A SNF benefit (see Pub. L. 100–04, ch.6, § 20.4); by contrast, therapeutic drugs such as DIFICID® would fall within the scope of SNF coverage under Part A. Regarding the commenter's concern that the continued inclusion of DIFICID® within the SNF PPS bundle could affect the extent to which SNFs may be inclined to consider its use, we note that while bundling provides incentives for SNFs to be efficient in the provision of care, SNFs are still required to provide ''the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being'' of each resident in accordance with the resident's assessment and plan of care (§ 483.25).

Comment: One commenter reiterated a number of recommendations that commenters had urged us to adopt in previous years. These included expanding the existing chemotherapy exclusion to encompass related drugs that are commonly administered in conjunction with chemotherapy to ameliorate the side effects of the chemotherapy drugs, and excluding additional categories of services beyond those specified in the BBRA, such as positron emission tomography (PET) scans.

Response: Regarding the exclusion of chemotherapy-related drugs, we have noted repeatedly in this and previous final rules—most recently, the FY 2012 SNF PPS final rule (76 FR 48532, August 8, 2011)—that the BBRA authorizes us to identify additional

service codes for exclusion only within those particular service categories (chemotherapy items; chemotherapy administration services; radioisotope services; and, customized prosthetic devices) that it has designated for this purpose, and does not give us the authority to exclude other services which, though they may be related, fall outside of the specified service categories themselves. Thus, while anti-emetics (anti-nausea drugs), for example, are commonly administered in conjunction with chemotherapy, they are not inherently chemotherapeutic in nature (that is, they do not actively destroy cancer cells) and, consequently, do not fall within the excluded chemotherapy category designated in the BBRA. Regarding the exclusion of PET scans, we noted in the FY 2012 SNF PPS final rule that ''. . . we decline to add to the exclusion list those services submitted by commenters that have already been considered and not excluded in previous years based on their being outside the particular service categories that the statute authorizes for exclusion'' (76 FR 48531, August 8, 2011). Such services would include PET scans, as discussed previously in the FY 2006 SNF PPS final rule (70 FR 45049, August 4, 2005).

Comment: One commenter recommended that the surgical debridement procedures represented by HCPCS codes 11040 through 11044 be excluded from consolidated billing.

Response: We note that debridement codes 11040 (skin, partial thickness) and 11041 (skin, full thickness) were discontinued as of December 2010. The remaining debridement codes that the commenter cited—11042 (skin, and subcutaneous tissue), 11043 (skin, subcutaneous tissue, and muscle), and 11044 (skin, subcutaneous tissue, muscle, and bone)—are listed correctly in Carrier/A/B MAC File 1 as physician services that are excluded from consolidated billing. However, these same three codes (along with the two discontinued ones) currently appear erroneously in Major Category I.F of the FI/A/B MAC Annual Update as included (that is, bundled) ambulatory surgery codes. Accordingly, we will make the appropriate corrections to the FI/A/B MAC Annual Update to ensure that it no longer lists these codes incorrectly as ambulatory surgery inclusions.

Comment: One commenter suggested that, rather than relying solely on feedback through the public comment process on possible exclusions from consolidated billing, CMS should convene an official expert group to review the codes and make formal recommendations.

Response: In the FY 2010 SNF PPS final rule (74 FR 40354, August 11, 2009), we noted that the Congress gave specific direction regarding the review of consolidated billing codes that it envisioned: In the BBRA Conference Report (H.R. Rep. No. 106–479 at 854 (1999) (Conf. Rep.)), it specified that the GAO was to conduct a special, one-time comprehensive review of the existing code set, and it then conferred on the Secretary the authority ''. . . to review periodically and modify, as needed, the list of excluded services.'' However, as we explained in the FY 2002 SNF PPS final rule (66 FR 39588, July 31, 2001), this ongoing review function must be considered within the context of the overall process in which it takes place:

> . . . we do not view making additions to the list of excluded services as a part of a process of continual expansion to encompass an ever-broadening array of excluded services. Further, . . . the fundamental purpose of the consolidated billing provision . . . is to make the SNF responsible for billing Medicare for essentially *all* of its residents' services, other than those identified in a small number of narrow and specifically delimited statutory exclusions (emphasis added).

Thus, the purpose of this ongoing review is not to devise new and increasingly expansive rationales for the unbundling of services, but rather, simply to ensure that services which meet the *already-established* criteria for exclusion are not overlooked. We believe that our longstanding practice of periodically inviting input through the public comment process (which is already open to any interested parties who may wish to provide the benefit of their expertise in this area) is both appropriate and sufficient to achieve this objective.

3. Payment for SNF-Level Swing-Bed Services

Section 1883 of the Act permits certain small, rural hospitals to enter into a Medicare swing-bed agreement, under which the hospital can use its beds to provide either acute- or SNF-level care, as needed. For critical access hospitals (CAHs), Medicare pays on a reasonable cost basis under Part A for SNF-level services furnished under a swing-bed agreement. However, in accordance with section 1888(e)(7) of the Act, these SNF-level services when furnished by non-CAH rural hospitals are paid under the SNF PPS, effective with cost reporting periods beginning on or after July 1, 2002. As explained in the FY 2002 SNF PPS final rule (66 FR 39562), this effective date is consistent with the statutory provision to integrate swing-bed rural hospitals into the SNF PPS by the end of the transition period, June 30, 2002.

Accordingly, all non-CAH swing-bed rural hospitals are being paid under the SNF PPS. Therefore, all rates and wage indexes outlined in earlier sections of this final rule for the SNF PPS also apply to all non-CAH swing-bed rural hospitals. A complete discussion of assessment schedules, the MDS, and the transmission software (RAVEN–SB for Swing Beds) appears in the FY 2002 final rule (66 FR 39562) and in the FY 2010 final rule (74 FR 40288). As finalized in the FY 2010 SNF PPS final rule (74 FR 40356–57), effective October 1, 2010, non-CAH swing-bed rural hospitals are required to complete an MDS 3.0 swing-bed assessment, which is limited to the required demographic, payment, and quality items. The latest changes in the MDS for swing-bed rural hospitals appear on the SNF PPS Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/SNFPPS/index.html.* We received no comments on this aspect of the proposed rule.

D. Other Issues

1. Monitoring Impact of FY 2012 Policy Changes

In the FY 2014 SNF PPS proposed rule (78 FR 26463 through 26465), we discussed our monitoring efforts associated with impacts of certain policy changes finalized in the FY 2012 SNF PPS final rule (76 FR 48486). Specifically, we have been monitoring the impact of the following changes:

- Recalibration of the FY 2011 SNF parity adjustment to align overall payments under RUG–IV with those under RUG–III.
- Allocation of group therapy time to pay more appropriately for group therapy services based on resource utilization and cost.
- Implementation of changes to the MDS 3.0 patient assessment instrument, most notably the introduction of the Change-of-Therapy (COT) Other Medicare Required Assessment (OMRA).

We have posted quarterly memos to the SNF PPS Web site which highlight some of the trends we have observed over a given time period. These memos may be accessed through the SNF PPS Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/SNFPPS/Downloads/SNF_Monitoring.zip.* In the FY 2014 SNF PPS proposed rule (78 FR 26465), we stated that based on the data reviewed thus far, we have found no evidence of possible negative impacts on SNF providers cited

in the comments in the FY 2012 SNF PPS final rule (see 76 FR 48497–98, 48537), particularly references to a ''double hit'' from the combined impact of the recalibration of the FY 2011 SNF parity adjustment and the FY 2012 policy changes. Therefore, we stated that while we will continue our SNF monitoring efforts, we will post information to the aforementioned Web site only as appropriate.

A discussion of the comments we received on these efforts, with our responses, appears below.

Comment: One commenter stated that they appreciate the transparency demonstrated by releasing the quarterly findings memos and urged us to continue this practice into the future.

Response: We appreciate the support for our efforts to provide this data on the FY 2012 policy changes. As stated in the FY 2014 SNF PPS proposed rule (78 FR 26465), this level of analysis was being conducted to determine if any evidence existed of possible negative impacts on SNF providers cited in the comments in the FY 2012 SNF PPS final rule (76 FR 48497–48498, 48537), particularly references to a ''double hit'' from the combined impact of the recalibration of the FY 2011 SNF parity adjustment and the FY 2012 policy changes (for example, allocation of group therapy and introduction of the COT OMRA). Based on the data we have examined so far, there is no evidence of such negative impacts—overall case mix has not been affected significantly and providers appear to have adjusted their internal processes and care planning activities well to accommodate the FY 2012 policy changes. Given these findings, we do not regard the continued publishing of quarterly memos, in the absence of some marked finding, as still being necessary at this point. Therefore, as stated in the FY 2014 SNF PPS proposed rule (78 FR 26465), we will continue our SNF monitoring efforts but will henceforth only post information regarding our monitoring activities discussed above to the SNF PPS Web site as appropriate.

Comment: One commenter asked that we reevaluate the potential negative impacts of implementing the COT OMRA; specifically, that the COT OMRA is unnecessarily burdensome and inflexible. This commenter requested that we consider ways to make the COT OMRA more flexible for providers.

Response: As noted in the FY 2012 SNF PPS final rule (76 FR 48518), the COT OMRA was implemented because the then-existing range of PPS assessments did not give providers adequate opportunity to report changes in the resident's therapy services that occur outside the observation window which, as always, should be based on medical evidence. Since implementing the COT OMRA, we have continued to monitor its utilization and determine if any negative impacts have resulted for facilities and/or SNF residents. Our monitoring efforts have revealed, as demonstrated in Table 21 of the FY 2014 SNF PPS proposed rule (78 FR 26465), that the COT OMRA comprises just 11 percent of all assessments completed for SNF residents. As such, based on the limited number of COT OMRAs being completed, we do not believe that the COT OMRA represents a significant burden for providers.

With respect to the flexibility of the assessment, the limited number of COT OMRAs might also be the result of the flexibility in completing the COT OMRA afforded in the MDS RAI Manual (for example, the flexibility discussed in Chapter 2 of the MDS RAI Manual, whereby the COT observation period for a resident is reset if a scheduled or unscheduled assessment is completed on or prior to day 7 of the COT observation period). Additionally, as the COT OMRA may be used to report either an increase or decrease in therapy services relative to the resident's previous therapy RUG classification, the COT OMRA has helped ensure greater accuracy of SNF payments and ensure that providers are appropriately reimbursed for the level of care delivered to their residents. Therefore, while we will continue to monitor for potential negative impacts associated with the FY 2012 policy changes, as noted above, we have not yet found any evidence of such an adverse impact.

2. Ensuring Accuracy in Grouping to Rehabilitation RUG–IV Categories

In the FY 2014 SNF PPS proposed rule (78 FR 26465–26466), we clarified that our classification criteria for the Rehabilitation RUG categories require that the resident receive the requisite number of distinct calendar days of therapy to be classified into the Rehabilitation RUG category, and focused particularly on issues related to classification into the Medium and Low Rehabilitation categories. We explained that in requiring distinct calendar days of therapy, our classification criteria are consistent with the SNF level of care requirement under § 409.31(b)(1), which provides that skilled services must be needed and received on a daily basis, and § 409.34(a)(2),which specifies that the ''daily basis'' criterion can be met by skilled rehabilitation services that are needed and provided at least 5 days per week. However, we explained in the FY 2014 SNF PPS proposed rule (78 FR 26465–66) that the MDS item set currently does not contain an item that permits SNFs to report the total number of distinct calendar days of therapy provided by all rehabilitation disciplines. Instead, the MDS item set requires the SNF to record, separately by each therapy discipline, the number of days therapy was received during the 7-day look-back period, without distinguishing between distinct calendar days. As we explained in the FY 2014 SNF PPS proposed rule, currently, the RUG grouper adds these days together which results in some residents being classified into the Medium and Low Rehabilitation RUG categories when they do not actually meet our classification criteria. Thus, we proposed to add an item to the MDS 3.0 item set (item O0420) which would permit SNF providers to code the total number of distinct calendar days that the resident received therapy services across all rehabilitation disciplines during the assessment look-back period to ensure that residents are classified into the correct Rehabilitation RUG in accordance with our existing classification criteria. We stated that effective October 1, 2013, facilities would be required to record under this item the number of distinct calendar days of therapy provided by all the rehabilitation disciplines over the 7-day look-back period for the current assessment, which would be used to classify the resident into the correct Rehabilitation RUG category. A discussion of the comments we received on this proposal, and our responses, appear below.

Comment: Many commenters supported the proposal to add a new item to the MDS 3.0 to capture distinct therapy days and agreed that patients should be appropriately categorized into the applicable RUG category to ensure accurate payment. Several commenters appeared to be under the impression that this proposal will change the policy on how many days of therapy are required in order to group to specific rehabilitation RUG categories. Furthermore, some commenters stated that we did not provide any clinical basis for this addition to the MDS 3.0, and that therapist judgment should be the deciding factor for scheduling therapy services to best meet the residents' needs.

Response: We appreciate that many commenters supported the proposal to add item O0420 to the MDS 3.0 to capture distinct therapy days and to pay more accurately for therapy services. We emphasize that we did not propose to add item O0420 as a result of a change

in policy; instead, we proposed to add this item to enable us to implement our existing policy more accurately. As explained in the FY 2014 SNF PPS proposed rule (78 FR 26465 through 26466), throughout all iterations of the SNF PPS from 1998 until the present time, in order to qualify for the Medium Rehabilitation (Medium Rehab) RUG category, a resident must receive at least 150 minutes of therapy per week (a seven-day time period) and 5 days of any combination of the three rehabilitation disciplines (physical therapy, occupational therapy, or speech-language pathology). The policy has always been that the term ''days'' in this context denotes distinct calendar days of therapy. Similarly, for the Low, High, Very High, and Ultra High Rehabilitation RUG categories, the policy has always been that distinct calendar days of therapy are required to classify into these RUG categories (for example, for the Low Rehabilitation category, 3 distinct calendar days of therapy are required). Thus, in the proposed rule, we clarified that our classification criteria for the Rehabilitation RUG categories require that the resident receive the requisite number of distinct calendar days of therapy to be classified into the Rehabilitation RUG category. However, there has not been a way until now to record on the MDS 3.0 the number of distinct calendar days of therapy provided across all rehabilitation disciplines in order to ensure accurate calculation of these days in the RUG grouper software. It is true that our proposed change to the MDS 3.0 item set will require an additional item for reporting of therapy services; however, this change solely addresses the manner of reporting (and not the manner of providing) these services. We agree that licensed therapists are to use their clinical judgment to treat the patients in the most appropriate manner, and to maintain professional standards while providing all necessary services. Providers are not required to change clinical practice patterns based on this additional reporting requirement; rather, they could continue to provide therapy as they always have and would use the new item to report more accurately the days on which they provided therapy services, in order to ensure that the patient is assigned to the correct RUG.

In addition, we note that under section 1814(a)(2)(B) of the Act, one of the basic elements of the SNF level of care (which constitutes a precondition for SNF coverage under Part A) is that a beneficiary must *need* and *receive* skilled care on a daily basis. Under an exception in the regulations at § 409.34(a)(2), when skilled rehabilitation services are not available 7 days a week, they can still be considered furnished on a ''daily basis'' when *needed* and *provided* at least 5 days a week. However, it is important to note that merely *scheduling* therapy services on 5 distinct calendar days during the week would be insufficient to satisfy this requirement unless the beneficiary also has an actual *clinical need* for the services to be scheduled in this manner. As noted in § 30.6 of the Medicare Benefit Policy Manual, Chapter 8:

> It is not sufficient for the scheduling of therapy sessions to be arranged so that some therapy is furnished each day, unless the patient's medical needs indicate that daily therapy is required. For example, if physical therapy is furnished on 3 days each week and occupational therapy is furnished on 2 other days each week, the ''daily basis'' requirement would be satisfied only if there is a valid medical reason why both cannot be furnished on the same day. The basic issue here is not whether the services are needed, but when they are needed. Unless there is a legitimate medical need for scheduling a therapy session each day, the ''daily basis'' requirement for SNF coverage would not be met.

Accordingly, we do not expect that the addition of this MDS item, which is intended to facilitate more accurate reporting, will result in any changes in clinical practice patterns, as SNFs should already be appropriately providing skilled rehabilitation services on a daily basis *only* in those instances where the beneficiary has an actual need for therapy to be furnished on at least 5 distinct calendar days during the week.

Comment: Some commenters stated that the proposal to add item O0420 to the MDS 3.0 would have a significant impact on the ability of residents to qualify for a rehabilitation RUG for the 5-day PPS assessment because the Assessment Reference Date (ARD) for the 5-day PPS assessment must be set for no later than Day 8 of the stay. They expressed concern that residents who miss therapy for clinical or scheduling reasons are not being appropriately classified into rehabilitation RUG categories. Additionally, these commenters explained that it is difficult to provide therapy to a resident for 5 distinct days over a 7-day period and this challenge correlates to residents being placed in non-rehabilitation RUGs. They suggested that CMS does not adequately reimburse for rehabilitation services that are delivered beyond the minimum number of minutes required for a specific RUG category and that this amounts to unpaid therapy services provided to residents.

Additionally, these commenters stated that this proposal will result in greater burden for providers; for example, requiring scheduling changes for therapists, requiring therapists to work on weekends, evenings, and holidays, and requiring part-time therapists to work on full-time schedules. They explained that the need for two different therapy disciplines does not change, irrespective of whether these therapies are received on distinct days or on the same days. Some commenters requested that we implement an ''exceptions'' policy to account for missed or rescheduled therapy sessions beyond provider control which result in different therapies being provided on the same day.

Finally, several commenters expressed concern related to a possible conflict between the proposal to add item O0420 to the MDS item set to capture more appropriately the distinct days of therapy provided and instructions from CMS in recent guidance which clarified the term ''daily skilled services defined'' (CMS Transmittal 161, October 26, 2012) which states, ''A patient whose inpatient stay is based solely on the need for skilled rehabilitation services would meet the ''daily basis'' requirement when they need and receive those services on at least 5 days a week. (If therapy services are provided less than 5 days a week, the ''daily'' requirement would not be met.) This requirement should not be applied so strictly that it would not be met merely because there is an isolated break of a day or two during which no skilled rehabilitation services are furnished and discharge from the facility would not be practical.'' For the above reasons, several commenters suggested we postpone the proposed addition to the MDS 3.0 of item O0420 requiring that facilities report the number of distinct calendar days of therapy and carefully review the impact of the change as discussed in these comments.

Response: We do not agree with the commenters' assertion that the proposal to add item O0420 to the MDS 3.0 item set will make it more difficult to classify residents into rehabilitation RUGs during the 5-day PPS assessment period because the ARD must be set for no later than Day 8 of the stay. As we discussed in the FY 2014 SNF PPS proposed rule (78 FR 26465–66) and in this final rule, the addition of this item was not proposed as a result of a change in policy. Our policy has always been that distinct calendar days of therapy are

required to classify into a Rehabilitation RUG. The new MDS item was proposed to provide for more accurate reporting and calculation of these therapy days, and to ensure that patients are appropriately classified into Rehabilitation RUG categories in accordance with our existing classification policy. Furthermore, given that residents currently classify on the 5-day PPS assessment for Rehabilitation RUGs which require 5 calendar days of therapy (Medium, High, Very High, or Ultra High), it appears that providers are clearly able to provide the necessary therapy time within the first days of the SNF stay regardless of this new item. More generally, if facilities are having difficulty meeting the daily skilled needs of the residents in their care, then this might indicate a need for the facility to revisit its admissions policies and determine if the facility is accepting such patients only when it can appropriately meet their care needs.

Furthermore, with regard to the comments that it is difficult to provide therapy to a resident for 5 distinct days over a 7-day period, we would note that, based on the monitoring reports we have published to the SNF PPS Web site (*http://cms.gov/Medicare/Medicare-Fee-for-Service-Payment/SNFPPS/Spotlight.html*), in FY 2012, 84.3 percent of the days billed to Medicare Part A were billed at one of the upper three rehabilitation RUG categories (Ultra-High, Very-High, and High) which require that 1 discipline provide at least 5 days of therapy. This is a longstanding requirement that appeared in the applicable instructions at least as far back as 2006, as noted on page 3–216 of the MDS RAI Manual, Version 2.0:

> If orders are received for more than one therapy discipline, enter the number of days at least one therapy service is performed. For example, if PT is provided on MWF, and OT is provided on MWF, the MDS should be coded as 3 days, not 6 days.

Accordingly, since multiple therapy disciplines furnished on the same calendar day would still comprise only a single calendar day's worth of therapy, this means that those residents being classified into one of these RUG categories must have received at least one therapy discipline on 5 distinct calendar days during the look-back period for the assessment. Therefore, given that 84.3 percent of patient days are billed at one of these upper three rehabilitation RUG categories, the vast majority of SNF residents should be currently receiving at least 5 distinct calendar days of therapy per week. If this is the standard of practice that exists within the SNF industry currently, as evidenced by the current billing and care delivery patterns, we do not agree with the comment that it is difficult for SNFs to provide therapy to their residents for 5 distinct days over a 7-day period. Again, the new MDS item is not being added as a result of any change in policy, but simply to provide for more accurate reporting of therapy days so we can ensure that patients are appropriately classified into Rehabilitation RUGs in accordance with our current classification criteria.

In addition, commenters suggested that CMS does not adequately reimburse for rehabilitation services that are delivered beyond the minimum number of minutes required for a specific RUG category. We recognize that residents who do not meet the minimum qualifying minutes/days of therapy services may not be placed into Rehabilitation RUGs. However, we do not consider this a flaw of the SNF PPS RUG–IV system, as some commenters have suggested. The RUG–IV system was designed so that RUG payment levels are based on an average amount of minutes of therapy provided, not the minimum threshold of minutes for each RUG category. The original RUG–III grouper logic was based on clinical data collected in 1990, 1995, and 1997. As discussed in the SNF PPS proposed rule for FY 2010 (74 FR 22208, May 12, 2009), we subsequently conducted a multi-year data collection and analysis under the Staff Time and Resource Intensity Verification (STRIVE) project to update the case-mix classification system for FY 2011. The resulting RUG–IV case-mix classification system reflected the data collected in 2006 and 2007 during the STRIVE project, and was finalized in the FY 2010 SNF PPS final rule (74 FR 40288, August 11, 2009) for implementation in FY 2011. In the FY 2010 SNF PPS proposed rule (74 FR 22208, 22223–25) and final rule (74 FR 40288, 40319–21, we explained the process of calculating therapy time to determine RUG payment levels. As part of this explanation, we discussed how we adjusted the therapy time for the calculations: ''We give the maximum credit possible for any day that therapy time was recorded for 15 or more minutes to avoid underestimating the actual amounts of therapy furnished to patients'' (74 FR 22225). Therapy reimbursement for each RUG is based on the average utilization between the thresholds, so those at the minimum thresholds are, in fact, being adequately paid relative to the average resource amount used to determine the reimbursement level. Moreover, the majority of MDS assessments submitted to CMS show that the number of therapy minutes provided to beneficiaries cluster at the minimum threshold amount necessary to qualify for a given RUG group. This would suggest that, for the majority of billed therapy days, the resource intensity used to determine the reimbursement for that RUG group is greater than the resource intensity of the therapy provided to the resident. Therefore, we do not agree that the system allows for a significant amount of unpaid therapy provided to SNF residents.

In addition, we do not agree with the assertion that adding item O0420 to the MDS 3.0 item set will result in greater burden to the providers. As discussed previously, this item is not being added as a result of a change in policy. Facilities should not change practice patterns merely because of the additional item for reporting therapy. Until now, facilities have been calculating the days of therapy that each discipline provided to a specific resident. The new item will require the providers to use the exact same clinical information found on daily notes or therapy logs to count the days that therapy was provided to a patient; however, instead of counting each discipline's days separately they will now have to count each distinct calendar day that any therapy was provided. We agree that the need for different therapy disciplines does not change regardless of whether these therapies are provided on the same or distinct calendar days. However, as explained previously, the ''daily basis'' requirement for Part A SNF coverage can be met only when therapy is not merely scheduled but is actually *needed* and provided on each of 5 distinct calendar days during the week. In addition, the design of the SNF PPS RUG–IV system requires very specific calculation of therapy minutes and days in order to place patients most appropriately into the correct case-mix classification. Therefore, we do not believe it would be appropriate to establish an ''exceptions'' policy to allow for counting of different therapies on the same day when residents experience missed or rescheduled therapy sessions beyond provider control.

Finally, with respect to the comments raising the issue of a potential conflict between the proposed MDS item and the daily basis discussion in Transmittal 161, we would note that the particular language being cited was not, in fact, introduced by this transmittal. Rather, it has long appeared in the manual instructions and was also discussed as

far back as the FY 2000 SNF PPS final rule (64 FR 41670, July 30, 1999):

* * * Some comments reflected certain longstanding misconceptions regarding the SNF level of care definition, in terms of a beneficiary's need for and receipt of skilled services on a daily basis which, as a practical matter, can be furnished only in an SNF on an inpatient basis. One recurring misconception with regard to the ''daily basis'' requirement (which some of the commenters expressed as well) is that Medicare coverage guidelines provide for specific breaks in skilled therapy services for the observance of a prescribed list of national holidays. Another longstanding misconception shared by some commenters is that the cessation of therapy for so much as a single day due, for example, to the beneficiary's temporary illness or fatigue, would mandate an automatic discontinuance of coverage * * * As explained below, these interpretations of Medicare SNF coverage requirements are incorrect.

[T]he requirement for daily skilled services should not be applied so strictly that it would not be met merely because there is a brief, isolated absence from the facility in a situation where discharge from the facility would not be practical * * * [W]ith regard to the ''daily basis'' requirement, the Medicare program does not specify in regulations or guidelines an official list of holidays or other specific occasions that a facility may observe as breaks in rehabilitation services, but recognizes that the resident's own condition dictates the amount of service that is appropriate. Accordingly, the facility itself must judge whether a brief, temporary pause in the delivery of therapy services would adversely affect the resident's condition (emphasis added).

Similarly, section 409.34(b) states that a ''. . . break of one or two days in the furnishing of rehabilitation services will not preclude coverage if discharge would not be practical for the one or two days during which, for instance, the physician has suspended the therapy sessions because the patient exhibited extreme fatigue.'' We note that the references in the manual (see Pub. L. 100–02, ch. 8, § 30.6) and the regulations in this context to an isolated break in therapy denote a situation in which such a lapse represents a rare exception rather than a regular or frequent occurrence. Accordingly, the policy reflected in the above-cited manual, rule preamble, and regulation is intended to indicate that such a lapse would not necessarily result in discontinuing coverage that is already ongoing.

While coverage may continue where there is a brief, isolated break in therapy as discussed above, the patient's RUG classification and the level of payment are still based on the number of days and minutes of therapy provided to the patient as reported on the MDS 3.0, and the new MDS item will ensure that these days are calculated correctly. Thus, we do not believe that the addition of the new MDS item presents a conflict with existing coverage policy as set forth in the manual, as they address separate issues. The manual and regulatory provisions cited above provide that in certain exceptional circumstances coverage of a SNF stay will not necessarily be discontinued because of a brief, isolated break in therapy; and the new MDS item provides the information necessary (total number of days that therapy was provided during the look-back period) to enable us to determine the appropriate RUG classification and payment for that SNF stay. We believe that this MDS item, by permitting more accurate reporting of therapy days, enables us to ensure that residents are appropriately classified into Rehabilitation RUG categories in accordance with our existing classification criteria. In addition, we note that if a resident's stay is also based on receipt of non-rehabilitation related skilled services (for example, ventilator care) in combination with rehabilitation services (which we believe to characterize the majority of SNF stays), then such non-rehabilitation care would also constitute care provided toward meeting the daily basis requirement. Therefore, the new MDS item would not appear to present a conflict with the daily basis requirement discussed in Transmittal 161, but instead permits providers to report the precise number of distinct calendar days their residents receive therapy during the assessment observation period. Furthermore, because this new MDS item allows for more accurate reporting and thus more accurate RUG classification and payment, we do not see any reason to postpone the addition of the item to MDS 3.0 item set.

Comment: Some commenters expressed concern over the practical implementation of adding item O0420 to the MDS 3.0 item set. They stated that October 1, 2013 is too soon for software vendors to incorporate the new reporting requirement into SNF and therapy software systems and to program, test, and implement the changes. Additionally, although the commenters appreciated that CMS released draft programming specifications, they criticized the accompanying warning which stated that this version of the specifications should be considered provisional and subject to change until the final specifications are published. They stated that the timeframe between CMS issuing the final rule and the effective date of October 1, 2013 does not give the software vendors and facilities that are already overburdened with the implementation of electronic health records sufficient time to make these changes.

Response: We appreciate the concern that commenters expressed about implementing the additional reporting requirement for the MDS 3.0. We recognize the need for software vendors to program, test, and implement the changes that will need to be made. However, we remind commenters that CMS offers j-RAVEN, which is a free software option that allows facilities to collect and maintain facility, patient, and assessment information for subsequent submission to the appropriate data repository. This software will be available and ready for the implementation of the new MDS 3.0 reporting requirement and facilities that contract with alternative software vendors may choose to utilize the CMS-provided software until the vendor-created software is ready for implementation. With regard to the draft specifications, CMS released these specifications at the same time as we released the proposed rule. Software vendors had the ability to begin planning for any potential programming requirements with the release of draft specifications. We believe that software vendors should be structuring projects in a manner that is responsive to potentially changing requirements.

Accordingly, for the reasons specified in this final rule and in the FY 2014 SNF PPS proposed rule (78 FR 26465–26466), we are finalizing our proposal to add an item to the MDS item set (Item O0420) effective October 1, 2013, which will capture the number of distinct calendar days that the resident received therapy services during the assessment look-back period across all rehabilitation disciplines. As proposed, effective October 1, 2013, facilities will be required to record under this item the number of distinct calendar days of therapy provided by all rehabilitation disciplines over the 7-day look-back period for the current assessment, which will be used to classify the resident into the correct Rehabilitation RUG category.

3. SNF Therapy Research Project

In the FY 2014 SNF PPS proposed rule (78 FR 26466), we discussed our current research efforts associated with SNF payments for therapy services. As stated in the FY 2014 SNF PPS proposed rule (78 FR 26466), we contracted with Acumen, LLC and the Brookings Institution to identify

potential alternatives to the existing methodology used to pay for therapy services received under the SNF PPS. A discussion of the comments on this topic, with our responses, appears below.

Comment: All of the comments we received on this work supported CMS's broad objective to develop a new methodology for paying for therapy services received in the SNF. These commenters urged CMS to expedite the research necessary to develop a new therapy payment model, with one commenter stating that CMS should be prepared to implement a new system by FY 2015. A few commenters stated that CMS should seek input from stakeholders on how best to revise the current therapy payment model.

Response: We appreciate the broad support for this research initiative and understand well the importance and urgency of completing this work in both a timely and efficient manner. We also recognize the importance of seeking input from stakeholders on how best to revise the current therapy payment model, which is why we had created the therapy research email box at *SNFTherapyPayments@cms.hhs.gov.* Stakeholders can send input on a revised therapy payment model at any time.

In terms of the timeframe for completing this work and implementing a new payment model, we believe it would be premature to speculate on when a new model will be ready to be implemented. As many of the comments on this issue indicate, it is very important to ensure that any change to the current therapy payment model addresses any concerns with the existing model and provides sufficient time for providers to understand and prepare for implementation of such a model.

V. Provisions of the Final Rule; Regulations Text

In this final rule, in addition to accomplishing the required annual update of the SNF PPS payment rates and finalizing the other policies discussed above, we are also finalizing certain revisions to the regulations text. One of these revisions relates to the regulations dealing with SNF level of care certifications and recertifications. In the calendar year (CY) 2011 Medicare Physician Fee Schedule (MPFS) final rule with comment period (75 FR 73387, 73602, 73626–73627), we revised the regulations at § 424.20(e)(2) to implement section 3108 of the Affordable Care Act, which amended section 1814(a)(2) of the Act by adding physician assistants to the provision authorizing nurse practitioners and clinical nurse specialists to sign SNF level of care certifications and recertifications. However, as we stated in the FY 2014 SNF PPS proposed rule, we inadvertently neglected to make a conforming change in the regulations text at § 424.11(e)(4). Therefore, we proposed to make a minor technical correction in the regulations text at § 424.11(e)(4) regarding the types of practitioners (in addition to physicians) who can sign the required SNF level of care certification and recertifications. The correction consisted of a conforming change to reflect that physician assistants ''as defined in section 1861(aa)(5) of the Act'' are now authorized to perform this function, in accordance with section 1814(a)(2) of the Act (as amended by section 3108 of the Affordable Care Act) and the implementing regulations at § 424.20(e)(2). We received no comments on this proposal and, therefore, are finalizing this provision essentially as proposed. However, we are revising the statutory citation of the physician assistant definition to read ''section 1861(aa)(5)(A) of the Act'' in order to provide greater clarity and specificity as to the precise location of this definition in the statute. In addition, we inadvertently neglected to make a similar conforming technical change in the second paragraph of § 424.10(a), which describes the general purpose of this subpart of the regulations, and describes the types of practitioners (in addition to physicians) permitted under section 1814(a)(2) of the Act to certify and recertify the need for post-hospital extended care services. Thus, in this final rule, we also are making a similar minor technical correction to the regulations text at § 424.10(a) so that it accurately reflects that physician assistants are now permitted under section 1814(a)(2) of the Act to certify and recertify the need for post-hospital extended care services and so that it conforms with the regulations text at § 424.20(e)(2) and § 424.11(e)(4) (as revised in this rule).

Additionally, in the FY 2014 SNF PPS proposed rule (78 FR 26438), we proposed to make the wage index tables available exclusively through the Internet on CMS's SNF PPS Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/SNFPPS/WageIndex.html.* In order to accommodate this approach, we also proposed to revise the phrase ''wage index'' that currently appears in the second sentence of § 413.345 to read ''factors to be applied in making the area wage adjustment,'' consistent with the wording of the corresponding statutory authority at section 1888(e)(4)(H)(iii) of the Act. We received no comments on this proposal, and therefore, are finalizing this provision as proposed.

VI. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995 (PRA), we are required to provide 30-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to OMB for review and approval. In order to evaluate fairly 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.

In the May 6, 2013 proposed rule (78 FR 26437) we solicited public comment on each of the section 3506(c)(2)(A)-required issues for the following information collection requirements (ICRs). We did not receive any comments.

ICRs Regarding Nursing Home and Swing Bed PPS Item Sets

Under sections 4204(b) and 4214(d) of the Omnibus Budget Reconciliation Act of 1987 (OBRA 1987, Pub. L. 100–203 enacted on December 22, 1987), the submission and retention of resident assessment data for purposes of carrying out OBRA 1987 are not subject to the PRA. While certain data items that are collected under the SNF resident assessment instrument (or MDS 3.0) fall under the OBRA 1987 exemption, MDS 3.0's PPS-related item sets are outside the scope of OBRA 1987 and require PRA consideration.

As discussed in section IV.D.2 of this rule, we are finalizing our proposal to add Item O0420 to the MDS 3.0 form to capture the number of distinct calendar days a SNF resident has received therapy across all rehabilitation disciplines in a seven-day look-back period. The item would not be added as a result of any change in statute or policy; rather, it would be added to ensure that our existing Rehabilitation RUG classification policies are properly implemented as intended. We do not believe this action will cause any

measureable adjustments to our burden estimates.

While we are not revising the form's burden estimates, we are revising OCN 0938–1140 (CMS–10387) by adding item O0420 to the Nursing Home and Swing Bed PPS Item Sets.

If you comment on these information collection and recordkeeping requirements, please do either of the following:

1. Submit your comments electronically as specified in the **ADDRESSES** section of the proposed rule; or

2. Submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: CMS Desk Officer, [CMS–1446–F] by fax: (202) 395–6974 or by email: *OIRA_submission@omb.eop.gov.*

VII. Economic Analyses

A. Regulatory Impact Analysis

1. Introduction

We have examined the impacts of this final 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), 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 (UMRA, 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). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated an economically significant rule, under section 3(f)(1) of Executive Order 12866, and thus a major rule under the Congressional Review Act. Also, the rule has been reviewed by OMB.

2. Statement of Need

This final rule updates the SNF prospective payment rates for FY 2014 as required under section 1888(e)(4)(E) of the Act. It also responds to section 1888(e)(4)(H) of the Act, which requires the Secretary to ''provide for publication in the **Federal Register**'' before the August 1 that precedes the start of each fiscal year, of the unadjusted federal per diem rates, the case-mix classification system, and the factors to be applied in making the area wage adjustment. As these statutory provisions prescribe a detailed methodology for calculating and disseminating payment rates under the SNF PPS, we do not have the discretion to adopt an alternative approach.

3. Overall Impacts

This final rule sets forth the updates of the SNF PPS rates contained in the update notice for FY 2013 (77 FR 46214). Based on the above, we estimate that the aggregate impact would be an increase of $470 million in payments to SNFs, resulting from the SNF market basket update to the payment rates, as adjusted by the forecast error correction and MFP adjustment. The impact analysis of this final rule represents the projected effects of the changes in the SNF PPS from FY 2013 to FY 2014. Although the best data available are utilized, there is no attempt to predict behavioral responses to these changes, or to make adjustments for future changes in such variables as days or case-mix.

Certain events may occur to limit the scope or accuracy of our impact analysis, as this analysis is future-oriented and, thus, very susceptible to forecasting errors due to certain events that may occur within the assessed impact time period. Some examples of possible events may include legislated general Medicare program funding changes by the Congress, or changes specifically related to SNFs. In addition, changes to the Medicare program may continue to be made as a result of previously-enacted legislation, or new statutory provisions. Although these changes may not be specific to the SNF PPS, the nature of the Medicare program is such that the changes may interact and, thus, the complexity of the interaction of these changes could make it difficult to predict accurately the full scope of the impact upon SNFs.

In accordance with sections 1888(e)(4)(E) and 1888(e)(5) of the Act, we update the FY 2013 payment rates by a factor equal to the market basket index percentage change adjusted by the forecast error for FY 2012, the latest FY for which final data are available, and the MFP adjustment to determine the payment rates for FY 2014. As discussed previously, for FY 2012 and each subsequent FY, as required by section 1888(e)(5)(B) of the Act as amended by section 3401(b) of the Affordable Care Act, the market basket percentage is reduced by the MFP adjustment. The special AIDS add-on established by section 511 of the MMA remains in effect until ''. . . such date as the Secretary certifies that there is an appropriate adjustment in the case mix . . . .'' We have not provided a separate impact analysis for the MMA provision. Our latest estimates indicate that there are fewer than 4,100 beneficiaries who qualify for the add-on payment for SNF residents with AIDS. The impact to Medicare is included in the ''total'' column of Table 10. In updating the SNF PPS rates for FY 2014, we made a number of standard annual revisions and clarifications mentioned elsewhere in this final rule (for example, the update to the wage and market basket indexes used for adjusting the federal rates).

The annual update set forth in this final rule applies to SNF payments in FY 2014. Accordingly, the analysis that follows only describes the impact of this single year. In accordance with the requirements of the Act, we will publish a notice or rule in the **Federal Register** for each subsequent FY that will provide for an update to the SNF payment rates and include an associated impact analysis.

4. Detailed Economic Analysis

The FY 2014 SNF PPS impacts appear in Table 10. Using the most recently available data, in this case FY 2012, we apply the current FY 2013 wage index and labor-related share value to the number of payment days to simulate FY 2013 payments. Then, using the same FY 2012 data, we apply the FY 2014 wage index and labor-related share value to simulate FY 2014 payments. We tabulate the resulting payments according to the classifications in Table 10, for example, facility type, geographic region, facility ownership, and compare the difference between current and FY 2014 payments to determine the overall impact. The breakdown of the various categories of data in the table follows.

The first column shows the breakdown of all SNFs by urban or rural status, hospital-based or freestanding status, census region, and ownership.

The first row of figures describes the estimated effects of the various changes on all facilities. The next six rows show the effects on facilities split by hospital-based, freestanding, urban, and rural categories. The urban and rural designations are based on the location of the facility under the CBSA designation. The next nineteen rows show the effects on facilities by urban versus rural status by census region. The last three rows

show the effects on facilities by ownership (that is, government, profit, and non-profit status).

The second column in the table shows the number of facilities in the impact database.

The third column of the table shows the effect of the annual update to the wage index. This represents the effect of using the most recent wage data available. The total impact of this change is zero percent; however, there are distributional effects of the change.

The fourth column shows the effect of all of the changes on the FY 2014 SNF PPS payments. The FY 2014 update of 1.3 percent (consisting of the market basket increase of 2.3 percentage points, reduced by the 0.5 percentage point forecast error correction and further reduced by the 0.5 percentage point MFP adjustment) is constant for all providers and, though not shown individually, is included in the total column. It is projected that aggregate payments will increase by 1.3 percent, assuming facilities do not change their care delivery and billing practices in response.

As illustrated in Table 10, the combined effects of all of the changes vary by specific types of providers and by location. Though all facilities would experience payment increases, the projected impact on providers for FY 2014 varies due to the impact of the wage index update. For example, due to changes from updating the wage index, providers in the rural Pacific region would experience a 2.8 percent increase in FY 2014 total payments and providers in the urban East South Central region would experience a 0.8 percent increase in FY 2014 total payments.

TABLE 10—RUG–IV PROJECTED IMPACT TO THE SNF PPS FOR FY 2014

	Number of facilities FY 2014	Update wage data (percent)	Total FY 2014 change (percent)
Group:			
Total	15,380	0.0	1.3
Urban	10,582	0.1	1.4
Rural	4,798	−0.3	1.0
Hospital based urban	758	0.2	1.5
Freestanding urban	9,824	0.1	1.4
Hospital based rural	402	−0.3	1.0
Freestanding rural	4,396	−0.3	1.0
Urban by region:			
New England	804	0.3	1.6
Middle Atlantic	1,452	0.8	2.1
South Atlantic	1,741	−0.6	0.7
East North Central	2,049	−0.2	1.1
East South Central	526	−0.5	0.8
West North Central	868	−0.7	0.6
West South Central	1,241	−0.4	0.9
Mountain	490	−0.1	1.2
Pacific	1,405	1.1	2.5
Outlying	6	0.1	1.4
Rural by region:			
New England	153	0.2	1.5
Middle Atlantic	262	0.2	1.5
South Atlantic	608	−0.6	0.7
East North Central	928	−0.6	0.7
East South Central	551	−0.6	0.7
West North Central	1,114	0.5	1.8
West South Central	813	−0.9	0.4
Mountain	246	0.2	1.5
Pacific	123	1.4	2.8
Ownership:			
Government	832	0.2	1.5
Profit	10,724	0.0	1.3
Non-profit	3,824	0.0	1.3

Note: The Total column includes the 2.3 percent market basket increase, reduced by the 0.5 percentage point forecast error correction and further reduced by the 0.5 percentage point MFP adjustment. Additionally, we found no SNFs in rural outlying areas.

5. Alternatives Considered

As described above, we estimate that the aggregate impact for FY 2014 would be an increase of $470 million in payments to SNFs, resulting from the SNF market basket update to the payment rates, as adjusted by the forecast error correction and the MFP adjustment.

Section 1888(e) of the Act establishes the SNF PPS for payment of Medicare SNF services for cost reporting periods beginning on or after July 1, 1998. This section of the statute prescribes a detailed formula for calculating payment rates under the SNF PPS, and does not provide for the use of any alternative methodology. This section of the statute specifies that the base year cost data to be used for computing the SNF PPS payment rates are from FY 1995 (October 1, 1994, through September 30, 1995). In accordance with the statute, we also incorporated a number of elements into the SNF PPS (for example, case-mix classification methodology, a market basket index, a wage index, and the urban and rural distinction used in the development or adjustment of the federal rates). Further, section 1888(e)(4)(H) of the Act specifically requires us to provide for publication of the payment rates for each new FY in the **Federal Register**, and to do so before the August 1 that precedes the start of the new FY.

Accordingly, we are not pursuing alternatives with respect to the payment methodology as discussed above.

We received a number of comments on the potential impact of finalizing the proposals in the FY 2014 SNF PPS proposed rule. A discussion of those comments, and our responses, appear below.

Comment: In their March 2013 report (available at: *http://www.medpac.gov/documents/Mar13_entirereport.pdf*), and in their comment on this proposed rule, MedPAC recommended that CMS eliminate the market basket update for SNFs and rebase payments for the SNF PPS, beginning with a 4 percent reduction in FY 2014. Several commenters raised concerns with MedPAC's recommendations, specifically that the cost and margin data used by MedPAC to justify their recommendations did not adequately represent the costs of providing SNF care. A few commenters also noted that any cuts in Medicare rates can have a cascading effect in combination with increased fiscal pressures deriving from reduced Medicaid funding.

Response: With regard to MedPAC's proposals to eliminate the market basket update for SNFs and to implement a 4 percent reduction to the SNF PPS rates, we would note that CMS does not have the statutory authority to act on either one of these proposals at the current time.

In addition, as we have stated in previous years—most recently, in the FY 2012 SNF PPS final rule (76 FR 48496, August 8, 2011)—we believe that it is not the appropriate role of the Medicare SNF benefit to cross-subsidize nursing home payments made under the Medicaid program. As noted by several commenters, the primary purpose of the SNF PPS is to provide accurate payment for Medicare Part A services provided in a SNF setting. Further, we note that MedPAC has also indicated that it is inappropriate for the Medicare payments to SNFs to serve as a remedy for any Medicaid shortfalls. Specifically, on page 177 of its March 2013 Report to Congress on Medicare Payment Policy (which is available online at *http://www.medpac.gov/documents/Mar13_EntireReport.pdf*), MedPAC stated:

> The Commission believes such cross-subsidization is not advisable for several reasons. First, the strategy of using Medicare rates to supplement low payments from other payers results in poorly targeted subsidies. Facilities with high shares of Medicare payments—presumably the facilities that need revenues the least—would receive the most in subsidies from higher Medicare payments, while facilities with low Medicare shares—presumably the facilities with the greatest need—would receive the smallest subsidies * * * In addition, Medicare's subsidy does not discriminate among states with relatively high and low payments * * * Finally, Medicare's current overpayments represent a subsidy of trust fund dollars (and its taxpayer support) to the low payments made by states and private payers.

We agree with MedPAC, and therefore, do not agree with the commenters that cited cross-subsidizing Medicaid as a justification for maintaining Medicare SNF payments at any specific level.

Comment: A few commenters requested that CMS consider a larger update to account for the forthcoming costs associated with the implementation of the Affordable Care Act employer responsibility requirements, which, at a general level, would require that employers with 50 or more full-time-equivalent employees provide health care coverage to their full-time employees (those working on average 30 or more hours per week) or face a penalty.

Response: As discussed in section IV.B of this proposed rule, CMS is required by statute to follow a specific methodology for updating the payment rates each year. We are not permitted to increase the update to account for these types of additional costs under existing authority.

6. Accounting Statement

As required by OMB Circular A–4 (available online at *www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf*), in Table 11, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of this final rule. Table 11 provides our best estimate of the possible changes in Medicare payments under the SNF PPS as a result of the policies in this final rule, based on the data for 15,380 SNFs in our database. All expenditures are classified as transfers to Medicare SNF providers.

TABLE 11—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES, FROM THE 2013 SNF PPS FISCAL YEAR TO THE 2014 SNF PPS FISCAL YEAR

Category	Transfers
Annualized monetized transfers.	$470 million*
From Whom To Whom.	Federal Government to SNF Medicare Providers

*The net increase of $470 million in transfer payments is a result of the SNF market basket update to the payment rates, as adjusted by the forecast error correction and the MFP adjustment.

7. Conclusion

This final rule sets forth updates of the SNF PPS rates contained in the update notice for FY 2013 (77 FR 46214). Based on the above, we estimate the overall estimated payments for SNFs in FY 2014 are projected to increase by $470 million, or 1.3 percent, compared with those in FY 2013. We estimate that in FY 2014, SNFs in urban and rural areas would experience, on average, a 1.4 and 1.0 percent increase, respectively, in estimated payments compared with FY 2013. Providers in the rural Pacific region would experience the largest estimated increase in payments of approximately 2.8 percent. Providers in the rural West South Central region would experience the smallest increase in payments of 0.4 percent.

B. Regulatory Flexibility Act Analysis

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, small entities include small businesses, non-profit organizations, and small governmental jurisdictions. Most SNFs and most other providers and suppliers are small entities, either by their non-profit status or by having revenues of $25.5 million or less in any 1 year. For purposes of the RFA, approximately 91 percent of SNFs are considered small businesses according to the Small Business Administration's latest size standards (NAICS 623110), with total revenues of $25.5 million or less in any 1 year. (For details, see the Small Business Administration's Web site at *http://www.sba.gov/category/navigation-structure/contracting/contracting-officials/eligibility-size-standards*). Individuals and States are not included in the definition of a small entity. In addition, approximately 25 percent of SNFs classified as small entities are non-profit organizations. Finally, the estimated number of small

business entities does not distinguish provider establishments that are within a single firm and, therefore, the number of SNFs classified as small entities may be higher than the estimate above.

This final rule sets forth updates of the SNF PPS rates contained in the update notice for FY 2013 (77 FR 46214). Based on the above, we estimate that the aggregate impact would be an increase of $470 million in payments to SNFs, resulting from the SNF market basket update to the payment rates, as adjusted by the forecast error correction and the MFP adjustment. While it is projected in Table 10 that all groups of providers would experience a net increase in payments, we note that some individual providers within the same group but different regions may experience different impacts on payments than others due to the distributional impact of the FY 2014 wage indexes and the degree of Medicare utilization.

Guidance issued by the Department of Health and Human Services on the proper assessment of the impact on small entities in rulemakings, utilizes a cost or revenue impact of 3 to 5 percent as a significance threshold under the RFA. According to MedPAC, Medicare covers approximately 12 percent of total patient days in freestanding facilities and 23 percent of facility revenue. However, they note that the distribution of days and payments is highly variable. That is, the majority of SNFs have significantly lower Medicare utilization (Report to the Congress: Medicare Payment Policy, March 2013, available at *http://www.medpac.gov/documents/Mar13_EntireReport.pdf*). As a result, for most facilities, when all payers are included in the revenue stream, the overall impact on total revenues should be substantially less than those impacts presented in Table 10. As indicated in Table 10, the effect on facilities is projected to be an aggregate positive impact of 1.3 percent. As the overall impact on the industry as a whole, and thus on small entities specifically, is less than the 3 to 5 percent threshold discussed above, the Secretary has determined that this final rule would not have a significant 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. This final rule would affect small rural hospitals that (a) furnish SNF services under a swing-bed agreement or (b) have a hospital-based SNF. We anticipate that the impact on small rural hospitals would be similar to the impact on SNF providers overall. Moreover, as noted in the FY 2012 final rule (76 FR 48539), the category of small rural hospitals would be included within the analysis of the impact of this final rule on small entities in general. As indicated in Table 10, the effect on facilities is projected to be an aggregate positive impact of 1.3 percent. As the overall impact on the industry as a whole is less than the 3 to 5 percent threshold discussed above, the Secretary has determined that this final rule would not have a significant impact on a substantial number of small rural hospitals.

C. Unfunded Mandates Reform Act Analysis

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 2013, that threshold is approximately $141 million. This final rule would not impose spending costs on State, local, or tribal governments in the aggregate, or by the private sector, of $141 million.

D. Federalism Analysis

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that impose substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications. This final rule would have no substantial direct effect on State and local governments, preempt State law, or otherwise have federalism implications.

List of Subjects

42 CFR Part 413

Health facilities, Kidney diseases, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 424

Emergency medical services, Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

PART 413—PRINCIPLES OF REASONABLE COST REIMBURSEMENT; PAYMENT FOR END-STAGE RENAL DISEASE SERVICES; OPTIONAL PROSPECTIVELY DETERMINED PAYMENT RATES FOR SKILLED NURSING FACILITIES

■ 1. The authority citation for part 413 continues to read as follows:

Authority: Secs. 1102, 1812(d), 1814(b), 1815, 1833(a), (i), and (n), 1861(v), 1871, 1881, 1883, and 1886 of the Social Security Act (42 U.S.C. 1302, 1395d(d), 1395f(b), 1395g, 1395l(a), (i), and (n), 1395x(v), 1395hh, 1395rr, 1395tt, and 1395ww); sec. 124 of Pub. L. 106–133 (113 Stat. 1501A–332) and sec. 3201 of Pub. L. 112–96 (126 Stat. 156).

■ 2. Section 413.345 is revised to read as follows:

§ 413.345 Publication of Federal prospective payment rates.

CMS publishes information pertaining to each update of the Federal payment rates in the **Federal Register**. This information includes the standardized Federal rates, the resident classification system that provides the basis for case-mix adjustment (including the designation of those specific Resource Utilization Groups under the resident classification system that represent the required SNF level of care, as provided in § 409.30 of this chapter), and the factors to be applied in making the area wage adjustment. This information is published before May 1 for the fiscal year 1998 and before August 1 for the fiscal years 1999 and after.

PART 424—CONDITIONS FOR MEDICARE PAYMENT

■ 3. The authority citation for part 424 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

■ 4. In § 424.10, paragraph (a) is amended by removing the phrase ''nurse practitioners or clinical nurse specialists'' and adding in its place ''nurse practitioners, clinical nurse specialists, or physician assistants''.

■ 5. Section 424.11 is amended by revising paragraph (e)(4) to read as follows:

§ 424.11 General procedures.

* * * * *

(e) * * *

(4) A nurse practitioner or clinical nurse specialist as defined in paragraph (e)(5) or (e)(6) of this section, or a physician assistant as defined in section

1861(aa)(5)(A) of the Act, in the circumstances specified in § 424.20(e).

* * * * *

Authority: (Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: July 19, 2013.

Marilyn Tavenner,

Administrator, Centers for Medicare & Medicaid Services.

Approved: July 29, 2013.

Kathleen Sebelius,

Secretary.

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

Addendum—FY 2014 CBSA Wage Index Tables

In this addendum, we provide the wage index tables referred to in the preamble to this final rule. Tables A and B display the CBSA-based wage index values for urban and rural providers. As noted previously in this final rule, we are adopting an approach already being followed by other Medicare payment systems, whereby for SNF PPS rules and notices published on or after October 1, 2013, these wage index tables will henceforth be made available exclusively through the Internet on the CMS Web site rather than being published in the **Federal Register** as part of the annual SNF PPS rulemaking.

TABLE A—FY 2014 WAGE INDEX FOR URBAN AREAS BASED ON CBSA LABOR MARKET AREAS

CBSA Code	Urban area (constituent counties)	Wage index
10180	Abilene, TX	0.8225
	Callahan County, TX.	
	Jones County, TX.	
	Taylor County, TX.	
10380	Aguadilla-Isabela-San Sebastián, PR.	0.3647
	Aguada Municipio, PR.	
	Aguadilla Municipio, PR.	
	Añasco Municipio, PR.	
	Isabela Municipio, PR.	
	Lares Municipio, PR.	
	Moca Municipio, PR.	
	Rincón Municipio, PR.	
	San Sebastián Municipio, PR.	
10420	Akron, OH	0.8521
	Portage County, OH.	
	Summit County, OH.	
10500	Albany, GA	0.8713
	Baker County, GA.	
	Dougherty County, GA.	
	Lee County, GA.	
	Terrell County, GA.	
	Worth County, GA.	
10580	Albany-Schenectady-Troy, NY.	0.8600
	Albany County, NY.	
	Rensselaer County, NY.	
	Saratoga County, NY.	
	Schenectady County, NY.	
	Schoharie County, NY.	
10740	Albuquerque, NM	0.9663
	Bernalillo County, NM.	
	Sandoval County, NM.	
	Torrance County, NM.	
	Valencia County, NM.	
10780	Alexandria, LA	0.7788
	Grant Parish, LA.	
	Rapides Parish, LA.	
10900	Allentown-Bethlehem-Easton, PA–NJ.	0.9215
	Warren County, NJ.	
	Carbon County, PA.	
	Lehigh County, PA.	
	Northampton County, PA.	
11020	Altoona, PA	0.9101
	Blair County, PA.	
11100	Amarillo, TX	0.8302
	Armstrong County, TX.	
	Carson County, TX.	
	Potter County, TX.	
	Randall County, TX.	
11180	Ames, IA	0.9425
	Story County, IA.	
11260	Anchorage, AK	1.2221
	Anchorage Municipality, AK.	
	Matanuska-Susitna Borough, AK.	
11300	Anderson, IN	0.9654
	Madison County, IN.	
11340	Anderson, SC	0.8766
	Anderson County, SC.	
11460	Arbor, MI	1.0086
	Washtenaw County, MI.	
11500	Anniston-Oxford, AL	0.7402
	Calhoun County, AL.	
11540	Appleton, WI	0.9445
	Calumet County, WI.	
	Outagamie County, WI.	
11700	Asheville, NC	0.8511
	Buncombe County, NC.	
	Haywood County, NC.	
	Henderson County, NC.	
	Madison County, NC.	
12020	Athens-Clarke County, GA.	0.9244
	Clarke County, GA.	
	Madison County, GA.	
	Oconee County, GA.	
	Oglethorpe County, GA.	
12060	Atlanta-Sandy Springs-Marietta, GA.	0.9452
	Barrow County, GA.	
	Bartow County, GA.	
	Butts County, GA.	
	Carroll County, GA.	
	Cherokee County, GA.	
	Clayton County, GA.	
	Cobb County, GA.	
	Coweta County, GA.	
	Dawson County, GA.	
	DeKalb County, GA.	
	Douglas County, GA.	
	Fayette County, GA.	
	Forsyth County, GA.	
	Fulton County, GA.	
	Gwinnett County, GA.	
	Haralson County, GA.	
	Heard County, GA.	
	Henry County, GA.	
	Jasper County, GA.	
	Lamar County, GA.	
	Meriwether County, GA.	
	Newton County, GA.	
	Paulding County, GA.	
	Pickens County, GA.	
	Pike County, GA.	
	Rockdale County, GA.	
	Spalding County, GA.	
	Walton County, GA.	
12100	Atlantic City-Hammonton, NJ.	1.2258
	Atlantic County, NJ.	
12220	Auburn-Opelika, AL	0.7771
	Lee County, AL.	
12260	Augusta-Richmond County, GA–SC.	0.9150
	Burke County, GA.	
	Columbia County, GA.	
	McDuffie County, GA.	
	Richmond County, GA.	
	Aiken County, SC.	
	Edgefield County, SC.	
12420	Austin-Round Rock, TX	0.9576
	Bastrop County, TX.	
	Caldwell County, TX.	
	Hays County, TX.	
	Travis County, TX.	
	Williamson County, TX.	
12540	Bakersfield, CA	1.1579
	Kern County, CA.	
12580	Baltimore-Towson, MD	0.9873
	Anne Arundel County, MD.	
	Baltimore County, MD.	
	Carroll County, MD.	
	Harford County, MD.	
	Howard County, MD.	
	Queen Anne's County, MD.	
	Baltimore City, MD.	
12620	Bangor, ME	0.9710
	Penobscot County, ME.	
12700	Barnstable Town, MA ...	1.3007
	Barnstable County, MA.	
12940	Baton Rouge, LA	0.8078
	Ascension Parish, LA.	
	East Baton Rouge Parish, LA.	
	East Feliciana Parish, LA.	
	Iberville Parish, LA.	
	Livingston Parish, LA.	
	Pointe Coupee Parish, LA.	
	St. Helena Parish, LA.	
	West Baton Rouge Parish, LA.	
	West Feliciana Parish, LA.	
12980	Battle Creek, MI	0.9915
	Calhoun County, MI.	
13020	Bay City, MI	0.9486
	Bay County, MI.	

TABLE A—FY 2014 WAGE INDEX FOR URBAN AREAS BASED ON CBSA LABOR MARKET AREAS—Continued

CBSA Code	Urban area (constituent counties)	Wage index
13140	Beaumont-Port Arthur, TX.	0.8598
	Hardin County, TX.	
	Jefferson County, TX.	
	Orange County, TX.	
13380	Bellingham, WA	1.1890
	Whatcom County, WA.	
13460	Bend, OR	1.1807
	Deschutes County, OR.	
13644	Bethesda-Frederick-Gaithersburg, MD.	1.0319
	Frederick County, MD.	
	Montgomery County, MD.	
13740	Billings, MT	0.8691
	Carbon County, MT.	
	Yellowstone County, MT.	
13780	Binghamton, NY	0.8602
	Broome County, NY.	
	Tioga County, NY.	
13820	Birmingham-Hoover, AL	0.8367
	Bibb County, AL.	
	Blount County, AL.	
	Chilton County, AL.	
	Jefferson County, AL.	
	St. Clair County, AL.	
	Shelby County, AL.	
	Walker County, AL.	
13900	Bismarck, ND	0.7282
	Burleigh County, ND.	
	Morton County, ND.	
13980	Blacksburg-Christiansburg-Radford, VA.	0.8319
	Giles County, VA.	
	Montgomery County, VA.	
	Pulaski County, VA.	
	Radford City, VA.	
14020	Bloomington, IN	0.9304
	Greene County, IN.	
	Monroe County, IN.	
	Owen County, IN.	
14060	Bloomington-Normal, IL	0.9310
	McLean County, IL.	
14260	Boise City-Nampa, ID ...	0.9259
	Ada County, ID.	
	Boise County, ID.	
	Canyon County, ID.	
	Gem County, ID.	
	Owyhee County, ID.	
14484	Boston-Quincy, MA	1.2453
	Norfolk County, MA.	
	Plymouth County, MA.	
	Suffolk County, MA.	
14500	Boulder, CO	0.9850
	Boulder County, CO.	
14540	Bowling Green, KY	0.8573
	Edmonson County, KY.	
	Warren County, KY.	
14740	Bremerton-Silverdale, WA.	1.0268
	Kitsap County, WA.	
14860	Bridgeport-Stamford-Norwalk, CT.	1.3252
	Fairfield County, CT.	
15180	Brownsville-Harlingen, TX.	0.8179
	Cameron County, TX.	
15260	Brunswick, GA	0.8457
	Brantley County, GA.	
	Glynn County, GA.	
	McIntosh County, GA.	
15380	Buffalo-Niagara Falls, NY.	1.0045
	Erie County, NY.	
	Niagara County, NY.	
15500	Burlington, NC	0.8529
	Alamance County, NC.	
15540	Burlington-South Burlington, VT.	1.0130
	Chittenden County, VT.	
	Franklin County, VT.	
	Grand Isle County, VT.	
15764	Cambridge-Newton-Framingham, MA.	1.1146
	Middlesex County, MA.	
15804	Camden, NJ	1.0254
	Burlington County, NJ.	
	Camden County, NJ.	
	Gloucester County, NJ.	
15940	Canton-Massillon, OH ..	0.8730
	Carroll County, OH.	
	Stark County, OH.	
15980	Cape Coral-Fort Myers, FL.	0.8683
	Lee County, FL.	
16020	Cape Girardeau-Jackson, MO–IL.	0.9174
	Alexander County, IL.	
	Bollinger County, MO.	
	Cape Girardeau County, MO.	
16180	Carson City, NV	1.0721
	Carson City, NV.	
16220	Casper, WY	1.0111
	Natrona County, WY.	
16300	Cedar Rapids, IA	0.8964
	Benton County, IA.	
	Jones County, IA.	
	Linn County, IA.	
16580	Champaign-Urbana, IL	0.9416
	Champaign County, IL.	
	Ford County, IL.	
	Piatt County, IL.	
16620	Charleston, WV	0.8119
	Boone County, WV.	
	Clay County, WV.	
	Kanawha County, WV.	
	Lincoln County, WV.	
	Putnam County, WV.	
16700	Charleston-North Charleston-Summerville, SC.	0.8972
	Berkeley County, SC.	
	Charleston County, SC.	
	Dorchester County, SC.	
16740	Charlotte-Gastonia-Concord, NC–SC.	0.9447
	Anson County, NC.	
	Cabarrus County, NC.	
	Gaston County, NC.	
	Mecklenburg County, NC.	
	Union County, NC.	
	York County, SC.	
16820	Charlottesville, VA	0.9209
	Albemarle County, VA.	
	Fluvanna County, VA.	
	Greene County, VA.	
	Nelson County, VA.	
	Charlottesville City, VA.	
16860	Chattanooga, TN–GA ...	0.8783
	Catoosa County, GA.	
	Dade County, GA.	
	Walker County, GA.	
	Hamilton County, TN.	
	Marion County, TN.	
	Sequatchie County, TN.	
16940	Cheyenne, WY	0.9494
	Laramie County, WY.	
16974	Chicago-Naperville-Joliet, IL.	1.0418
	Cook County, IL.	
	DeKalb County, IL.	
	DuPage County, IL.	
	Grundy County, IL.	
	Kane County, IL.	
	Kendall County, IL.	
	McHenry County, IL.	
	Will County, IL.	
17020	Chico, CA	1.1616
	Butte County, CA.	
17140	Cincinnati-Middletown, OH–KY–IN.	0.9470
	Dearborn County, IN.	
	Franklin County, IN.	
	Ohio County, IN.	
	Boone County, KY.	
	Bracken County, KY.	
	Campbell County, KY.	
	Gallatin County, KY.	
	Grant County, KY.	
	Kenton County, KY.	
	Pendleton County, KY.	
	Brown County, OH.	
	Butler County, OH.	
	Clermont County, OH.	
	Hamilton County, OH.	
	Warren County, OH.	
17300	Clarksville, TN–KY	0.7802
	Christian County, KY.	
	Trigg County, KY.	
	Montgomery County, TN.	
	Stewart County, TN.	
17420	Cleveland, TN	0.7496
	Bradley County, TN.	
	Polk County, TN.	
17460	Cleveland-Elyria-Mentor, OH.	0.9303
	Cuyahoga County, OH.	
	Geauga County, OH.	
	Lake County, OH.	
	Lorain County, OH.	
	Medina County, OH.	
17660	Coeur d'Alene, ID	0.9064
	Kootenai County, ID.	
17780	College Station-Bryan, TX.	0.9497
	Brazos County, TX.	
	Burleson County, TX.	
	Robertson County, TX.	
17820	Colorado Springs, CO ..	0.9282
	El Paso County, CO.	
	Teller County, CO.	

TABLE A—FY 2014 WAGE INDEX FOR URBAN AREAS BASED ON CBSA LABOR MARKET AREAS—Continued

CBSA Code	Urban area (constituent counties)	Wage index
17860	Columbia, MO	0.8196
	Boone County, MO.	
	Howard County, MO.	
17900	Columbia, SC	0.8601
	Calhoun County, SC.	
	Fairfield County, SC.	
	Kershaw County, SC.	
	Lexington County, SC.	
	Richland County, SC.	
	Saluda County, SC.	
17980	Columbus, GA–AL	0.8170
	Russell County, AL.	
	Chattahoochee County, GA.	
	Harris County, GA.	
	Marion County, GA.	
	Muscogee County, GA.	
18020	Columbus, IN	0.9818
	Bartholomew County, IN.	
18140	Columbus, OH	0.9803
	Delaware County, OH.	
	Fairfield County, OH.	
	Franklin County, OH.	
	Licking County, OH.	
	Madison County, OH.	
	Morrow County, OH.	
	Pickaway County, OH.	
	Union County, OH.	
18580	Corpus Christi, TX	0.8433
	Aransas County, TX.	
	Nueces County, TX.	
	San Patricio County, TX.	
18700	Corvallis, OR	1.0596
	Benton County, OR.	
18880	Crestview-Fort Walton Beach-Destin, FL.	0.8911
	Okaloosa County, FL.	
19060	Cumberland, MD–WV ..	0.8054
	Allegany County, MD.	
	Mineral County, WV.	
19124	Dallas-Plano-Irving, TX	0.9831
	Collin County, TX.	
	Dallas County, TX.	
	Delta County, TX.	
	Denton County, TX.	
	Ellis County, TX.	
	Hunt County, TX.	
	Kaufman County, TX.	
	Rockwall County, TX.	
19140	Dalton, GA	0.8625
	Murray County, GA.	
	Whitfield County, GA.	
19180	Danville, IL	0.9460
	Vermilion County, IL.	
19260	Danville, VA	0.7888
	Pittsylvania County, VA.	
	Danville City, VA.	
19340	Davenport-Moline-Rock Island, IA–IL.	0.9306
	Henry County, IL.	
	Mercer County, IL.	
	Rock Island County, IL.	
	Scott County, IA.	
19380	Dayton, OH	0.9034
	Greene County, OH.	
	Miami County, OH.	
	Montgomery County, OH.	
	Preble County, OH.	
19460	Decatur, AL	0.7165
	Lawrence County, AL.	
	Morgan County, AL.	
19500	Decatur, IL	0.8151
	Macon County, IL.	
19660	Deltona-Daytona Beach-Ormond Beach, FL.	0.8560
	Volusia County, FL.	
19740	Denver-Aurora-Broomfield, CO.	1.0395
	Adams County, CO.	
	Arapahoe County, CO.	
	Broomfield County, CO.	
	Clear Creek County, CO.	
	Denver County, CO.	
	Douglas County, CO.	
	Elbert County, CO.	
	Gilpin County, CO.	
	Jefferson County, CO.	
	Park County, CO.	
19780	Des Moines-West Des Moines, IA.	0.9393
	Dallas County, IA.	
	Guthrie County, IA.	
	Madison County, IA.	
	Polk County, IA.	
	Warren County, IA.	
19804	Detroit-Livonia-Dearborn, MI.	0.9237
	Wayne County, MI.	
20020	Dothan, AL	0.7108
	Geneva County, AL.	
	Henry County, AL.	
	Houston County, AL.	
20100	Dover, DE	0.9939
	Kent County, DE.	
20220	Dubuque, IA	0.8790
	Dubuque County, IA.	
20260	Duluth, MN–WI	1.0123
	Carlton County, MN.	
	St. Louis County, MN.	
	Douglas County, WI.	
20500	Durham-Chapel Hill, NC	0.9669
	Chatham County, NC.	
	Durham County, NC.	
	Orange County, NC.	
	Person County, NC.	
20740	Eau Claire, WI	1.0103
	Chippewa County, WI.	
	Eau Claire County, WI.	
20764	Edison-New Brunswick, NJ.	1.0985
	Middlesex County, NJ.	
	Monmouth County, NJ.	
	Ocean County, NJ.	
	Somerset County, NJ.	
20940	El Centro, CA	0.8848
	Imperial County, CA.	
21060	Elizabethtown, KY	0.7894
	Hardin County, KY.	
	Larue County, KY.	
21140	Elkhart-Goshen, IN	0.9337
	Elkhart County, IN.	
21300	Elmira, NY	0.8725
	Chemung County, NY.	
21340	El Paso, TX	0.8404
	El Paso County, TX.	
21500	Erie, PA	0.7940
	Erie County, PA.	
21660	Eugene-Springfield, OR	1.1723
	Lane County, OR.	
21780	Evansville, IN–KY	0.8381
	Gibson County, IN.	
	Posey County, IN.	
	Vanderburgh County, IN.	
	Warrick County, IN.	
	Henderson County, KY.	
	Webster County, KY.	
21820	Fairbanks, AK	1.0997
	Fairbanks North Star Borough, AK.	
21940	Fajardo, PR	0.3728
	Ceiba Municipio, PR.	
	Fajardo Municipio, PR.	
	Luquillo Municipio, PR.	
22020	Fargo, ND–MN	0.7802
	Cass County, ND.	
	Clay County, MN.	
22140	Farmington, NM	0.9735
	San Juan County, NM.	
22180	Fayetteville, NC	0.8601
	Cumberland County, NC.	
	Hoke County, NC.	
22220	Fayetteville-Springdale-Rogers, AR–MO.	0.8955
	Benton County, AR.	
	Madison County, AR.	
	Washington County, AR.	
	McDonald County, MO.	
22380	Flagstaff, AZ	1.2786
	Coconino County, AZ.	
22420	Flint, MI	1.1238
	Genesee County, MI.	
22500	Florence, SC	0.7999
	Darlington County, SC.	
	Florence County, SC.	
22520	Florence-Muscle Shoals, AL.	0.7684
	Colbert County, AL.	
	Lauderdale County, AL.	
22540	Fond du Lac, WI	0.9477
	Fond du Lac County, WI.	
22660	Fort Collins-Loveland, CO.	0.9704
	Larimer County, CO.	
22744	Fort Lauderdale-Pompano Beach-Deerfield Beach, FL.	1.0378
	Broward County, FL.	
22900	Fort Smith, AR–OK	0.7561
	Crawford County, AR.	
	Franklin County, AR.	
	Sebastian County, AR.	
	Le Flore County, OK.	
	Sequoyah County, OK.	
23060	Fort Wayne, IN	0.9010
	Allen County, IN.	
	Wells County, IN.	
	Whitley County, IN.	
23104	Fort Worth-Arlington, TX.	0.9535
	Johnson County, TX.	
	Parker County, TX.	

TABLE A—FY 2014 WAGE INDEX FOR URBAN AREAS BASED ON CBSA LABOR MARKET AREAS—Continued

CBSA Code	Urban area (constituent counties)	Wage index
	Tarrant County, TX.	
	Wise County, TX.	
23420	Fresno, CA	1.1768
	Fresno County, CA.	
23460	Gadsden, AL	0.7983
	Etowah County, AL.	
23540	Gainesville, FL	0.9710
	Alachua County, FL.	
	Gilchrist County, FL.	
23580	Gainesville, GA	0.9253
	Hall County, GA.	
23844	Gary, IN	0.9418
	Jasper County, IN.	
	Lake County, IN.	
	Newton County, IN.	
	Porter County, IN.	
24020	Glens Falls, NY	0.8367
	Warren County, NY.	
	Washington County, NY.	
24140	Goldsboro, NC	0.8550
	Wayne County, NC.	
24220	Grand Forks, ND–MN ..	0.7290
	Polk County, MN.	
	Grand Forks County, ND.	
24300	Grand Junction, CO	0.9270
	Mesa County, CO.	
24340	Grand Rapids-Wyoming, MI.	0.9091
	Barry County, MI.	
	Ionia County, MI.	
	Kent County, MI.	
	Newaygo County, MI.	
24500	Great Falls, MT	0.9235
	Cascade County, MT.	
24540	Greeley, CO	0.9653
	Weld County, CO.	
24580	Green Bay, WI	0.9587
	Brown County, WI.	
	Kewaunee County, WI.	
	Oconto County, WI.	
24660	Greensboro-High Point, NC.	0.8320
	Guilford County, NC.	
	Randolph County, NC.	
	Rockingham County, NC.	
24780	Greenville, NC	0.9343
	Greene County, NC.	
	Pitt County, NC.	
24860	Greenville-Mauldin-Easley, SC.	0.9604
	Greenville County, SC.	
	Laurens County, SC.	
	Pickens County, SC.	
25020	Guayama, PR	0.3707
	Arroyo Municipio, PR.	
	Guayama Municipio, PR.	
	Patillas Municipio, PR.	
25060	Gulfport-Biloxi, MS	0.8575
	Hancock County, MS.	
	Harrison County, MS.	
	Stone County, MS.	
25180	Hagerstown-Martinsburg, MD–WV.	0.9234
	Washington County, MD.	
	Berkeley County, WV.	
	Morgan County, WV.	
25260	Hanford-Corcoran, CA ..	1.1124
	Kings County, CA.	
25420	Harrisburg-Carlisle, PA	0.9533
	Cumberland County, PA.	
	Dauphin County, PA.	
	Perry County, PA.	
25500	Harrisonburg, VA	0.9090
	Rockingham County, VA.	
	Harrisonburg City, VA.	
25540	Hartford-West Hartford-East Hartford, CT.	1.1050
	Hartford County, CT.	
	Middlesex County, CT.	
	Tolland County, CT.	
25620	Hattiesburg, MS	0.7938
	Forrest County, MS.	
	Lamar County, MS.	
	Perry County, MS.	
25860	Hickory-Lenoir-Morganton, NC.	0.8492
	Alexander County, NC.	
	Burke County, NC.	
	Caldwell County, NC.	
	Catawba County, NC.	
25980	Hinesville-Fort Stewart, GA [1].	0.8700
	Liberty County, GA.	
	Long County, GA.	
26100	Holland-Grand Haven, MI.	0.8016
	Ottawa County, MI.	
26180	Honolulu, HI	1.2321
	Honolulu County, HI.	
26300	Hot Springs, AR	0.8474
	Garland County, AR.	
26380	Houma-Bayou Cane-Thibodaux, LA.	0.7525
	Lafourche Parish, LA.	
	Terrebonne Parish, LA.	
26420	Houston-Sugar Land-Baytown, TX.	0.9915
	Austin County, TX.	
	Brazoria County, TX.	
	Chambers County, TX.	
	Fort Bend County, TX.	
	Galveston County, TX.	
	Harris County, TX.	
	Liberty County, TX.	
	Montgomery County, TX.	
	San Jacinto County, TX.	
	Waller County, TX.	
26580	Huntington-Ashland, WV–KY–OH.	0.8944
	Boyd County, KY.	
	Greenup County, KY.	
	Lawrence County, OH.	
	Cabell County, WV.	
	Wayne County, WV.	
26620	Huntsville, AL	0.8455
	Limestone County, AL.	
	Madison County, AL.	
26820	Idaho Falls, ID	0.9312
	Bonneville County, ID.	
	Jefferson County, ID.	
26900	Indianapolis-Carmel, IN	1.0108
	Boone County, IN.	
	Brown County, IN.	
	Hamilton County, IN.	
	Hancock County, IN.	
	Hendricks County, IN.	
	Johnson County, IN.	
	Marion County, IN.	
	Morgan County, IN.	
	Putnam County, IN.	
	Shelby County, IN.	
26980	Iowa City, IA	0.9854
	Johnson County, IA.	
	Washington County, IA.	
27060	Ithaca, NY	0.9326
	Tompkins County, NY.	
27100	Jackson, MI	0.8944
	Jackson County, MI.	
27140	Jackson, MS	0.8162
	Copiah County, MS.	
	Hinds County, MS.	
	Madison County, MS.	
	Rankin County, MS.	
	Simpson County, MS.	
27180	Jackson, TN	0.7729
	Chester County, TN.	
	Madison County, TN.	
27260	Jacksonville, FL	0.8956
	Baker County, FL.	
	Clay County, FL.	
	Duval County, FL.	
	Nassau County, FL.	
	St. Johns County, FL.	
27340	Jacksonville, NC	0.7861
	Onslow County, NC.	
27500	Janesville, WI	0.9071
	Rock County, WI.	
27620	Jefferson City, MO	0.8465
	Callaway County, MO.	
	Cole County, MO.	
	Moniteau County, MO.	
	Osage County, MO.	
27740	Johnson City, TN	0.7226
	Carter County, TN.	
	Unicoi County, TN.	
	Washington County, TN.	
27780	Johnstown, PA	0.8450
	Cambria County, PA.	
27860	Jonesboro, AR	0.7983
	Craighead County, AR.	
	Poinsett County, AR.	
27900	Joplin, MO	0.7983
	Jasper County, MO.	
	Newton County, MO.	
28020	Kalamazoo-Portage, MI	0.9959
	Kalamazoo County, MI.	
	Van Buren County, MI.	
28100	Kankakee-Bradley, IL ...	0.9657
	Kankakee County, IL.	
28140	Kansas City, MO–KS ...	0.9447
	Franklin County, KS.	
	Johnson County, KS.	
	Leavenworth County, KS.	
	Linn County, KS.	
	Miami County, KS.	
	Wyandotte County, KS.	
	Bates County, MO.	
	Caldwell County, MO.	
	Cass County, MO.	
	Clay County, MO.	
	Clinton County, MO.	

TABLE A—FY 2014 WAGE INDEX FOR URBAN AREAS BASED ON CBSA LABOR MARKET AREAS—Continued

CBSA Code	Urban area (constituent counties)	Wage index
	Jackson County, MO.	
	Lafayette County, MO.	
	Platte County, MO.	
	Ray County, MO.	
28420	Kennewick-Pasco-Richland, WA.	0.9459
	Benton County, WA.	
	Franklin County, WA.	
28660	Killeen-Temple-Fort Hood, TX.	0.8925
	Bell County, TX.	
	Coryell County, TX.	
	Lampasas County, TX.	
28700	Kingsport-Bristol-Bristol, TN–VA.	0.7192
	Hawkins County, TN.	
	Sullivan County, TN.	
	Bristol City, VA.	
	Scott County, VA.	
	Washington County, VA.	
28740	Kingston, NY	0.9066
	Ulster County, NY.	
28940	Knoxville, TN	0.7432
	Anderson County, TN.	
	Blount County, TN.	
	Knox County, TN.	
	Loudon County, TN.	
	Union County, TN.	
29020	Kokomo, IN	0.9061
	Howard County, IN.	
	Tipton County, IN.	
29100	La Crosse, WI–MN	1.0205
	Houston County, MN.	
	La Crosse County, WI.	
29140	Lafayette, IN	0.9954
	Benton County, IN.	
	Carroll County, IN.	
	Tippecanoe County, IN.	
29180	Lafayette, LA	0.8231
	Lafayette Parish, LA.	
	St. Martin Parish, LA.	
29340	Lake Charles, LA	0.7765
	Calcasieu Parish, LA.	
	Cameron Parish, LA.	
29404	Lake County-Kenosha County, IL–WI.	1.0658
	Lake County, IL.	
	Kenosha County, WI.	
29420	Lake Havasu City-Kingman, AZ.	0.9912
	Mohave County, AZ.	
29460	Lakeland-Winter Haven, FL.	0.8283
	Polk County, FL.	
29540	Lancaster, PA	0.9695
	Lancaster County, PA.	
29620	Lansing-East Lansing, MI.	1.0618
	Clinton County, MI.	
	Eaton County, MI.	
	Ingham County, MI.	
29700	Laredo, TX	0.7586
	Webb County, TX.	
29740	Las Cruces, NM	0.9265
	Dona Ana County, NM.	
29820	Las Vegas-Paradise, NV.	1.1627
	Clark County, NV.	
29940	Lawrence, KS	0.8664
	Douglas County, KS	
30020	Lawton, OK	0.7893
	Comanche County, OK.	
30140	Lebanon, PA	0.8157
	Lebanon County, PA.	
30300	Lewiston, ID–WA	0.9215
	Nez Perce County, ID.	
	Asotin County, WA.	
30340	Lewiston-Auburn, ME	0.9048
	Androscoggin County, ME.	
30460	Lexington-Fayette, KY	0.8902
	Bourbon County, KY.	
	Clark County, KY.	
	Fayette County, KY.	
	Jessamine County, KY.	
	Scott County, KY.	
	Woodford County, KY.	
30620	Lima, OH	0.9158
	Allen County, OH.	
30700	Lincoln, NE	0.9465
	Lancaster County, NE.	
	Seward County, NE.	
30780	Little Rock-North Little Rock-Conway, AR.	0.8629
	Faulkner County, AR.	
	Grant County, AR.	
	Lonoke County, AR.	
	Perry County, AR.	
	Pulaski County, AR.	
	Saline County, AR.	
30860	Logan, UT–ID	0.8754
	Franklin County, ID.	
	Cache County, UT.	
30980	Longview, TX	0.8933
	Gregg County, TX.	
	Rusk County, TX.	
	Upshur County, TX.	
31020	Longview, WA	1.0460
	Cowlitz County, WA.	
31084	Los Angeles-Long Beach-Glendale, CA.	1.2417
	Los Angeles County, CA.	
31140	Louisville-Jefferson County, KY–IN.	0.8852
	Clark County, IN.	
	Floyd County, IN.	
	Harrison County, IN.	
	Washington County, IN.	
	Bullitt County, KY.	
	Henry County, KY.	
	Meade County, KY.	
	Nelson County, KY.	
	Oldham County, KY.	
	Shelby County, KY.	
	Spencer County, KY.	
	Trimble County, KY.	
31180	Lubbock, TX	0.8956
	Crosby County, TX.	
	Lubbock County, TX.	
31340	Lynchburg, VA	0.8771
	Amherst County, VA.	
	Appomattox County, VA.	
	Bedford County, VA.	
	Campbell County, VA.	
	Bedford City, VA.	
	Lynchburg City, VA.	
31420	Macon, GA	0.9014
	Bibb County, GA.	
	Crawford County, GA.	
	Jones County, GA.	
	Monroe County, GA.	
	Twiggs County, GA.	
31460	Madera-Chowchilla, CA	0.8317
	Madera County, CA.	
31540	Madison, WI	1.1414
	Columbia County, WI.	
	Dane County, WI.	
	Iowa County, WI.	
31700	Manchester-Nashua, NH.	1.0057
	Hillsborough County, NH.	
31740	Manhattan, KS	0.7843
	Geary County, KS.	
	Pottawatomie County, KS.	
	Riley County, KS.	
31860	Mankato-North Mankato, MN.	0.9277
	Blue Earth County, MN.	
	Nicollet County, MN.	
31900	Mansfield, OH	0.8509
	Richland County, OH.	
32420	Mayagüez, PR	0.3762
	Hormigueros Municipio, PR.	
	Mayagüez Municipio, PR.	
32580	McAllen-Edinburg-Mission, TX.	0.8393
	Hidalgo County, TX.	
32780	Medford, OR	1.0690
	Jackson County, OR.	
32820	Memphis, TN–MS–AR	0.9038
	Crittenden County, AR.	
	DeSoto County, MS.	
	Marshall County, MS.	
	Tate County, MS.	
	Tunica County, MS.	
	Fayette County, TN.	
	Shelby County, TN.	
	Tipton County, TN.	
32900	Merced, CA	1.2734
	Merced County, CA.	
33124	Miami-Miami Beach-Kendall, FL.	0.9870
	Miami-Dade County, FL.	
33140	Michigan City-La Porte, IN.	0.9216
	LaPorte County, IN.	
33260	Midland, TX	1.0049
	Midland County, TX.	
33340	Milwaukee-Waukesha-West Allis, WI.	0.9856
	Milwaukee County, WI.	
	Ozaukee County, WI.	
	Washington County, WI.	
	Waukesha County, WI.	
33460	Minneapolis-St. Paul-Bloomington, MN–WI.	1.1213
	Anoka County, MN.	
	Carver County, MN.	
	Chisago County, MN.	
	Dakota County, MN.	
	Hennepin County, MN.	
	Isanti County, MN.	

TABLE A—FY 2014 WAGE INDEX FOR URBAN AREAS BASED ON CBSA LABOR MARKET AREAS—Continued

CBSA Code	Urban area (constituent counties)	Wage index
	Ramsey County, MN.	
	Scott County, MN.	
	Sherburne County, MN.	
	Washington County, MN.	
	Wright County, MN.	
	Pierce County, WI.	
	St. Croix County, WI.	
33540	Missoula, MT	0.9142
	Missoula County, MT.	
33660	Mobile, AL	0.7507
	Mobile County, AL.	
33700	Modesto, CA	1.3629
	Stanislaus County, CA.	
33740	Monroe, LA	0.7530
	Ouachita Parish, LA.	
	Union Parish, LA.	
33780	Monroe, MI	0.8718
	Monroe County, MI.	
33860	Montgomery, AL	0.7475
	Autauga County, AL.	
	Elmore County, AL.	
	Lowndes County, AL.	
	Montgomery County, AL.	
34060	Morgantown, WV	0.8339
	Monongalia County, WV.	
	Preston County, WV.	
34100	Morristown, TN	0.6861
	Grainger County, TN.	
	Hamblen County, TN.	
	Jefferson County, TN.	
34580	Mount Vernon-Anacortes, WA.	1.0652
	Skagit County, WA.	
34620	Muncie, IN.	
	Delaware County, IN	0.8743
34740	Muskegon-Norton Shores, MI.	1.1076
	Muskegon County, MI.	
34820	Myrtle Beach-North Myrtle Beach-Conway, SC.	0.8700
	Horry County, SC.	
34900	Napa, CA	1.5375
	Napa County, CA.	
34940	Naples-Marco Island, FL.	0.9108
	Collier County, FL.	
34980	Nashville-Davidson—Murfreesboro-Franklin, TN.	0.9141
	Cannon County, TN.	
	Cheatham County, TN.	
	Davidson County, TN.	
	Dickson County, TN.	
	Hickman County, TN.	
	Macon County, TN.	
	Robertson County, TN.	
	Rutherford County, TN.	
	Smith County, TN.	
	Sumner County, TN.	
	Trousdale County, TN.	
	Williamson County, TN.	
	Wilson County, TN.	
35004	Nassau-Suffolk, NY	1.2755
	Nassau County, NY.	
	Suffolk County, NY.	
35084	Newark-Union, NJ–PA	1.1268
	Essex County, NJ.	
	Hunterdon County, NJ.	
	Morris County, NJ.	
	Sussex County, NJ.	
	Union County, NJ.	
	Pike County, PA.	
35300	New Haven-Milford, CT	1.1883
	New Haven County, CT.	
35380	New Orleans-Metairie-Kenner, LA.	0.8752
	Jefferson Parish, LA.	
	Orleans Parish, LA.	
	Plaquemines Parish, LA.	
	St. Bernard Parish, LA.	
	St. Charles Parish, LA.	
	St. John the Baptist Parish, LA.	
	St. Tammany Parish, LA.	
35644	New York-White Plains-Wayne, NY–NJ.	1.3089
	Bergen County, NJ.	
	Hudson County, NJ.	
	Passaic County, NJ.	
	Bronx County, NY.	
	Kings County, NY.	
	New York County, NY.	
	Putnam County, NY.	
	Queens County, NY.	
	Richmond County, NY.	
	Rockland County, NY.	
	Westchester County, NY.	
35660	Niles-Benton Harbor, MI	0.8444
	Berrien County, MI.	
35840	North Port-Bradenton-Sarasota-Venice, FL.	0.9428
	Manatee County, FL.	
	Sarasota County, FL.	
35980	Norwich-New London, CT.	1.1821
	New London County, CT.	
36084	Oakland-Fremont-Hayward, CA.	1.7048
	Alameda County, CA.	
	Contra Costa County, CA.	
36100	Ocala, FL	0.8425
	Marion County, FL.	
36140	Ocean City, NJ	1.0584
	Cape May County, NJ.	
36220	Odessa, TX	0.9661
	Ector County, TX.	
36260	Ogden-Clearfield, UT ...	0.9170
	Davis County, UT.	
	Morgan County, UT.	
	Weber County, UT.	
36420	Oklahoma City, OK	0.8879
	Canadian County, OK.	
	Cleveland County, OK.	
	Grady County, OK.	
	Lincoln County, OK.	
	Logan County, OK.	
	McClain County, OK.	
	Oklahoma County, OK.	
36500	Olympia, WA	1.1601
	Thurston County, WA.	
36540	Omaha-Council Bluffs, NE–IA.	0.9756
	Harrison County, IA.	
	Mills County, IA.	
	Pottawattamie County, IA.	
	Cass County, NE.	
	Douglas County, NE.	
	Sarpy County, NE.	
	Saunders County, NE.	
	Washington County, NE.	
36740	Orlando-Kissimmee, FL	0.9063
	Lake County, FL.	
	Orange County, FL.	
	Osceola County, FL.	
	Seminole County, FL.	
36780	Oshkosh-Neenah, WI ...	0.9398
	Winnebago County, WI.	
36980	Owensboro, KY	0.7790
	Daviess County, KY.	
	Hancock County, KY.	
	McLean County, KY.	
37100	Oxnard-Thousand Oaks-Ventura, CA.	1.3113
	Ventura County, CA.	
37340	Palm Bay-Melbourne-Titusville, FL.	0.8790
	Brevard County, FL.	
37380	Palm Coast, FL	0.8174
	Flagler County, FL.	
37460	Panama City-Lynn Haven-Panama City Beach, FL.	0.7876
	Bay County, FL.	
37620	Parkersburg-Marietta-Vienna, WV–OH.	0.7569
	Washington County, OH.	
	Pleasants County, WV.	
	Wirt County, WV.	
	Wood County, WV.	
37700	Pascagoula, MS	0.7542
	George County, MS.	
	Jackson County, MS.	
37764	Peabody, MA	1.0553
	Essex County, MA.	
37860	Pensacola-Ferry Pass-Brent, FL.	0.7767
	Escambia County, FL.	
	Santa Rosa County, FL.	
37900	Peoria, IL	0.8434
	Marshall County, IL.	
	Peoria County, IL.	
	Stark County, IL.	
	Tazewell County, IL.	
	Woodford County, IL.	
37964	Philadelphia, PA	1.0849
	Bucks County, PA.	
	Chester County, PA.	
	Delaware County, PA.	
	Montgomery County, PA.	
	Philadelphia County, PA.	
38060	Phoenix-Mesa-Scottsdale, AZ.	1.0465
	Maricopa County, AZ.	
	Pinal County, AZ.	
38220	Pine Bluff, AR	0.8069
	Cleveland County, AR.	
	Jefferson County, AR.	
	Lincoln County, AR.	
38300	Pittsburgh, PA	0.8669

TABLE A—FY 2014 WAGE INDEX FOR URBAN AREAS BASED ON CBSA LABOR MARKET AREAS—Continued

CBSA Code	Urban area (constituent counties)	Wage index
	Allegheny County, PA.	
	Armstrong County, PA.	
	Beaver County, PA.	
	Butler County, PA.	
	Fayette County, PA.	
	Washington County, PA.	
	Westmoreland County, PA.	
38340	Pittsfield, MA	1.0920
	Berkshire County, MA.	
38540	Pocatello, ID	0.9754
	Bannock County, ID.	
	Power County, ID.	
38660	Ponce, PR	0.4594
	Juana Díaz Municipio, PR.	
	Ponce Municipio, PR.	
	Villalba Municipio, PR.	
38860	Portland-South Portland-Biddeford, ME.	0.9981
	Cumberland County, ME.	
	Sagadahoc County, ME.	
	York County, ME.	
38900	Portland-Vancouver-Beaverton, OR–WA.	1.1766
	Clackamas County, OR.	
	Columbia County, OR.	
	Multnomah County, OR.	
	Washington County, OR.	
	Yamhill County, OR.	
	Clark County, WA.	
	Skamania County, WA.	
38940	Port St. Lucie, FL	0.9352
	Martin County, FL.	
	St. Lucie County, FL.	
39100	Poughkeepsie-Newburgh-Middletown, NY.	1.1544
	Dutchess County, NY.	
	Orange County, NY.	
39140	Prescott, AZ	1.0161
	Yavapai County, AZ.	
39300	Providence-New Bedford-Fall River, RI–MA.	1.0539
	Bristol County, MA.	
	Bristol County, RI.	
	Kent County, RI.	
	Newport County, RI.	
	Providence County, RI.	
	Washington County, RI.	
39340	Provo-Orem, UT	0.9461
	Juab County, UT.	
	Utah County, UT.	
39380	Pueblo, CO	0.8215
	Pueblo County, CO.	
39460	Punta Gorda, FL	0.8734
	Charlotte County, FL.	
39540	Racine, WI	0.8903
	Racine County, WI.	
39580	Raleigh-Cary, NC	0.9304
	Franklin County, NC.	
	Johnston County, NC.	
	Wake County, NC.	
39660	Rapid City, SD	0.9568
	Meade County, SD.	
	Pennington County, SD.	
39740	Reading, PA	0.9220
	Berks County, PA.	
39820	Redding, CA	1.4990
	Shasta County, CA.	
39900	Reno-Sparks, NV	1.0326
	Storey County, NV.	
	Washoe County, NV.	
40060	Richmond, VA	0.9723
	Amelia County, VA.	
	Caroline County, VA.	
	Charles City County, VA.	
	Chesterfield County, VA.	
	Cumberland County, VA.	
	Dinwiddie County, VA.	
	Goochland County, VA.	
	Hanover County, VA.	
	Henrico County, VA.	
	King and Queen County, VA.	
	King William County, VA.	
	Louisa County, VA.	
	New Kent County, VA.	
	Powhatan County, VA.	
	Prince George County, VA.	
	Sussex County, VA.	
	Colonial Heights City, VA.	
	Hopewell City, VA.	
	Petersburg City, VA.	
	Richmond City, VA.	
40140	Riverside-San Bernardino-Ontario, CA.	1.1497
	Riverside County, CA.	
	San Bernardino County, CA.	
40220	Roanoke, VA	0.9195
	Botetourt County, VA.	
	Craig County, VA.	
	Franklin County, VA.	
	Roanoke County, VA.	
	Roanoke City, VA.	
	Salem City, VA.	
40340	Rochester, MN	1.1662
	Dodge County, MN.	
	Olmsted County, MN.	
	Wabasha County, MN.	
40380	Rochester, NY	0.8749
	Livingston County, NY.	
	Monroe County, NY.	
	Ontario County, NY.	
	Orleans County, NY.	
	Wayne County, NY.	
40420	Rockford, IL	0.9751
	Boone County, IL.	
	Winnebago County, IL.	
40484	Rockingham County-Strafford County, NH.	1.0172
	Rockingham County, NH.	
	Strafford County, NH.	
40580	Rocky Mount, NC	0.8750
	Edgecombe County, NC.	
	Nash County, NC.	
40660	Rome, GA	0.8924
	Floyd County, GA.	
40900	Sacramento-Arden-Arcade-Roseville, CA.	1.5498
	El Dorado County, CA.	
	Placer County, CA.	
	Sacramento County, CA.	
	Yolo County, CA.	
40980	Saginaw-Saginaw Township North, MI.	0.8849
	Saginaw County, MI.	
41060	St. Cloud, MN	1.0658
	Benton County, MN.	
	Stearns County, MN.	
41100	St. George, UT	0.9345
	Washington County, UT.	
41140	St. Joseph, MO–KS	0.9834
	Doniphan County, KS.	
	Andrew County, MO.	
	Buchanan County, MO.	
	DeKalb County, MO.	
41180	St. Louis, MO–IL	0.9336
	Bond County, IL.	
	Calhoun County, IL.	
	Clinton County, IL.	
	Jersey County, IL.	
	Macoupin County, IL.	
	Madison County, IL.	
	Monroe County, IL.	
	St. Clair County, IL.	
	Crawford County, MO.	
	Franklin County, MO.	
	Jefferson County, MO.	
	Lincoln County, MO.	
	St. Charles County, MO.	
	St. Louis County, MO.	
	Warren County, MO.	
	Washington County, MO.	
	St. Louis City, MO.	
41420	Salem, OR	1.1148
	Marion County, OR.	
	Polk County, OR.	
41500	Salinas, CA	1.5820
	Monterey County, CA.	
41540	Salisbury, MD	0.8948
	Somerset County, MD.	
	Wicomico County, MD.	
41620	Salt Lake City, UT	0.9350
	Salt Lake County, UT.	
	Summit County, UT.	
	Tooele County, UT.	
41660	San Angelo, TX	0.8169
	Irion County, TX.	
	Tom Green County, TX.	
41700	San Antonio, TX	0.8911
	Atascosa County, TX.	
	Bandera County, TX.	
	Bexar County, TX.	
	Comal County, TX.	
	Guadalupe County, TX.	
	Kendall County, TX.	
	Medina County, TX.	
	Wilson County, TX.	
41740	San Diego-Carlsbad-San Marcos, CA.	1.2213
	San Diego County, CA.	
41780	Sandusky, OH	0.7788
	Erie County, OH.	

TABLE A—FY 2014 WAGE INDEX FOR URBAN AREAS BASED ON CBSA LABOR MARKET AREAS—Continued

CBSA Code	Urban area (constituent counties)	Wage index
41884	San Francisco-San Mateo-Redwood City, CA.	1.6743
	Marin County, CA.	
	San Francisco County, CA.	
	San Mateo County, CA.	
41900	San Germán-Cabo Rojo, PR.	0.4550
	Cabo Rojo Municipio, PR.	
	Lajas Municipio, PR.	
	Sabana Grande Municipio, PR.	
	San Germán Municipio, PR.	
41940	San Jose-Sunnyvale-Santa Clara, CA.	1.7086
	San Benito County, CA.	
	Santa Clara County, CA.	
41980	San Juan-Caguas-Guaynabo, PR.	0.4356
	Aguas Buenas Municipio, PR.	
	Aibonito Municipio, PR.	
	Arecibo Municipio, PR.	
	Barceloneta Municipio, PR.	
	Barranquitas Municipio, PR.	
	Bayamón Municipio, PR.	
	Caguas Municipio, PR.	
	Camuy Municipio, PR.	
	Canóvanas Municipio, PR.	
	Carolina Municipio, PR.	
	Cataño Municipio, PR.	
	Cayey Municipio, PR.	
	Ciales Municipio, PR.	
	Cidra Municipio, PR.	
	Comerío Municipio, PR.	
	Corozal Municipio, PR.	
	Dorado Municipio, PR.	
	Florida Municipio, PR.	
	Guaynabo Municipio, PR.	
	Gurabo Municipio, PR.	
	Hatillo Municipio, PR.	
	Humacao Municipio, PR.	
	Juncos Municipio, PR.	
	Las Piedras Municipio, PR.	
	Loíza Municipio, PR.	
	Manatí Municipio, PR.	
	Maunabo Municipio, PR.	
	Morovis Municipio, PR.	
	Naguabo Municipio, PR.	
	Naranjito Municipio, PR.	
	Orocovis Municipio, PR.	
	Quebradillas Municipio, PR.	
	Río Grande Municipio, PR.	
	San Juan Municipio, PR.	
	San Lorenzo Municipio, PR.	
	Toa Alta Municipio, PR.	
	Toa Baja Municipio, PR.	
	Trujillo Alto Municipio, PR.	
	Vega Alta Municipio, PR.	
	Vega Baja Municipio, PR.	
	Yabucoa Municipio, PR.	
42020	San Luis Obispo-Paso Robles, CA.	1.3036
	San Luis Obispo County, CA.	
42044	Santa Ana-Anaheim-Irvine, CA.	1.2111
	Orange County, CA.	
42060	Santa Barbara-Santa Maria-Goleta, CA.	1.2825
	Santa Barbara County, CA.	
42100	Santa Cruz-Watsonville, CA.	1.7937
	Santa Cruz County, CA.	
42140	Santa Fe, NM	1.0136
	Santa Fe County, NM.	
42220	Santa Rosa-Petaluma, CA.	1.6679
	Sonoma County, CA.	
42340	Savannah, GA	0.8757
	Bryan County, GA.	
	Chatham County, GA.	
	Effingham County, GA.	
42540	Scranton-Wilkes-Barre, PA.	0.8331
	Lackawanna County, PA.	
	Luzerne County, PA.	
	Wyoming County, PA.	
42644	Seattle-Bellevue-Everett, WA.	1.1733
	King County, WA.	
	Snohomish County, WA.	
42680	Sebastian-Vero Beach, FL.	0.8760
	Indian River County, FL.	
43100	Sheboygan, WI	0.9203
	Sheboygan County, WI.	
43300	Sherman-Denison, TX ..	0.8723
	Grayson County, TX	0.8723
43340	Shreveport-Bossier City, LA.	0.8262
	Bossier Parish, LA.	
	Caddo Parish, LA.	
	De Soto Parish, LA.	
43580	Sioux City, IA–NE–SD ..	0.9163
	Woodbury County, IA.	
	Dakota County, NE.	
	Dixon County, NE.	
	Union County, SD.	
43620	Sioux Falls, SD	0.8275
	Lincoln County, SD.	
	McCook County, SD.	
	Minnehaha County, SD.	
	Turner County, SD.	
43780	South Bend-Mishawaka, IN–MI.	0.9425
	St. Joseph County, IN.	
	Cass County, MI.	
43900	Spartanburg, SC	0.8782
	Spartanburg County, SC.	
44060	Spokane, WA	1.1174
	Spokane County, WA.	
44100	Springfield, IL	0.9165
	Menard County, IL.	
	Sangamon County, IL.	
44140	Springfield, MA	1.0378
	Franklin County, MA.	
	Hampden County, MA.	
	Hampshire County, MA.	
44180	Springfield, MO	0.8440
	Christian County, MO.	
	Dallas County, MO.	
	Greene County, MO.	
	Polk County, MO.	
	Webster County, MO.	
44220	Springfield, OH	0.8447
	Clark County, OH	
44300	State College, PA	0.9575
	Centre County, PA.	
44600	Steubenville-Weirton, OH–WV.	0.7598
	Jefferson County, OH.	
	Brooke County, WV.	
	Hancock County, WV.	
44700	Stockton, CA	1.3734
	San Joaquin County, CA.	
44940	Sumter, SC	0.7594
	Sumter County, SC.	
45060	Syracuse, NY	0.9897
	Madison County, NY.	
	Onondaga County, NY.	
	Oswego County, NY.	
45104	Tacoma, WA	1.1574
	Pierce County, WA.	
45220	Tallahassee, FL	0.8391
	Gadsden County, FL.	
	Jefferson County, FL.	
	Leon County, FL.	
	Wakulla County, FL.	
45300	Tampa-St. Petersburg-Clearwater, FL.	0.9075
	Hernando County, FL.	
	Hillsborough County, FL.	
	Pasco County, FL.	
	Pinellas County, FL.	
45460	Terre Haute, IN	0.9706
	Clay County, IN.	
	Sullivan County, IN.	
	Vermillion County, IN.	
	Vigo County, IN.	
45500	Texarkana, TX-Texarkana, AR.	0.7428
	Miller County, AR.	
	Bowie County, TX.	
45780	Toledo, OH	0.9013
	Fulton County, OH.	
	Lucas County, OH.	
	Ottawa County, OH.	
	Wood County, OH.	
45820	Topeka, KS	0.8974
	Jackson County, KS.	
	Jefferson County, KS.	
	Osage County, KS.	
	Shawnee County, KS.	
	Wabaunsee County, KS.	
45940	Trenton-Ewing, NJ	1.0648
	Mercer County, NJ.	
46060	Tucson, AZ	0.8953

TABLE A—FY 2014 WAGE INDEX FOR URBAN AREAS BASED ON CBSA LABOR MARKET AREAS—Continued

CBSA Code	Urban area (constituent counties)	Wage index
	Pima County, AZ.	
46140	Tulsa, OK	0.8145
	Creek County, OK.	
	Okmulgee County, OK.	
	Osage County, OK.	
	Pawnee County, OK.	
	Rogers County, OK.	
	Tulsa County, OK.	
	Wagoner County, OK.	
46220	Tuscaloosa, AL	0.8500
	Greene County, AL.	
	Hale County, AL.	
	Tuscaloosa County, AL.	
46340	Tyler, TX	0.8526
	Smith County, TX.	
46540	Utica-Rome, NY	0.8769
	Herkimer County, NY.	
	Oneida County, NY.	
46660	Valdosta, GA	0.7527
	Brooks County, GA.	
	Echols County, GA.	
	Lanier County, GA.	
	Lowndes County, GA.	
46700	Vallejo-Fairfield, CA	1.6286
	Solano County, CA.	
47020	Victoria, TX	0.8949
	Calhoun County, TX.	
	Goliad County, TX.	
	Victoria County, TX.	
47220	Vineland-Millville-Bridgeton, NJ.	1.0759
	Cumberland County, NJ.	
47260	Virginia Beach-Norfolk-Newport News, VA–NC.	0.9121
	Currituck County, NC.	
	Gloucester County, VA.	
	Isle of Wight County, VA.	
	James City County, VA.	
	Mathews County, VA.	
	Surry County, VA.	
	York County, VA.	
	Chesapeake City, VA.	
	Hampton City, VA.	
	Newport News City, VA.	
	Norfolk City, VA.	
	Poquoson City, VA.	
	Portsmouth City, VA.	
	Suffolk City, VA.	
	Virginia Beach City, VA.	
	Williamsburg City, VA.	
47300	Visalia-Porterville, CA ...	0.9947
	Tulare County, CA.	
47380	Waco, TX	0.8213
	McLennan County, TX.	
47580	Warner Robins, GA	0.7732
	Houston County, GA.	
47644	Warren-Troy-Farmington Hills, MI.	0.9432
	Lapeer County, MI.	
	Livingston County, MI.	
	Macomb County, MI.	
	Oakland County, MI.	
	St. Clair County, MI.	
47894	Washington-Arlington-Alexandria, DC–VA–MD–WV.	1.0533
	District of Columbia, DC.	
	Calvert County, MD.	
	Charles County, MD.	
	Prince George's County, MD.	
	Arlington County, VA.	
	Clarke County, VA.	
	Fairfax County, VA.	
	Fauquier County, VA.	
	Loudoun County, VA.	
	Prince William County, VA.	
	Spotsylvania County, VA.	
	Stafford County, VA.	
	Warren County, VA.	
	Alexandria City, VA.	
	Fairfax City, VA.	
	Falls Church City, VA.	
	Fredericksburg City, VA.	
	Manassas City, VA.	
	Manassas Park City, VA.	
	Jefferson County, WV.	
47940	Waterloo-Cedar Falls, IA.	0.8331
	Black Hawk County, IA.	
	Bremer County, IA.	
	Grundy County, IA.	
48140	Wausau, WI	0.8802
	Marathon County, WI.	
48300	Wenatchee-East Wenatchee, WA.	1.0109
	Chelan County, WA.	
	Douglas County, WA.	
48424	West Palm Beach-Boca Raton-Boynton Beach, FL.	0.9597
	Palm Beach County, FL.	
48540	Wheeling, WV–OH	0.6673
	Belmont County, OH.	
	Marshall County, WV.	
	Ohio County, WV.	
48620	Wichita, KS	0.8674
	Butler County, KS.	
	Harvey County, KS.	
	Sedgwick County, KS.	
	Sumner County, KS.	
48660	Wichita Falls, TX	0.9537
	Archer County, TX.	
	Clay County, TX.	
	Wichita County, TX.	
48700	Williamsport, PA	0.8268
	Lycoming County, PA.	
48864	Wilmington, DE–MD–NJ	1.0593
	New Castle County, DE.	
	Cecil County, MD.	
	Salem County, NJ.	
48900	Wilmington, NC.	
	Brunswick County, NC	0.8862
	New Hanover County, NC.	
	Pender County, NC.	
49020	Winchester, VA–WV	0.9034
	Frederick County, VA.	
	Winchester City, VA.	
	Hampshire County, WV.	
49180	Winston-Salem, NC	0.8560
	Davie County, NC.	
	Forsyth County, NC.	
	Stokes County, NC.	
	Yadkin County, NC.	
49340	Worcester, MA	1.1584
	Worcester County, MA.	
49420	Yakima, WA	1.0355
	Yakima County, WA.	
49500	Yauco, PR	0.3782
	Guánica Municipio, PR.	
	Guayanilla Municipio, PR.	
	Peñuelas Municipio, PR.	
	Yauco Municipio, PR.	
49620	York-Hanover, PA	0.9540
	York County, PA.	
49660	Youngstown-Warren-Boardman, OH–PA.	0.8262
	Mahoning County, OH.	
	Trumbull County, OH.	
	Mercer County, PA.	
49700	Yuba City, CA	1.1759
	Sutter County, CA.	
	Yuba County, CA.	
49740	Yuma, AZ	0.9674
	Yuma County, AZ.	

[1] At this time, there are no hospitals located in this urban area on which to base a wage index.

State code	Nonurban area	Wage index
1	Alabama	0.7147
2	Alaska	1.3662
3	Arizona	0.9166
4	Arkansas	0.7343
5	California	1.2788
6	Colorado	0.9802
7	Connecticut	1.1311
8	Delaware	1.0092
10	Florida	0.7985
11	Georgia	0.7459
12	Hawaii	1.0739
13	Idaho	0.7605
14	Illinois	0.8434
15	Indiana	0.8513
16	Iowa	0.8434
17	Kansas	0.7929
18	Kentucky	0.7784
19	Louisiana	0.7585
20	Maine	0.8238
21	Maryland	0.8696
22	Massachusetts	1.3614
23	Michigan	0.8270
24	Minnesota	0.9133
25	Mississippi	0.7568
26	Missouri	0.7775
27	Montana	0.9098
28	Nebraska	0.8855
29	Nevada	0.9781
30	New Hampshire	1.0339
31	New Jersey[1]	—
32	New Mexico	0.8922
33	New York	0.8220
34	North Carolina	0.8100
35	North Dakota	0.6785
36	Ohio	0.8377
37	Oklahoma	0.7704
38	Oregon	0.9435

State code	Nonurban area	Wage index
39	Pennsylvania	0.8430
40	Puerto Rico[1]	0.4047
41	Rhode Island[1]	—
42	South Carolina	0.8329
43	South Dakota	0.8164
44	Tennessee	0.7444
45	Texas	0.7874
46	Utah	0.8732
47	Vermont	0.9740
48	Virgin Islands	0.7060
49	Virginia	0.7758
50	Washington	1.0529
51	West Virginia	0.7407
52	Wisconsin	0.8904
53	Wyoming	0.9243
65	Guam	0.9611

[1] All counties within the State are classified as urban, with the exception of Puerto Rico. Puerto Rico has areas designated as rural; however, no short-term, acute care hospitals are located in the area(s) for FY 2014. The Puerto Rico wage index is the same as FY 2013.

[FR Doc. 2013–18776 Filed 7–31–13; 4:15 pm]

BILLING CODE 4120–01–P



FEDERAL REGISTER

Vol. 78 Tuesday,
No. 151 August 6, 2013

Part V

Department of Education

34 CFR Subtitle A
Final Priorities, Requirements, Definitions, and Selection Criteria; Race to the Top—District; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Subtitle A

RIN 1810–AB17

[Docket No. ED–2013–OS–0050]

Final Priorities, Requirements, Definitions, and Selection Criteria; Race to the Top—District

AGENCY: Office of the Deputy Secretary, Department of Education.

ACTION: Final priorities, requirements, definitions, and selection criteria.

[CFDA Number: 84.416.]

SUMMARY: The Secretary announces priorities, requirements, definitions, and selection criteria under the Race to the Top—District program. The Secretary may use one or more of these priorities, requirements, definitions, and selection criteria for competitions in fiscal year (FY) 2013 and later years.

The Race to the Top—District program builds on the experience of States and districts in implementing reforms in the four core educational assurance areas through Race to the Top and other key programs and supports applicants that demonstrate how they can personalize education for all students in their schools. The U.S. Department of Education (Department) conducted one competition under the Race to the Top—District program in FY 2012, and we are maintaining the overall purpose and structure of the FY 2012 Race to the Top—District competition. These priorities, requirements, definitions, and selection criteria are almost identical to the ones we used in the FY 2012 competition.

DATES: *Effective Date:* These priorities, requirements, definitions, and selection criteria are effective September 5, 2013

FOR FURTHER INFORMATION CONTACT: James Butler, U.S. Department of Education, 400 Maryland Avenue SW., Room 7E214, Washington, DC 20202–4260. Telephone: (202) 453–6800. FAX: (202) 401–1557. Email: *racetothetop.district@ed.gov*.

If you use a telecommunications device for the deaf (TDD) or text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of This Regulatory Action: The purpose of this action is to establish priorities, requirements, definitions, and selection criteria that will enable effective grant making, resulting in the selection of high-quality applicants who propose to implement activities that the Department believes are most likely to support bold, locally directed improvements in learning and teaching that would directly improve student achievement and educator effectiveness.

Summary of the Major Provisions of This Regulatory Action: This document establishes priorities, requirements, definitions, and selection criteria for the Race to the Top—District program.

The Race to the Top—District program is designed to build on the momentum of other Race to the Top competitions by encouraging bold, innovative reform at the local level. The Race to the Top—District competition is aimed squarely at classrooms and the all-important relationship between educators and students. The priorities, requirements, definitions, and selection criteria in this document are almost identical to those we used in the FY 2012 competition. The competition will again support applicants that demonstrate how they can personalize education for all students in their schools.

In that regard, through this competition, the Department will encourage and reward those local educational agencies (LEAs) or consortia of LEAs that have the leadership and vision to implement the strategies, structures, and systems that the Department believes are needed to implement personalized, student-focused approaches to learning and teaching that will produce excellence and ensure equity for all students. The priorities, definitions, requirements, and selection criteria are designed to help LEAs meet these goals. As stated in the notice of proposed priorities, requirements, definitions, and selection criteria (NPP) (published in the **Federal Register** on April 16, 2013 (78 FR 22451)), most changes from the FY 2012 competition reflect minor language clarifications. The two substantive changes are the removal of the opportunity to apply for an optional budget supplement and the reduction of the minimum and maximum grant amount for which an applicant may apply. We believe these changes enable the Department to maximize the number of grantees that would receive funding under a competition, while still awarding grants of sufficient size to support bold improvements in learning and teaching. In addition, this document includes some revisions from the NPP. We discuss changes from the NPP in greater detail in the *Analysis of Comments and Changes* section.

Under Priority 1, applicants must design a personalized learning environment that uses collaborative, data-based strategies and 21st-century tools, such as online learning platforms, computers, mobile devices, and learning algorithms, to deliver instruction and supports tailored to the needs and goals of each student, with the aim of enabling all students to graduate college- and career-ready. Implementation of a personalized learning environment is not achieved through a single solution or product but rather requires a multi-faceted approach that addresses the individual and collective needs of students, educators, and families and that dramatically transforms the learning environment in order to improve student outcomes.

Through Race to the Top—District, the Department will continue to support high-quality proposals from applicants across a varied set of LEAs in order to create diverse models of personalized learning environments for use by LEAs across the Nation. For this reason, the Department is establishing four additional priorities. Priorities 2 through 5 support efforts to expand the types of reform efforts being implemented in LEAs in States that have received a Race to the Top Phase 1, 2, or 3 award and to LEAs in other States. Moreover, these priorities also help ensure that LEAs of varying sizes, both rural and non-rural, and with different local contexts, are able to implement innovative personalized learning environments for their students that can serve as models for other LEAs and help improve student achievement widely.

Finally, we establish one additional priority to support applicants that propose to extend their reforms beyond the classroom and partner with public or private entities in order to address the social, emotional, and behavioral needs of students, particularly students who attend a high-need school.

Costs and Benefits: The Secretary believes that the costs imposed on applicants by these priorities, requirements, definitions, and selection criteria are limited to paperwork burden related to preparing an application and the benefits of implementing them would outweigh any costs incurred by applicants. The costs of carrying out activities would be paid for with program funds. Thus, the costs of implementation would not be a burden for any eligible applicants, including small entities. Please refer to the *Regulatory Impact Analysis* in this document for a more complete discussion of the costs and benefits of this regulatory action.

This notice provides an accounting statement that estimates that approximately $120 million will

transfer from the Federal Government to LEAs under this program. Please refer to the accounting statement in this document for a more detailed discussion.

Purpose of Program: The purpose of the Race to the Top—District program is to build on the lessons learned from the State competitions conducted under the Race to the Top program and to support bold, locally directed improvements in learning and teaching that will directly improve student achievement and educator effectiveness.

Program Authority: Sections 14005 and 14006 of the American Recovery and Reinvestment Act (Pub. L. 111–5), as amended by section 1832(b) of Division B of the Department of Defense and Full-Year Continuing Appropriations Act, 2011 (Pub. L. 112–10), and the Department of Education Appropriations Act, 2012 (Consolidated Appropriations Act, 2012) (Title III of Division F of Pub. L. 112–74).

We published proposed priorities, requirements, definitions, and selection criteria for this program in the **Federal Register** on April 16, 2013 (78 FR 22451). That notice contained background information and our reasons for proposing the particular priorities, requirements, definitions, and selection criteria.

Public Comment: In response to our invitation in the NPP, 43 parties submitted comments.

We group responses to comments according to subject. Generally, we do not address technical and other minor changes.

Analysis of Comments and Changes: An analysis of the comments and of any changes in the priorities, requirements, definitions, and selection criteria since publication of the NPP follows. We have included category headings below to help with organization, though some comments were relevant to multiple categories and were considered accordingly.

General

Comment: Many commenters expressed support for the Race to the Top—District program's focus on personalized learning and advancing innovation in education. Commenters noted that this approach will help accelerate and deepen student learning, close achievement gaps, and help all students graduate ready for college and a career. A couple commenters suggested the program could lead to transformational changes in teaching and learning. A commenter specifically agreed with the key proposed changes to the program, including removing the optional budget supplement and adapting the budget bands, and particularly applauded the decrease in the number of minimum participating students required in the largest award range.

However, some commenters suggested different directions for the program. A commenter suggested that the program should have a primary focus on the implementation of college- and career-ready standards, the institution of wraparound services, and the expansion of early education. Another commenter suggested providing more flexibility for applicants to address the Race to the Top reform areas in the context of, and without distracting them from, their own local reform efforts. A couple commenters suggested that building on the four core assurance areas could detract from the focus on personalized learning. A few commenters suggested streamlining the selection criteria to reduce the risk of overburdening LEAs while retaining the ambitious goals of the Race to the Top—District program.

Discussion: We appreciate the support from commenters for the emphasis on personalized learning and the potential for contributing to significant improvements in learning and teaching. We believe it is important for applicants to create personalized learning environments that will lead to the greatest improvement in each LEA while also ensuring alignment with the broader education context in their States, including Race to the Top State grants, ESEA flexibility, and other relevant programs and initiatives.

We appreciate the suggestions for different directions for the program and the suggestions for narrowing the priorities and selection criteria. We decline to shift the focus away from personalized learning or to significantly change the priorities and selection criteria. However we have removed one selection criterion—that was designated in the NPP as (B)(5) Analysis of Needs and Gaps—which we believe can be addressed in a more integrated way in applicants' plans and responses to other selection criteria. We believe that the priorities and remaining selection criteria allow sufficient flexibility for applicants to design proposals aligned to their local context and needs while maximizing the opportunity for the Department to support bold, locally directed improvements in learning and teaching that will directly improve student achievement and educator effectiveness.

Changes: We have removed selection criterion (B)(5).

Comment: A few commenters expressed support for continuing to fund districts to lead the way with reforms at the local level. A number of commenters supported the Department's plan to conduct a new competition and suggested that this will provide an opportunity for more districts to propose and implement bold plans. In addition, a commenter noted that maintaining a nearly identical application to the application used in the FY 2012 competition will lead to stronger responses in 2013. Another commenter noted that the Department included the strongest elements of the 2012 competition within the new NPP.

In contrast, many commenters, the majority on behalf of districts in one State and a few on behalf of districts in another State, asked that the Department fund high-scoring but unsuccessful applicants from the FY 2012 Race to the Top—District competition rather than invite districts to apply through a new competition. Commenters suggested that this would limit the time and resources spent by applicants on preparing submissions and by the Department on conducting the competition. A commenter also suggested that if the Department limits the competition to prior applicants, it should include applications that had high scores from two out of three peer reviewers.

Discussion: Based on past Race to the Top competitions, we believe that the quality of applications increases each year that we run a competition. A new competition allows both new and past applicants to develop and submit proposals that reflect their current vision, strategies, and context and permits applicants to learn from winning applications, learn from peer reviewer comments, and ensure that their proposals reflect their current vision, strategies, and context. For these reasons, we do not plan to limit the competition to past applicants. We acknowledge the time required to prepare a grant application, but we also believe the application process provides a worthwhile opportunity for LEAs to work with stakeholders within and across LEAs on developing proposals for bold improvements in learning and teaching. In addition, past applicants have reported that developing their application positioned them for greater educational impact whether or not they received funding.

Changes: None.

Comment: A commenter recommended that the Department allot substantially more money to this program and provide further incentives for district participation by awarding at least the same number and size of LEA grants as in FY 2012. This commenter also suggested lowering the minimum award range to $2 million to $10 million. Another commenter

appreciated the decision to continue this funding opportunity for local school districts, especially during a time of sequestration and other cuts to education, noting that this program provides an opportunity to support innovation at the local level and achieve equity and excellence in education for all children.

Discussion: The Department anticipates awarding approximately $120 million for the Race to the Top—District competition and $370 million for the Race to the Top—Early Learning Challenge competition. While we welcome the opportunity to fund additional LEA and State grantees, we believe the amount allocated this year will encourage and reward reform in LEAs and States. In addition, we proposed through the NPP to remove the opportunity to apply for an optional budget supplement and reduce the minimum and maximum grant amount for which an applicant may apply. We believe these changes will enable the Department to maximize the number of grantees that would receive funding under a district competition while still awarding grants of sufficient size and scope to support bold improvements in learning and teaching.

Changes: None.

Comment: A commenter expressed support for setting the minimum number of participating students at 2,000. A couple commenters felt this number should be further reduced, as it will exclude some districts from applying individually and instead require them to join a consortium despite the individual district's unique problems, strengths, and goals.

Discussion: The Department believes it is important to award grants of sufficient size and scope to support bold, innovative reforms in learning and teaching that can help to create diverse models of personalized learning environments for use by LEAs across the Nation. The Department also believes that the eligibility requirements allow for sufficient flexibility for individual LEA applicants and consortia applicants. According to the National Center for Education Statistics' ''Numbers and Types of Public Elementary and Secondary Local Education Agencies From the Common Core of Data: School Year 2010–11,'' more than 80 percent of public elementary and secondary school districts had a student membership over 2,999 in 2010–2011. Thus, the majority of LEAs may apply individually. For those LEAs with fewer than 2,000 participating students, there are two paths to apply, either by joining a consortium with a minimum of 2,000 participating students or by joining a consortium with fewer than 2,000 participating students, provided those students are served by a consortium of at least 10 LEAs and at least 75 percent of the students served by each LEA are participating students (as defined in this notice).

Changes: None.

Comment: A commenter expressed concern that several aspects of Race to the Top—District core reforms are too prescriptive and expressed concern about the trend toward using competitive, as opposed to formula, funding to advance education goals.

Discussion: The core education reform areas were established in the statute authorizing the Race to the Top programs. The Race to the Top—District program builds on the experience of States and districts in implementing reforms in the four core educational assurance areas through Race to the Top and other key programs and supports applicants that demonstrate how they can personalize education for all students in their schools. The great majority—over 80 percent—of the Department's funds for early childhood and elementary and secondary education are distributed by formula. We believe competitive funds provide an important opportunity to encourage and reward States and LEAs that propose to implement bold, innovative reforms that are most likely to directly improve student outcomes.

Changes: None.

Definitions

Comment: A commenter recommended that the Department broaden the definition of ''digital learning content'' to ensure that all high-quality multiplatform digital content is captured in the selection criteria. The commenter believed this would help align proposals with the variety of ways in which children learn and provide children with more opportunities to learn anytime, anywhere.

Discussion: There is nothing in the priorities, requirements, definitions, or selection criteria that would preclude an eligible applicant from proposing plans that utilize multiplatform digital content, provided that the proposal otherwise addresses the priorities, requirements, and selection criteria. Given the variety of proposals that can be funded under the Race to the Top—District program, we do not want to prescribe specific tools or approaches that must be used.

Changes: None.

Comment: A commenter recommended that the Department provide a definition of ''high-quality plan.''

Discussion: The Department agrees to add ''high-quality plan'' as a defined term. We have described high-quality plans the same way in the FY 2013 competition as we did in the FY 2012 competition.

Changes: We have added ''high-quality plan'' as a defined term.

Comment: A commenter recommended adding a definition for ''stakeholder'' and requiring that this definition be applied whenever the term ''stakeholder'' is used in the document, because school improvement cannot succeed without the involvement of these crucial partners. This commenter also recommended that in selection criterion (B)(4)(a), the Department add ''community partners'' to the list of groups that should be engaged in the development of the proposal.

Discussion: We agree that engaging stakeholders is important, as demonstrated through the emphasis on stakeholder engagement throughout the requirements and selection criteria. However, we decline to include a specific definition of this term in order to allow applicants the flexibility to determine appropriate stakeholders for their local context and needs. In addition, selection criterion (B)(4)(b) already includes community-based organizations, and there is nothing that precludes an applicant from engaging these stakeholders further, provided that the applicant addresses the priorities, requirements, and selection criteria. Accordingly, we decline to add a reference to ''community partners'' to selection criterion (B)(4)(a).

Changes: None.

Comment: A commenter recommended that the Department be more specific in its definition of ''on-track indicator,'' and incorporate specific research-based characteristics into that definition to ensure districts are accurately measuring the number of students who are on and off track to college- and career-readiness and on-time graduation from high school. The commenter suggested that a more specific definition would also provide a more uniform measure of effectiveness that would result in a better understanding of which interventions have the most impact. Another commenter recommended that applicants serving middle and high school students should describe the process for implementing an early warning indicator system to identify students in need of targeted supports and integrated services, particularly for applicants responding to the competitive preference priority. Both

commenters suggested using the same three characteristics—attendance, behavior, and course performance—though the commenters recommended different measures for each characteristic.

Discussion: We agree on the importance of capturing and using data frequently and highlight this throughout priorities, requirements, definitions, and selection criteria. For example, selection criterion (C)(1)(b)(iv) emphasizes ongoing and regular feedback for each student, and selection criterion (E)(3) includes both required performance measures and applicant-proposed performance measures that provide rigorous, timely, and formative leading information tailored to the proposed plan and theory of action. However, because the potential applicants and plans are so diverse, we feel that it is important for applicants to propose the specific on-track indicator and related systems that best support achieving the goals in their proposals, and we decline to further specify definitions or system requirements in this area.

Changes: None.

Comment: A couple commenters requested that in the definition of ''student growth'' we add the word ''multiple'' before ''measures'' and before ''alternative measures.'' These commenters also recommended that the Department support maximum flexibility in how student growth measures are included in teacher evaluation systems.

Discussion: The proposed definition of ''student growth'' aligns with the definitions used in past Race to the Top competitions and in ESEA flexibility. We believe that using this similar definition is helpful for applicants and note that multiple measures are currently incorporated within the definition. We appreciate the recommendation about flexibility on how student growth measures are included in teacher evaluation and believe the Department's programs in these areas allow for local flexibility.

Changes: None.

Comment: A commenter noted that the definition of ''achievement gaps'' appears to depart from traditional definitions because it would potentially compare subgroup, LEA, and school performance to the State's highest-achieving subgroups rather than to the State average of all students.

Discussion: The proposed definition of ''achievement gap'' aligns with ESEA flexibility's approach to measuring achievement gaps, in particular for ''focus schools.'' We believe that this alignment is helpful for applicants in order to minimize the different ways in which they calculate and report achievement gap information. In addition, ''achievement gap'' was not a defined term in some of our other competitive grant programs. We believe having a definition consistent with the one used in ESEA flexibility is helpful for applicants and grantees as they learn from each other during implementation of their grants and strive to meet ambitious goals.

Changes: None.

Comment: A few commenters applauded the Department for requiring districts to detail how they will leverage personalization to accelerate and deepen student learning. A couple commenters suggested that the Department provide a definition of ''deeper learning'' since districts may interpret it in a variety of ways. A commenter suggested using a particular definition of ''deeper learning'' that includes a set of six competencies that students must develop. This commenter also recommended that districts be required to share how they plan to measure progress towards student mastery.

Discussion: The Department declines to define ''deeper learning'' or require a specific plan in this area. Because the potential applicants and plans are so diverse, we think applicants are in the best position to determine the approaches to deeper learning that will maximize improvement in their context and through their proposals.

Changes: None.

Comment: None.

Discussion: We are removing the definition of the term ''four intervention models'' because it is not used as a defined term in the Race to the Top—District program.

Changes: We removed the definition of the term ''four intervention models.''

Comment: A commenter recommended adding to the definition of ''four intervention models'' a new option for the school intervention models, specifically community schools in which social, emotional, medical, and academic services that students and their families need are provided in the school buildings.

Discussion: Because ''four intervention models'' is not used as a defined term in the Race to the Top—District program, we are removing the definition and not considering changes to it.

Changes: None.

Selection Criteria

Note: Throughout the discussion of comments and changes on selection criteria, Section A refers to the group of selection criteria in A. Vision, i.e., (A)(1), (A)(2), (A)(3), (A)(4). Section B refers to the group of selection criteria in B. Prior Record of Success and Conditions for Reform. Section C refers to the group of selection criteria in C. Preparing Students for College and Careers. Section D refers to the group of selection criteria in D. LEA Policy and Infrastructure. Section E refers to the group of selection criteria in E. Continuous Improvement. Lastly, Section F refers to the group of selection criteria in F. Budget and Sustainability.

Section A. Vision

Comment: A few commenters discussed aspects of Section A. A commenter suggested that the Department increase the number of points allocated to Section A and ask districts to describe (1) their classroom-level vision for helping students meet college- and career-ready standards through gaining such deeper learning skills as critical thinking, problem solving, collaboration, and communication; (2) how they will incorporate social, emotional, and behavioral supports; (3) the human capital strategies they will use to achieve shifts in teaching and learning; and (4) the ongoing data cycles they will use to drive continuous improvement. A commenter suggested requiring applicants to be specific in the vision they wish to achieve and provide a graphical representation of their instructional vision to help districts map how their plan will enact change in the district. This commenter recommended a stronger emphasis on how personalized learning environments will look different in different schools and classrooms. The commenter also recommended that districts identify the unique set of supports required by each school in order for it to successfully implement personalized learning environments.

Discussion: The Department agrees that some additional description could be helpful in Section A, specifically selection criterion (A)(1). We agree that in responding to Section A, applicants should be specific in explaining how the educational experience will be different for students and teachers, and we have revised the language in (A)(1) accordingly. We believe that social, emotional, and behavioral supports, human capital strategies, and data use for continuous improvement are covered in other requirements, selection criteria, and priorities, and decline to add additional language on these topics to Section A. We do not believe we should require graphical representation or unique sets of supports at the individual school-level and leave it to the applicant to develop strong proposals and determine the best way to

convey this information. We do, however, require grantees to submit an individual school implementation plan for participating schools (as defined in this notice). Although the Department did not solicit comments on the points to be assigned to the selection criteria and does not include the points in this regulatory action, we appreciate the support for Section C and the related scoring suggestions. We are keeping the majority of the criteria almost identical to the FY 2012 competition and similarly will keep the scoring rubric consistent in order to maximize applicants' ability to learn from past applications, peer reviewer comments, and other aligned resources.

Changes: We have added language to selection criterion (A)(1) to ask applicants to include in their reform vision how the classroom experience will be different for students and teachers.

Section B. Prior Record of Success and Conditions for Reform

Comment: A couple commenters suggested that requiring a four-year track record of success in selection criterion (B)(1) could make it difficult for districts with the greatest need to receive grant funds. These commenters noted that this requirement could also negatively affect States that have worked to achieve key goals, such as adoption of college- and career-ready standards and next generation assessment systems, since there may be an initial decrease in test scores. On the other hand, another commenter expressed support for asking for a four-year track record of success. A couple commenters suggested decreasing the point value for Section B because many districts scored highly on the criteria in this section in the FY 2012 competition, and the commenters suggested that it did not significantly differentiate applicants.

Discussion: In order to make the wisest investments of public funds, the Department believes a prior record of improvement over a sustained period with a plan for continued growth should be considered when awarding grants. We do not believe that this disadvantages districts with the greatest need, as the priorities and selection criteria emphasize high-need students in many places, and this particular criterion offers many ways by which applicants can demonstrate a clear track record of success. We do not specify point values in these final selection criteria, and instead indicate in any notice inviting applications the points we will assign to a particular criterion. That said, we do not intend to reduce the point value of Section B for the FY 2013 competition because of how critical it is for districts to have a record of success, transparency in LEA processes, State context for implementation, and stakeholder engagement. We will, however, remove selection criterion (B)(5) because we believe needs and gaps are already addressed in applicants' plans and responses to other selection criteria. Also, in the notice inviting applications, we will include the points from selection criterion (B)(5) into selection criterion (B)(4), keeping the overall scoring for Section B the same as it was in FY 2012 but further emphasizing the importance of stakeholder engagement with the addition of five points for that selection criterion.

Changes: We are removing selection criterion (B)(5).

Comment: Some commenters suggested that the data collection and reporting language in selection criterion (B)(2) be eliminated or modified. In addition, some commenters noted that it is unclear how this requirement is relevant to evaluating an applicant's prior record of success, how it strengthens an application, or how it demonstrates transparency in LEA processes, practices, and investments. Commenters also recommended changes to the language in selection criterion (B)(2). A couple commenters expressed privacy concerns about reporting personnel salaries, especially where this information is not already a matter of public record, and suggested that selection criterion (B)(2) should clarify that personally identifiable information will remain confidential. Another commenter pointed out that the current wording in selection criterion (B)(2) is not clear about whether the expenditure reporting requirements apply only to participating schools or to all schools within the LEA. Finally, a commenter suggested that if the aims of the expenditure reporting requirements are to improve teaching and learning and ensure equity, the focus should extend beyond salaries to provide a more complete picture of the real problems in hard-to-staff schools.

Discussion: As a commenter noted, the aim of including selection criterion (B)(2) is to emphasize the importance of transparency and equity, with the public reporting of school-level expenditures on salaries as a proxy for both. Also, as this data is reported through the Department's Civil Rights Data Collection (CRDC) instrument, we believe using the same language will help minimize burden on applicants. As we noted in the Frequently Asked Questions (FAQ) document for the FY 2012 competition, applicants should follow the 2011–2012 school year CRDC guidelines when reporting school expenditure data. The Department will keep (B)(2) as part of the selection criteria and will clarify for applicants that reporting is for all schools within each LEA.

Nothing in our selection criteria authorizes or encourages applicants to violate any local, State, or Federal privacy laws and we will communicate to applicants their obligations to comply with such laws. Finally, we want to highlight that selection criterion (B)(2) is not a requirement, as some commenters stated, but rather a selection criterion for which applicants may earn points based on the extent to which each LEA demonstrates evidence that addresses the selection criterion.

Changes: None.

Section C. Preparing Students for College and Careers

Comment: A commenter noted that Section C reflects the most essential district actions around transforming teaching and learning and suggested increasing the number of points allocated to this section.

Discussion: Although the Department did not solicit comments on the points to be assigned to the selection criteria and does not include the points in this regulatory action, we appreciate the support for Section C and the related scoring suggestions. We are keeping the majority of the criteria almost identical to the FY 2012 competition and similarly will keep the scoring rubric consistent in order to maximize applicants' ability to learn from past applications, peer reviewer comments, and other aligned resources.

Changes: None.

Comment: A commenter noted that proposed selection criterion (C)(1)(b) seems to require that the district provide every student with a personalized learning plan, defined as a formal document that would include personalized learning recommendations. The commenter suggested an approach to implementation of personalized learning plans that would first meet the needs of students with disabilities and those at risk of dropping out.

Discussion: The Department appreciates the emphasis on meeting the needs of all students, particularly high-need students. We do not believe, however, that plans in response to this criterion must include a formal document and did not intend selection criterion (C)(1)(b) to ask for such a plan. We also specifically did not define ''personalized learning plan'' in order to

give applicants the flexibility to propose an approach that will maximize improvement in their context and through their proposals.

Changes: None.

Comment: A commenter requested more specificity in the term ''frequently'' as used in selection criterion (C)(1)(b)(iv)(A), regarding frequently updated individual student data, and selection criterion (C)(2)(a)(iii), regarding frequently measuring student progress. This commenter also recommended that data be used to drive small group or individual instruction. The commenter suggested that data should be something teachers use weekly, if not daily, to make instructional decisions and implement feedback loops frequently enough to accelerate student learning and student ownership for their learning.

Discussion: We agree with the importance of frequent data use. We decline to specify a particular frequency or group size for optimal data use. We believe applicants are in the best position to propose an approach that will maximize improvement in their context and through their proposals.

Changes: None.

Comment: A commenter suggested that the Department further study the concept of students earning credit based on demonstrated mastery, not the amount of time spent on a topic, specifically in light of core content standards assigned to each grade level and State tests that measure specific skills at each grade level.

Discussion: The purpose of the Race to the Top—District program is to build on the lessons learned from the State competitions conducted under the Race to the Top program and to support bold, locally directed improvements in learning and teaching that will directly improve student achievement and educator effectiveness, and then to help share those practices across the Nation. Implementing an education system that moves from focusing on inputs such as seat time to outputs and outcomes such as student mastery of academic skills and content and realized gains in student achievement is the very type of project that aligns with the purposes of this program. We believe that demonstration of mastery can align well with grade-level standards and assessments and think that applicants should propose the approaches that will maximize improvement in their contexts and through their proposals, provided they address the Race to the Top—District priorities, requirements, and selection criteria.

Changes: None.

Comment: A couple commenters recommended that in order to support successful implementation, appropriate time and professional development for educators be included in the components of a personalized learning environment. A commenter recommended that priority be given to applicants that ensure educators will receive support through this program, including through the use of funds to recall or hire much-needed teachers, education support professionals, and specialized instructional support personnel to advance personalized instruction.

Discussion: The Department agrees that support for educators is an important part of implementing and sustaining personalized learning environments. We believe that we have already emphasized this support throughout the selection criteria, for example through educator access to training, tools, data, and resources, in selection criteria (C)(2)(a), (C)(2)(b), (D)(2)(a), and (D)(2)(b). We welcome applicants' plans for educator support that best support implementation of personalized learning environments in their local contexts and through their proposals, provided the plans address the priorities, requirements, and selection criteria.

Changes: None.

Comment: A commenter recommended that districts be required to put in place training and support for parents to ensure that parents know how to use tools and resources, similar to the emphasis on supporting students in selection criterion (C)(1)(c). Another commenter suggested that the Department give priority to applicants that focus on parental engagement, particularly within the competitive preference priority, as it is a key factor in student achievement. The commenter suggested that applicants be asked to include detailed parent engagement strategies in their applications. A couple commenters noted the importance of ensuring equitable access for parents and suggested paring back other requirements to allow more emphasis on important efforts such as helping parents.

Discussion: The Department acknowledges the importance of parental involvement and as a result has already included parent engagement in many places throughout the priorities, selection criteria, and definitions. For example, parents are included as key stakeholders and users of data in Section B and are noted as key to engaging and empowering all learners in Section C; in Section D applicants are asked to ensure parents have access to necessary content, tools, and other learning resources and appropriate levels of technical support. We believe that the priorities, selection criteria, and definitions appropriately emphasize parental engagement and support.

Changes: None.

Comment: A commenter noted that although the teaching and leading requirements in the proposed selection criterion (C)(2) are strong, it is important to require districts to describe the role of the school leader in developing and implementing a new approach to personalized learning and how the districts will build the capacity of principals to lead this work.

Discussion: We agree that school leaders and leadership teams play an important role in developing and implementing personalized learning environments and believe that this is emphasized in the selection criteria. Selection criterion (C)(2)(c) emphasizes that school leaders and school leadership teams have the training, policies, tools, data, and resources to enable them to structure an effective learning environment. Selection criterion (D)(1)(b) emphasizes flexibility and autonomy for school leadership teams. Therefore, the Department believes the selection criteria effectively address the commenter's suggestions and does not believe any changes are necessary.

Changes: None.

Comment: A commenter recommended expanding selection criterion (C)(2)(d) to ask applicants to include, at the secondary school level and at the elementary school level (when applicable), a plan for increasing the number of students who receive instruction from effective and highly effective teachers fully certified to teach in the subject area in which they are assigned as the teacher of record. The commenter noted that schools serving urban and poor students are more likely to employ teachers who are on emergency waivers and who are not certified in the subject they teach.

Discussion: We agree with the emphasis on equitable access to effective teachers. Through this criterion, we ask applicants to propose a plan for increasing the number of students who receive instruction from effective and highly effective teachers and principals, including in hard-to-staff schools, subjects, and specialty areas. We believe the current language in the criterion addresses the commenter's suggestions and declines to provide further specificity in order to maintain flexibility for applicants to propose approaches that will maximize

improvement in their context and through their proposals.

Changes: None.

Comment: A commenter suggested that schools should analyze schoolwide discipline issues, drawing on data collected for the CRDC, and then identify strategies that improve student-staff relationships and school environment. Another commenter agreed with our requirement that district grantees produce a detailed assessment of root causes behind disproportionate discipline and expulsions, along with a plan to address these causes. They suggested that wraparound services and supports would be one way to reduce disproportionate discipline and expulsion.

Discussion: We believe program requirement 4 addresses the commenters' suggestions. Program requirement 4 requires grantees in which minority students or students with disabilities are disproportionately subject to discipline (as defined in this notice) and expulsion (according to data submitted through the Department's CRDC, which is available at *http://ocrdata.ed.gov/*) to conduct a district assessment of the root causes of the disproportionate discipline and expulsions. These grantees must also develop a detailed plan over the grant period to address these root causes and to reduce disproportionate discipline (as defined in this notice) and expulsions. Applicants are not precluded from identifying strategies that improve student-staff relationships and school environment or from using wraparound services and supports as ways to reduce disproportionate discipline and expulsion, provided their plans meet the program requirements and other relevant priorities, requirements, and selection criteria. In addition, in selection criterion (C)(2)(c)(i), we emphasize the importance of structuring an effective learning environment using information that helps school leaders and school leadership teams (as defined in this notice) assess, and take steps to improve, individual and collective educator effectiveness and school culture and climate for the purpose of continuous school improvement.

Changes: None.

Comment: A commenter suggested that applicants' plans should enable students to graduate college- and career-ready but that plans should also include a focus on student health. Specifically, the commenter suggested that selection criterion (C)(2)(b)(ii) be revised to specify that high-quality learning resources should be designed to improve health. The commenter also suggested the addition of a new sub-criterion, (C)(2)(b)(iv), that emphasizes high-quality professional development, learning resources, and parental engagement strategies focusing on optimizing students' healthy development. In addition, the commenter suggested that a preference be given to all applicants that include strategies to improve overall health, incorporate a strong focus on physical activity and physical education, and incorporate health education skill building.

Discussion: We agree that overall health, physical activity, and healthy eating are important areas of focus, and we believe that the current language allows applicants to address these areas. Applicants are not precluded from addressing these areas, provided that their proposals address the priorities, requirements, and selection criteria of the Race to the Top—District program. We decline to provide a more specific focus on health areas in order to allow applicants the flexibility to create proposals that will maximize improvement in their contexts.

Changes: None.

Section D. LEA Policy and Infrastructure

Comment: A couple commenters recommended reducing the points allocated for Section D, noting that the selection criteria in this section include essential elements but were not a key differentiator between winning applicants and all other applicants in the prior competition.

Discussion: Although the Department did not solicit comments on the number of points to be assigned to the selection criteria, we appreciate the suggestions from commenters in this area. We are keeping the majority of the criteria almost identical to the FY 2012 competition and similarly will keep the scoring rubric consistent in order to maximize applicants' ability to learn from past applications, peer reviewer comments, and other aligned resources.

Changes: None.

Comment: A commenter expressed concern that selection criterion (D)(1)(b) could conflict with provisions of the Individuals with Disabilities Act (IDEA), particularly those concerning Individualized Education Programs. The commenter also believed that this criterion encourages principals to bypass collective bargaining over such factors as, among other things, school schedules and calendars, school staffing models, and school-level budgets. The commenter suggested that the Department consider school autonomy (rather than principal autonomy) in which a principal and staff would, through the collective bargaining process, propose modifications to Federal, State, or local law, regulation, or contract.

Discussion: The current language does not encourage or permit violations of the IDEA or the collective bargaining process. In addition, we do not propose that a principal be given autonomy over such decisions as scheduling or school-level budgets. Rather, by definition, a school leadership team is composed of the principal or other head of a school, teachers, and other educators (as defined in this notice) and, as applicable, other school employees, parents, students, and other community members. We also believe that requirements for the signature of a union representative, where applicable, and, in those instances where a union signature is not required, the selection criterion that asks applicants to give evidence that at least 70 percent of the teachers in a participating school support the proposal, help to ensure that the views and rights of teachers are considered in the development of the application. In order to ensure consistency in the interpretation of ''school leadership teams,'' we are adding ''(as defined in this notice)'' after ''school leadership teams'' when it appears. Finally, since the notice inviting applications published elsewhere in this issue of the **Federal Register** includes a savings clause, described elsewhere in this section, we believe it is clear that the Department does not encourage bypassing the collective bargaining process.

Changes: We have added ''(as defined in this notice)'' after ''school leadership teams'' in selection criterion (D)(1)(b).

Comment: A commenter supported our inclusion of interoperable data systems in selection criterion (D)(2)(d) and suggested preference be given to applicants that seek to share data across sectors—for example, giving school nurses access to medical records. In this way, according to the commenter, the Race to the Top—District program could advance innovative partnerships between schools, early learning providers, health systems, and other relevant sectors.

Discussion: Priority 6 rewards applications that propose to form innovative partnerships that address the social, emotional, or behavioral needs of the participating students. Under the Race to the Top—District program, applicants are not precluded from sharing data across sectors, provided that they comply with all applicable Federal, State, and local privacy laws and regulations and address the

priorities, requirements, and selection criteria for the competition.

Changes: None.

Comment: A couple commenters suggested that efforts to decrease class size should be encouraged and supported by the program. The commenter noted that small class size, which promotes personalized attention and instruction, is an important infrastructure improvement that should be advanced by the Race to the Top—District program.

Discussion: The Department shares the desire for students to receive personalized attention, and the Race to the Top—District program focuses on accelerating and deepening students' learning through attention to their individual needs. We look to applicants to propose the strategies and plans that are most appropriate for maximizing improvement in their contexts and through their proposals.

Changes: None.

Section E. Continuous Improvement

Comment: A couple commenters emphasized the importance of continuous improvement for all students and recommended that the point allotment for this section be increased. The commenters also recommended that the Department ask applicants to describe their continuous improvement processes in more detail, including use of evidence-based practices; use of data-driven continuous improvement processes at the classroom, school, and district levels; and methods to assess return on investment for grant funds and use of this information to help inform the most efficient and effective future investment of funds.

Discussion: The Department agrees that it is important to have data-driven discussions that lead to improvement at the classroom, school, and district levels. We believe that the selection criteria, in particular in Section E and Section C, already ask applicants to develop plans that address data-driven discussions, continuous improvement, and return on investment. We have also added language about data use to selection criterion (F)(2), described later in this section of the document. In addition, while the Department did not solicit comments on the points assigned to the selection criteria, we appreciate the suggestions from commenters in this area. We are keeping the majority of the criteria almost identical to the FY 2012 competition and similarly will keep the scoring rubric consistent in order to maximize applicants' ability to learn from past applications, peer reviewer comments, and other aligned resources. While the majority of Section E will remain consistent with the FY 2012 competition, selection criterion (E)(4) has been revised to focus more narrowly on evaluating the effectiveness of program-funded activities and to emphasize that these evaluations should be rigorous. The Department believes selection criteria (E)(1) and (F)(2) provide an opportunity for applicants to address the areas previously included in selection criterion (E)(4).

Changes: We have revised selection criterion (E)(4) to add ''rigorously'' before ''evaluate'' and to include only the first part of the FY 2012 selection criterion, and have removed the following language ''and to more productively use time, staff, money, or other resources in order to improve results, through such strategies as improved use of technology, working with community partners, compensation reform, and modification of school schedules and structures (e.g., service delivery, school leadership teams (as defined in this notice), and decision-making structures).''

Comment: A commenter suggested that the Department revise the description of the performance measures for grades 4–8 and 9–12 in which the applicant is asked to propose a health or social-emotional leading indicator. The commenter suggested adding examples of academic behaviors that research shows are linked to high school and postsecondary success, including such measures as motivation, social engagement, and self-regulation.

Discussion: Because the potential applicants and plans are so diverse, we feel that it is important for applicants to propose performance measures they believe will provide the best leading indicators of progress against their specific plans. Therefore, we decline to include specific examples in this area.

Changes: None.

Section F. Budget and Sustainability

Comment: A couple commenters noted that the selection criteria for the budget are important components, and they recommended keeping the point allocation the same for this section. A commenter supported the Department's approach to post-grant sustainability and recommended that the Department clarify that scoring for selection criterion (F)(2) will not be adversely affected if applicants choose not to include a detailed budget.

Discussion: We agree that applicants should not lose points under selection criterion (F)(2) if they choose not to include a detailed budget, and the criterion already reflects this. We will reinforce this for applicants and peer reviewers through FAQs or technical assistance. In addition, we are adding language to selection criterion (F)(2) that broadens the focus and emphasizes the importance of gathering and using data to evaluate past investments and inform future ones. We believe this will help make selection criterion (F)(2) more complete and will provide more ways for applicants to address it in a high-quality manner. In addition, while the Department did not solicit comments on the points assigned to the selection criteria, we appreciate the suggestions from commenters in this area. We are keeping the majority of the criteria almost identical to the FY 2012 competition and similarly will keep the scoring rubric consistent in order to maximize applicants' ability to learn from past applications, peer reviewer comments, and other aligned resources.

Changes: We have added language to selection criterion (F)(2) that asks applicants for a plan for how they will evaluate the effectiveness of past investments and use data to inform future investments. We also added language to this criterion noting that this plan may address how the applicant will evaluate improvements in productivity and outcomes to inform a post-grant budget and may include an estimated budget.

General Comments on Selection Criteria

Comment: A commenter recommended that the Department add an additional selection criterion focused on identifying risks and barriers and on articulating a comprehensive risk mitigation plan. The commenter suggested that allocating points to a criterion focused on this topic would force a more deliberate approach to thinking through challenges and solving them proactively, especially during implementation of applicants' proposals.

Discussion: We agree that it is important to consider risks and how to mitigate them and will explore ways to incorporate this further into our ongoing work with grantees as they implement their proposals. We are keeping the majority of the criteria almost identical to the FY 2012 competition in order to maximize applicants' ability to learn from past applications, peer reviewer comments, and other aligned resources. Therefore, we decline to add an additional selection criterion for applicants.

Changes: None.

Comment: A commenter suggested that the application be more specific in inviting district leaders to engage in systematic, research-based school climate reform efforts that strive to

engage a variety of stakeholders in the school improvement process. The commenter asked that these efforts recognize social, emotional, civic, and intellectual aspects of learning.

Discussion: In Priority 6, we encourage districts to engage community partners and stakeholders as is appropriate in their proposal. The definition for ''Family and Community Supports'' guides districts to form partnerships that help serve the social, behavioral, and emotional needs of students. We encourage partnerships that focus on the social and emotional needs of students and give applicants flexibility in addressing the most appropriate aspects of learning for their students that will maximize improvement in their context and through their proposals. Additionally, in selection criterion (C)(2)(c)(i), applicants are asked to propose an approach that helps school leaders and school leadership teams assess, and take steps to improve, individual and collective educator effectiveness and school culture and climate for the purpose of continuous school improvement. Therefore, we think that the language already addresses the comment and that no changes are necessary.

Changes: None.

Comment: A few commenters suggested that the scoring rubrics should be altered to include assessments of capacity and viability, especially for LEAs with ambitious inter-district and inter-state plans for cooperation.

Discussion: We believe that the current priorities, definitions, and selection criteria already enable assessments of capacity and viability. As part of the proposal, applicants are asked to submit high-quality plans and ambitious yet achievable goals, performance measures, and annual targets. In determining the quality of an applicant's plan, peer reviewers will evaluate the key goals, the activities to be undertaken and rationale for the activities, the timeline, the deliverables, the parties responsible for implementing the activities, and the overall credibility of the plan (as judged, in part, by the information submitted as supporting evidence). Peer reviewers will also determine whether an applicant has ''ambitious yet achievable'' goals, performance measures, and annual targets that are meaningful for the applicant's proposal and for assessing implementation progress, successes, and challenges. To help ensure consistency of interpretation and scoring across reviewers, the Department will provide peer reviewers with training and a detailed scoring chart. Finally, although the Department did not solicit comments on the points to be assigned to the selection criteria and does not include the points in this regulatory action, we appreciate the scoring suggestions. We are keeping the majority of the selection criteria almost identical to the FY 2012 competition and similarly will keep the scoring rubric consistent in order to maximize applicants' ability to learn from past applications, peer reviewer comments, and other aligned resources.

Changes: None.

Priorities

Priority 1

Comment: A commenter recommended referencing student engagement and ownership of learning within Priority 1, as both are important components of personalized learning environments and essential to increasing student achievement. The commenter noted that student engagement and having a sense of ownership of learning are included in the selection criteria in Section A but that it would be helpful to include them in Priority 1 as well.

Discussion: We agree with the emphasis on increasing student engagement and ownership. However, we believe this is already a central concept in the Race to the Top—District program and decline to add additional language to Priority 1.

Changes: None.

Priority 6

Comment: Numerous commenters expressed support for Priority 6, in particular for the focus on partnerships; innovative health, safety, and community programs for high-need students; and capacity-building for districts. A commenter noted that this priority could be a good basis for a competitive grant program on its own or in combination with work on the Common Core standards, while other commenters noted support for keeping it as a competitive preference priority. Another commenter recommended that the Department increase the number of points available for this priority if the Department uses the priority as a competitive preference priority. A commenter suggested that preference be given to proposals that address early learning, given rates of reading failure among children. The commenter cited the importance of reading ability as an individual predictor of adult health status as well. A few commenters suggested changes to Priority 6. A commenter suggested that the Department add ''community-based media organizations'' to the illustrative list of partners to help ensure that public media continues to be a key partner in education. Another commenter suggested that the Department increase its focus on partnerships with small businesses. A commenter suggested that a preference be given to applicants that include a specific coordinated effort among education, public health, child health, and early care providers, as well as services for children, youth, and their families that span from cradle to graduation. A couple commenters described the importance of aligning the approach to Priority 6 with the applicant's personalized learning goals and plans. These commenters also recommended that the priority further detail expectations regarding the quality of the supports and partners, for example by emphasizing that the supports are based on student needs, are grounded in evidence, have a demonstrated record of improving student achievement, are integrated into the districts' or schools' vision for teaching and learning, and directly align with school and classroom level instruction and goals.

Discussion: We appreciate the support for Priority 6 and the suggestions for expanding it. While the Department did not solicit comments on the number of points to be awarded under this priority if it decides to use it as a competitive preference priority, we appreciate the suggestions from commenters in this area. We are keeping the majority of the criteria and priorities almost identical to the FY 2012 competition in order to maximize applicants' ability to learn from past applications, peer reviewer comments, and other aligned resources. In that regard, we are planning to use Priority 6 as a competitive preference priority in the FY 2013 competition and will keep the points assigned to the priority consistent with those from the FY 2012 competition. In addition, because the potential applicants and plans are so diverse, we feel that it is important to allow flexibility for applicants to propose the specific partners and partnership approaches that will maximize improvement in their contexts and through their proposals. For these reasons and based on the strong support for Priority 6, we decline to revise the priority. Finally, applicants are not precluded from addressing the matters raised by the commenters in their proposals, provided the proposals address the Race to the Top—District priorities, requirements, and selection criteria.

Changes: None.

Comment: A commenter expressed concern that Priority 6 may be seen as an ''add-on'' and not fit comprehensively into district plans. The commenter recommended that districts be allowed to delay implementation of Priority 6 until the second year of the grant period so that they may focus first on implementation of personalized learning environments and thoughtful selection of partners. The commenter also recommended that applicants refrain from naming partners in their application, similar to the approach for vendors.

Discussion: Priority 6 specifically asks applicants to describe how the partnership supports the applicant's plan for addressing Priority 1, rewarding alignment of the applicants' partnership proposals and broader plans. In addition, the Department expects applicants to propose ambitious yet achievable plans for implementing their proposals. Applicants have the flexibility to apply for the award range that aligns with their implementation and scale-up plan and to sequence activities in the way that best achieves the goals outlined in their proposal. In addition, we believe it is important to allow applicants to identify proposed partnerships as appropriate and to provide sufficient detail for peer reviewers to determine the extent to which the applicant has met the priority.

Changes: None.

Comment: A couple commenters suggested that the Department give priority to applicants that focus on improving overall child health, including healthy eating, physical activity, social-emotional competencies, socioeconomic needs, and mental health. They explained the positive correlation between physical health and academic performance. A commenter suggested that applicants emphasize children's overall healthy development throughout the application. This commenter would like to see health measured in data systems, data shared across systems in different sectors, increased relationships with health care providers, and preference to applicants that address health literacy and incorporate a strong focus on physical activity and physical education.

Discussion: The Department recognizes the importance of student health and its relationship to academic achievement. Within Priority 6, the Department gives priority to applicants that propose partnerships designed to augment the schools' resources by providing additional student and family supports to schools that address the social, emotional, or behavioral needs of the participating students. The first example of this type of partnership includes public health organizations. In addition, the definition of ''family and community supports'' includes child and youth health programs, such as physical, mental, behavioral, and emotional health programs. We believe that the current language sufficiently emphasizes the importance of student health while allowing districts flexibility to develop proposals that will maximize improvement in their contexts and through their proposals. In addition, applicants are not precluded from addressing the matters raised by the commenter in their proposals, provided the proposals address the Race to the Top—District priorities, requirements, and criteria.

Changes: None.

Requirements

Comment: A commenter suggested that the minimum percentage of participating students from low-income families served by a project be increased from 40 percent to 60 percent to ensure that Federal funds are targeted to students with the greatest need.

Discussion: We believe that this suggestion may reduce the number of high-need students who benefit from the program rather than increase it. Based on data from the National Center for Education Statistics (NCES) 2010–2011 Common Core of Data (CCD) school and agency files, more than 82 percent of students eligible for a free or reduced-price lunch subsidy attend a school in which at least 40 percent of the students are eligible for such a subsidy. Further, more than 60,000 schools (approximately 63 percent of schools nationally) have at least 40 percent of their students eligible for a free or reduced-price lunch subsidy. A total of approximately 29 million students (roughly 59 percent of elementary and secondary students) attend those schools. By contrast, only 59 percent of students eligible for a free or reduced-price lunch subsidy attend a school in which at least 60 percent of the students are eligible for such a subsidy. In addition, fewer than 38,000 schools have at least 60 percent of their students eligible for a free or reduced-price lunch subsidy, and only 18 million students (36 percent of students nationally) attend such a school. The Department believes that requiring applicants to develop proposals in which at least 40 percent of the participating students are from low-income families ensures that program funds are targeted effectively to the neediest students.

Changes: None.

Comment: A couple commenters suggested that the definition of ''local educational agency'' be amended to explicitly make schools operated by the Bureau of Indian Education eligible to receive funds under the Race to the Top—District program.

Discussion: The proposed definition of ''local educational agency'' is the definition from section 9101(26) of the ESEA, which includes a provision under which a BIE school may be considered an LEA. If a BIE school is an LEA, the BIE school would be able to apply for a Race to the Top—District grant as an eligible LEA on its own or as part of a consortium.

Changes: None.

Comment: A commenter questioned the appropriateness of including in a grant program a requirement that an applicant agree to implement a superintendent evaluation system that reflects (1) the feedback of many stakeholders, including but not limited to educators, principals, and parents; and (2) student outcomes. A second commenter expressed support for the superintendent evaluation requirement and suggested that there be a common definition of ''student outcomes'' and that the definition should include a measure of student growth that aligns with the requirements for teacher evaluation.

Discussion: For reasons similar to those underlying the emphasis on teacher and principal evaluation, the Department believes it is important for superintendents to be evaluated. We also believe that the definition of ''superintendent evaluation'' provides sufficient flexibility for applicants to propose evaluation systems that reflect their specific circumstances while aligning to the approaches to teacher and principal evaluation in other Department programs. We agree that the definition of ''superintendent evaluation'' should include a measure of student growth to allow even better alignment to teacher and principal evaluation approaches and are revising the definition accordingly.

Changes: We have added language to the definition of ''superintendent evaluation'' to indicate that student outcomes include student growth for all students (including English learners and students with disabilities).

Comment: A commenter expressed concern that many of the teacher evaluation systems are currently being implemented without being piloted, field-tested, or validated and encouraged the Department to focus on those applicants that would build in such feedback systems in early implementation phases. The commenter

also urged the Department to stress the importance of implementing evaluation systems with fidelity. Another commenter indicated that tying teacher evaluations to student test scores had changed school culture from supporting innovation and trying new things to test preparation and a fear of change. The commenter further noted that teachers are leaving the profession and that good teachers are leaving at-risk schools for fear of being unable to improve the test scores of high-need children. On the other hand, this same commenter applauded the Department for shifting the rhetoric from removing bad teachers to developing teachers and elevating the profession.

Discussion: To be eligible to receive a Race to the Top—District award, each LEA must include an assurance that it will implement not later than the 2014–2015 school year a teacher evaluation system that meets the Race to the Top—District requirements. In addition, an application from an individual LEA must include, among others, the signature of the local teacher union or association president if the LEA employs teachers who are represented by a teacher union or association (in a bargaining or non-bargaining State). For LEAs in which teachers do not have bargaining representation, applicants are asked to provide evidence that at least 70 percent of teachers in participating schools support the proposal. We believe that these requirements and selection criteria help to ensure that teacher evaluation systems are developed and implemented collaboratively with teacher representation. ESEA flexibility provides for a pilot year for teacher and principal evaluation and support systems. As of July 15, 2013, thirty-nine States plus the District of Columbia have been approved for ESEA flexibility, and an additional six States plus Puerto Rico and the Bureau of Indian Education currently have requests under review. The remaining five States have either not yet requested ESEA flexibility, or have withdrawn their requests.

Changes: None.

Comment: A couple commenters asked that the Department, through the Race to the Top—District program, provide incentives for greater charter sector accountability and transparency through clear and measurable objectives in charter contracts; clear and rigorous guidelines and procedures for charter school application reviews and ongoing oversight; and regular, rigorous reviews of charter schools by authorizers.

Discussion: We believe that the selection criteria require applicants to consider how they will rigorously review and measure the progress of participating schools, including charter schools, toward program goals. For example, the selection criteria require an applicant to include in its proposal strategies for ensuring that students are making progress toward college- and career-ready standards and graduation requirements. Under selection criterion (E)(1) an applicant also must present ''a high-quality plan for implementing a rigorous continuous process that provides timely and regular feedback on progress toward project goals and opportunities for ongoing corrections and improvements during and after the term of the grant.'' Given the emphasis on personalized learning, we do not believe it is appropriate to add a criterion focused specifically on charter school accountability, but applicants are not precluded from including an emphasis on this in their proposals, provided the proposals address the Race to the Top—District priorities, requirements, and criteria.

Changes: None.

Comment: A commenter expressed strong support for the proposed shift in the award ranges and lowering of the minimum number of participating students in the top range. The commenter suggested that this change will enable districts to take a more deliberate approach to the roll-out of personalized learning environments across a set of students and teachers within the district. Another commenter stated that for the largest award range, to ease the transition to implementing personalized learning environments, a grantee should be required to serve a minimum of 15,000 students during the first year of the grant and a minimum of 20,000 students during the second year of the grant. Similarly, another commenter recommended having a phase-in period that lasts beyond the first year of the grant.

Discussion: The Department expects applicants to propose an ambitious yet achievable plan for implementing their proposals. We will not lower the minimum number of participating students for the first year within the largest award range because we want to encourage plans of sufficient size and scope to support bold, innovative reforms. In addition, applicants already have the flexibility to apply for the award range that aligns with their implementation and scale-up plans and to sequence activities in the way that best achieves the goals outlined in their proposal, provided that applicants begin implementation with a number of participating students not lower than the minimum number of participating students in the award range for which they applied and that they address the priorities, requirements, and selection criteria.

Changes: None.

Comment: A couple commenters suggested the Department should emphasize that lower-capacity districts are allowed to collaborate and partner with higher-capacity districts to effectively leverage existing district strengths to improve struggling districts.

Discussion: This approach to collaboration is permitted. The Department welcomes inter-district collaboration, and any LEAs may form consortia, provided they meet the eligibility and application requirements.

Changes: None.

Comment: A couple commenters suggested eliminating the requirement that an applicant provide the State with the opportunity to comment on the application. The commenters noted that State educational agencies have formal and extensive educational expertise and missions but that they are not responsible for delivering educational services at the local level. A commenter requested that the Department clarify the weight that a peer reviewer should give to State comments during the application review process. The commenter expressed concern that assigning a high weight to such comments could stifle innovation at the local level. Another commenter stated that LEAs should have the freedom to identify and propose innovations that they feel best meet their needs, consistent with Federal requirements and State law. Furthermore, the commenters indicated that LEAs should not be required to document that the State ''declined'' to comment but rather that it should be sufficient for an applicant to provide evidence that the State was provided with the opportunity to comment for at least five business days.

The same commenters also provided similar suggestions with respect to comments from local entities. The commenters suggested eliminating the requirement that an applicant provide the mayor or city or town administrator with the opportunity to comment on the application. A commenter stated that there is a profound mismatch of expertise, experience, accountability, liability, and mission between local school districts and local governments and that many city and county government leaders and managers are not required to have and do not have expertise in complex educational systems, just as many school board members or superintendents are not required to have and do not have

expertise on municipal services. Both commenters noted that a county or city could serve multiple school districts. A commenter stated that requiring an applicant to identify all entities eligible to submit comments, provide the application to these entities, and document all entities' decision not to comment or incorporate comments into the final application or otherwise attempt to respond to comments prior to submitting the final application is unnecessarily burdensome. The commenter further stated that it is unclear how an applicant should address or reconcile the comments received. One commenter expressed concern that collecting possibly contradictory and inconsistent feedback from multiple stakeholders could confuse rather than aid peer reviewers. A commenter further expressed concern that potential applicants could be discouraged from developing applications because of this additional layer of complexity in the application process.

Discussion: The Department believes that applicants under the Race to the Top—District program have sufficient flexibility to develop proposals that best meet their needs. However, we also believe that it is important for State officials to have the opportunity to comment on applications, to identify whether the proposed reforms are aligned with statewide reform efforts, to provide assistance where relevant, and to provide meaningful comments on the proposals. We also believe that it is important that mayors (or city or town administrators) be given the opportunity to comment on the applications. Services provided by municipalities can help to support the educational reforms proposed in the applications. Mayors or other local officials can decline to comment on an application if they believe that it is out of their area of expertise or authority. The State and local comments are an application requirement and not related to a specific selection criterion. In addition, the application requirement permits LEAs to respond to the State and local comments where they feel it is necessary. Therefore, peer reviewers will take comments into consideration as appropriate when assessing relevant selection criteria such as stakeholder engagement and State context for implementation. The requirement that State and local officials comment on an application was in place for the first Race to the Top—District competition and the Department is not aware of these requirements preventing a potential applicant from applying.

Changes: None.

Comment: A couple commenters recommended the Department require any LEA located on Indian lands to consult with the appropriate tribes and provide them with the same 10-day period to comment on the application. The commenters requested that tribes be listed as potential partners and that an LEA on Indian lands receive additional preference points if it describes a plan to consult and partner with the applicable tribes. Further, the commenters stated that any LEA that does not participate in this consultation should be ineligible to receive a Race to the Top—District grant.

Discussion: We agree that any LEA located on tribal lands, or proposing to address native student education should coordinate with the appropriate tribes when developing an application and implementing the project. Because local contexts vary significantly, applicants will need to demonstrate that they provided the mayor or other comparable local official at least 10 business days to comment on the application. We also emphasize stakeholder engagement in other sections. For example, selection criterion (B)(4) asks applicants to provide evidence of meaningful stakeholder engagement in the development of the proposal and meaningful stakeholder support for the proposal, and tribes are specifically noted in this criterion. Therefore, we feel that the language already addresses the commenters' suggestions and that no changes are necessary.

Changes: None.

Comment: Some commenters supported requiring the signature of a local union leader on the application. These commenters noted the importance of labor-management collaboration to the successful implementation of school reforms. A commenter suggested that the Department require applicants to provide evidence that staff at the participating schools have been informed and agreed to participate in the proposal. A commenter asked that the Department carefully consider reasons given by applicants that indicate that the signature of a local teacher union or association president is ''not applicable.'' This commenter noted that, even with the collaboration requirements, some districts developed applications without the input of their union counterparts or asked for signatures at the last minute. A commenter also suggested that more importance and prominence should be given to approval by the local union president as a condition of participation in the Race to the Top—District program.

A couple commenters encouraged the Department to require that memorandum of understanding (MOU) agreements include the signature of a local teacher union or association president in order to assure that all parties have seen and agreed to all documents submitted for grant consideration. A commenter further suggested that consortium applications involving States/districts/schools with recognized bargaining agents and States/districts/schools without such representation include some indication of educator agreement in the LEAs lacking educator representation.

A couple commenters recommended eliminating the requirement that a local teacher union or association president sign the application. These commenters noted that although the superintendent and school board are legal representatives of the school district as a unit of local government, the union is not. The commenters noted further that requiring the signature of the local teacher union or association misrepresents the respective roles of employees, superintendents, and school boards.

Discussion: The Department believes that the support of educators is essential to help ensure that the proposed reforms will be effective in better preparing students for college and careers. Therefore, we will retain the requirement that, when applicable, an application include the signature of the local teacher union or association president. When reviewing applications for eligibility, the Department carefully considers those applications indicating that the union signature is not applicable. Consortium applicants are required to include the signature of a local teacher union or association president, where applicable, on each MOU. For individual LEA applicants and for each LEA in a consortium, if the signature of a local teacher union or association president is not required, applications are evaluated based on the extent to which the LEA has demonstrated that at least 70 percent of the teachers from participating schools support the proposal. Therefore, we believe that the requirements and selection criteria encourage sufficient levels of educator support.

Finally, we believe requiring the signatures of the superintendent or chief executive officer (CEO), local school board president, and local teacher union or association president (where applicable) is important to maximizing the likelihood of timely, high-quality implementation of ambitious plans, and we will continue to require all three signatures.

Changes: None.

Comment: A couple commenters suggested that the Department include a savings clause that recognizes and supports existing collective bargaining agreements.

Discussion: The FY 2012 NIA included a savings clause, and the FY 2013 NIA also includes it.

Changes: None.

Comment: A commenter suggested that the Department require that an application include the local union or association president's signature, even in the absence of collective bargaining, to ensure the support of key stakeholders and to bolster the district's capacity for success.

Discussion: Selection criterion (B)(4)(a)(ii) asks LEAs without collective bargaining representation to provide as part of the application evidence that at least 70 percent of teachers from participating schools (as defined in this notice) support the proposal. The Department believes that this selection criterion sufficiently encourages applicants to engage teachers in the development of the proposal and demonstrate support for it.

Changes: None.

Comment: Some commenters suggested that, in the interest of transparency, the Department post more information about applicants. Specifically, the commenters suggested that before the competition the Department post all notices of intent to apply, including the names of each member of a consortium, and that after the competition the Department post all applications, including the signers of each application. A couple commenters described instances where union leaders were shown applications close to the deadline and felt pressured to sign with little or no time to review. A commenter suggested that the notices of intent to apply require the signatures of all school districts and their respective unions.

Discussion: We agree that stakeholder engagement and transparency in these areas are very important. In the FY 2012 Race to the Top—District competition, the Department posted a list of districts intending to apply, all winning applications, and the scores and comments for all applicants, and we will continue to do so in the FY 2013 competition. We have not posted appendices for the FY 2012 competition and do not anticipate posting them for the FY 2013 competition due to the length of the appendices and the need to redact personally identifiable information. Therefore, we intend to explore ways to make more readily available the names of all people who signed applications and MOUs, for example by including them within the body of the application. We will consider revising the notice of intent to apply form to include the names of both member and lead LEAs for consortium applicants. We will include in the NIA and application the recommendation for LEAs to share with relevant stakeholders their intent to apply. Finally, in selection criterion (B)(4), to further emphasize the importance of early stakeholder engagement, we are replacing the word ''in'' with the word ''throughout'' so that the criterion asks for meaningful stakeholder engagement ''throughout'' the development of the proposal.

Changes: We plan to make more readily available the names of all individuals who signed the application and MOUs, request names of member and lead LEAs for consortium applicants in notices of intent to apply, and include in the NIA the recommendation for LEAs to share with relevant stakeholders their intent to apply. In selection criterion (B)(4), we are replacing the word ''in'' with the word ''throughout.''

Final Priorities

The Secretary establishes six priorities. The Department may apply one or more of these priorities in any year in which a competition for program funds is held. In addition, in any year in which a Race to the Top—District competition is held, we may include priorities from the notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486), and corrected on May 12, 2011 (76 FR 276637).

Priority 1—Personalized Learning Environments.

To meet this priority, an applicant must coherently and comprehensively address how it will build on the core educational assurance areas (as defined in this notice) to create learning environments that are designed to significantly improve learning and teaching through the personalization of strategies, tools, and supports for students and educators that are aligned with college- and career-ready standards (as defined in this notice) or college- and career-ready graduation requirements (as defined in this notice); accelerate student achievement and deepen student learning by meeting the academic needs of each student; increase the effectiveness of educators; expand student access to the most effective educators; decrease achievement gaps across student groups; and increase the rates at which students graduate from high school prepared for college and careers.

Priority 2—Non-Rural LEAs in Race to the Top States.[1]

To meet this priority, an applicant must be an LEA or a consortium of LEAs in which more than 50 percent of participating students (as defined in this notice) are in non-rural LEAs in States that received awards under the Race to the Top Phase 1, Phase 2, or Phase 3 competition.

Priority 3—Rural LEAs in Race to the Top States.

To meet this priority, an applicant must be an LEA or a consortium of LEAs in which more than 50 percent of participating students (as defined in this notice) are in rural LEAs (as defined in this notice) in States that received awards under the Race to the Top Phase 1, Phase 2, or Phase 3 competition.

Priority 4—Non-Rural LEAs in non-Race to the Top States.

To meet this priority, an applicant must be an LEA or a consortium of LEAs in which more than 50 percent of participating students (as defined in this notice) are in non-rural LEAs in States that did not receive awards under the Race to the Top Phase 1, Phase 2, or Phase 3 competition.

Priority 5—Rural LEAs in non-Race to the Top States.

To meet this priority, an applicant must be an LEA or a consortium of LEAs in which more than 50 percent of participating students (as defined in this notice) are in rural LEAs (as defined in this notice) in States that did not receive awards under the Race to the Top Phase 1, Phase 2, or Phase 3 competition.

Priority 6—Results, Resource Alignment, and Integrated Services.

To meet this priority, an applicant must demonstrate the extent to which the applicant proposes to integrate public or private resources in a partnership designed to augment the schools' resources by providing additional student and family supports to schools that address the social, emotional, or behavioral needs of the participating students (as defined in this notice), giving highest priority to students in participating schools (as defined in this notice) with high-need students (as defined in this notice). To meet this priority, an applicant's proposal does not need to be comprehensive and may provide

[1] Race to the Top Phase 1, 2, and 3 States are: Arizona, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, and the District of Columbia.

student and family supports that focus on a subset of these needs.

To meet this priority, an applicant must—

(1) Provide a description of the coherent and sustainable partnership to support the plan described in Priority 1 that it has formed with public or private organizations, such as public health, before-school, after-school, and social service providers; integrated student service providers; businesses, philanthropies, civic groups, and other community-based organizations; early learning programs; and postsecondary institutions;

(2) Identify not more than 10 population-level desired results for students in the LEA or consortium of LEAs that align with and support the applicant's broader Race to the Top—District proposal. These results must include both (a) educational results or other education outcomes (e.g., children enter kindergarten prepared to succeed in school, children exit third grade reading at grade level, and students graduate from high school college- and career-ready) and (b) family and community supports (as defined in this notice) results;

(3) Describe how the partnership would—

(a) Track the selected indicators that measure each result at the aggregate level for all children within the LEA or consortium and at the student level for the participating students (as defined in this notice);

(b) Use the data to target its resources in order to improve results for participating students (as defined in this notice), with special emphasis on students facing significant challenges, such as students with disabilities, English learners, and students affected by poverty (including highly mobile students), family instability, or other child welfare issues;

(c) Develop a strategy to scale the model beyond the participating students (as defined in this notice) to at least other high-need students (as defined in this notice) and communities in the LEA or consortium over time; and

(d) Improve results over time;

(4) Describe how the partnership would, within participating schools (as defined in this notice), integrate education and other services (e.g., services that address social-emotional and behavioral needs, acculturation for immigrants and refugees) for participating students (as defined in this notice);

(5) Describe how the partnership and LEA or consortium would build the capacity of staff in participating schools (as defined in this notice) by providing them with tools and supports to—

(a) Assess the needs and assets of participating students (as defined in this notice) that are aligned with the partnership's goals for improving the education and family and community supports (as defined in this notice) identified by the partnership;

(b) Identify and inventory the needs and assets of the school and community that are aligned with those goals for improving the education and family and community supports (as defined in this notice) identified by the applicant;

(c) Create a decision-making process and infrastructure to select, implement, and evaluate supports that address the individual needs of participating students (as defined in this notice) and support improved results;

(d) Engage parents and families of participating students (as defined in this notice) in both decision-making about solutions to improve results over time and in addressing student, family, and school needs; and

(e) Routinely assess the applicant's progress in implementing its plan to maximize impact and resolve challenges and problems; and

(6) Identify its annual ambitious yet achievable performance measures for the proposed population-level and describe desired results for students.

Types of Priorities

When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the **Federal Register**. The effect of each type of priority follows:

Absolute priority: Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

Competitive preference priority: Under a competitive preference priority, we give competitive preference to an application by (1) awarding additional points, depending on the extent to which the application meets the priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

Invitational priority: Under an invitational priority, we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

Final Eligibility Requirements

The Secretary establishes the following requirements that an LEA or consortium of LEAs must meet in order to be eligible to receive funds under this competition. We may apply one or more of these requirements in any year in which this program is in effect.

(1) *Eligible applicants:* To be eligible for a grant under this competition:

(a) An applicant must be an individual LEA (as defined in this notice) or a consortium of individual LEAs from one of the 50 States, the District of Columbia, or the Commonwealth of Puerto Rico.

(i) LEAs may apply for all or a portion of their schools, for specific grades, or for subject-area bands (e.g., lowest-performing schools, secondary schools, schools connected by a feeder pattern, middle school math, or preschool through third grade).

(ii) Consortia may include LEAs from multiple States.

(iii) Each LEA may participate in only one Race to the Top—District application. Successful applicants (i.e., grantees) from past Race to the Top—District competitions may not apply for additional funding.

(b) An applicant must serve a minimum of 2,000 participating students (as defined in this notice) or may serve fewer than 2,000 participating students (as defined in this notice) provided those students are served by a consortium of at least 10 LEAs and at least 75 percent of the students served by each LEA are participating students (as defined in this notice). An applicant must base its requested award amount on the number of participating students (as defined in this notice) it proposes to serve at the time of application or within the first 100 days of the grant award.

(c) At least 40 percent of participating students (as defined in this notice) across all participating schools (as defined in this notice) must be students from low-income families, based on eligibility for free or reduced-price lunch subsidies under the Richard B. Russell National School Lunch Act, or other poverty measures that LEAs use to make awards under section 1113(a) of the Elementary and Secondary Education Act of 1965, as amended (ESEA). If an applicant has not identified all participating schools (as defined in this notice) at the time of application, it must provide an assurance that within 100 days of the grant award it will meet this requirement.

(d) An applicant must demonstrate its commitment to the core educational

assurance areas (as defined in this notice), including, for each LEA included in an application, an assurance signed by the LEA's superintendent or chief executive officer (CEO) that—

(i) The LEA, at a minimum, will implement no later than the 2014–2015 school year—

(A) A teacher evaluation system (as defined in this notice);

(B) A principal evaluation system (as defined in this notice); and

(C) A superintendent evaluation (as defined in this notice);

(ii) The LEA is committed to preparing all students for college or career, as demonstrated by—

(A) Being located in a State that has adopted college- and career-ready standards (as defined in this notice); or

(B) Measuring all student progress and performance against college- and career-ready graduation requirements (as defined in this notice);

(iii) The LEA has a robust data system that has, at a minimum—

(A) An individual teacher identifier with a teacher-student match; and

(B) The capability to provide timely data back to educators and their supervisors on student growth (as defined in this notice);

(iv) The LEA has the capability to receive or match student-level preschool-through-12th grade and higher education data; and

(v) The LEA ensures that any disclosure of or access to personally identifiable information in students' education records complies with the Family Educational Rights and Privacy Act (FERPA).

(e) Required signatures for the LEA or lead LEA in a consortium are those of the superintendent or CEO, local school board president, and local teacher union or association president (where applicable).

Final Application Requirements

The Secretary establishes the following application requirements for the application an LEA or consortium of LEAs would submit to the Department for funding under this competition. We may apply one or more of these requirements in any year in which this program is in effect.

(1) *State comment period.* Each LEA included in an application must provide its State at least 10 business days to comment on the LEA's application and submit as part of its application package—

(a) The State's comments or, if the State declined to comment, evidence that the LEA offered the State 10 business days to comment; and

(b) The LEA's response to the State's comments (optional).

(2) *Mayor (or city or town administrator) comment period.* Each LEA included in an application must provide its mayor or other comparable official at least 10 business days to comment on the LEA's application and submit as part of its application package—

(a) The mayor or city or town administrator's comments or, if that individual declines to comment, evidence that the LEA offered such official 10 business days to comment; and

(b) The LEA's response to the mayor or city or town administrator comments (optional).

(3) *Consortium.* For LEAs applying as a consortium, the application must—

(a) Indicate, consistent with 34 CFR 75.128, whether—

(i) One member of the consortium is applying for a grant on behalf of the consortium; or

(ii) The consortium has established itself as a separate, eligible legal entity and is applying for a grant on its own behalf;

(b) Be signed by—

(i) If one member of the consortium is applying for a grant on behalf of the consortium, the superintendent or CEO, local school board president, and local teacher union or association president (where applicable) of that LEA; or

(ii) If the consortium has established itself as a separate eligible legal entity and is applying for a grant on its own behalf, a legal representative of the consortium; and

(c) Include, consistent with 34 CFR 75.128, for each LEA in the consortium, copies of all memoranda of understanding or other binding agreements related to the consortium. These binding agreements must—

(i) Detail the activities that each member of the consortium plans to perform;

(ii) Describe the consortium governance structure (as defined in this notice);

(iii) Bind each member of the consortium to every statement and assurance made in the application; and

(iv) Include an assurance signed by the LEA's superintendent or CEO that—

(A) The LEA, at a minimum, will implement no later than the 2014–2015 school year—

(*1*) A teacher evaluation system (as defined in this notice);

(*2*) A principal evaluation system (as defined in this notice); and

(*3*) A superintendent evaluation (as defined in this notice);

(B) The LEA is committed to preparing students for college or career, as demonstrated by—

(*1*) Being located in a State that has adopted college- and career-ready standards (as defined in this notice); or

(*2*) Measuring all student progress and performance against college- and career-ready graduation requirements (as defined in this notice);

(C) The LEA has a robust data system that has, at a minimum—

(*1*) An individual teacher identifier with a teacher-student match; and

(*2*) The capability to provide timely data back to educators and their supervisors on student growth (as defined in this notice);

(D) The LEA has the capability to receive or match student-level preschool-through-12th grade and higher education data; and

(E) The LEA ensures that any disclosure of or access to personally identifiable information in students' education records complies with the FERPA; and

(v) Be signed by the superintendent or CEO, local school board president, and local teacher union or association president (where applicable).

Final Program Requirements

The Secretary establishes the following requirements for LEAs receiving funds under this competition. We may apply one or more of these requirements in any year in which this program is in effect.

(1) An applicant's budget request for all years of its project must fall within the applicable budget range as follows:

Number of participating students (as defined in this notice)	Award range ($ million)
2,000–5,000 or Fewer than 2,000, provided those students are served by a consortium of at least 10 LEAs and at least 75 percent of the students served by each LEA are participating students (as defined in this notice)	4–10
5,001–10,000	10–20
10,001–20,000	20–25
20,001+	25–30

The Department will not consider an application that requests a budget outside the applicable range of awards.

(2) A grantee must commit to participate in any national evaluation of the program and work with the Department and with a national evaluator or another entity designated by the Department to ensure that data collection and program design are consistent with plans to conduct a rigorous national evaluation of the program and of specific solutions and strategies pursued by individual grantees. This commitment must include, but need not be limited to—

(i) Consistent with 34 CFR 80.36 and State and local procurement procedures, grantees must include in contracts with external vendors provisions that allow contractors to provide implementation data to the LEA, the Department, the national evaluator, or other appropriate entities in ways consistent with all privacy laws and regulations.

(ii) Developing, in consultation with the national evaluator, a plan for identifying and collecting reliable and valid baseline data for program participants.

(3) LEAs must share metadata about content alignment with college- and career-ready standards (as defined in this notice) and use through open-standard registries.

(4) LEAs in which minority students or students with disabilities are disproportionately subject to discipline (as defined in this notice) and expulsion (according to data submitted through the Department's Civil Rights Data Collection, which is available at *http://ocrdata.ed.gov/*) must conduct a district assessment of the root causes of the disproportionate discipline and expulsions. These LEAs must also develop a detailed plan over the grant period to address these root causes and to reduce disproportionate discipline (as defined in this notice) and expulsions.

(5) Each grantee must make all project implementation and student data available to the Department and its authorized representatives in compliance with FERPA, as applicable.

(6) Grantees must ensure that requests for information (RFIs) and requests for proposal (RFPs) developed as part of this grant are made public, and are consistent with the requirements of State and local law.

(7) Within 100 days of award, each grantee must submit to the Department—

(i) A scope of work that is consistent with its grant application and includes specific goals, activities, deliverables, timelines, budgets, key personnel, and annual targets for key performance measures; and

(ii) An individual school implementation plan for participating schools (as defined in this notice).

(8) Within 100 days of award, each grantee must demonstrate that at least 40 percent of participating students (as defined in this notice) in participating schools (as defined in this notice) are from low-income families, based on eligibility for free or reduced-price lunch subsidies under the Richard B. Russell National School Lunch Act, or other poverty measures that LEAs use to make awards under section 1113(a) of the ESEA.

Final Definitions

The Secretary establishes the following definitions for terms not defined in the American Recovery and Reinvestment Act (ARRA) (or, by reference, in the ESEA). We may apply one or more of these definitions in any year in which this program is in effect.

Achievement gap means the difference in the performance between each subgroup (as defined in this notice) within a participating LEA or school and the statewide average performance of the LEA's or State's highest-achieving subgroups in reading or language arts and in mathematics as measured by the assessments required under the ESEA, as amended.

College- and career-ready graduation requirements means minimum high school graduation expectations (e.g., completion of a minimum course of study, content mastery, proficiency on college- and career-ready assessments) that are aligned with a rigorous, robust, and well-rounded curriculum and that cover a wide range of academic and technical knowledge and skills to ensure that by the time students graduate high school, they satisfy requirements for admission into credit-bearing courses commonly required by the State's public four-year degree-granting institutions.

College- and career-ready standards means content standards for kindergarten through 12th grade that build towards college- and career-ready graduation requirements (as defined in this notice). A State's college- and career-ready standards must be either (1) standards that are common to a significant number of States; or (2) standards that are approved by a State network of institutions of higher education, which must certify that students who meet the standards will not need remedial course work at the postsecondary level.

College enrollment means the enrollment of students who graduate from high school consistent with 34 CFR 200.19(b)(1)(i) and who enroll in a public institution of higher education in the State (as defined in section 101(a) of the Higher Education Act of 1965, as amended, 20 U.S.C. 1001) within 16 months of graduation.

Consortium governance structure means the consortium's structure for carrying out its operations, including—

(1) The organizational structure of the consortium and the differentiated roles that a member LEA may hold (e.g., lead LEA, member LEA);

(2) For each differentiated role, the associated rights and responsibilities, including rights and responsibilities for adopting and implementing the consortium's proposal for a grant;

(3) The consortium's method and process (e.g., consensus, majority) for making different types of decisions (e.g., policy, operational);

(4) The protocols by which the consortium will operate, including the protocols for member LEAs to change roles or leave the consortium;

(5) The consortium's procedures for managing funds received under this grant;

(6) The terms and conditions of the memorandum of understanding or other binding agreement executed by each member LEA; and

(7) The consortium's procurement process, and evidence of each member LEA's commitment to that process.

Core educational assurance areas means the four key areas originally identified in the ARRA to support comprehensive education reform: (1) Adopting standards and assessments that prepare students to succeed in college and the workplace and to compete in the global economy; (2) building data systems that measure student growth and success, and inform teachers and principals with data about how they can improve instruction; (3) recruiting, developing, rewarding, and retaining effective teachers and principals, especially where they are needed most; and (4) turning around lowest-achieving schools.

Digital learning content means learning materials and resources that can be displayed on an electronic device and shared electronically with other users. Digital learning content includes both open source and commercial content. In order to comply with the requirements of the Americans with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973, as amended, any digital learning content used by grantees must be accessible to individuals with disabilities, including individuals who use screen readers. For additional information regarding the

application of these laws to technology, please refer to *www.ed.gov/ocr/letters/colleague-201105-ese.pdf* and *www.ed.gov/ocr/docs/dcl-ebook-faq-201105.pdf.*

Discipline means any disciplinary measure collected by the 2009–2010 or 2011–2012 Civil Rights Data Collection (see *http://ocrdata.ed.gov*).

Educators means all education professionals and education paraprofessionals working in participating schools (as defined in this notice), including principals or other heads of a school, teachers, other professional instructional staff (e.g., staff involved in curriculum development or staff development, bilingual/English as a Second Language (ESL) specialists, or instructional staff who operate library, media, and computer centers), pupil support services staff (e.g., guidance counselors, nurses, speech pathologists), other administrators (e.g., assistant principals, discipline specialists), and education paraprofessionals (e.g., assistant teachers, bilingual/ESL instructional aides).

Effective principal means a principal whose students, overall and for each subgroup, achieve acceptable rates (e.g., at least one grade level in an academic year) of student growth (as defined in this notice) as defined in the LEA's principal evaluation system (as defined in this notice).

Effective teacher means a teacher whose students achieve acceptable rates (e.g., at least one grade level in an academic year) of student growth (as defined in this notice) as defined in the LEA's teacher evaluation system (as defined in this notice).

Family and community supports means—

(1) Child and youth health programs, such as physical, mental, behavioral, and emotional health programs (e.g., home visiting programs; Head Start; Early Head Start; programs to improve nutrition and fitness, reduce childhood obesity, and create healthier communities);

(2) Safety programs, such as programs in school and out of school to prevent, control, and reduce crime, violence, drug and alcohol use, and gang activity; programs that address classroom and school-wide behavior and conduct; programs to prevent child abuse and neglect; programs to prevent truancy and reduce and prevent bullying and harassment; and programs to improve the physical and emotional security of the school setting as perceived, experienced, and created by students, staff, and families;

(3) Community stability programs, such as programs that: (a) Provide adult education and employment opportunities and training to improve educational levels, job skills, and readiness in order to decrease unemployment, with a goal of increasing family stability; (b) improve families' awareness of, access to, and use of a range of social services, if possible at a single location; (c) provide unbiased, outcome-focused, and comprehensive financial education, inside and outside the classroom and at every life stage; (d) increase access to traditional financial institutions (e.g., banks and credit unions) rather than alternative financial institutions (e.g., check cashers and payday lenders); (e) help families increase their financial literacy, financial assets, and savings; (f) help families access transportation to education and employment opportunities; and (g) provide supports and services to students who are homeless, in foster care, migrant, or highly mobile; and

(4) Family and community engagement programs that are systemic, integrated, sustainable, and continue through a student's transition from K–12 schooling to college and career. These programs may include family literacy programs and programs that provide adult education and training and opportunities for family members and other members of the community to support student learning and establish high expectations for student educational achievement; mentorship programs that create positive relationships between children and adults; programs that provide for the use of such community resources as libraries, museums, television and radio stations, and local businesses to support improved student educational outcomes; programs that support the engagement of families in early learning programs and services; programs that provide guidance on how to navigate through a complex school system and how to advocate for more and improved learning opportunities; and programs that promote collaboration with educators and community organizations to improve opportunities for healthy development and learning.

Graduation rate means the four-year or extended-year adjusted cohort graduation rate as defined by 34 CFR 200.19(b)(1).

High-minority school is defined by the LEA in a manner consistent with its State's Teacher Equity Plan, as required by section 1111(b)(8)(C) of the ESEA. The LEA must provide, in its Race to the Top—District application, the definition used.

High-need students means students at risk of educational failure or otherwise in need of special assistance and support, such as students who are living in poverty, who attend high-minority schools (as defined in this notice), who are far below grade level, who have left school before receiving a regular high school diploma, who are at risk of not graduating with a diploma on time, who are homeless, who are in foster care, who have been incarcerated, who have disabilities, or who are English learners.

High-quality plan means a plan that includes key goals, activities to be undertaken and the rationale for the activities, the timeline, the deliverables, and the parties responsible for implementing the activities.

Highly effective principal means a principal whose students, overall and for each subgroup, achieve high rates (e.g., one and one-half grade levels in an academic year) of student growth (as defined in this notice) as defined under the LEA's principal evaluation system (as defined in this notice).

Highly effective teacher means a teacher whose students achieve high rates (e.g., one and one-half grade levels in an academic year) of student growth (as defined in this notice) as defined under the LEA's teacher evaluation system (as defined in this notice).

Interoperable data system means a system that uses a common, established structure such that data can easily flow from one system to another and in which data are in a non-proprietary, open format.

Local educational agency is an entity as defined in section 9101(26) of the ESEA, except that an entity described under section 9101(26)(D) must be recognized under applicable State law as a local educational agency.

Low-performing school means a school that is in the bottom 10 percent of performance in the State, or that has significant achievement gaps, based on student academic performance in reading/language arts and mathematics on the assessments required under the ESEA, or that has a graduation rate (as defined in this notice) below 60 percent.

Metadata means information about digital learning content such as the grade or age for which it is intended, the topic or standard to which it is aligned, or the type of resource it is (e.g., video, image).

On-track indicator means a measure, available at a time sufficiently early to allow for intervention, of a single student characteristic (e.g., number of days absent, number of discipline referrals, number of credits earned), or a composite of multiple characteristics, that is both predictive of student success (e.g., students demonstrating the measure graduate at an 80 percent rate)

and comprehensive of students who succeed (e.g., of all graduates, 90 percent demonstrated the indicator). Using multiple indicators that are collectively comprehensive but vary by student characteristics may be an appropriate alternative to a single indicator that applies to all students.

Open data format means data that are available in a non-proprietary, machine-readable format (e.g., Extensible Markup Language (XML) and JavaScript Object Notation (JSON)) such that they can be understood by a computer. Digital formats that require extraction, data translation such as optical character recognition, or other manipulation in order to be used in electronic systems are not machine-readable formats.

Open-standard registry means a digital platform, such as the Learning Registry, that facilitates the exchange of information about digital learning content (as defined in this notice), including (1) alignment of content with college- and career-ready standards (as defined in this notice) and (2) usage information about learning content used by educators (as defined in this notice). This digital platform must have the capability to share content information with other LEAs and with State educational agencies.

Participating school means a school that is identified by the applicant and chooses to work with the applicant to implement the plan under Priority 1, either in one or more specific grade spans or subject areas or throughout the entire school and affecting a significant number of its students.

Participating student means a student enrolled in a participating school (as defined in this notice) and who is directly served by an applicant's plan under Priority 1.

Persistently lowest-achieving school means, as determined by the State, consistent with the requirements of the School Improvement Grants (SIG) program authorized by section 1003(g) of the ESEA,[2] (1) any Title I school in improvement, corrective action, or restructuring that (a) is among the lowest-achieving five percent of Title I schools in improvement, corrective action, or restructuring or the lowest-achieving five Title I schools in improvement, corrective action, or restructuring in the State, whichever number of schools is greater; or (b) is a high school that has had a graduation rate (as defined in this notice) that is less than 60 percent over a number of years; and (2) any secondary school that is eligible for, but does not receive, Title I funds that (a) is among the lowest-achieving five percent of secondary schools or the lowest-achieving five secondary schools in the State that are eligible for, but do not receive, Title I funds, whichever number of schools is greater; or (b) is a high school that has had a graduation rate (as defined in this notice) that is less than 60 percent over a number of years.

To identify the lowest-achieving schools, a State must take into account both (1) the academic achievement of the ''all students'' group in a school in terms of proficiency on the State's assessments under section 1111(b)(3) of the ESEA in reading or language arts and in mathematics combined; and (2) the school's lack of progress on those assessments over a number of years in the ''all students'' group.

Principal evaluation system means a system that: (1) Is used for continual improvement of instructional leadership; (2) meaningfully differentiates performance using at least three performance levels; (3) uses multiple valid measures in determining performance levels, including, as a significant factor, data on student growth (as defined in this notice) for all students (including English learners and students with disabilities), as well as other measures of professional practice (which may be gathered through multiple formats and sources, such as observations based on rigorous leadership performance standards, teacher evaluation data, and student and parent surveys); (4) evaluates principals on a regular basis; (5) provides clear, timely, and useful feedback, including feedback that identifies and guides professional development needs; and (6) is used to inform personnel decisions.

Rural local educational agency means an LEA, at the time of the application, that is eligible under the Small Rural School Achievement (SRSA) program or the Rural and Low-Income School (RLIS) program authorized under Title VI, Part B of the ESEA. Eligible applicants may determine whether a particular LEA is eligible for these programs by referring to information on the Department's Web site at *http://www2.ed.gov/programs/reapsrsa/eligible13/index.html*.

School leadership team means a team that leads the implementation of improvement and other initiatives at the school and is composed of the principal or other head of a school, teachers, and other educators (as defined in this notice), and, as applicable, other school employees, parents, students, and other community members. In cases where statute or local policy, including collective bargaining agreements, establishes a school leadership team, that body shall serve as the school leadership team for the purpose of this program.

Student growth means the change in student achievement for an individual student between two or more points in time, defined as—

(1) For grades and subjects in which assessments are required under ESEA section 1111(b)(3): (a) A student's score on such assessments; and (b) may include other measures of student learning, such as those described in (2) below, provided they are rigorous and comparable across schools within an LEA.

(2) For grades and subjects in which assessments are not required under ESEA section 1111(b)(3): Alternative measures of student learning and performance, such as student results on pre-tests, end-of-course tests, and objective performance-based assessments; performance against student learning objectives; student performance on English language proficiency assessments; and other measures of student achievement that are rigorous and comparable across schools within an LEA.

Student-level data means demographic, performance, and other information that pertains to a single student.

Student performance data means information about the academic progress of a single student, such as formative and summative assessment data, information on completion of coursework, instructor observations, information about student engagement and time on task, and similar information.

Subgroup means each category of students identified under section 1111(b)(2)(C)(v)(II) of the ESEA and any combined subgroup used in the State accountability system that is approved by the Department in a State's request for ESEA flexibility.

Superintendent evaluation means a rigorous, transparent, and fair annual evaluation of an LEA superintendent that provides an assessment of performance and encourages professional growth. This evaluation must reflect: (1) The feedback of many stakeholders, including but not limited to educators, principals, and parents; and (2) student outcomes, including student growth for all students (including English learners and students with disabilities).

[2] The Department considers schools that are identified as Tier I or Tier II schools under the SIG program (see 75 FR 66363) as part of a State's approved applications to be persistently lowest-achieving schools. A list of these Tier I and Tier II schools can be found on the Department's Web site at *http://www2.ed.gov/programs/sif/index.html*.

Teacher evaluation system means a system that: (1) Is used for continual improvement of instruction; (2) meaningfully differentiates performance using at least three performance levels; (3) uses multiple valid measures in determining performance levels, including, as a significant factor, data on student growth (as defined in this notice) for all students (including English learners and students with disabilities), as well as other measures of professional practice (which may be gathered through multiple formats and sources, such as observations based on rigorous teacher performance standards, teacher portfolios, and student and parent surveys); (4) evaluates teachers on a regular basis; (5) provides clear, timely, and useful feedback, including feedback that identifies and guides professional development needs; and (6) is used to inform personnel decisions.

Teacher of record means an individual (or individuals in a co-teaching assignment) who has been assigned the lead responsibility for a student's learning in a subject or course.

Final Selection Criteria

The Secretary establishes the following selection criteria for evaluating an application under this competition. We may apply one or more of these criteria or sub-criteria, any of the selection criteria in 34 CFR 75.210, criteria based on statutory requirements for the program in accordance with 34 CFR 75.209, or any combination of these in any year in which this program is in effect. In the notice inviting applications, the application package, or both, the Department will announce the selection criteria that apply to a competition and the maximum possible points assigned to each criterion.

A. Vision

(1) The extent to which the applicant has set forth a comprehensive and coherent reform vision that—

(a) Builds on its work in four core educational assurance areas (as defined in this notice);

(b) Articulates a clear and credible approach to the goals of accelerating student achievement, deepening student learning, and increasing equity through personalized student support grounded in common and individual tasks that are based on student academic interests; and

(c) Describes what the classroom experience will be like for students and teachers participating in personalized learning environments.

(2) The extent to which the applicant's approach to implementing its reform proposal (e.g., schools, grade bands, or subject areas) will support high-quality LEA-level and school-level implementation of that proposal, including—

(a) A description of the process that the applicant used or will use to select schools to participate. The process must ensure that the participating schools (as defined in this notice) collectively meet the competition's eligibility requirements;

(b) A list of the schools that will participate in grant activities (as available); and

(c) The total number of participating students (as defined in this notice), participating students (as defined in this notice) from low-income families, participating students (as defined in this notice) who are high-need students (as defined in this notice), and participating educators (as defined in this notice). If participating schools (as defined in this notice) have yet to be selected, the applicant may provide approximate numbers.

(3) The extent to which the application includes a high-quality plan (as defined in this notice) describing how the reform proposal will be scaled up and translated into meaningful reform to support district-wide change beyond the participating schools (as defined in this notice), and will help the applicant reach its outcome goals (e.g., the applicant's logic model or theory of change of how its plan will improve student learning outcomes for all students who would be served by the applicant).

(4) The extent to which the applicant's vision is likely to result in improved student learning and performance and increased equity as demonstrated by ambitious yet achievable annual goals that are equal to or exceed State ESEA targets for the LEA(s), overall and by student subgroup (as defined in this notice), for each participating LEA in the following areas:

(a) Performance on summative assessments (proficiency status and growth).

(b) Decreasing achievement gaps (as defined in this notice).

(c) Graduation rates (as defined in this notice).

(d) College enrollment (as defined in this notice) rates.

Optional: The extent to which the applicant's vision is likely to result in improved student learning and performance and increased equity as demonstrated by ambitious yet achievable annual goals for each participating LEA in the following area:

(e) Postsecondary degree attainment.

B. Prior Record of Success and Conditions for Reform

The extent to which each LEA has demonstrated evidence of—

(1) A clear record of success in the past four years in advancing student learning and achievement and increasing equity in learning and teaching, including a description, charts or graphs, raw student data, and other evidence that demonstrates the applicant's ability to—

(a) Improve student learning outcomes and close achievement gaps (as defined in this notice), including by raising student achievement, high school graduation rates (as defined in this notice), and college enrollment (as defined in this notice) rates;

(b) Achieve ambitious and significant reforms in its persistently lowest-achieving schools (as defined in this notice) or in its low-performing schools (as defined in this notice); and

(c) Make student performance data (as defined in this notice) available to students, educators (as defined in this notice), and parents in ways that inform and improve participation, instruction, and services.

(2) A high level of transparency in LEA processes, practices, and investments, including by making public, by school, actual school-level expenditures for regular K–12 instruction, instructional support, pupil support, and school administration. At a minimum, this information must include a description of the extent to which the applicant already makes available the following four categories of school-level expenditures from State and local funds:

(a) Actual personnel salaries at the school level for all school-level instructional and support staff, based on the U.S. Census Bureau's classification used in the F–33 survey of local government finances (information on the survey can be found at *http://nces.ed.gov/ccd/f33agency.asp*);

(b) Actual personnel salaries at the school level for instructional staff only;

(c) Actual personnel salaries at the school level for teachers only; and

(d) Actual non-personnel expenditures at the school level (if available).

(3) Successful conditions and sufficient autonomy under State legal, statutory, and regulatory requirements to implement the personalized learning environments described in the applicant's proposal;

(4) Meaningful stakeholder engagement throughout the development of the proposal and meaningful stakeholder support for the proposal, including—

(a) A description of how students, families, teachers, and principals in participating schools (as defined in this notice) were engaged in the development of the proposal and, as appropriate, how the proposal was revised based on their engagement and feedback, including—

(i) For LEAs with collective bargaining representation, evidence of direct engagement and support for the proposals from teachers in participating schools (as defined in this notice); or

(ii) For LEAs without collective bargaining representation, at a minimum, evidence that at least 70 percent of teachers from participating schools (as defined in this notice) support the proposal; and

(b) Letters of support from such key stakeholders as parents and parent organizations, student organizations, early learning programs, tribes, the business community, civil rights organizations, advocacy groups, local civic and community-based organizations, and institutions of higher education.

C. Preparing Students for College and Careers

The extent to which the applicant has a high-quality plan (as defined in this notice) for improving learning and teaching by personalizing the learning environment in order to provide all students the support to graduate college- and career-ready. This plan must include an approach to implementing instructional strategies for all participating students (as defined in this notice) that enable participating students to pursue a rigorous course of study aligned to college- and career-ready standards (as defined in this notice) and college- and career-ready graduation requirements (as defined in this notice) and accelerate his or her learning through support of his or her needs. This includes the extent to which the applicant proposes an approach that includes the following:

(1) *Learning:* An approach to learning that engages and empowers all learners, in particular high-need students (as defined in this notice), in an age-appropriate manner such that:

(a) With the support of parents and educators, all students—

(i) Understand that what they are learning is key to their success in accomplishing their goals;

(ii) Identify and pursue learning and development goals linked to college- and career-ready standards (as defined in this notice) or college- and career-ready graduation requirements (as defined in this notice), understand how to structure their learning to achieve their goals, and measure progress toward those goals;

(iii) Are able to be involved in deep learning experiences in areas of academic interest;

(iv) Have access and exposure to diverse cultures, contexts, and perspectives that motivate and deepen individual student learning; and

(v) Master critical academic content and develop skills and traits such as goal-setting, teamwork, perseverance, critical thinking, communication, creativity, and problem-solving;

(b) With the support of parents and educators (as defined in this notice), each student has access to—

(i) A personalized sequence of instructional content and skill development designed to enable the student to achieve his or her individual learning goals and ensure he or she can graduate on time and college- and career-ready;

(ii) A variety of high-quality instructional approaches and environments;

(iii) High-quality content, including digital learning content (as defined in this notice) as appropriate, aligned with college- and career-ready standards (as defined in this notice) or college- and career-ready graduation requirements (as defined in this notice);

(iv) Ongoing and regular feedback, including, at a minimum—

(A) Frequently updated individual student data that can be used to determine progress toward mastery of college- and career-ready standards (as defined in this notice), or college- and career-ready graduation requirements (as defined in this notice); and

(B) Personalized learning recommendations based on the student's current knowledge and skills, college- and career-ready standards (as defined in this notice) or college- and career-ready graduation requirements (as defined in this notice), and available content, instructional approaches, and supports; and

(v) Accommodations and high-quality strategies for high-need students (as defined in this notice) to help ensure that they are on track toward meeting college- and career-ready standards (as defined in this notice) or college- and career-ready graduation requirements (as defined in this notice); and

(c) Mechanisms are in place to provide training and support to students that will ensure that they understand how to use the tools and resources provided to them in order to track and manage their learning.

(2) *Teaching and Leading:* An approach to teaching and leading that helps educators (as defined in this notice) to improve instruction and increase their capacity to support student progress toward meeting college- and career-ready standards (as defined in this notice) or college- and career-ready graduation requirements (as defined in this notice) by enabling the full implementation of personalized learning and teaching for all students, in particular high-need students (as defined in this notice), such that:

(a) All participating educators (as defined in this notice) engage in training, and in professional teams or communities, that supports their individual and collective capacity to—

(i) Support the effective implementation of personalized learning environments and strategies that meet each student's academic needs and help ensure all students can graduate on time and college- and career-ready;

(ii) Adapt content and instruction, providing opportunities for students to engage in common and individual tasks, in response to their academic needs, academic interests, and optimal learning approaches (e.g., discussion and collaborative work, project-based learning, videos, audio, manipulatives);

(iii) Frequently measure student progress toward meeting college- and career-ready standards (as defined in this notice) or college- and career-ready graduation requirements (as defined in this notice) and use data to inform both the acceleration of student progress and the improvement of the individual and collective practice of educators (as defined in this notice); and

(iv) Improve teachers' and principals' practice and effectiveness by using feedback provided by the LEA's teacher and principal evaluation systems (as defined in this notice), including frequent feedback on individual and collective effectiveness, as well as by providing recommendations, supports, and interventions as needed for improvement.

(b) All participating educators (as defined in this notice) have access to, and know how to use, tools, data, and resources to accelerate student progress toward meeting college- and career-ready graduation requirements (as defined in this notice). Those resources must include—

(i) Actionable information that helps educators (as defined in this notice) identify optimal learning approaches that respond to individual student academic needs and interests;

(ii) High-quality learning resources (e.g., instructional content and assessments), including digital resources, as appropriate, that are aligned with college- and career-ready

standards (as defined in this notice) or college- and career-ready graduation requirements (as defined in this notice), and the tools to create and share new resources; and

(iii) Processes and tools to match student needs (see Selection Criterion (C)(2)(b)(i)) with specific resources and approaches (see Selection Criterion (C)(2)(b)(ii)) to provide continuously improving feedback about the effectiveness of the resources in meeting student needs.

(c) All participating school leaders and school leadership teams (as defined in this notice) have training, policies, tools, data, and resources that enable them to structure an effective learning environment that meets individual student academic needs and accelerates student progress through common and individual tasks toward meeting college- and career-ready standards (as defined in this notice) or college- and career-ready graduation requirements (as defined in this notice). The training, policies, tools, data, and resources must include:

(i) Information, from such sources as the district's teacher evaluation system (as defined in this notice), that helps school leaders and school leadership teams (as defined in this notice) assess, and take steps to improve, individual and collective educator effectiveness and school culture and climate, for the purpose of continuous school improvement; and

(ii) Training, systems, and practices to continuously improve school progress toward the goals of increasing student performance and closing achievement gaps (as defined in this notice).

(d) The applicant has a high-quality plan (as defined in this notice) for increasing the number of students who receive instruction from effective and highly effective teachers and principals (as defined in this notice), including in hard-to-staff schools, subjects (such as mathematics and science), and specialty areas (such as special education).

D. LEA Policy and Infrastructure

The extent to which the applicant has a high-quality plan (as defined in this notice) to support project implementation through comprehensive policies and infrastructure that provide every student, educator (as defined in this notice), and level of the education system (classroom, school, and LEA) with the support and resources they need, when and where they are needed. This includes the extent to which—

(1) The applicant has practices, policies, and rules that facilitate personalized learning by—

(a) Organizing the LEA central office, or the consortium governance structure (as defined in this notice), to provide support and services to all participating schools (as defined in this notice);

(b) Providing school leadership teams (as defined in this notice) in participating schools (as defined in this notice) with sufficient flexibility and autonomy over factors such as school schedules and calendars, school personnel decisions and staffing models, roles and responsibilities for educators and noneducators, and school-level budgets;

(c) Giving students the opportunity to progress and earn credit based on demonstrated mastery, not the amount of time spent on a topic;

(d) Giving students the opportunity to demonstrate mastery of standards at multiple times and in multiple comparable ways; and

(e) Providing learning resources and instructional practices that are adaptable and fully accessible to all students, including students with disabilities and English learners; and

(2) The LEA and school infrastructure supports personalized learning by—

(a) Ensuring that all participating students (as defined in this notice), parents, educators (as defined in this notice), and other stakeholders (as appropriate and relevant to student learning), regardless of income, have access to necessary content, tools, and other learning resources both in and out of school to support the implementation of the applicant's proposal;

(b) Ensuring that students, parents, educators (as defined in this notice), and other stakeholders (as appropriate and relevant to student learning) have appropriate levels of technical support, which may be provided through a range of strategies (e.g., peer support, online support, or local support);

(c) Using information technology systems that allow parents and students to export their information in an open data format (as defined in this notice) and to use the data in other electronic learning systems (e.g., electronic tutors, tools that make recommendations for additional learning supports, or software that securely stores personal records); and

(d) Ensuring that LEAs and schools use interoperable data systems (as defined in this notice) (e.g., systems that include human resources data, student information data, budget data, and instructional improvement system data).

E. Continuous Improvement

Because the applicant's plans represent the best thinking at a point in time, and may require adjustments and revisions during implementation, it is vital that the applicant have a clear and high-quality approach to continuously improve its plans. This will be determined by the extent to which the applicant has—

(1) A high-quality plan (as defined in this notice) for implementing a rigorous continuous improvement process that provides timely and regular feedback on progress toward project goals and opportunities for ongoing corrections and improvements during and after the term of the grant. The plan must address how the applicant will monitor, measure, and publicly share information on the quality of its investments funded by Race to the Top—District, such as investments in professional development, technology, and staff;

(2) A high-quality plan (as defined in this notice) for ongoing communication and engagement with internal and external stakeholders; and

(3) Ambitious yet achievable performance measures, overall and by subgroup (as defined in this notice), with annual targets for required and applicant-proposed performance measures. For each applicant-proposed measure, the applicant must describe—

(a) Its rationale for selecting that measure;

(b) How the measure will provide rigorous, timely, and formative leading information tailored to its proposed plan and theory of action regarding the applicant's implementation success or areas of concern; and

(c) How it will review and improve the measure over time if it is insufficient to gauge implementation progress.

The applicant should have a total of approximately 12 to 14 performance measures.

The chart below outlines the required and applicant-proposed performance measures based on an applicant's applicable population.

Applicable population	Performance measure
All	(a) The number and percentage of participating students (as defined in this notice), by subgroup (as defined in this notice), whose teacher of record (as defined in this notice) and principal are a highly effective teacher (as defined in this notice) and a highly effective principal (as defined in this notice); and

Applicable population	Performance measure
	(b) The number and percentage of participating students (as defined in this notice), by subgroup (as defined in this notice), whose teacher of record (as defined in this notice) and principal are an effective teacher (as defined in this notice) and an effective principal (as defined in this notice).
PreK–3	(a) Applicant must propose at least one age-appropriate measure of students' academic growth (e.g., language and literacy development or cognition and general learning, including early mathematics and early scientific development); and
	(b) Applicant must propose at least one age-appropriate non-cognitive indicator of growth (e.g., physical well-being and motor development, or social-emotional development).
4–8	(a) The number and percentage of participating students (as defined in this notice), by subgroup, who are on track to college- and career-readiness based on the applicant's on-track indicator (as defined in this notice);
	(b) Applicant must propose at least one grade-appropriate academic leading indicator of successful implementation of its plan; and
	(c) Applicant must propose at least one grade-appropriate health or social-emotional leading indicator of successful implementation of its plan.
9–12	(a) The number and percentage of participating students (as defined in this notice) who complete and submit the Free Application for Federal Student Aid (FAFSA) form;
	(b) The number and percentage of participating students (as defined in this notice), by subgroup, who are on track to college- and career-readiness based on the applicant's on-track indicator (as defined in this notice);
	(c) Applicant must propose at least one measure of career-readiness in order to assess the number and percentage of participating students (as defined in this notice) who are or are on track to being career-ready;
	(d) Applicant must propose at least one grade-appropriate academic leading indicator of successful implementation of its plan; and
	(e) Applicant must propose at least one grade-appropriate health or social-emotional leading indicator of successful implementation of its plan.

(4) A high-quality plan to rigorously evaluate the effectiveness of Race to the Top—District funded activities, such as professional development and activities that employ technology.

F. Budget and Sustainability

The extent to which—

(1) The applicant's budget, including the budget narrative and tables—

(a) Identifies all funds that will support the project (e.g., Race to the Top—District grant; external foundation support; LEA, State, and other Federal funds);

(b) Is reasonable and sufficient to support the development and implementation of the applicant's proposal; and

(c) Clearly provides a thoughtful rationale for investments and priorities, including—

(i) A description of *all* of the funds (e.g., Race to the Top—District grant; external foundation support; LEA, State, and other Federal funds) that the applicant will use to support the implementation of the proposal, including total revenue from these sources; and

(ii) Identification of the funds that will be used for one-time investments versus those that will be used for ongoing operational costs that will be incurred during and after the grant period, as described in the proposed budget and budget narrative, with a focus on strategies that will ensure the long-term sustainability of the personalized learning environments; and

(2) The applicant has a high-quality plan (as defined in this notice) for sustainability of the project's goals after the term of the grant. The plan should include support from State and local government leaders, financial support, and a description of how the applicant will evaluate the effectiveness of past investments and use this data to inform future investments. Such a plan may address how the applicant will evaluate improvements in productivity and outcomes to inform a post-grant budget, and include an estimated budget for the three years after the term of the grant that includes budget assumptions, potential sources, and uses of funds.

This notice does not preclude us from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

Note: This notice does *not* solicit applications. In any year in which we choose to use one or more of these priorities, requirements, definitions, and selection criteria, we invite applications through a notice in the **Federal Register**.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether this regulatory action is ''significant'' and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities in a material way (also referred to as an ''economically significant'' rule);

(2) Create 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 novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This final regulatory action will have an annual effect on the economy of more than $100 million because more than that amount has been appropriated for Race to the Top and we anticipate that more than that amount will be awarded as grants. Therefore, this final action is ''economically significant'' and subject to review by OMB under section 3(f)(1) of Executive Order 12866. Notwithstanding this determination, we have assessed the potential costs and benefits, both quantitative and qualitative, of this final regulatory action and have determined that the benefits justify the costs.

We have also reviewed this final regulatory action under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are issuing these final priorities, requirements, definitions, and selection criteria only on a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that this regulatory action is consistent with the principles in Executive Order 13563.

We also have determined that this final regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

In this regulatory impact analysis we discuss the need for regulatory action, the potential costs and benefits, net budget impacts, assumptions, limitations, and data sources, as well as regulatory alternatives we considered.

Discussion of Costs and Benefits

The Secretary believes that these priorities, requirements, definitions, and selection criteria would not impose significant costs on eligible LEAs. The Secretary also believes that the benefits of implementing the priorities, requirements, definitions, and selection criteria contained in this notice outweigh any associated costs.

The Secretary believes that these priorities, requirements, definitions, and selection criteria will result in selection of high-quality applications to implement activities that are most likely to support bold, locally directed improvements in learning and teaching that would directly improve student achievement and educator effectiveness. Additionally, the priorities, requirements, definitions, and selection criteria in this notice clarify the scope of activities the Secretary expects to support with program funds and the expected burden of work involved in preparing an application and implementing a project under the program. Potential applicants need to consider carefully the effort that will be required to prepare a strong application, their capacity to implement a project successfully, and their chances of submitting a successful application.

Program participation is voluntary. The Secretary believes that the costs imposed on applicants by these priorities, requirements, definitions, and selection criteria would be limited to paperwork burden related to preparing an application and that the benefits of implementing them would outweigh any costs incurred by applicants. The costs of carrying out activities would be paid for with program funds. Thus, the costs of implementation would not be a burden for any eligible applicants, including small entities.

Regulatory Alternatives Considered

These final priorities, requirements, definitions, and selection criteria are needed to implement the Race to the Top—District program. The Secretary does not believe that the statute, by itself, provides a sufficient level of detail to ensure that the Race to the Top—District competition serves as a mechanism for driving significant education reform in LEAs. These final priorities, requirements, definitions, and selection criteria will enable effective grant making, resulting in the selection of high-quality applicants who propose to implement activities that are most likely to support bold, locally directed improvements in learning and teaching that would directly improve student achievement and educator effectiveness.

In the absence of specific selection criteria for Race to the Top—District grants, the Department would use the general selection criteria in 34 CFR 75.210 of the Education Department General Administrative Regulations in selecting LEAs to receive grants. The Secretary does not believe the use of those general criteria would be appropriate for the Race to the Top—District competition, because they do not focus on the educational reforms that districts must be implementing in order to receive a Race to the Top—District grant, on the specific uses of funds under Race to the Top—District, or on the plans that the Secretary believes districts should develop for their Race to the Top—District grants.

The priorities, requirements, definitions, and selection criteria in this notice reflect and promote the purpose of the Race to the Top—District program. They also align the Race to the Top—District program, where possible and permissible, with other Departmental priorities. Although we maintain the overall purpose and structure of the FY 2012 Race to the Top—District program, we incorporate changes based on specific lessons learned from the first competition.

Accounting Statement

As required by OMB Circular A–4 (available at *www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf*), in the following table we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of this regulatory action. This table provides our best estimate of the changes in annual monetized transfers as a result of this regulatory action. Expenditures are classified as transfers from the Federal Government to LEAs.

ACCOUNTING STATEMENT CLASSIFICATION OF ESTIMATED EXPENDITURES

[in millions]

Category	Transfers
Annualized Monetized Transfers	Approximately $120.
From Whom To Whom?	From the Federal Government to LEAs.

Intergovernmental Review: This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* 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 Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

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

Dated: July 30, 2013.

Arne Duncan,

Secretary of Education.

[FR Doc. 2013–18710 Filed 8–5–13; 8:45 am]

BILLING CODE 4000–01–P



FEDERAL REGISTER

Vol. 78 Tuesday,
No. 151 August 6, 2013

Part VI

Department of Education

Applications for New Awards; Race to the Top—District; Notice

DEPARTMENT OF EDUCATION

Applications for New Awards; Race to the Top—District

AGENCY: Office of the Deputy Secretary, Department of Education.

ACTION: Notice.

Overview Information:

Race to the Top—District

Notice inviting applications for new awards for fiscal year (FY) 2013.

of Federal Domestic Assistance (CFDA) Number: 84.416.

DATES: Applications Available: August 6, 2013.

Deadline for Notice of Intent to Apply: August 23, 2013.

Note: Submission of a notice of intent to apply is optional.

Date of Application Webinar: Please refer to the Department's Race to the Top—District Web site (*http://www2.ed.gov/programs/racetothetop-district/index.html*) for webinar details.

Deadline for Transmittal of Applications: October 3, 2013.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the Race to the Top—District program is to build on the lessons learned from the State competitions conducted under the Race to the Top program and to support bold, locally directed improvements in learning and teaching that will directly improve student achievement and educator effectiveness.

Background:

The Statutory Context and Program Overview

Race to the Top

The Race to the Top program, authorized under the American Recovery and Reinvestment Act (ARRA) (Pub. L. 111–5), as amended, is centered on four core educational reform areas:

(a) Adopting standards and assessments that prepare students to succeed in college and the workplace and to compete in the global economy;

(b) Building data systems that measure student growth and success and inform teachers and principals about how they can improve instruction;

(c) Recruiting, developing, rewarding, and retaining effective teachers and principals, especially where they are needed most; and

(d) Turning around the Nation's lowest-achieving schools.

In 2010, the Department conducted Race to the Top State competitions, which provided incentives to States to adopt bold and comprehensive reforms in elementary and secondary education and laid the foundation for unprecedented innovation. A total of 46 States and the District of Columbia put together plans to implement college- and career-ready standards, use data systems to guide teaching and learning, evaluate and support teachers and school leaders, and turn around their lowest-performing schools. The Race to the Top State competitions provided States with incentives to implement large-scale, system-changing reforms designed to improve student achievement, narrow achievement gaps, and increase graduation and college enrollment rates.

The Race to the Top Assessment program, also authorized under the ARRA, supports consortia of States in developing new and better assessments aligned with high standards.

In 2011, the ARRA was amended by section 1832(b) of Division B of the Department of Defense and Full-Year Continuing Appropriations Act, 2011 (Pub. L. 112–10), which added an additional education reform area: Strengthening the quality of early learning and development programs and increasing access to high-quality early learning programs for all children, including those with high needs. As a result, the Department had the authority to use a portion of the FY 2011 and FY 2012 appropriations for Race to the Top on the Race to the Top-Early Learning Challenge program, which is jointly administered by the Departments of Education and Health and Human Services. The Race to the Top-Early Learning Challenge supports 14 States' efforts to strengthen the quality of their early learning programs.

Race to the Top—District Competition

On May 22, 2012, the Secretary announced the Race to the Top—District program, which is designed to build on the momentum of other Race to the Top competitions by encouraging bold, innovative reform at the local level. This district-level program is authorized under sections 14005 and 14006 of the ARRA, as amended. Congress appropriated approximately $550 million for Race to the Top for FY 2012. Of these funds, the Department awarded approximately $383 million to 16 Race to the Top—District grantees representing 55 local educational agencies (LEAs), with grants ranging from $10 to $40 million. The amount of an award for which an applicant was eligible to apply depended upon the number of students who would be served under the application.

The Race to the Top—District competition is aimed squarely at classrooms and the all-important relationship between educators and students. The priorities, requirements, definitions, and selection criteria in this document are almost identical to those used in the FY 2012 competition. The competition will again support applicants that demonstrate how they can personalize education for all students in their schools.

In that regard, through this competition, the Department will encourage and reward those LEAs or consortia of LEAs that have the leadership and vision to implement the strategies, structures, and systems needed to implement personalized, student-focused approaches to learning and teaching that the Department believes will produce excellence and ensure equity for all students. The priorities, definitions, requirements, and selection criteria are designed to help LEAs meet these goals.

Under Absolute Priority 1, applicants must design a personalized learning environment that uses collaborative, data-based strategies and 21st-century tools, such as online learning platforms, computers, mobile devices, and learning algorithms, to deliver instruction and supports tailored to the needs and goals of each student, with the aim of enabling all students to graduate college- and career-ready. Implementation of a personalized learning environment is not achieved through a single solution or product but rather requires a multi-faceted approach that addresses the individual and collective needs of students, educators, and families and that dramatically transforms the learning environment in order to improve student outcomes.

The Secretary believes that teacher and student classroom interaction, supported by strong principals and engaged families, is crucial to educating students. Teacher and student interactions are strengthened when an effective teacher has useful information about students' particular needs, support from his or her principal or leadership team, a quality curriculum aligned with college- and career-ready standards, and the other tools needed to do the job.

Too often, however, these supportive conditions have not existed in our schools or districts, and the results are painfully predictable: Students fall behind or drop out, achievement gaps remain or widen, teachers get frustrated and leave the field, and stakeholders become polarized and divided under pressure to perform.

That is why—for more than four years—the Department has supported bold reforms at the State and local levels in order to reduce barriers to good teaching and help create better conditions for learning.

There is no single approach or boutique solution to implementation of personalized learning environments. An LEA or consortium of LEAs receiving an award under this competition will build on the experience of States and districts in implementing reforms in the four core educational assurance areas (as defined in this notice) through Race to the Top and other key programs. A successful applicant will provide teachers the information, tools, and supports that enable them to meet the needs of each student and substantially accelerate and deepen each student's learning. These LEAs will have the policies, systems, infrastructure, capacity, and culture to enable teachers, teacher teams, and school leaders to continuously focus on improving individual student achievement and closing achievement gaps. These LEAs will also make equity and access a priority and aim to prepare each student to master the content and skills required for college- and career-readiness, provide each student the opportunity to pursue a rigorous course of study, and accelerate and deepen students' learning through attention to their individual needs. As important, they will create opportunities for students to identify and pursue areas of personal academic interest—all while ensuring that each student masters critical areas identified in college- and career-ready standards or college- and career-ready high school graduation requirements.

Educators want a way to inspire and challenge those students who are furthest ahead, provide targeted help and assistance to those furthest behind, and engage fully and effectively with the students in the middle. To accomplish this objective, educators across the country have created personalized learning environments and used strategies that involve such elements as technology, virtual and blended learning, individual and group tasks, partnering with parents, and aligning non-school hours with the educational needs of students.

Personalized learning environments enable students to: understand their individual learning goals and needs; access deep learning experiences that include individual and group tasks; and develop such skills and traits as goal setting, teamwork, perseverance, critical thinking, communications, creativity, and problem solving across multiple academic domains. In order for students to do this successfully, we believe both students and educators need opportunities to build their individual and collective capacity to support the implementation of personalized learning environments and strategies.

The Race to the Top—District program does not create new stand-alone programs or support niche programs or interventions. Nor is it a vehicle for maintenance of the status quo. Rather, the Race to the Top—District program supports LEAs that demonstrate their commitment to identifying teachers, principals, and schools with a vision and the expertise to personalize education and extend their reach to all of their students. The Department believes that the successful implementation of personalized learning environments will lay a foundation for raising student achievement, decreasing the achievement gap across student groups, and increasing the rates at which students graduate from high school prepared for college and careers.

The Department will also continue to support high-quality proposals from applicants across a varied set of LEAs in order to create diverse models of personalized learning environments for use by LEAs across the Nation. For this reason, the Department has established four additional priorities—Absolute Priorities 2 through 5—through which the Department will support efforts to expand the types of reform efforts being implemented in LEAs in States that have received a Race to the Top award and LEAs in other States. Moreover, these priorities will also help ensure that LEAs of varying sizes, both rural and non-rural, and with different local contexts are able to implement innovative personalized learning environments for their students that can serve as models for other LEAs and help improve student achievement widely.

Finally, we have established one additional priority—the competitive preference priority—to support applicants that propose to extend their reforms beyond the classroom and partner with public or private entities in order to address the social, emotional, and behavioral needs of students, particularly students who attend a high-need school. This priority aligns with other Department programs, such as the Promise Neighborhoods program, and further amplifies the Department's commitment to improve education as well as family and community supports. We believe that this priority will help children and youth in communities with these partnerships access great schools and the complementary family and community supports that will help prepare them to attain an excellent education and successfully transition to college and a career.

Changes From the FY 2012 Competition

These priorities, requirements, definitions, and selection criteria maintain the overall purpose and structure of the FY 2012 Race to the Top—District competition, and include almost identical language to the FY 2012 competition. As stated in the notice of proposed priorities, requirements, definitions, and selection criteria (NPP) (published in the **Federal Register** on April 16, 2013 (78 FR 22451)), most changes from the FY 2012 competition reflect minor language clarifications. The two substantive changes are the removal of the opportunity to apply for an optional budget supplement and the reduction of the minimum and maximum grant amount for which an applicant may apply. We believe these changes enable the Department to maximize the number of grantees that would receive funding under a competition, while still awarding grants of sufficient size to support bold improvements in learning and teaching.

We invited public comment on the NPP from April 16, 2013 to May 16, 2013. Forty-three parties submitted comments reflecting the viewpoints of a variety of individuals and organizations, which we considered in the development of this notice. Changes that resulted from public comment are described in the *Analysis of Comments and Changes* section in the notice of final priorities, requirements, definitions, and selection criteria (NFP) for this program, published elsewhere in this issue of the **Federal Register**. One key change beyond those previously mentioned is the removal of selection criterion (B)(5), which we believe applicants can address in a more integrated way in their plans and responses to other selection criteria. Most other changes are edits made to clarify or streamline the selection criteria and definitions for the program.

Priorities: This competition includes five absolute priorities and one competitive preference priority. These priorities are from the FY 2013 Race to the Top—District NFP, published elsewhere in this issue of the **Federal Register**. We may apply one or more of these priorities in any year in which this program is in effect.

Absolute Priorities: These priorities are absolute priorities. Under 34 CFR 75.105(c)(3) we consider only applications that meet Absolute Priority 1 and one of Absolute Priorities 2 through 5.

Absolute Priority 1—Personalized Learning Environments. To meet this priority, an applicant must coherently and comprehensively address how it will build on the core educational assurance areas (as defined in this notice) to create learning environments that are designed to significantly improve learning and teaching through the personalization of strategies, tools, and supports for students and educators that are aligned with college- and career-ready standards (as defined in this notice) or college- and career-ready graduation requirements (as defined in this notice); accelerate student achievement and deepen student learning by meeting the academic needs of each student; increase the effectiveness of educators; expand student access to the most effective educators; decrease achievement gaps across student groups; and increase the rates at which students graduate from high school prepared for college and careers.

Absolute Priority 2—Non-Rural LEAs in Race to the Top States.[1] To meet this priority, an applicant must be an LEA or a consortium of LEAs in which more than 50 percent of participating students (as defined in this notice) are in non-rural LEAs in States that received awards under the Race to the Top Phase 1, Phase 2, or Phase 3 competition.

Absolute Priority 3—Rural LEAs in Race to the Top States. To meet this priority, an applicant must be an LEA or a consortium of LEAs in which more than 50 percent of participating students (as defined in this notice) are in rural LEAs (as defined in this notice) in States that received awards under the Race to the Top Phase 1, Phase 2, or Phase 3 competition.

Absolute Priority 4—Non-Rural LEAs in non-Race to the Top States. To meet this priority, an applicant must be an LEA or a consortium of LEAs in which more than 50 percent of participating students (as defined in this notice) are in non-rural LEAs in States that did not receive awards under the Race to the Top Phase 1, Phase 2, or Phase 3 competition.

Absolute Priority 5—Rural LEAs in non-Race to the Top States. To meet this priority, an applicant must be an LEA or a consortium of LEAs in which more than 50 percent of participating students (as defined in this notice) are in rural LEAs (as defined in this notice) in States that did not receive awards under the Race to the Top Phase 1, Phase 2, or Phase 3 competition.

Competitive Preference Priority: This priority is a competitive preference priority. Under 34 CFR 75.105(c)(2)(i), we award up to an additional 10 points to an application, depending on how well the application meets this priority.

Competitive Preference Priority—Results, Resource Alignment, and Integrated Services

To meet this priority, an applicant must demonstrate the extent to which the applicant proposes to integrate public or private resources in a partnership designed to augment the schools' resources by providing additional student and family supports to schools that address the social, emotional, or behavioral needs of the participating students (as defined in this notice), giving highest priority to students in participating schools (as defined in this notice) with high-need students (as defined in this notice). To meet this priority, an applicant's proposal does not need to be comprehensive and may provide student and family supports that focus on a subset of these needs.

To meet this priority, an applicant must—

(1) Provide a description of the coherent and sustainable partnership to support the plan described in Absolute Priority 1 that it has formed with public or private organizations, such as public health, before-school, after-school, and social service providers; integrated student service providers; businesses, philanthropies, civic groups, and other community-based organizations; early learning programs; and postsecondary institutions;

(2) Identify not more than 10 population-level desired results for students in the LEA or consortium of LEAs that align with and support the applicant's broader Race to the Top—District proposal. These results must include both (a) educational results or other education outcomes (e.g., children enter kindergarten prepared to succeed in school, children exit third grade reading at grade level, and students graduate from high school college- and career-ready) and (b) family and community supports (as defined in this notice) results;

(3) Describe how the partnership would—

(a) Track the selected indicators that measure each result at the aggregate level for all children within the LEA or consortium and at the student level for the participating students (as defined in this notice);

(b) Use the data to target its resources in order to improve results for participating students (as defined in this notice), with special emphasis on students facing significant challenges, such as students with disabilities, English learners, and students affected by poverty (including highly mobile students), family instability, or other child welfare issues;

(c) Develop a strategy to scale the model beyond the participating students (as defined in this notice) to at least other high-need students (as defined in this notice) and communities in the LEA or consortium over time; and (d) Improve results over time;

(4) Describe how the partnership would, within participating schools (as defined in this notice), integrate education and other services (e.g., services that address social-emotional and behavioral needs, acculturation for immigrants and refugees) for participating students (as defined in this notice);

(5) Describe how the partnership and LEA or consortium would build the capacity of staff in participating schools (as defined in this notice) by providing them with tools and supports to—

(a) Assess the needs and assets of participating students (as defined in this notice) that are aligned with the partnership's goals for improving the education and family and community supports (as defined in this notice) identified by the partnership;

(b) Identify and inventory the needs and assets of the school and community that are aligned with those goals for improving the education and family and community supports (as defined in this notice) identified by the applicant;

(c) Create a decision-making process and infrastructure to select, implement, and evaluate supports that address the individual needs of participating students (as defined in this notice) and support improved results;

(d) Engage parents and families of participating students (as defined in this notice) in both decision-making about solutions to improve results over time and in addressing student, family, and school needs; and

(e) Routinely assess the applicant's progress in implementing its plan to maximize impact and resolve challenges and problems; and

(6) Identify its annual ambitious yet achievable performance measures for the proposed population-level and describe desired results for students.

Definitions:

These definitions are from the FY 2013 Race to the Top—District NFP, published elsewhere in this issue of the **Federal Register**. We may apply one or

[1] Race to the Top Phase 1, 2, and 3 States are: Arizona, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, and the District of Columbia.

more of these definitions in any year in which this program is in effect.

Achievement gap means the difference in the performance between each subgroup (as defined in this notice) within a participating LEA or school and the statewide average performance of the LEA's or State's highest-achieving subgroups in reading or language arts and in mathematics as measured by the assessments required under the Elementary and Secondary Education Act of 1965 (ESEA), as amended.

College- and career-ready graduation requirements means minimum high school graduation expectations (e.g., completion of a minimum course of study, content mastery, proficiency on college- and career-ready assessments) that are aligned with a rigorous, robust, and well-rounded curriculum and that cover a wide range of academic and technical knowledge and skills to ensure that by the time students graduate high school, they satisfy requirements for admission into credit-bearing courses commonly required by the State's public four-year degree-granting institutions.

College- and career-ready standards means content standards for kindergarten through 12th grade that build towards college- and career-ready graduation requirements (as defined in this notice). A State's college- and career-ready standards must be either (1) standards that are common to a significant number of States; or (2) standards that are approved by a State network of institutions of higher education, which must certify that students who meet the standards will not need remedial course work at the postsecondary level.

College enrollment means the enrollment of students who graduate from high school consistent with 34 CFR 200.19(b)(1)(i) and who enroll in a public institution of higher education in the State (as defined in section 101(a) of the Higher Education Act of 1965, as amended, 20 U.S.C. 1001) within 16 months of graduation.

Consortium governance structure means the consortium's structure for carrying out its operations, including—

(1) The organizational structure of the consortium and the differentiated roles that a member LEA may hold (e.g., lead LEA, member LEA);

(2) For each differentiated role, the associated rights and responsibilities, including rights and responsibilities for adopting and implementing the consortium's proposal for a grant;

(3) The consortium's method and process (e.g., consensus, majority) for making different types of decisions (e.g., policy, operational);

(4) The protocols by which the consortium will operate, including the protocols for member LEAs to change roles or leave the consortium;

(5) The consortium's procedures for managing funds received under this grant;

(6) The terms and conditions of the memorandum of understanding (MOU) or other binding agreement executed by each member LEA; and

(7) The consortium's procurement process, and evidence of each member LEA's commitment to that process.

Core educational assurance areas means the four key areas originally identified in the American Reinvestment and Recovery Act (ARRA) to support comprehensive education reform: (1) Adopting standards and assessments that prepare students to succeed in college and the workplace and to compete in the global economy; (2) building data systems that measure student growth and success, and inform teachers and principals with data about how they can improve instruction; (3) recruiting, developing, rewarding, and retaining effective teachers and principals, especially where they are needed most; and (4) turning around lowest-achieving schools.

Digital learning content means learning materials and resources that can be displayed on an electronic device and shared electronically with other users. Digital learning content includes both open source and commercial content. In order to comply with the requirements of the Americans with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973, as amended, any digital learning content used by grantees must be accessible to individuals with disabilities, including individuals who use screen readers. For additional information regarding the application of these laws to technology, please refer to *www.ed.gov/ocr/letters/colleague-201105-ese.pdf* and *www.ed.gov/ocr/docs/dcl-ebook-faq-201105.pdf*.

Discipline means any disciplinary measure collected by the 2009–2010 or 2011–2012 Civil Rights Data Collection (see *http://ocrdata.ed.gov*).

Educators means all education professionals and education paraprofessionals working in participating schools (as defined in this notice), including principals or other heads of a school, teachers, other professional instructional staff (e.g., staff involved in curriculum development or staff development, bilingual/English as a Second Language (ESL) specialists, or instructional staff who operate library, media, and computer centers), pupil support services staff (e.g., guidance counselors, nurses, speech pathologists), other administrators (e.g., assistant principals, discipline specialists), and education paraprofessionals (e.g., assistant teachers, bilingual/ESL instructional aides).

Effective principal means a principal whose students, overall and for each subgroup, achieve acceptable rates (e.g., at least one grade level in an academic year) of student growth (as defined in this notice) as defined in the LEA's principal evaluation system (as defined in this notice).

Effective teacher means a teacher whose students achieve acceptable rates (e.g., at least one grade level in an academic year) of student growth (as defined in this notice) as defined in the LEA's teacher evaluation system (as defined in this notice).

Family and community supports means—

(1) Child and youth health programs, such as physical, mental, behavioral, and emotional health programs (e.g., home visiting programs; Head Start; Early Head Start; programs to improve nutrition and fitness, reduce childhood obesity, and create healthier communities);

(2) Safety programs, such as programs in school and out of school to prevent, control, and reduce crime, violence, drug and alcohol use, and gang activity; programs that address classroom and school-wide behavior and conduct; programs to prevent child abuse and neglect; programs to prevent truancy and reduce and prevent bullying and harassment; and programs to improve the physical and emotional security of the school setting as perceived, experienced, and created by students, staff, and families;

(3) Community stability programs, such as programs that: (a) Provide adult education and employment opportunities and training to improve educational levels, job skills, and readiness in order to decrease unemployment, with a goal of increasing family stability; (b) improve families' awareness of, access to, and use of a range of social services, if possible at a single location; (c) provide unbiased, outcome-focused, and comprehensive financial education, inside and outside the classroom and at every life stage; (d) increase access to traditional financial institutions (e.g., banks and credit unions) rather than alternative financial institutions (e.g., check cashers and payday lenders); (e) help families increase their financial literacy, financial assets, and savings; (f) help families access transportation to education and employment opportunities; and (g) provide supports

and services to students who are homeless, in foster care, migrant, or highly mobile; and

(4) Family and community engagement programs that are systemic, integrated, sustainable, and continue through a student's transition from K–12 schooling to college and career. These programs may include family literacy programs and programs that provide adult education and training and opportunities for family members and other members of the community to support student learning and establish high expectations for student educational achievement; mentorship programs that create positive relationships between children and adults; programs that provide for the use of such community resources as libraries, museums, television and radio stations, and local businesses to support improved student educational outcomes; programs that support the engagement of families in early learning programs and services; programs that provide guidance on how to navigate through a complex school system and how to advocate for more and improved learning opportunities; and programs that promote collaboration with educators and community organizations to improve opportunities for healthy development and learning.

Graduation rate means the four-year or extended-year adjusted cohort graduation rate as defined by 34 CFR 200.19(b)(1).

High-minority school is defined by the LEA in a manner consistent with its State's Teacher Equity Plan, as required by section 1111(b)(8)(C) of the ESEA. The LEA must provide, in its Race to the Top—District application, the definition used.

High-need students means students at risk of educational failure or otherwise in need of special assistance and support, such as students who are living in poverty, who attend high-minority schools (as defined in this notice), who are far below grade level, who have left school before receiving a regular high school diploma, who are at risk of not graduating with a diploma on time, who are homeless, who are in foster care, who have been incarcerated, who have disabilities, or who are English learners.

High-quality plan means a plan that includes key goals, activities to be undertaken and the rationale for the activities, the timeline, the deliverables, and the parties responsible for implementing the activities.

Highly effective principal means a principal whose students, overall and for each subgroup, achieve high rates (e.g., one and one-half grade levels in an academic year) of student growth (as defined in this notice) as defined under the LEA's principal evaluation system (as defined in this notice).

Highly effective teacher means a teacher whose students achieve high rates (e.g., one and one-half grade levels in an academic year) of student growth (as defined in this notice) as defined under the LEA's teacher evaluation system (as defined in this notice).

Interoperable data system means a system that uses a common, established structure such that data can easily flow from one system to another and in which data are in a non-proprietary, open format.

Local educational agency is an entity as defined in section 9101(26) of the ESEA, except that an entity described under section 9101(26)(D) must be recognized under applicable State law as a local educational agency.

Low-performing school means a school that is in the bottom 10 percent of performance in the State, or that has significant achievement gaps, based on student academic performance in reading/language arts and mathematics on the assessments required under the ESEA, or that has a graduation rate (as defined in this notice) below 60 percent.

Metadata means information about digital learning content such as the grade or age for which it is intended, the topic or standard to which it is aligned, or the type of resource it is (e.g., video, image).

On-track indicator means a measure, available at a time sufficiently early to allow for intervention, of a single student characteristic (e.g., number of days absent, number of discipline referrals, number of credits earned), or a composite of multiple characteristics, that is both predictive of student success (e.g., students demonstrating the measure graduate at an 80 percent rate) and comprehensive of students who succeed (e.g., of all graduates, 90 percent demonstrated the indicator). Using multiple indicators that are collectively comprehensive but vary by student characteristics may be an appropriate alternative to a single indicator that applies to all students.

Open data format means data that are available in a non-proprietary, machine-readable format (e.g., Extensible Markup Language (XML) and JavaScript Object Notation (JSON)) such that they can be understood by a computer. Digital formats that require extraction, data translation such as optical character recognition, or other manipulation in order to be used in electronic systems are not machine-readable formats.

Open-standard registry means a digital platform, such as the Learning Registry, that facilitates the exchange of information about digital learning content (as defined in this notice), including (1) alignment of content with college- and career-ready standards (as defined in this notice) and (2) usage information about learning content used by educators (as defined in this notice). This digital platform must have the capability to share content information with other LEAs and with State educational agencies.

Participating school means a school that is identified by the applicant and chooses to work with the applicant to implement the plan under Absolute Priority 1, either in one or more specific grade spans or subject areas or throughout the entire school and affecting a significant number of its students.

Participating student means a student enrolled in a participating school (as defined in this notice) and who is directly served by an applicant's plan under Absolute Priority 1.

Persistently lowest-achieving school means, as determined by the State, consistent with the requirements of the School Improvement Grants (SIG) program authorized by section 1003(g) of the ESEA,[2] (1) any Title I school in improvement, corrective action, or restructuring that (a) is among the lowest-achieving five percent of Title I schools in improvement, corrective action, or restructuring or the lowest-achieving five Title I schools in improvement, corrective action, or restructuring in the State, whichever number of schools is greater; or (b) is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years; and (2) any secondary school that is eligible for, but does not receive, Title I funds that (a) is among the lowest-achieving five percent of secondary schools or the lowest-achieving five secondary schools in the State that are eligible for, but do not receive, Title I funds, whichever number of schools is greater; or (b) is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years.

To identify the lowest-achieving schools, a State must take into account both (1) the academic achievement of the ''all students'' group in a school in terms of proficiency on the State's assessments under section 1111(b)(3) of the ESEA in reading or language arts

[2] The Department considers schools that are identified as Tier I or Tier II schools under the SIG program (see 75 FR 66363) as part of a State's approved applications to be persistently lowest-achieving schools. A list of these Tier I and Tier II schools can be found on the Department's Web site at *http://www2.ed.gov/programs/sif/index.html*

and in mathematics combined; and (2) the school's lack of progress on those assessments over a number of years in the ''all students'' group.

Principal evaluation system means a system that: (1) Is used for continual improvement of instructional leadership; (2) meaningfully differentiates performance using at least three performance levels; (3) uses multiple valid measures in determining performance levels, including, as a significant factor, data on student growth (as defined in this notice) for all students (including English learners and students with disabilities), as well as other measures of professional practice (which may be gathered through multiple formats and sources, such as observations based on rigorous leadership performance standards, teacher evaluation data, and student and parent surveys); (4) evaluates principals on a regular basis; (5) provides clear, timely, and useful feedback, including feedback that identifies and guides professional development needs; and (6) is used to inform personnel decisions.

Rural local educational agency means an LEA, at the time of the application, that is eligible under the Small Rural School Achievement (SRSA) program or the Rural and Low-Income School (RLIS) program authorized under Title VI, Part B of the ESEA. Eligible applicants may determine whether a particular LEA is eligible for these programs by referring to information on the Department's Web site at *http://www2.ed.gov/programs/reapsrsa/eligible13/index.html.*

School leadership team means a team that leads the implementation of improvement and other initiatives at the school and is composed of the principal or other head of a school, teachers, and other educators (as defined in this notice), and, as applicable, other school employees, parents, students, and other community members. In cases where statute or local policy, including collective bargaining agreements, establishes a school leadership team, that body shall serve as the school leadership team for the purpose of this program.

Student growth means the change in student achievement for an individual student between two or more points in time, defined as—

(1) For grades and subjects in which assessments are required under ESEA section 1111(b)(3): (a) A student's score on such assessments; and (b) may include other measures of student learning, such as those described in (2) below, provided they are rigorous and comparable across schools within an LEA.

(2) For grades and subjects in which assessments are not required under ESEA section 1111(b)(3): Alternative measures of student learning and performance, such as student results on pre-tests, end-of-course tests, and objective performance-based assessments; performance against student learning objectives; student performance on English language proficiency assessments; and other measures of student achievement that are rigorous and comparable across schools within an LEA.

Student-level data means demographic, performance, and other information that pertains to a single student.

Student performance data means information about the academic progress of a single student, such as formative and summative assessment data, information on completion of coursework, instructor observations, information about student engagement and time on task, and similar information.

Subgroup means each category of students identified under section 1111(b)(2)(C)(v)(II) of the ESEA and any combined subgroup used in the State accountability system that is approved by the Department in a State's request for ESEA flexibility.

Superintendent evaluation means a rigorous, transparent, and fair annual evaluation of an LEA superintendent that provides an assessment of performance and encourages professional growth. This evaluation must reflect: (1) The feedback of many stakeholders, including but not limited to educators, principals, and parents; and (2) student outcomes, including student growth for all students (including English learners and students with disabilities).

Teacher evaluation system means a system that: (1) Is used for continual improvement of instruction; (2) meaningfully differentiates performance using at least three performance levels; (3) uses multiple valid measures in determining performance levels, including, as a significant factor, data on student growth (as defined in this notice) for all students (including English learners and students with disabilities), as well as other measures of professional practice (which may be gathered through multiple formats and sources, such as observations based on rigorous teacher performance standards, teacher portfolios, and student and parent surveys); (4) evaluates teachers on a regular basis; (5) provides clear, timely, and useful feedback, including feedback that identifies and guides professional development needs; and (6) is used to inform personnel decisions.

Teacher of record means an individual (or individuals in a co-teaching assignment) who has been assigned the lead responsibility for a student's learning in a subject or course.

Application Requirements:

These application requirements are from the FY 2013 Race to the Top—District NFP, published elsewhere in this issue of the **Federal Register**. We may apply one or more of these application requirements in any year in which this program is in effect.

(1) *State comment period.* Each LEA included in an application must provide its State at least 10 business days to comment on the LEA's application and submit as part of its application package—

(a) The State's comments or, if the State declined to comment, evidence that the LEA offered the State 10 business days to comment; and

(b) The LEA's response to the State's comments (optional).

(2) *Mayor (or city or town administrator) comment period.* Each LEA included in an application must provide its mayor or other comparable official at least 10 business days to comment on the LEA's application and submit as part of its application package—

(a) The mayor or city or town administrator's comments or, if that individual declines to comment, evidence that the LEA offered such official 10 business days to comment; and

(b) The LEA's response to the mayor or city or town administrator comments (optional).

(3) *Consortium.* For LEAs applying as a consortium, the application must—

(a) Indicate, consistent with 34 CFR 75.128, whether—

(i) One member of the consortium is applying for a grant on behalf of the consortium; or

(ii) The consortium has established itself as a separate, eligible legal entity and is applying for a grant on its own behalf;

(b) Be signed by—

(i) If one member of the consortium is applying for a grant on behalf of the consortium, the superintendent or chief executive officer (CEO), local school board president, and local teacher union or association president (where applicable) of that LEA; or

(ii) If the consortium has established itself as a separate eligible legal entity and is applying for a grant on its own behalf, a legal representative of the consortium; and

(c) Include, consistent with 34 CFR 75.128, for each LEA in the consortium,

copies of all MOUs or other binding agreements related to the consortium. These binding agreements must—

(i) Detail the activities that each member of the consortium plans to perform;

(ii) Describe the consortium governance structure (as defined in this notice);

(iii) Bind each member of the consortium to every statement and assurance made in the application; and

(iv) Include an assurance signed by the LEA's superintendent or chief executive officer (CEO) that—

(A) The LEA, at a minimum, will implement no later than the 2014–2015 school year—

(*1*) A teacher evaluation system (as defined in this notice);

(*2*) A principal evaluation system (as defined in this notice); and

(*3*) A superintendent evaluation (as defined in this notice);

(B) The LEA is committed to preparing students for college or career, as demonstrated by—

(*1*) Being located in a State that has adopted college- and career-ready standards (as defined in this notice); or

(*2*) Measuring all student progress and performance against college- and career-ready graduation requirements (as defined in this notice);

(C) The LEA has a robust data system that has, at a minimum—

(*1*) An individual teacher identifier with a teacher-student match; and

(*2*) The capability to provide timely data back to educators and their supervisors on student growth (as defined in this notice);

(D) The LEA has the capability to receive or match student-level preschool-through 12th-grade and higher education data; and

(E) The LEA ensures that any disclosure of or access to personally identifiable information in students' education records complies with the Family Educational Rights and Privacy Act (FERPA); and

(v) Be signed by the superintendent or CEO, local school board president, and local teacher union or association president (where applicable).

Program Requirements:

These program requirements are from the FY 2013 Race to the Top—District NFP, published elsewhere in this issue of the **Federal Register**. We may apply one or more of these program requirements in any year in which this program is in effect.

(1) An applicant's budget request for all years of its project must fall within the applicable budget range as follows:

Number of participating students (as defined in this notice)	Award range
2,000–5,000 ..... or Fewer than 2,000, provided those students are served by a consortium of at least 10 LEAs and at least 75 percent of the students served by each LEA are participating students (as defined in this notice).	$4–10 million.
5,001–10,000	$10–20 million.
10,001–20,000	$20–25 million.
20,001+	$25–30 million.

The Department will not consider an application that requests a budget outside the applicable range of awards.

(2) A grantee must commit to participate in any national evaluation of the program and work with the Department and with a national evaluator or another entity designated by the Department to ensure that data collection and program design are consistent with plans to conduct a rigorous national evaluation of the program and of specific solutions and strategies pursued by individual grantees. This commitment must include, but need not be limited to—

(i) Consistent with 34 CFR 80.36 and State and local procurement procedures, grantees must include in contracts with external vendors provisions that allow contractors to provide implementation data to the LEA, the Department, the national evaluator, or other appropriate entities in ways consistent with all privacy laws and regulations.

(ii) Developing, in consultation with the national evaluator, a plan for identifying and collecting reliable and valid baseline data for program participants.

(3) LEAs must share metadata about content alignment with college- and career-ready standards (as defined in this notice) and use through open-standard registries.

(4) LEAs in which minority students or students with disabilities are disproportionately subject to discipline (as defined in this notice) and expulsion (according to data submitted through the Department's Civil Rights Data Collection, which is available at *http://ocrdata.ed.gov/*) must conduct a district assessment of the root causes of the disproportionate discipline and expulsions. These LEAs must also develop a detailed plan over the grant period to address these root causes and to reduce disproportionate discipline (as defined in this notice) and expulsions.

(5) Each grantee must make all project implementation and student data available to the Department and its authorized representatives in compliance with FERPA, as applicable.

(6) Grantees must ensure that requests for information (RFIs) and requests for proposal (RFPs) developed as part of this grant are made public, and are consistent with the requirements of State and local law.

(7) Within 100 days of award, each grantee must submit to the Department—

(i) A scope of work that is consistent with its grant application and includes specific goals, activities, deliverables, timelines, budgets, key personnel, and annual targets for key performance measures; and

(ii) An individual school implementation plan for participating schools (as defined in this notice).

(8) Within 100 days of award, each grantee must demonstrate that at least 40 percent of participating students (as defined in this notice) in participating schools (as defined in this notice) are from low-income families, based on eligibility for free or reduced-price lunch subsidies under the Richard B. Russell National School Lunch Act, or other poverty measures that LEAs use to make awards under section 1113(a) of the ESEA.

Program Authority: Sections 14005 and 14006 of the American Recovery and Reinvestment Act (Pub. L. 111–5), as amended by section 1832(b) of Division B of the Department of Defense and Full-Year Continuing Appropriations Act, 2011 (Pub. L. 112–10), and the Department of Education Appropriations Act, 2012 (Consolidated Appropriations Act, 2012) (Title III of Division F of Pub. L. 112–74).

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 86, 97, 98, and 99. (b) The Education Department suspension and debarment regulations in 2 CFR part 3485. (c) The notice of final priorities, requirements, definitions, and selection criteria for this program, published elsewhere in this issue of the **Federal Register**.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

Note: Nothing in this notice shall be construed to alter or otherwise affect the rights, remedies, and procedures afforded school or school district employees under Federal, State, or local laws (including applicable regulations or court orders) or under the terms of collective bargaining

agreements, MOUs, or other agreements between such employees and their employers.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $120,000,000.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2013 or subsequent fiscal years from the list of unfunded applicants from this competition.

The Department may use any unused funds from the FY 2013 Race to the Top-Early Learning Challenge program in the FY 2013 Race to the Top—District competition. Conversely, we may use any unused FY 2013 funds from the Race to the Top—District competition in the FY 2013 Race to the Top-Early Learning Challenge competition. The FY 2013 Race to the Top-Early Learning Challenge competition will be announced in a separate notice published in the **Federal Register**.

Estimated Range of Awards and Maximum Awards: The following chart illustrates the range for awards based on the number of participating students (as defined in this notice):

Number of participating students (as defined in this notice)	Award range
2,000–5,000	$4–10 million.
or	
Fewer than 2,000, provided those students are served by a consortium of at least 10 LEAs and at least 75 percent of the students served by each LEA are participating students (as defined in this notice).	
5,001–10,000	$10–20 million.
10,001–20,000	$20–25 million
20,001+	$25–30 million.

The Department will not consider an application that requests a budget outside the applicable range of awards.

The Secretary may change the maximum amount through a notice published in the **Federal Register.**

Estimated Number of Awards: 5–10.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 48 months.

III. Eligibility Information

These eligibility requirements are from the FY 2013 Race to the Top—District NFP, published elsewhere in this issue of the **Federal Register.** We may apply one or more of these eligibility requirements in any year in which this program is in effect.

(1) *Eligible applicants:* To be eligible for a grant under this competition:

(a) An applicant must be an individual LEA (as defined in this notice) or a consortium of individual LEAs from one of the 50 States, the District of Columbia, or the Commonwealth of Puerto Rico.

(i) LEAs may apply for all or a portion of their schools, for specific grades, or for subject-area bands (e.g., lowest-performing schools, secondary schools, schools connected by a feeder pattern, middle school math, or preschool through third grade).

(ii) Consortia may include LEAs from multiple States.

(iii) Each LEA may participate in only one Race to the Top—District application. Successful applicants (i.e., grantees) from past Race to the Top—District competitions may not apply for additional funding.

(b) An applicant must serve a minimum of 2,000 participating students (as defined in this notice) or may serve fewer than 2,000 participating students (as defined in this notice) provided those students are served by a consortium of at least 10 LEAs and at least 75 percent of the students served by each LEA are participating students (as defined in this notice). An applicant must base its requested award amount on the number of participating students (as defined in this notice) it proposes to serve at the time of application or within the first 100 days of the grant award.

(c) At least 40 percent of participating students (as defined in this notice) across all participating schools (as defined in this notice) must be students from low-income families, based on eligibility for free or reduced-price lunch subsidies under the Richard B. Russell National School Lunch Act, or other poverty measures that LEAs use to make awards under section 1113(a) of the ESEA. If an applicant has not identified all participating schools (as defined in this notice) at the time of application, it must provide an assurance that within 100 days of the grant award it will meet this requirement.

(d) An applicant must demonstrate its commitment to the core educational assurance areas (as defined in this notice), including, for each LEA included in an application, an assurance signed by the LEA's superintendent or CEO that—

(i) The LEA, at a minimum, will implement no later than the 2014–2015 school year—

(A) A teacher evaluation system (as defined in this notice);

(B) A principal evaluation system (as defined in this notice); and

(C) A superintendent evaluation (as defined in this notice);

(ii) The LEA is committed to preparing all students for college or career, as demonstrated by—

(A) Being located in a State that has adopted college- and career-ready standards (as defined in this notice); or

(B) Measuring all student progress and performance against college- and career-ready graduation requirements (as defined in this notice);

(iii) The LEA has a robust data system that has, at a minimum—

(A) An individual teacher identifier with a teacher-student match; and

(B) The capability to provide timely data back to educators and their supervisors on student growth (as defined in this notice);

(iv) The LEA has the capability to receive or match student-level preschool-through-12th grade and higher education data; and

(v) The LEA ensures that any disclosure of or access to personally identifiable information in students' education records complies with the FERPA.

(e) Required signatures for the LEA or lead LEA in a consortium are those of the superintendent or CEO, local school board president, and local teacher union or association president (where applicable).

(2) *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet or from the Department of Education. To obtain a copy via the Internet, use the following address: *www.ed.gov/programs/racetothetop-district.* To obtain a copy

from the Department of Education, write, fax, call, or email the following: James Butler, U.S. Department of Education, 400 Maryland Avenue SW., Room 7e214, Washington, DC 20202–4260. Telephone: (202) 453–6800. FAX: (202) 401–1557. Email: *racetothetop.district@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the program contact person listed in this section.

2. a. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Deadline for Notice of Intent to Apply: August 23, 2013. We will be able to develop a more efficient process for reviewing grant applications if we know the approximate number of applicants that intend to apply for funding under this competition. Therefore, the Secretary strongly encourages each potential applicant to notify us of the applicant's intent to submit an application for funding by completing a Web-based form. When completing this form, applicants will provide (1) the applicant's name and address; (2) whether the applicant is applying as an individual LEA or as a consortium of LEAs, including a list of the names of expected participating LEAs; (3) expected budget request; and (4) contact person (and phone number and email). Applicants may access this form online at *http://www2.ed.gov/programs/racetothetop-district/.* Applicants that do not complete this form may still apply for funding. In addition, the Secretary encourages LEAs that submit a notice of intent to apply to also notify relevant local stakeholders so that such stakeholders are aware of the applicant's intent to apply and can engage in the application process as appropriate.

Page Limit: The application narrative is where you, the applicant, address the selection criteria and priorities that reviewers use to evaluate your application. We strongly recommend you limit the application narrative to no more than 200 pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Each page has a page number.
- Line spacing for the narrative is set to 1.5 spacing, and the font used is 12 point Times New Roman.

The recommended page limit does not apply to the appendices; however we strongly recommend that you limit appendix length to the extent possible. The Department strongly requests applicants to follow the recommended page limits, although the Department will consider applications of greater length.

b. *Submission of Proprietary Information:*

Given the types of projects that may be proposed in applications for the Race to the Top—District program, an application may include business information, generally commercial or financial information, that the applicant considers proprietary. The Department's regulations define ''business information'' in 34 CFR 5.11.

Following the process used with our previous Race to the Top competitions, we plan to post applications on our Web site, so you may wish to request confidentiality of business information.

Consistent with Executive Order 12600, please designate in your application any information that you feel is exempt from disclosure under Exemption 4 of the Freedom of Information Act. In an attachment in Appendix A, titled ''Disclosure Exemption,'' please list the page number or numbers on which we can find this information. For additional information please see 34 CFR 5.11(c).

3. *Submission Dates and Times:*

Applications Available: August 6, 2013.

Deadline for Notice of Intent to Apply: August 23, 2013.

Note: Submission of a notice of intent to apply is optional.

Date of Application Webinar: Please refer to the Department's Race to the Top—District Web site (*http://www2.ed.gov/programs/racetothetop-district/index.html*) for webinar details.

Deadline for Transmittal of Applications: October 3, 2013.

Applications for grants under this competition must be submitted in electronic format on a CD or DVD, with CD–ROM or DVD–ROM preferred, by mail or hand delivery. For information (including dates and times) about how to submit your application by mail or hand delivery, please refer to section IV.7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. However, under 34 CFR 79.8(a), we waive intergovernmental review in order to make awards by December 31, 2013.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and System for Award Management:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the System for Award Management (SAM) (formerly the Central Contractor Registry (CCR)), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The SAM registration process may take five or more business days to complete. If you are currently registered with the SAM, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your SAM registration annually. This may take three or more business days to complete. Information about SAM is available at SAM.gov.

7. *Other Submission Requirements:* Applicants for a grant under this competition must submit: (1) An electronic copy of the application; and (2) signed originals of certain sections of the application. Applicants must submit their application in electronic format on a CD or DVD, with CD–ROM or DVD–ROM preferred. We strongly recommend that the applicant submit three CDs or DVDs. Each of these three CDs or DVDs should include the following four files:

(1) A single file that contains the body of the application narrative, including required budget tables, that has been converted into a searchable .PDF document. Note that a .PDF created from a scanned document will not be searchable;

(2) A single file that contains all application appendices in a .PDF format;

(3) A single file in a .PDF format that contains all of the required signature pages. The signature pages may be scanned and turned into a PDF. Consortia applicants should also include all signed MOUs or other binding agreements for each LEA in the consortium; and

(4) A single, separate file of the completed electronic budget spreadsheets (e.g., .XLS or .XLSX formats) that includes the required budget tables and budget justifications (the spreadsheets will be used by the Department for budget reviews).

Each of these items must be clearly labeled with the LEA's or lead LEA's name, city, State, and any other relevant identifying information. Applicants also must not password-protect these files. Additionally, please ensure that: (1) All three CDs or DVDs contain the same four files; (2) the files are not corrupted; and (3) all files print correctly. The Department is not responsible for reviewing any information that is not able to be opened or printed from your application package.

In addition to the electronic files, applicants must submit signed originals of certain sections of the application. An individual LEA applicant must submit signed originals of Parts IV, V, and VII of the application. An application from a consortium of LEAs must include signed originals of Parts IV, VI, and VII of the application as well as a signed MOU from each LEA in the consortium (as described in Part XIII of the application). The Department will not review any paper submissions of the application narrative and appendices. All applications must be submitted by mail or hand delivery. Whether you submit an application by mail or hand delivery, you must indicate on the envelope the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application. The instructions for each delivery method are provided below. The Department must receive the application by 4:30:00 p.m., Washington, DC time, on or before October 3, 2013. If we receive an application after the application deadline, we will not consider that application.

a. *Submission of Applications by Mail.*

If you submit your application by mail (through the U.S. Postal Service or a commercial carrier), we must receive your three CDs or DVDs containing the four application files, and the signed originals of the appropriate Parts (Parts IV, V, and VII for an individual LEA applicant, or Parts IV, VI, and VII and MOUs for a consortium applicant) on or before the application deadline date and time. Therefore, to avoid delays, we strongly recommend sending the application via overnight mail. Mail the application to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: CFDA Number 84.416, LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

If we receive an application after the application deadline, we will not consider that application.

b. *Submission of Applications by Hand Delivery.*

If you submit your application by hand delivery, you (or a courier service) must deliver the three CDs or DVDs containing the four application files, and the signed originals of the appropriate Parts (Parts IV, V, and VII for an individual LEA applicant, or Parts IV, VI, and VII and MOUs for a consortium applicant, on or before the application deadline date and time, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: CFDA Number 84.416, 550 12th Street SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260. The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30 p.m., Washington, DC, time, except Saturdays, Sundays, and Federal holidays. In accordance with EDGAR § 75.216 (b) and (c), an application will not be evaluated for funding if the applicant does not comply with all of the procedural rules that govern the submission of the application or the application does not contain the information required under the program.

Note for Mail or Hand Delivery of Applications: When you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* These selection criteria are from the FY 2013 Race to the Top—District NFP, published elsewhere in this issue of the **Federal Register**. We may apply one or more of these selection criteria in any year in which this program is in effect.

Note: Peer reviewers will use the scoring rubric that can be found in Appendix A of this notice when scoring the selection criteria.

A. Vision

(1) The extent to which the applicant has set forth a comprehensive and coherent reform vision that—

(a) Builds on its work in four core educational assurance areas (as defined in this notice);

(b) Articulates a clear and credible approach to the goals of accelerating student achievement, deepening student learning, and increasing equity through personalized student support grounded in common and individual tasks that are based on student academic interests; and

(c) Describes what the classroom experience will be like for students and teachers participating in personalized learning environments.

(2) The extent to which the applicant's approach to implementing its reform proposal (e.g., schools, grade bands, or subject areas) will support high-quality LEA-level and school-level implementation of that proposal, including—

(a) A description of the process that the applicant used or will use to select schools to participate. The process must ensure that the participating schools (as defined in this notice) collectively meet the competition's eligibility requirements;

(b) A list of the schools that will participate in grant activities (as available); and

(c) The total number of participating students (as defined in this notice), participating students (as defined in this

notice) from low-income families, participating students (as defined in this notice) who are high-need students (as defined in this notice), and participating educators (as defined in this notice). If participating schools (as defined in this notice) have yet to be selected, the applicant may provide approximate numbers.

(3) The extent to which the application includes a high-quality plan (as defined in this notice) describing how the reform proposal will be scaled up and translated into meaningful reform to support district-wide change beyond the participating schools (as defined in this notice), and will help the applicant reach its outcome goals (e.g., the applicant's logic model or theory of change of how its plan will improve student learning outcomes for all students who would be served by the applicant).

(4) The extent to which the applicant's vision is likely to result in improved student learning and performance and increased equity as demonstrated by ambitious yet achievable annual goals that are equal to or exceed State ESEA targets for the LEA(s), overall and by student subgroup (as defined in this notice), for each participating LEA in the following areas:

(a) Performance on summative assessments (proficiency status and growth).

(b) Decreasing achievement gaps (as defined in this notice).

(c) Graduation rates (as defined in this notice).

(d) College enrollment (as defined in this notice) rates.

Optional: The extent to which the applicant's vision is likely to result in improved student learning and performance and increased equity as demonstrated by ambitious yet achievable annual goals for each participating LEA in the following area:

(e) Postsecondary degree attainment.

B. Prior Record of Success and Conditions for Reform

The extent to which each LEA has demonstrated evidence of—

(1) A clear record of success in the past four years in advancing student learning and achievement and increasing equity in learning and teaching, including a description, charts or graphs, raw student data, and other evidence that demonstrates the applicant's ability to—

(a) Improve student learning outcomes and close achievement gaps (as defined in this notice), including by raising student achievement, high school graduation rates (as defined in this notice), and college enrollment (as defined in this notice) rates;

(b) Achieve ambitious and significant reforms in its persistently lowest-achieving schools (as defined in this notice) or in its low-performing schools (as defined in this notice); and

(c) Make student performance data (as defined in this notice) available to students, educators (as defined in this notice), and parents in ways that inform and improve participation, instruction, and services.

(2) A high level of transparency in LEA processes, practices, and investments, including by making public, by school, actual school-level expenditures for regular K–12 instruction, instructional support, pupil support, and school administration. At a minimum, this information must include a description of the extent to which the applicant already makes available the following four categories of school-level expenditures from State and local funds:

(a) Actual personnel salaries at the school level for all school-level instructional and support staff, based on the U.S. Census Bureau's classification used in the F–33 survey of local government finances (information on the survey can be found at *http://nces.ed.gov/ccd/f33agency.asp*);

(b) Actual personnel salaries at the school level for instructional staff only;

(c) Actual personnel salaries at the school level for teachers only; and

(d) Actual non-personnel expenditures at the school level (if available).

(3) Successful conditions and sufficient autonomy under State legal, statutory, and regulatory requirements to implement the personalized learning environments described in the applicant's proposal;

(4) Meaningful stakeholder engagement throughout the development of the proposal and meaningful stakeholder support for the proposal, including—

(a) A description of how students, families, teachers, and principals in participating schools (as defined in this notice) were engaged in the development of the proposal and, as appropriate, how the proposal was revised based on their engagement and feedback, including—

(i) For LEAs with collective bargaining representation, evidence of direct engagement and support for the proposals from teachers in participating schools (as defined in this notice); or

(ii) For LEAs without collective bargaining representation, at a minimum, evidence that at least 70 percent of teachers from participating schools (as defined in this notice) support the proposal; and

(b) Letters of support from such key stakeholders as parents and parent organizations, student organizations, early learning programs, tribes, the business community, civil rights organizations, advocacy groups, local civic and community-based organizations, and institutions of higher education.

C. Preparing Students for College and Careers

The extent to which the applicant has a high-quality plan (as defined in this notice) for improving learning and teaching by personalizing the learning environment in order to provide all students the support to graduate college- and career-ready. This plan must include an approach to implementing instructional strategies for all participating students (as defined in this notice) that enable participating students to pursue a rigorous course of study aligned to college- and career-ready standards (as defined in this notice) and college- and career-ready graduation requirements (as defined in this notice) and accelerate his or her learning through support of his or her needs. This includes the extent to which the applicant proposes an approach that includes the following:

(1) *Learning:* An approach to learning that engages and empowers all learners, in particular high-need students (as defined in this notice), in an age-appropriate manner such that:

(a) With the support of parents and educators, all students—

(i) Understand that what they are learning is key to their success in accomplishing their goals;

(ii) Identify and pursue learning and development goals linked to college- and career-ready standards (as defined in this notice) or college- and career-ready graduation requirements (as defined in this notice), understand how to structure their learning to achieve their goals, and measure progress toward those goals;

(iii) Are able to be involved in deep learning experiences in areas of academic interest;

(iv) Have access and exposure to diverse cultures, contexts, and perspectives that motivate and deepen individual student learning; and

(v) Master critical academic content and develop skills and traits such as goal-setting, teamwork, perseverance, critical thinking, communication, creativity, and problem-solving;

(b) With the support of parents and educators (as defined in this notice), each student has access to—

(i) A personalized sequence of instructional content and skill development designed to enable the student to achieve his or her individual learning goals and ensure he or she can graduate on time and college- and career-ready;

(ii) A variety of high-quality instructional approaches and environments;

(iii) High-quality content, including digital learning content (as defined in this notice) as appropriate, aligned with college- and career-ready standards (as defined in this notice) or college- and career-ready graduation requirements (as defined in this notice);

(iv) Ongoing and regular feedback, including, at a minimum—

(A) Frequently updated individual student data that can be used to determine progress toward mastery of college- and career-ready standards (as defined in this notice), or college- and career-ready graduation requirements (as defined in this notice); and

(B) Personalized learning recommendations based on the student's current knowledge and skills, college- and career-ready standards (as defined in this notice) or college- and career-ready graduation requirements (as defined in this notice), and available content, instructional approaches, and supports; and

(v) Accommodations and high-quality strategies for high-need students (as defined in this notice) to help ensure that they are on track toward meeting college- and career-ready standards (as defined in this notice) or college- and career-ready graduation requirements (as defined in this notice); and

(c) Mechanisms are in place to provide training and support to students that will ensure that they understand how to use the tools and resources provided to them in order to track and manage their learning.

(2) *Teaching and Leading:* An approach to teaching and leading that helps educators (as defined in this notice) to improve instruction and increase their capacity to support student progress toward meeting college- and career-ready standards (as defined in this notice) or college- and career-ready graduation requirements (as defined in this notice) by enabling the full implementation of personalized learning and teaching for all students, in particular high-need students (as defined in this notice), such that:

(a) All participating educators (as defined in this notice) engage in training, and in professional teams or communities, that supports their individual and collective capacity to—

(i) Support the effective implementation of personalized learning environments and strategies that meet each student's academic needs and help ensure all students can graduate on time and college- and career-ready;

(ii) Adapt content and instruction, providing opportunities for students to engage in common and individual tasks, in response to their academic needs, academic interests, and optimal learning approaches (e.g., discussion and collaborative work, project-based learning, videos, audio, manipulatives);

(iii) Frequently measure student progress toward meeting college- and career-ready standards (as defined in this notice) or college- and career-ready graduation requirements (as defined in this notice) and use data to inform both the acceleration of student progress and the improvement of the individual and collective practice of educators (as defined in this notice); and

(iv) Improve teachers' and principals' practice and effectiveness by using feedback provided by the LEA's teacher and principal evaluation systems (as defined in this notice), including frequent feedback on individual and collective effectiveness, as well as by providing recommendations, supports, and interventions as needed for improvement.

(b) All participating educators (as defined in this notice) have access to, and know how to use, tools, data, and resources to accelerate student progress toward meeting college- and career-ready graduation requirements (as defined in this notice). Those resources must include—

(i) Actionable information that helps educators (as defined in this notice) identify optimal learning approaches that respond to individual student academic needs and interests;

(ii) High-quality learning resources (e.g., instructional content and assessments), including digital resources, as appropriate, that are aligned with college- and career-ready standards (as defined in this notice) or college- and career-ready graduation requirements (as defined in this notice), and the tools to create and share new resources; and

(iii) Processes and tools to match student needs (see Selection Criterion (C)(2)(b)(i)) with specific resources and approaches (see Selection Criterion (C)(2)(b)(ii)) to provide continuously improving feedback about the effectiveness of the resources in meeting student needs.

(c) All participating school leaders and school leadership teams (as defined in this notice) have training, policies, tools, data, and resources that enable them to structure an effective learning environment that meets individual student academic needs and accelerates student progress through common and individual tasks toward meeting college- and career-ready standards (as defined in this notice) or college- and career-ready graduation requirements (as defined in this notice). The training, policies, tools, data, and resources must include:

(i) Information, from such sources as the district's teacher evaluation system (as defined in this notice), that helps school leaders and school leadership teams (as defined in this notice) assess, and take steps to improve, individual and collective educator effectiveness and school culture and climate, for the purpose of continuous school improvement; and

(ii) Training, systems, and practices to continuously improve school progress toward the goals of increasing student performance and closing achievement gaps (as defined in this notice).

(d) The applicant has a high-quality plan (as defined in this notice) for increasing the number of students who receive instruction from effective and highly effective teachers and principals (as defined in this notice), including in hard-to-staff schools, subjects (such as mathematics and science), and specialty areas (such as special education).

D. LEA Policy and Infrastructure

The extent to which the applicant has a high-quality plan (as defined in this notice) to support project implementation through comprehensive policies and infrastructure that provide every student, educator (as defined in this notice), and level of the education system (classroom, school, and LEA) with the support and resources they need, when and where they are needed. This includes the extent to which—

(1) The applicant has practices, policies, and rules that facilitate personalized learning by—

(a) Organizing the LEA central office, or the consortium governance structure (as defined in this notice), to provide support and services to all participating schools (as defined in this notice);

(b) Providing school leadership teams (as defined in this notice) in participating schools (as defined in this notice) with sufficient flexibility and autonomy over factors such as school schedules and calendars, school personnel decisions and staffing models, roles and responsibilities for educators and noneducators, and school-level budgets;

(c) Giving students the opportunity to progress and earn credit based on

demonstrated mastery, not the amount of time spent on a topic;

(d) Giving students the opportunity to demonstrate mastery of standards at multiple times and in multiple comparable ways; and

(e) Providing learning resources and instructional practices that are adaptable and fully accessible to all students, including students with disabilities and English learners; and

(2) The LEA and school infrastructure supports personalized learning by—

(a) Ensuring that all participating students (as defined in this notice), parents, educators (as defined in this notice), and other stakeholders (as appropriate and relevant to student learning), regardless of income, have access to necessary content, tools, and other learning resources both in and out of school to support the implementation of the applicant's proposal;

(b) Ensuring that students, parents, educators (as defined in this notice), and other stakeholders (as appropriate and relevant to student learning) have appropriate levels of technical support, which may be provided through a range of strategies (e.g., peer support, online support, or local support);

(c) Using information technology systems that allow parents and students to export their information in an open data format (as defined in this notice) and to use the data in other electronic learning systems (e.g., electronic tutors, tools that make recommendations for additional learning supports, or software that securely stores personal records); and

(d) Ensuring that LEAs and schools use interoperable data systems (as defined in this notice) (e.g., systems that include human resources data, student information data, budget data, and instructional improvement system data).

E. Continuous Improvement

Because the applicant's plans represent the best thinking at a point in time, and may require adjustments and revisions during implementation, it is vital that the applicant have a clear and high-quality approach to continuously improve its plans. This will be determined by the extent to which the applicant has—

(1) A high-quality plan (as defined in this notice) for implementing a rigorous continuous improvement process that provides timely and regular feedback on progress toward project goals and opportunities for ongoing corrections and improvements during and after the term of the grant. The plan must address how the applicant will monitor, measure, and publicly share information on the quality of its investments funded by Race to the Top—District, such as investments in professional development, technology, and staff;

(2) A high-quality plan (as defined in this notice) for ongoing communication and engagement with internal and external stakeholders; and

(3) Ambitious yet achievable performance measures, overall and by subgroup (as defined in this notice), with annual targets for required and applicant-proposed performance measures. For each applicant-proposed measure, the applicant must describe—

(a) Its rationale for selecting that measure;

(b) How the measure will provide rigorous, timely, and formative leading information tailored to its proposed plan and theory of action regarding the applicant's implementation success or areas of concern; and

(c) How it will review and improve the measure over time if it is insufficient to gauge implementation progress.

The applicant should have a total of approximately 12 to 14 performance measures.

The chart below outlines the required and applicant-proposed performance measures based on an applicant's applicable population.

Applicable population	Performance measure
All	(a) The number and percentage of participating students (as defined in this notice), by subgroup (as defined in this notice), whose teacher of record (as defined in this notice) and principal are a highly effective teacher (as defined in this notice) and a highly effective principal (as defined in this notice); and (b) The number and percentage of participating students (as defined in this notice), by subgroup (as defined in this notice), whose teacher of record (as defined in this notice) and principal are an effective teacher (as defined in this notice) and an effective principal (as defined in this notice).
PreK–3	(a) Applicant must propose at least one age- appropriate measure of students' academic growth (e.g., language and literacy development or cognition and general learning, including early mathematics and early scientific development); and (b) Applicant must propose at least one age-appropriate non-cognitive indicator of growth (e.g., physical well-being and motor development, or social-emotional development).
4–8	(a) The number and percentage of participating students (as defined in this notice), by subgroup, who are on track to college- and career-readiness based on the applicant's on-track indicator (as defined in this notice); (b) Applicant must propose at least one grade-appropriate academic leading indicator of successful implementation of its plan; and (c) Applicant must propose at least one grade-appropriate health or social-emotional leading indicator of successful implementation of its plan.
9–12	(a) The number and percentage of participating students (as defined in this notice) who complete and submit the Free Application for Federal Student Aid (FAFSA) form; (b) The number and percentage of participating students (as defined in this notice), by subgroup, who are on track to college- and career-readiness based on the applicant's on-track indicator (as defined in this notice); (c) Applicant must propose at least one measure of career-readiness in order to assess the number and percentage of participating students (as defined in this notice) who are or are on track to being career-ready; (d) Applicant must propose at least one grade-appropriate academic leading indicator of successful implementation of its plan; and (e) Applicant must propose at least one grade-appropriate health or social-emotional leading indicator of successful implementation of its plan.

(4) A high-quality plan to rigorously evaluate the effectiveness of Race to the Top—District funded activities, such as professional development and activities that employ technology.

F. Budget and Sustainability

The extent to which—

(1) The applicant's budget, including the budget narrative and tables—

(a) Identifies all funds that will support the project (e.g., Race to the Top—District grant; external foundation support; LEA, State, and other Federal funds);

(b) Is reasonable and sufficient to support the development and implementation of the applicant's proposal; and

(c) Clearly provides a thoughtful rationale for investments and priorities, including—

(i) A description of *all* of the funds (e.g., Race to the Top—District grant; external foundation support; LEA, State, and other Federal funds) that the applicant will use to support the implementation of the proposal, including total revenue from these sources; and

(ii) Identification of the funds that will be used for one-time investments versus those that will be used for ongoing operational costs that will be incurred during and after the grant period, as described in the proposed budget and budget narrative, with a focus on strategies that will ensure the long-term sustainability of the personalized learning environments; and

(2) The applicant has a high-quality plan (as defined in this notice) for sustainability of the project's goals after the term of the grant. The plan should include support from State and local government leaders, financial support, and a description of how the applicant will evaluate the effectiveness of past investments and use this data to inform future investments. Such a plan may address how the applicant will evaluate improvements in productivity and outcomes to inform a post-grant budget, and include an estimated budget for the three years after the term of the grant that includes budget assumptions, potential sources, and uses of funds.

2. *Review and Selection Process:* In selecting grantees, the Secretary may consider high-ranking applications meeting Absolute Priorities 2 through 5 separately to ensure that there is a diversity of winning LEA applications from within States that have and have not previously received awards under Race to the Top, and from both non-rural and rural LEAs (as defined in this notice).

We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We also may notify you informally.

If your application is not evaluated or not selected for funding, we will notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* Each grantee receiving Race to the Top—District funds must submit to the Department an annual report that must include a description of its progress to date on its goals, timelines, activities, deliverables, and budgets, and a comparison of actual performance to the annual targets the grantee established in its application for each performance measure. Further, a grantee receiving funds under this program is accountable for meeting the goals, timelines, activities, deliverables, budget, and annual targets established in the application; adhering to an annual fund drawdown schedule that is tied to meeting these goals, timelines, activities, deliverables, budget, and annual targets; and fulfilling and maintaining all other conditions for the conduct of the project. The Department will monitor a grantee's progress in meeting its goals, timelines, activities, deliverables, budget, and annual targets and in fulfilling other applicable requirements. In addition, the Department may collect additional data as part of a grantee's annual reporting requirements.

To support a collaborative process between the grantee and the Department, the Department may require that applicants that are selected to receive an award enter into a written performance agreement or cooperative agreement with, or complete a scope of work to be approved by, the Department. If the Department determines that a grantee is not meeting its goals, timelines, activities, deliverables, budget, or annual targets or is not fulfilling other applicable requirements, the Department will take appropriate action, which could include a collaborative process between the Department and the grantee, or enforcement measures with respect to this grant, such as placing the grantee in high-risk status, putting it on reimbursement payment status, or delaying or withholding funds.

An LEA that receives a Race to the Top—District grant must also meet the reporting requirements for the Federal Funding Accountability and Transparency Act (FFATA) for subaward and executive compensation data. Grantees, referred to as ''prime awardees,'' must report using the FFATA Subaward Reporting System (FSRS) and must, therefore, register in FSRS. More specific information regarding the FFATA reporting requirements will be provided after the grants are awarded.

4. *Continuation Awards:* The Department may provide full funding for the entire project period to successful applicants from the FY 2013 funds currently available or may provide funding for an initial budget period from the FY 2013 funds. Depending upon the amount of funding provided in the initial awards and the availability of funds, the Department may make continuation awards for subsequent fiscal years in accordance with 34 CFR 75.253. In making such continuation awards, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made ''substantial progress toward meeting the objectives in its approved application.'' This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation grant, the Secretary also considers

whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: James Butler, U.S. Department of Education, 400 Maryland Avenue SW., Room 7e214, Washington, DC 20202. Telephone: (202) 453–6800 or by email: *racetothetop.district@ed.gov.*

If you use a TDD or a TTY, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* 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 Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

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

Dated: July 30, 2013.

Arne Duncan,

Secretary of Education.

Appendix A: Scoring Overview and Chart

I. Introduction

To help ensure inter-reviewer reliability and transparency for reviewing Race to the Top—District applications, the U.S. Department of Education has created a detailed scoring chart for scoring applications. The chart details the allocation of point values that reviewers will be using. Race to the Top—District grants will be awarded on a competitive basis to LEAs or consortia of LEAs. The chart will be used by reviewers to ensure consistency across and within review panels.

Reviewers will be assessing multiple aspects of each Race to the Top—District application. It is possible that an applicant that fails to earn points or earns a low number of points on one criterion might still win a Race to the Top—District award by earning high points on other criteria.

Reviewers will be required to make many thoughtful judgments about the quality of the applications. For example, reviewers will be assessing, based on the criteria, the comprehensiveness and feasibility of the plans. Reviewers will be asked to evaluate whether applicants have set ambitious yet achievable performance measures and annual targets in their applications. Reviewers will need to make informed judgments about applicants' goals, performance measures, annual targets, proposed activities and the rationale for those activities, the timeline, the deliverables, and credibility of applicants' plans.

Applicants must address Absolute Priority 1 throughout their applications, and Absolute Priority 1 must be met in order for an applicant to receive funding. Additionally, an applicant must designate which of Absolute Priorities 2 through 5 it meets. Applicants may choose to address the competitive preference priority in Part X of the application and may earn extra points under that priority.

This appendix includes the point values for each criterion and for the competitive preference priority, guidance on scoring, and the scoring chart that the Department will provide to reviewers.

II. Points Overview

The scoring chart below shows the maximum number of points that may be assigned to each criterion and to the competitive preference priority.

	Detailed points	Section points	Section %
Selection Criteria:			
A. Vision		40	19
(A)(1) Articulating a comprehensive and coherent reform vision	10		
(A)(2) Applicant's approach to implementation	10		
(A)(3) LEA-wide reform & change	10		
(A)(4) LEA-wide goals for improved student outcomes	10		
B. Prior Record of Success and Conditions for Reform		45	21
(B)(1) Demonstrating a clear track record of success	15		
(B)(2) Increasing transparency in LEA processes, practices, & investments	5		
(B)(3) State context for implementation	10		
(B)(4) Stakeholder engagement and support	15		
C. Preparing Students for College and Careers		40	19
(C)(1) Learning	20		
(C)(2) Teaching and Leading	20		
D. LEA Policy and Infrastructure		25	12
(D)(1) LEA practices, policies, and rules	15		
(D)(2) LEA and school infrastructure	10		
E. Continuous Improvement		30	14
(E)(1) Continuous improvement process	15		
(E)(2) Ongoing communication and engagement	5		
(E)(3) Performance measures	5		
(E)(4) Evaluating effectiveness of investments	5		
F. Budget and Sustainability		20	10
(F)(1) Budget for the project	10		
(F)(2) Sustainability of project goals	10		
Competitive Preference Priority	10	10	5
	210	210	100

III. About Scoring

The Department will give reviewers general guidance on how to evaluate and score the information that each applicant submits; this guidance will be consistent with the requirements, priorities, selection criteria, and definitions in the NIA. Reviewers will allot points based on the extent to which the applicant meets the criteria and the competitive preference priority, including existing track record and conditions as well as future plans. For plans, reviewers will allot points based on the quality of the applicant's plan and, where specified in the text of the criterion or competitive preference priority, whether the applicant has set ambitious yet achievable goals, performance measures, and annual targets. In making these judgments, reviewers will consider the extent to which the applicant has:

• *A high-quality plan.* In determining the quality of an applicant's plan, reviewers will evaluate the key goals, the activities to be undertaken and rationale for the activities, the timeline, the deliverables, the parties responsible for implementing the activities, and the overall credibility of the plan (as judged, in part, by the information submitted as supporting evidence). Applicants should submit this information for each criterion that the applicant addresses that includes a plan. Applicants may also submit additional information that they believe will be helpful to peer reviewers.

• *Ambitious yet achievable goals, performance measures, and annual targets.* In determining whether an applicant has ambitious yet achievable goals, performance measures, and annual targets, reviewers will examine the applicant's goals, measures, and annual targets in the context of the applicant's proposal and the evidence submitted (if any) in support of the proposal. There are no specific goals, performance measures, or annual targets that reviewers will be looking for here; nor will higher ones necessarily be rewarded above lower ones. Rather, reviewers will reward applicants for developing ''ambitious yet achievable'' goals, performance measures, and annual targets that are meaningful for the applicant's proposal and for assessing implementation progress, successes, and challenges.

Note that the evidence that applicants submit may be relevant both to judging whether the applicant has a high-quality plan and whether its goals, performance measures, and annual targets are ambitious yet achievable.

About Assigning Points: For each criterion, reviewers will assign points to an application. The Department has specified maximum point values at the criterion level.

The reviewers will use the general ranges below as a guide when awarding points.

Maximum point value	Quality of applicant's response		
	Low	Medium	High
20	0–4	5–15	16–20
15	0–3	4–11	12–15
10	0–2	3–7	8–10
5	0–1	2–3	4–5

About Priorities: There are two types of priorities in the Race to the Top—District competition.

• Absolute Priorities

○ Absolute Priority 1 cuts across the entire application and should not be addressed separately. It will be assessed, after the proposal has been fully reviewed and evaluated, to ensure that the application has met the priority. If an application has not met the priority, it will be eliminated from the competition. In those cases where there is a disparity in the reviewers' determinations on the priority, the Department will consider Absolute Priority 1 met only if a majority of the reviewers on a panel determine that an application meets the priority.

○ Absolute Priorities 2–5 are not judged by peer reviewers. Applicants indicate in the Application Assurances in Parts V or VI of the application which one of Absolute Priorities 2–5 applies to them. The Department will review Application Assurances before making grant awards.

• Competitive Preference Priority

○ The competitive preference priority is optional and applicants may respond to it in Part X of the application. It is worth up to 10 points, and reviewers will allot points based on the extent to which the applicant meets the priority.

In the Event of a Tie: If two or more applications have the same score and there is not sufficient funding to support all of the tied applicants in the funding range, the applicants' scores on criterion (B)(1) will be used to break the tie.

Review and Selection Process: We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

Appendix B: Memorandum of Understanding for Consortia Applicants

BACKGROUND

LEAs that apply to the Race to the Top—District competition as members of a consortium are required to enter into a memorandum of understanding (MOU) or other binding agreements with each other.

To support consortia in working together effectively, the U.S. Department of Education has produced a model MOU, which is attached. This model MOU may serve as a template for eligible LEAs that are considering entering into a consortium for the purpose of applying for a Race to the Top—District grant; however, consortia are not required to use it. They may use a different document that includes the key features noted below and in the model, and they should consult with their attorneys on what is most appropriate for their consortia.

The purpose of the model MOU is to help to specify a relationship that is specific to the Race to the Top—District competition. It is not meant to detail all typical aspects of consortia grant management or administration. At a minimum, each MOU must include the following key elements, each of which is described in detail below: (i) Terms and conditions, (ii) consortium governance structure, and (iii) signatures.

(i) Terms and conditions: Each member of a consortium should sign a standard set of terms and conditions that includes, at a minimum, key roles and responsibilities of the applicant for the consortium (lead LEA) and member LEAs and assurances that make clear what the applicant and member LEAs are agreeing to do. In accordance with the requirements for consortia applicants in the Race to the Top—District notice inviting applications and the requirements for group applicants under 34 CFR 75.127–129, the MOU must:

• Designate one member of the group to apply for the grant or establish a separate legal entity to apply for the grant;

• Detail the activities that each member of the consortium plans to perform;

• Bind each member of the consortium to every statement and assurance made by the applicant in the application;

• State that the applicant for the consortium (the lead LEA) is legally responsible for:

○ The use of all grant funds;

○ Ensuring that the project is carried out by the consortium in accordance with Federal requirements;

○ Ensuring that the indirect cost funds are determined as required under 34 CFR 75.564(e);

○ Carrying out the activities it has agreed to perform; and

○ Using the funds that it receives under the MOU in accordance with the Federal

requirements that apply to the Race to the Top—District grant;

• State that each member of the consortium is legally responsible for:

○ Carrying out the activities it has agreed to perform; and

○ Using the funds that it receives under the MOU in accordance with the Federal requirements that apply to the Race to the Top—District grant; and

• Contain an assurance that each LEA:

○ At a minimum, will implement no later than the 2014–2015 school year—

■ A teacher evaluation system (as defined in this notice); [3]

■ A principal evaluation system (as defined in this notice); and

■ A superintendent evaluation (as defined in this notice);

○ Is committed to preparing students for college or career, as demonstrated by:

■ Being located in a State that has adopted college- and career-ready standards (as defined in this notice); or

■ Measuring all student progress and performance against college- and career-ready graduation requirements (as defined in this notice);

○ Has a robust data system that has, at a minimum—

■ An individual teacher identifier with a teacher-student match; and

■ The capability to provide timely data back to educators and their supervisors on student growth;

○ Has the capability to receive or match student-level preschool-through- 12th grade and higher education data; and

○ Ensures that any disclosure of or access to personally identifiable information in students' education records complies with the Family Educational Rights and Privacy Act (FERPA).

(ii) Consortium governance structure: As stated in the notice, at a minimum, the MOU must describe the consortium's structure for carrying out its operations, including:

• The organizational structure of the consortium and the differentiated roles that a member LEA may hold (e.g., lead LEA, member LEA);

• For each differentiated role, the associated rights and responsibilities (including rights and responsibilities for adopting and implementing the consortium's proposal for a grant);

• The consortium's method and process (e.g., consensus, majority) for making different types of decisions (e.g., policy, operational);

• The protocols by which the consortium will operate, including the protocols for member LEAs to change roles or leave the consortium;

• The consortium's plan for managing funds received under this grant;

• The terms and conditions of the memorandum of understanding or other binding agreement executed by each member LEA; and

• The consortium's procurement process, and evidence of each member LEA's commitment to that process.

(iii) Signatures: As stated in the notice, each MOU must be signed by the LEA's superintendent or CEO, local school board president, and local teacher union or association president (where applicable).

I. Model Memorandum Of Understanding for Race to the Top—District Grant

[Consortium Name]

I. Parties

This Memorandum of Understanding (''MOU'') is made and effective as of this [DAY] day of [MONTH, YEAR], by and between the [LEA] and all other member LEAs of [CONSORTIUM (''Consortium'')] that have also executed this MOU.

[LEA] has elected to participate in [CONSORTIUM] as (check one):

_____ Lead LEA

_____ Member LEA

II. Scope of MOU

This MOU constitutes an understanding between the Consortium member LEAs to participate in the Consortium. This document describes the purpose and goals of the Consortium, explains its organizational and governance structure, and defines the terms and responsibilities of participation in the Consortium.

III. Binding Commitments and Assurances

To support these goals, each signatory LEA that signs this MOU assures, certifies, and represents that the signatory LEA:

a. Has all requisite power and authority to execute this MOU;

b. Is familiar with all the contents of the Consortium application;

c. At a minimum, will implement no later than the 2014–2015 school year—

i. A teacher evaluation system (as defined in this notice); [4]

ii. A principal evaluation system (as defined in this notice); and

iii. A superintendent evaluation (as defined in this notice);

d. Is committed to preparing students for college or career, as demonstrated by:

i. Being located in a State that has adopted college- and career-ready standards (as defined in this notice); or

ii. Measuring all student progress and performance against college- and career-ready graduation requirements (as defined in this notice);

e. Has a robust data system that has, at a minimum—

i. An individual teacher identifier with a teacher-student match; and

ii. The capability to provide timely data back to educators and their supervisors on student growth;

f. Has the capability to receive or match student-level preschool-through-12th grade and higher education data;

g. Ensures that any disclosure of or access to personally identifiable information in students' education records complies with the Family Educational Rights and Privacy Act (FERPA);

h. Will comply with all of the terms of the Grant, and all applicable Federal, State, and local laws and regulations, including laws and regulations applicable to the program, and the applicable provisions of EDGAR (34 CFR parts 75, 77, 79, 80, 82, 84, 86, 97, 98, and 99) and 2 CFR part 3485;

i. Meets all the eligibility requirements described in the application and notice;

j. Will bind itself to and comply with all elements of the Consortium governance structure described in this MOU and the individual LEA's role in the structure as described in this MOU; and

k. Will bind itself to every statement and assurance made in the Consortium's application, including but not limited to programs, plans, policies, strategies, and requirements that the Consortium plans to implement.

IV. Consortium Membership

a. Each member LEA and the lead LEA will sign on to only one application for a Race to the Top—District grant.

b. Each LEA in the Consortium is legally responsible for:

1. Carrying out the activities it has agreed to perform; and

2. Using the funds that it receives under the MOU in accordance with the Federal requirements that apply to the Race to the Top—District grant.

c. Each LEA in the Consortium will support the activities of the Consortium as follows:

1. Participate in all activities and projects that the Consortium board approves in support of the Consortium's application;

2. Participate in the management of all those activities and projects;

3. [Other activities as necessary]

d. [If applicable, the MOU should also describe the unique activities and roles that each LEA will perform for the Consortium.]

V. Lead LEA

a. The lead LEA will serve as the ''Applicant'' LEA for purposes of the grant application, applying as the member of the Consortium on behalf of the Consortium, pursuant to the Application Requirements of the notice and 34 CFR 75.127–129.

b. The lead LEA is legally responsible for:

i. The use of all grant funds;

ii. Ensuring that the project is carried out by the Consortium in accordance with Federal requirements; and

iii. Ensuring that the indirect cost funds are determined as required under 34 CFR 75.564(e).

c. The lead LEA or another LEA participating in the consortium will act as the fiscal agent on behalf of the Consortium.

d. The LEA acting as fiscal agent will comply with [STATE's] statutes regarding procurement, accounting practices, and all other relevant areas of law, including but not limited to [CITATIONS].

[3] The term ''as defined in this notice'' is used throughout this Appendix and model memorandum of understanding. ''This notice'' refers to the notice inviting applications (NIA) for the Race to the Top—District competition.

[4] The term ''as defined in this notice'' is used throughout the model memorandum of understanding. ''This notice'' refers to the notice inviting applications (NIA) for the Race to the Top—District competition.

VI. Consortium Governance:

[In this section the Consortium should describe its governance structure. As stated in the notice, at a minimum, the MOU must describe the Consortium's structure for carrying out its operations, including:

a. The organizational structure of the Consortium and the differentiated roles that a member LEA may hold (e.g., lead LEA, member LEA);

b. For each differentiated role, the associated rights and responsibilities (including rights and responsibilities related for adopting and implementing the Consortium's proposal for a grant);

c. The Consortium's method and process (e.g., consensus, majority) for making different types of decisions (e.g., policy, operational);

d. The protocols by which the Consortium will operate, including the protocols for member LEAs to change roles or leave the Consortium;

e. The Consortium's plan for managing funds received under this grant;

f. The terms and conditions of the MOU or other binding agreements executed by each member LEA; and

g. The Consortium's procurement process, and evidence of each member LEA's commitment to that process.]

VII. Modification

This MOU may be amended only by written agreement signed by each of the parties involved, and in consultation with the U.S. Department of Education.

[A Consortium may find it necessary to include other terms and conditions in its MOU, such as provisions explaining governing law, liability and risk of loss, and resolution of conflicts.]

VIII. Duration/Termination

This MOU shall be effective, beginning with the date of the last signature hereon, and if the grant is received, ending upon the expiration of the grant project period, or upon mutual agreement of the parties, whichever occurs first.

IX. Points of Contact

Communications with the LEA regarding this MOU should be directed to:

Name: [NAME]
Mailing Address: [ADDRESS]
Telephone: [(###) ###–####]
Fax: [(###) ###-####]
Email: [EMAIL@EMAIL]

Or hereinafter to another individual that may be designated by the LEA in writing transmitted to the [appropriate party of the Consortium].

X. Signatures

[LEA] hereby joins the Consortium as a lead/member (circle one), and agrees to be bound by all the assurances and commitments associated with lead/member (circle one) classification. Further, the LEA agrees to perform the duties and carry out the responsibilities associated with the lead/member (circle one) membership classification as described in this MOU.

Superintendent or CEO of the LEA (Printed Name):	Telephone:
Signature of Superintendent or CEO of the LEA:	Date:
Local School Board President (Printed Name):	Telephone:
Signature of Local School Board President:	Date:
President of the Local Teacher Union or Association, if applicable (Printed Name):	Telephone:
Signature of the President of the Local Teacher Union or Association:	Date:

[FR Doc. 2013–18708 Filed 8–5–13; 8:45 am]

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